CITATION: GREAT LAKES UNITED *v.* CANADA (MINISTER OF THE ENVIRONMENT), 2009 FC 408, [2010] 2 F.C.R. 515 T-1922-07

Great Lakes United and **MiningWatch Canada** (*Applicants*)

v.

Minister of the Environment (*Respondent*)

and

Mining Association of Canada (*Intervener*)

INDEXED AS: GREAT LAKES UNITED v. CANADA (MINISTER OF THE ENVIRONMENT) (F.C.)

Federal Court, Russell J.—Toronto, January 19; Ottawa, April 28, 2009.

Environment — Judicial review of respondent Minister's failure under Canadian Environmental Protection Act (CEPA) to require reporting of releases, transfers of pollutants to waste rock, tailings disposal areas — National Pollutant Release Inventory (NPRI) established by Minister, providing inventory of pollutants released into environment — NPRI reporting of controlled movements of substances inside disposal areas not required by Minister — Minister advising that different national inventory to be established for such reporting — Methods for collecting, reporting data also to be determined at later date — CEPA, s. 48 not contemplating separate national inventory — Information regarding release, transfer of pollutants to disposal areas to be collected, reported — Actions of Minister taken in exercise of statutory power, subject to judicial review — Application allowed.

Construction of Statutes — Whether Minister required by Canadian Environmental Protection Act (CEPA) to provide pollutant release information through National Pollutant Release Inventory in relation to releases, transfers to tailings, waste rock disposal areas — CEPA, s. 48 not contemplating separate national inventory — Reason for single inventory embodied in CEPA, s. 2 requiring Canada apply, enforce CEPA fairly, predictably, consistently, ensure ready access to information on pollutants — Forms of "release" in CEPA, s. 3(1) not actions signifying end of human control, return to control by natural forces — Meaning of words in CEPA, intention of Parliament revealing that information regarding release, transfer of pollutants to tailings, waste rock disposal areas to be collected, reported — S. 46 not permitting Minister broad discretion on what information to collect — S. 46 giving Minister wide powers to gather information, cannot be used to abrogate obligations of ss. 48, 50.

This was an application for judicial review of the Minister's failure under the *Canadian Environmental Protection Act* (CEPA) to require reporting by mining facilities of releases or transfers of pollutants to waste rock and tailings disposal areas. The applicants sought a declaration that the Minister erred in interpreting the CEPA and mandatory relief directing the respondent to publish data related to releases or transfers of pollutants to waste rock and tailings disposal areas through the National Pollutants Release Inventory (NPRI) pursuant to sections 48 and 50 of the CEPA.

The NPRI provides an annual inventory of industrial and commercial pollutants released into the environment and relies on multi-stakeholder consultations to determine pollutant reporting requirements. While

NPRI reporting of pollutants that leave disposal areas has always been required, NPRI reporting of controlled movements of substances inside those areas has not. Consultations have taken place over the years between the Minister and stakeholders on whether those movements should be reported. In 2007, the Minister advised at a stakeholder meeting that instead of adding data from tailings and waste rock to the NPRI, a different national inventory would be established for such reporting, and that the methods for collecting and reporting that data would be determined at a later date.

The principal issue was whether the Minister was required by the CEPA to provide pollutant release information through the NPRI in relation to releases and transfers to tailings and waste rock disposal areas.

Held, the application should be allowed.

Section 48 of the CEPA compels the Minister to "establish a national inventory of releases of pollutants" and to use "the information collected under section 46 and any other information to which the Minister has access". This provision does not contemplate separate national inventories for separate sectors. One of the reasons for mandating a single national inventory is embodied in section 2 of the CEPA, making it a duty for the Government of Canada to apply and enforce the CEPA fairly, predictably and consistently, and to ensure that Canadians have ready access to information on pollutants. The NPRI was the national inventory chosen by the Minister to fulfill its duties under section 48. Publishing data related to releases or transfers of pollutants to waste rock and tailings disposal areas through the NPRI will not prevent the Minister from continuing to study whether that information might not also need its own inventory, or from finding a more appropriate tool acceptable to all.

The definition of "release" in subsection 3(1) of the CEPA should not be read as requiring that all forms of release are actions that signify the end of human control and the return to control by natural forces. Such a reading would mean that harmful pollutants entering the environment would not be considered to have been released, and as such would not be reportable under section 48, if they remain within some form of human control. Nothing in the CEPA and its context allows such a reading. The fact that tailings and waste rock disposal areas are on-site does not prevent the release of pollutants into the environment. The distinction between "inside" and "outside" releases does not mean that the terms that appear in the statute or in the scheme and the objects of the CEPA must be given meanings that suit a particular sector. The plain and grammatical meaning of the words in the CEPA and the intentions of Parliament reveals that the information regarding the release and transfer of pollutants to tailings and waste rock disposal areas should be collected and reported. Similar arguments apply to the word "pollutants" as it appears in section 48 of the CEPA regarding "pollution prevention".

The assertions that the word "may" in section 46 permitted the Minister a broad discretion on what information to collect, and that the duties to establish a national inventory and to publish information regarding releases of pollutants were subservient to the discretion under section 46 were difficult to reconcile with the Government of Canada's obligations imposed by the CEPA, and in particular section 2. If the Minister chose not to collect information about releases of pollutants, the NPRI would not accurately or fully reveal environmental and health hazards. The NPRI thus cannot fulfill its role if the discretion under section 46 is not exercised in a way that meets the obligations of the Government of Canada. Rather, section 46 is a facilitating and enabling provision giving the Minister wide powers to gather information and cannot be used to abrogate the mandatory obligations of sections 48 and 50. The actions of the Minister were thus taken in the exercise of a statutory power and were subject to judicial review.

STATUTES AND REGULATIONS CITED

Canadian Environmental Protection Act, R.S.C., 1985 (4th Supp.), c. 16, Sch. I, II, III, IV.
Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33, preamble, ss. 2, 3(1) "environment",

"pollution prevention", "release", 43 to 55.
Department of the Environment Act, R.S.C., 1985, c. E-10, s. 5.
Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 18.1 (as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27).
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Maple Lodge Farms Ltd. v. Government of Canada, [1982] 2 S.C.R. 2, (1982), 137 D.L.R. (2d) 558, 44 N.R. 354; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, (1992), 88 D.L.R. (4th) 193, 2 Admin. L.R. (2d) 329; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, 231 D.L.R. (4th) 577, 5 Admin. L.R. (4th) 1; *Distribution Canada Inc. v. M.N.R.*, [1993] 2 F.C. 26, (1993), 98 D.L.R. (4th) 440, 10 Admin. L.R. (2d) 44 (C.A.); *Harris v. Canada*, [2000] 4 F.C. 37, (2000), 187 D.L.R. (4th) 419, [2000] 3 C.T.C. 220 (F.C.A.); *Whitton v. Canada (Attorney General)*, 2002 FCA 46, [2002] 4 F.C. 126, 19 C.C.E.L. (3d) 1, 291 N.R. 318; *Alberta v. Canada (Wheat Board)*, [1998] 2 F.C. 156, (1997), 2 Admin. L.R. (3d) 187, 138 F.T.R. 186 (T.D.), affd (1998), 13 Admin. L.R. (3d) 4, 234 N.R. 74 (F.C.A.); *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2001 FCT 780, [2001] 4 F.C. 391, 40 C.E.L.R. (N.S.) 174, 208 F.T.R. 189; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, 226 D.L.R. (4th) 193, 50 Admin. L.R. (3d) 1; *Ecology Action Centre Society v. Canada (Attorney General)*, 2004 FC 1087, 9 C.E.L.R. (3d) 161, 262 F.T.R. 160; *Vancouver Island Peace Society v. Canada*, [1994] 1 F.C. 102, (1993), 19 Admin. L.R. (2d) 91, 11 C.E.L.R. (N.S.) 1 (T.D.); *Nunavut Wildlife Management Board v. Canada (Minister of Fisheries and Oceans)*, 2009 FC 16, [2009] 4 F.C.R. 544, 339 F.T.R. 164, [2009] 1 C.N.L.R. 256; *Environmental Resource Centre v. Canada (Minister of the Environment)*, 2001 FCT 1423, 40 Admin. L.R. (3d) 217, 45 C.E.L.R. (N.S.) 114, 214 F.T.R. 94.

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et al. and National Harbours Board et al. (Re) (1978), 89 D.L.R. (3d) 704, 10 C.E.L.R. 31, 7 M.P.L.R. 151 (F.C.T.D.); *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997 (H.L.); *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, [1989] 1 F.C. 265, (1988), 52 D.L.R. (4th) 671, 32 Admin. L.R. 196 (C.A.); *Multi-Malls Inc. et al. and Minister of Transportation and Communications et al. (Re)* (1976), 14 O.R. (2d) 49, 73 D.L.R. (3d) 18 (C.A.); *Doctors Hospital and Minister of Health (Re)* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220, 1 C.P.C. 232 (H.C.J.); *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, 232 D.L.R. (4th) 385, 17 C.R. (6th) 276; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, 257 N.B.R. (2d) 207, 223 D.L.R. (4th) 577; *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1990] 2 W.W.R. 69, (1989), 38 Admin. L.R. 138, 4 C.E.L.R. (N.S.) 1 (F.C.A.); *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548, (1997), 155 D.L.R. (4th) 572, 221 N.R. 372 (C.A.); *Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans)*, [1987] 2 F.C. 93, (1986), 32 D.L.R. (4th) 737, [1987] 2 W.W.R. 727 (C.A.); *Northern Lights Fitness Products Inc. v. Canada (Minister of National Health and Welfare)* (1994), 55 C.P.R. (3d) 39, 75 F.T.R. 111 (F.C.T.D.); *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735, (1980), 115 D.L.R. (3d) 1, 33 N.R. 304; *Middlesex (County) v. Ontario (Minister of Municipal Affairs)* (1992), 10 O.R. (3d) 1, 95 D.L.R. (4th) 676, 9 Admin. L.R. (2d) 206 (Gen. Div.); *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, (1979), 106 D.L.R. (3d) 385, 50 C.C.C. (2d) 353; *Sutcliffe v. Ontario (Minister of the Environment)* (2004), 72 O.R. (3d) 213, 244 D.L.R. (4th) 392, 20 Admin. L.R. (4th) 239 (C.A.); *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425, (1999), 15 Admin. L.R. (3d) 25, 165 F.T.R. 1 (T.D.); *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263, (1999), 31 C.E.L.R. (N.S.) 239, 248 N.R. 25 (F.C.A.), affg [1998] 4 F.C. 340, (1998), 28 C.E.L.R. (N.S.) 97, 150 F.T.R. 161 (T.D.).

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APPLICATION for judicial review of the Minister of the Environment's failure under the *Canadian Environmental Protection Act* to require reporting by mining facilities of releases or

transfers of pollutants to waste rock and tailings disposal areas. Application allowed.

APPEARANCES

Marlene Cashin and *Justin Duncan* for applicants.
Paul J. Evraire, Q.C. and *Negar Hashemi* for respondent.
Rodney V. Northey for intervener.

SOLICITORS OF RECORD

Ecojustice Canada, Toronto, for applicants.
Deputy Attorney General of Canada for respondent.
Fogler, Rubinoff LLP, Toronto, for intervener.

The following are the reasons for judgment and judgment rendered in English by

[1] RUSSELL J.: This is an application for judicial review of the Minister of the Environment's ongoing failure under the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 (CEPA) to require reporting by mining facilities of releases or transfers of pollutants to waste rock and tailings disposal areas.

[2] The applicants are seeking a declaration that the Minister has erred in interpreting the CEPA by not providing such pollutant release information to the public through the National Pollutant Release Inventory (NPRI) in 2006 and subsequent years, and an order in the nature of *mandamus* directing the Minister to publish through the NPRI data from mining facilities of releases to tailings and waste rock disposal areas for the 2006 reporting year and subsequent years in accordance with sections 48 and 50 of the CEPA.

BACKGROUND

Waste rock and tailings

[3] Waste rock and tailings are created from mining. There are three steps involved in extracting ore from the ground and processing it:

(1) Removal of "overburden" such as soil, sand and gravel, trees, lichens, mosses, and other vegetation;

(2) Break up and removal of "waste rock" (rock that surrounds or overlays the ore) to access the ore; and

(3) Crushing of the ore to a powder and processing it to extract minerals, the waste from which is referred to as "tailings."

[4] More than 99 percent of the overburden, rock and ore removed to extract minerals is disposed of to overburden heaps and waste rock and tailings disposal areas.

[5] Ore contains minerals and chemical compounds as well as the economic mineral it is processed to extract. Ore may also contain varying amounts of metals that include aluminium, arsenic, cadmium, copper, mercury, nickel and selenium, all of which are pollutants listed under the NPRI system. Most mining in Canada occurs in rock with high sulphur content. When sulphur comes into contact with water, it generates sulphuric acid, which is also a pollutant listed under the NPRI. Although each ore body has unique properties, it all possesses the potential for environmental impact when materials are removed from the ground.

[6] The extraction of ore or minerals requires the removal of rock, or ore of too low a grade for processing, in order to gain access to the ore. This material is referred to as "waste rock" and is part of the mining process. Waste rock inside a facility is placed in waste rock storage areas (WRSAs). The processing of mined materials generates tailings which are usually managed inside a facility in a tailings impoundment area (TIA).

[7] When ore is broken down through mining and exposed to sun, wind, air and water, the pollutants contained in the ore, as well as those added during processing, are mobilized and can pose hazards to the environment and human health when sent to WRSAs and TIAs.

[8] In some mining communities, residences are built directly beside WRSAs and TIAs.

National Pollutant Release Inventory (NPRI)

[9] The NPRI was created in 1993 by the Minister of the Environment when he accepted the recommendations of a multi-stakeholder advisory committee made up of representatives from industry, environmental groups, and labour, as well as provincial and federal governments. The Minister used the provisions of the [then] *Canadian Environmental Protection Act*, R.S.C., 1985 (4th Supp.), c. 16 to compel certain persons to report specified information.

[10] The NPRI provides an annual, publicly available inventory of industrial and commercial pollutants released into the Canadian environment. It relies on multi-stakeholder consultations to inform the Minister and assist him/her in determining the pollutant reporting requirements under the current Act.

[11] Since the creation of the NPRI, the processing of mined materials has always been reportable. Since 2006, NPRI reporting has also been required for mining extraction activities. While the Minister has always required the NPRI reporting of NPRI substances that leave a TIA and WRSA, the Minister has never required the NPRI reporting of substances as part of controlled movements of tailings or waste rock inside a facility to a TIA or WRSA.

[12] Until October 2007, extensive consultations have taken place over the years between Environment Canada and stakeholders on the issue of whether the movement of tailings or waste rock inside a facility to a TIA or WRSA should be reported. This consultative process has been suspended since this application for judicial review was initiated in November 2007.

ISSUES

[13] The following issues are raised in this application:

(1) The standing of the applicants;

(2) The proper standard of review of the respondent Minister's ongoing failure to require the reporting of releases or transfers of pollutants to WRSAs and TIAs;

(3) Whether the Minister's conduct does or does not comply with the CEPA;

(4) Appropriate remedies.

Preliminary issue

[14] The respondent submits that this application was filed in November 2007 seeking judicial review of the Minister's decision not to require reporting of certain mining data in the 2006 notice dated February 25, 2006 [*Notice with respect to substances in the National Pollutant Release Inventory for 2005 — Amendment*, *C. Gaz.* 2006.I.364]. Therefore, the respondent submits that this application is out of time because it was not brought within 30 days of the date of the 2006 notice: *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. by S.C. 2002, c. 8, s. 14)], subsection 18.1(2) [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27]. The intervener agrees with the respondent on this issue.

[15] If the applicants needed an extension of time to file this application, the respondent submits that they should have sought an extension. Their failure to do so is fatal to this application: *Goodwin v. Canada (Attorney General)*, 2005 FC 1185, 279 F.T.R. 100.

[16] The intervener submits that the applicants have delayed in bringing their application well beyond the 30-day time limit set out in subsection 18.1(2) of the *Federal Courts Act*. There is no ongoing action because the Minister made a decision that was communicated in the 2006 notice and confirmed in letters sent to the applicants in November 2006. The applicants should have attacked the 2006 notice in November 2006 at the latest, but they have failed to follow that process or address the delay with a reasonable explanation. The intervener asks that the application be dismissed for delay.

[17] In reply, the applicants submit that they do not seek to attack a specific notice of the Minister. The applicants say they are challenging an ongoing course of action of the Minister to exempt pollutants sent to TIAs and WRSAs from the reporting requirements, and the Minister's failure to publish such information in the NPRI in accordance with his statutory duties as set out in sections 2, 48 and 50 of the CEPA. As this ongoing course of action constitutes the "decision" in this matter, the applicants submit that the 30-day time limit stipulated by subsection 18.1(2) of the *Federal Courts Act* is inapplicable in this case: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.), at paragraphs 23–24; *Canadian Assn. of the Deaf v. Canada*, 2006 FC 971, [2007] 2 F.C.R. 323, at paragraphs 71–72.

STATUTORY PROVISIONS

[18] The following provisions of the CEPA are applicable in these proceedings:

2. (1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada and subject to subsection (1.1),

(*a*) exercise its powers in a manner that protects the environment and human health, applies the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation, and promotes and reinforces enforceable pollution prevention approaches;

(*a.1*) take preventive and remedial measures to protect, enhance and restore the environment;

(*b*) take the necessity of protecting the environment into account in making social and economic decisions;

(*c*) implement an ecosystem approach that considers the unique and fundamental characteristics of ecosystems;

(*d*) endeavour to act in cooperation with governments to protect the environment;

(*e*) encourage the participation of the people of Canada in the making of decisions that affect the environment;

(*f*) facilitate the protection of the environment by the people of Canada;

(*g*) establish nationally consistent standards of environmental quality;

(*h*) provide information to the people of Canada on the state of the Canadian environment;

(*i*) apply knowledge, including traditional aboriginal knowledge, science and technology, to identify and resolve environmental problems;

(*j*) protect the environment, including its biological diversity, and human health, from the risk of any adverse effects of the use and release of toxic substances, pollutants and wastes;

(*j.1*) protect the environment, including its biological diversity, and human health, by ensuring the safe and effective use of biotechnology;

(*k*) endeavour to act expeditiously and diligently to assess whether existing substances or those new to Canada are toxic or capable of becoming toxic and assess the risk that such substances pose to the environment and human life and health;

(*l*) endeavour to act with regard to the intent of intergovernmental agreements and arrangements entered into for the purpose of achieving the highest level of environmental quality throughout Canada;

(*m*) ensure, to the extent that is reasonably possible, that all areas of federal regulation for the protection of the environment and human health are addressed in a complementary manner in order to avoid duplication and to provide effective and comprehensive protection;

(*n*) endeavour to exercise its powers to require the provision of information in a coordinated manner; and

(*o*) apply and enforce this Act in a fair, predictable and consistent manner.

. . .

44. (1) The Minister shall

(*a*) establish, operate and maintain a system for monitoring environmental quality;

(*b*) conduct research and studies relating to pollution prevention, the nature, transportation, dispersion, effects, control and abatement of pollution and the effects of pollution on environmental quality, and provide advisory and technical services and information related to that research and those studies;

(*c*) conduct research and studies relating to

(i) environmental contamination arising from disturbances of ecosystems by human activity,
(ii) changes in the normal geochemical cycling of toxic substances that are naturally present in the environment, and
(iii) detection and damage to ecosystems;

(*d*) collect, process, correlate, interpret, create an inventory of and publish on a periodic basis data on environmental quality in Canada from monitoring systems, research, studies and any other sources;

(*e*) formulate plans for pollution prevention and the control and abatement of pollution, including plans respecting the prevention of, preparedness for and response to an environmental emergency and for restoring any part of the environment damaged by or during an emergency, and establish, operate and publicize demonstration projects and make them available for demonstration; and

(*f*) publish, arrange for the publication of or distribute through an information clearing-house

(i) information respecting pollution prevention,
(i) pertinent information in respect of all aspects of environmental quality, and
(ii) a periodic report on the state of the Canadian environment.

(2) The Minister may

(*a*) in establishing a system referred to in paragraph (1)(*a*), cooperate with governments, foreign governments and aboriginal people and with any person who has established or proposes to establish any such system; and

(*b*) with the approval of the Governor in Council, enter into agreements for the operation or maintenance of a system referred to in paragraph (1)(*a*) by the Minister on behalf of any government, aboriginal people or any person or for the operation or maintenance of any such system by the government or any person on behalf of the Minister.

(3) The Minister may, in exercising the powers conferred by paragraphs (1)(*b*) to (*e*), act in cooperation with any government, foreign government, government department or agency, institution, aboriginal people or any person and may sponsor or assist in any of their research, studies, planning or activities in relation to environmental quality, pollution prevention, environmental emergencies or the control or abatement of pollution.

(4) The Ministers shall conduct research or studies relating to hormone disrupting substances, methods related to their detection, methods to determine their actual or likely short-term or long-term effect on the environment and human health, and preventive, control and abatement measures to deal with those substances to protect the environment and human health.

45. The Minister of Health shall

(*a*) conduct research and studies relating to the role of substances in illnesses or in health problems;

(*b*) collect, process, correlate and publish on a periodic basis data from any research or studies done under paragraph (*a*); and

(*c*) distribute available information to inform the public about the effects of substances on human health.

46. (1) The Minister may, for the purpose of conducting research, creating an inventory of data, formulating objectives and codes of practice, issuing guidelines or assessing or reporting on the state of the environment, publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate a notice requiring any person described in the notice to provide the Minister with any information that may be in the possession of that person or to which the person may reasonably be expected to have access, including information regarding the following:

(*a*) substances on the Priority Substances List;

(*b*) substances that have not been determined to be toxic under Part 5 because of the current extent of the environment's exposure to them, but whose presence in the environment must be monitored if the Minister considers that to be appropriate;

(*c*) substances, including nutrients, that can be released into water or are present in products like water conditioners and cleaning products;

(*d*) substances released, or disposed of, at or into the sea;

(*e*) substances that are toxic under section 64 or that may become toxic;

(*f*) substances that may cause or contribute to international or interprovincial pollution of fresh water, salt water or the atmosphere;

(*g*) substances or fuels that may contribute significantly to air pollution;

(*h*) substances that, if released into Canadian waters, cause or may cause damage to fish or to their habitat;

(*i*) substances that, if released into areas of Canada where there are migratory birds, endangered species or other wildlife regulated under any other Act of Parliament, are harmful or capable of causing harm to those birds, species or wildlife;

(*j*) substances that are on the list established under regulations made under subsection 200(1);

(*k*) the release of substances into the environment at any stage of their life-cycle;

(*l*) pollution prevention; and

(*m*) use of federal land and of aboriginal land.

(2) The Minister may, in accordance with an agreement signed with a government, require that a person to whom a notice is directed submit the information to the Minister or to that government.

(3) An agreement referred to in subsection (2) shall set out conditions respecting access by the Minister or other government to all or part of the information that the person is required to submit and may set out any other conditions respecting the information.

(4) A notice referred to in subsection (1) must indicate the period during which it is in force, which may not exceed three years, and the date or dates within which the person to whom the notice is directed shall comply with the notice.

(5) Every person to whom a notice is directed shall comply with the notice.

(6) The Minister may, on request in writing from any person to whom a notice is directed, extend the date or dates within which the person shall comply with the notice.

(7) The notice must indicate the manner in which the information is to be provided.

(8) The notice may indicate the period during which, and the location where, the person to whom the notice is directed shall keep copies of the required information, together with any calculations, measurements and other data on which the information is based. The period may not exceed three years from the date the information is required to be submitted to the Minister.

47. (1) The Minister shall issue guidelines respecting the use of the powers provided for by subsection 46(1) and, in issuing those guidelines, the Minister shall take into account any factor that the Minister considers relevant, including, but not limited to,

(*a*) the costs and benefits to the Minister and the person to whom the notice under subsection 46(1) is directed;

(*b*) the co-ordination of requests for information with other governments, to the extent practicable; and

(*c*) the manner in which the information collected under subsection 46(1) is to be used.

(2) In carrying out the duties under subsection (1), the Minister shall offer to consult with the government of a province and the members of the Committee who are representatives of aboriginal governments and may consult with a government department or agency, aboriginal people, representatives of industry and labour and municipal authorities or with persons interested in the quality of the environment.

(3) At any time after the 60th day following the day on which the Minister offers to consult in accordance with subsection (2), the Minister may act under subsection (1) if the offer to consult is not accepted by the government of a province or members of the Committee who are representatives of aboriginal governments.

48. The Minister shall establish a national inventory of releases of pollutants using the information collected under section 46 and any other information to which the Minister has access, and may use any information to which the Minister has access to establish any other inventory of information.

49. The notice published under subsection 46(1) must indicate whether or not the Minister intends to publish the information and, if so, whether in whole or in part.

50. Subject to subsection 53(4), the Minister shall publish the national inventory of releases of pollutants in any manner that the Minister considers appropriate and may publish or give notice of the availability of any other inventory of information established under section 48, in any manner that the Minister considers appropriate.

51. A person who provides information to the Minister under subsection 46(1) may, if the Minister's intention to publish the information has been indicated under section 49, submit with the information a written request, setting out a reason referred to in section 52, that the information be treated as confidential.

52. Despite Part 11, a request under section 51 may only be based on any of the following reasons:

(*a*) the information constitutes a trade secret;

(*b*) the disclosure of the information would likely cause material financial loss to, or prejudice to the competitive position of, the person providing the information or on whose behalf it is provided; and

(*c*) the disclosure of the information would likely interfere with contractual or other negotiations being conducted by the person providing the information or on whose behalf it is provided.

53. (1) The Minister may, after studying the reasons provided under section 52, require the person in question to provide, within 20 days and in writing, additional justification for the request for confidentiality.

(2) The Minister may extend the period mentioned in subsection (1) by up to 10 days if the extension is necessary to permit adequate preparation of the additional justification.

(3) In determining whether to accept or reject the request, the Minister shall consider whether the reasons are well-founded and, if they are, the Minister may nevertheless reject the request if

(*a*) the disclosure is in the interest of the protection of the environment, public health or public safety; and

(*b*) the public interest in the disclosure outweighs in importance

(i) any material financial loss or prejudice to the competitive position of the person who provided the information or on whose behalf it was provided, and
(ii) any damage to the privacy, reputation or human dignity of any individual that may result from the disclosure.

(4) If the Minister accepts the request, the information shall not be published.

(5) If the Minister rejects the request

(*a*) the person has the right to ask the Federal Court to review the matter within 30 days after the person is notified that the request has been rejected or within any further time that the Court may, before the expiry of those 30 days, fix or allow; and

(*b*) the Minister shall advise the person in question of the Minister's intention to publish the information and of the person's right to ask the Federal Court to review the matter.

(6) Where a person asks the Federal Court to review the matter under paragraph (5)(*a*), sections 45, 46 and 47 of the *Access to Information Act* apply, with any modifications that the circumstances require, in respect of a request for a review under that paragraph as if it were an application made under section 44 of that Act.

54. (1) For the purpose of carrying out the Minister's mandate related to preserving the quality of the environment, the Minister shall issue

(*a*) environmental quality objectives specifying goals or purposes for pollution prevention or environmental

control, including goals or purposes stated in quantitative or qualitative terms;

(*b*) environmental quality guidelines specifying recommendations in quantitative or qualitative terms to support and maintain particular uses of the environment;

(*c*) release guidelines recommending limits, including limits expressed as concentrations or quantities, for the release of substances into the environment from works, undertakings or activities; and

(*d*) codes of practice respecting pollution prevention or specifying procedures, practices or release limits for environmental control relating to works, undertakings and activities during any phase of their development and operation, including the location, design, construction, start-up, closure, dismantling and clean-up phases and any subsequent monitoring activities.

(2) The objectives, guidelines and codes of practice referred to in subsection (1) shall relate to

(*a*) the environment;

(*b*) pollution prevention or the recycling, reusing, treating, storing or disposing of substances or reducing the release of substances into the environment;

(*c*) works, undertakings or activities that affect or may affect the environment; or

(*d*) the conservation of natural resources and sustainable development.

(3) In carrying out the duties under subsection (1), the Minister shall offer to consult with the government of a province and the members of the Committee who are representatives of aboriginal governments and may consult with a government department or agency, aboriginal people, representatives of industry and labour and municipal authorities or with persons interested in the quality of the environment.

(3.1) At any time after the 60th day following the day on which the Minister offers to consult in accordance with subsection (3), the Minister may act under subsection (1) if the offer to consult is not accepted by the government of a province or members of the Committee who are representatives of aboriginal governments.

(4) The Minister shall publish any objectives, guidelines or codes of practice issued under this section, or give notice of them, in the *Canada Gazette* and in any other manner that the Minister considers appropriate.

55. (1) For the purpose of carrying out the mandate of the Minister of Health related to preserving and improving public health under this Act, the Minister of Health shall issue objectives, guidelines and codes of practice with respect to the elements of the environment that may affect the life and health of the people of Canada.

(2) In carrying out the duties under subsection (1), the Minister of Health may consult with a government, a government department or agency, aboriginal people, representatives of industry and labour and municipal authorities or with persons interested in the preservation and improvement of public health.

(3) The Minister of Health shall publish any objectives, guidelines or codes of practice issued under this section, or give notice of them, in the *Canada Gazette* and in any other manner that the Minister of Health considers appropriate.

[10] The following section from the *Department of the Environment Act*, R.S.C., 1985, c. E-10 is also relevant to this application:

5. The Minister, in exercising his powers and carrying out his duties and functions under section 4, shall

(*a*) initiate, recommend and undertake programs, and coordinate programs of the Government of Canada that are designed

(i) to promote the establishment or adoption of objectives or standards relating to environmental quality, or to control pollution,
(ii) to ensure that new federal projects, programs and activities are assessed early in the planning process for potential adverse effects on the quality of the natural environment and that a further review is carried out of those projects, programs, and activities that are found to have probable significant adverse effects, and the results thereof taken into account, and
(iii) to provide to Canadians environmental information in the public interest;

(*b*) promote and encourage the institution of practices and conduct leading to the better preservation and enhancement of environmental quality, and cooperate with provincial governments or agencies thereof, or any bodies, organizations or persons, in any programs having similar objects; and

(*c*) advise the heads of departments, boards and agencies of the Government of Canada on all matters pertaining to the preservation and enhancement of the quality of the natural environment.

[20] The following section from the *Interpretation Act*, R.S.C., 1985, c. I-21 is also applicable to this proceeding:

11. The expression "shall" is to be construed as imperative and the expression "may" as permissive.

[21] The following section from the *Federal Courts Act*, is also applicable to this proceeding:

18.1 . . .

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

STANDARD OF REVIEW

[22] The applicants submit that the Minister's duty to require pollutant release reporting by mining facilities and publication under the CEPA is a question of law so that the proper standard of review is correctness.

[23] The respondent submits that if this Court finds that the Minister's choice of whether tailings or waste rock that is moved inside a facility should be reported in the *Canada Gazette* is reviewable, then the standard of review should be reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 53. It is well established that the Court should not interfere with the exercise of a discretion by a statutory authority merely because the Court might have exercised the discretion differently had it been charged with that responsibility: *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2 (*Maple Lodge Farms*). Therefore, if a discretionary policy decision is reviewable, it is a non-legal question which is not within the expertise of the Court and

is subject to the reasonableness standard and a high degree of deference.

[24] The intervener submits that the appropriate standard of review is reasonableness. While the application involves questions of statutory interpretation which would normally call for a standard of correctness, the case seeks to review actions of the Minister or his delegate, both of whom merit deference for their expertise. The decision does not involve anyone's rights and was not rendered in an adjudicative setting; however, the intervener says that this application is about legislative choices by the Minister to collect information from a broad range of parties across the country, which suggests greater deference to the Minister.

ARGUMENTS

Applicants standing

[25] The applicants submit that they are a public interest organization and have been deeply involved in discussions, meetings and public discourse in their efforts to have the Minister require the reporting of pollutant releases by mining facilities to TIAs and WRSAs.

[26] The applicants rely upon *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 (*Canadian Council*) at page 253 for the test for public interest standing. It is as follows:

(1) There must be a serious issue to be tried;

(2) The applicant must show a "genuine interest" in the subject-matter; and

(3) There must be no other reasonable and effective manner for the case to come before the courts.

[27] The applicants state that the Court should adopt a "generous and liberal approach" in determining whether or not to grant standing and "will undoubtedly seek to ensure that [its] discretion is exercised so that standing is granted" in situations where it is necessary to ensure that a legal duty is met: *Canadian Council*, at pages 250 and 251 and *Fraser v. Canada (Attorney General)* (2005), 51 Imm. L.R. (3d) 101 (Ont. S.C.J.) (*Fraser*), at paragraph 52.

[28] The applicants also submit that there is a serious issue to be tried in this case, since the applicants allege that the Minister has failed to meet his mandatory duties based on the CEPA and a plain reading of the CEPA as a whole. This part of the test has a low threshold and all that is required is that the Court believe that the party requesting standing has an arguable case: *Fraser*, at paragraph 55.

[29] The applicants further submit that they have a "real and continuing interest" in the issue and that they meet the type of accumulated expertise and involvement necessary: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at pages 631–634; *Fraser*, at paragraph 102; *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211 (T.D.), at paragraphs 52, 54, 57–58, 66 and 68.

[30] The applicants say that public interest standing can be limited where it can be shown that a more directly affected private litigant is likely to bring forth a similar challenge: *Fraser*, at paragraph 109. However, to date, no other litigant has challenged the Minister's decision to exempt reporting for 2006 and subsequent years.

Minister's decision does not comply with the CEPA

[31] The applicants submit that the Minister's decision to exempt mining facilitates from reporting pollutant releases to TIAs and WRSAs and publication under the NPRI is an error of law.

[32] The Minister's duty to require reporting and publication is found in both legislation and case law. The applicants cite and rely upon *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624 (*Imperial Oil*), at paragraph 34:

> He must make decisions in a context in which the need for the long-term management of environmental problems plays a prominent role, and in which he must ensure that the fundamental legislative policy on which the interpretation and application of environment quality legislation are based is implemented. The Minister has the responsibility of protecting the public interest in the environment, and must make his decisions in consideration of that interest.

[33] The applicants also point out that the fundamental importance of governments acting in a manner to protect and improve the environment has been stressed by the Supreme Court of Canada: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pages 16–17; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at page 195; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at paragraph 55; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at paragraph 85; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241 [*114957 Canada Ltée*], at paragraph 1; and *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74, at paragraphs 7 and 226.

[34] The applicants submit that, from a legislative point of view, Parliament has recognized and affirmed the fundamental value of environmental protection by enacting legislation that imposes duties on the Minister to improve and protect Canada's environment: section 5 of the *Department of the Environment Act*.

[35] The CEPA remains the principal legislation imposing duties on the Minister to improve and protect Canada's environment. Section 2 of the CEPA mandates that the Minister:

> **2.** (1) . . .
>
> (*e*) encourage the participation of the people of Canada in the making of decisions that affect the environment;
>
> (*f*) facilitate the protection of the environment by the people of Canada;
>
> . . .
>
> (*h*) provide information to the people of Canada on the state of the Canadian environment;

. . .

(*n*) endeavour to exercise its powers to require the provision of information in a coordinated manner; and

(*o*) apply and enforce this Act in a fair, predictable and consistent manner.

[36] The applicants submit that the intervener and the respondent are attempting to immunize the ongoing decision of the Minister challenged in this case from judicial scrutiny by classifying it as either a policy or as a legislative decision. The applicants say that the Minister's failure to require reporting of pollutants to TIAs and WRSAs is, however, an abrogation of his statutorily mandated duties set out under sections 2, 48 and 50 of the CEPA.

[37] Sections 48 and 50 impose a duty on the Minister to establish the NPRI and publish pollutant release information to it: see Duncan J. Cameron, Daniel C. Blasioli and Michel Arès, *Annotated Guide to the Canadian Environmental Protection Act* (Aurora: Canada Law Book, 2007), at pages 62–63.

[38] The applicants take the position that the failure to require reporting and publication of the information of concern in this application further frustrates the Minister's statutory duty set out in section 5 of the *Department of the Environment Act* to provide infor-mation to the public on pollutants.

[39] The applicants say that the Minister's decision to exempt reporting of pollutants sent to TIAs and WRSAs was exercised in accordance with his view of his statutory powers under the CEPA. An exercise of a statutory power is "never absolute, regardless of the terms in which it is conferred" and "unfettered governmental discretion is a contradiction in terms". The applicants state that the Minister's decisions concerning NPRI reporting and publication are subject to the legislative purpose, objects and constraints set out in the CEPA. A statutory decision which goes against the purpose and objects of the governing legislation is a decision that is contrary to law and subject to review by this Court: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at page 1076; Sir William Wade and Christopher Forsyth, *Administrative Law*, 9th ed. (Oxford: Oxford University Press, 2004), at pages 354–359; David Phillip Jones and Anne S. de Villars, *Principles of Administrative Law*, 4th ed. (Toronto: Thomson Carswell, 2004), at page 168; and *Federal Courts Act*, paragraph 18.1(4)(*f*) [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27].

Minister's specific duties under Part 3 of the CEPA to require pollutant reporting

[40] The applicants submit that the intent of the CEPA amendments relating to the NPRI were highlighted during Parliamentary debates in 1998. The Honourable Christine Steward, Minister of Environment at that time, clarified the intent of the CEPA (*House of Commons Debates*, 36th Parl., 1st Sess., Vol. 135 (April 27, 1998), at pages 6124–6125):

> Greater public participation is key to protecting the environment. Canadians want to be part of the solution. They want more power to influence environmental decisions and stronger measures to ensure a legacy of clean air and clean water. The renewed act responds to their demands. It provides Canadians with more information giving them the tools to act in their communities.

In addition, the national pollutant release inventory, an accounting of the releases of 176 pollutants from all significant sources, will continue to provide Canadians with information about the toxics in their communities. Under a new Canadian Environmental Protection Act this program would become a legal commitment for the government in an effort to provide Canadians with as much information as possible.

. . .

The purpose and intent of my legislation is to put in place instruments with which I can work collaboratively with all levels of government, with all sectors in our society to protect the environment and to make sure we have the authorities there as well that when we see problems or abuses we are able to take prompt action.

[41] The applicants submit that Part 3 of the CEPA now requires the Minister to:

(i) Collect and publish pollutant release information through the NPRI (sections 44, 46–53);

(ii) Set objectives, guidelines and codes of practice to reduce pollution (sections 44, 54–55).

[42] Section 46 of the CEPA gives the Minister the power to require any person in Canada to provide information in relation to pollutant releases, while section 47 requires the Minister to issue guidelines in respect of decisions made under section 46. Section 48 requires the Minister to maintain the NPRI using the pollutant release information collected under section 46, and section 50 of the CEPA imposes a duty on the Minister to publish pollutant release information to the NPRI and grants a discretion to decide how pollutant information is published in the NPRI.

[43] The applicants submit that sections 48 and 50 impose duties on the Minister to (i) require reporting of major pollutant releases and to (ii) publish that information publicly to the NPRI to ensure that pollutant releases are reduced in Canada. Although section 46 indicates that the Minister has some discretion in the collection of pollutant information, the applicants submit that it would be illogical if such a weakly-worded discretionary power could be used to thwart the entire purpose of the CEPA by exempting Canada's largest source of pollution, when the CEPA must be interpreted as remedial. In the applicants view, section 46 is a mechanism by which information is obtained to meet the duties imposed under sections 48 and 50.

[44] The applicants submit that the Minister's decision has frustrated the purpose and objects of the CEPA under sections 48 and 50 in six ways:

(1) The Minister has hidden the largest source of pollution in Canada;

(2) The Minister's conduct distorts information currently reported through the NPRI;

(3) The Minister has mischaracterized a major pollutant release;

(4) The Minister has failed to promote the "polluter pays" principle under the CEPA;

(5) The Minister has failed to ensure Canada–U.S. harmony on pollutant release reporting;

(6) The Minister has delayed required reportings.

[45] The applicants submit that, currently, Environment Canada considers tailings and waste rock as disposals of waste, yet the Minister has failed to ensure that the public is provided with pollutant information through the NPRI as intended by Parliament. Mining is the only sector not required to report on-site disposals of the CEPA pollutants to the NPRI.

[46] The applicants say that, by exempting mining facilities from certain reporting requirements, the Minister is allowing a continuous build-up of pollutants in TIAs and WRSAs to be hidden from public scrutiny. The applicants reiterate that since two of the central purposes of the CEPA are to require polluters to publicly report on their pollutant releases in order to encourage them to reduce their releases, and to engage the public in an ongoing dialogue as to how this can be achieved, a failure to require reporting of a major source of pollutant releases in Canada runs contrary to the CEPA.

[47] The applicants submit that the NPRI is intended to provide a reliable "yearly snap-shot" of pollutant releases in Canada to "empower the public to demand improved environmental performance" from industrial facilities and sectors of the industry generally. By not requiring reporting of the pollutants in this case, the Minister makes it appear that other facilities and sectors responsible for reporting releases and disposals to the NPRI are larger polluters than mining facilities. This results in the public being misinformed about pollution from mines. Therefore, the applicants submit that the Minister has failed to meet the imperative of paragraph 2(1)(*o*) of the CEPA to "apply and enforce this Act in a fair, predictable and consistent manner."

[48] The applicants submit that the Minister's position is that pollutants sent to TIAs and WRSAs need not be reported as they have not been characterized as a release or disposal under the NPRI but, rather, as material which is part of the process within a mining operation. This is, however, inconsistent with how Environment Canada has characterized tailings and waste rock generally, namely as "disposals" of "waste" by mining facilities.

[49] The applicants suggest that the only explanation for the Minister's position is that tailings and waste rock could, at some point in the future, be processed to obtain minerals if commodity prices rise sufficiently for such reprocessing to be economical. The applicants submit that such an intangible rationale for failing to require reporting of a major source of pollution in Canada is inconsistent with the intent of the CEPA that yearly pollutant releases should be published. It would be consistent with the CEPA for the Minister to not require reporting only if a facility removed listed NPRI pollutants from TIAs or WRSAs in the same year that they were sent to those areas, in order to avoid double reporting of the same releases. However, the applicants note that nowhere in the CEPA does it allow pollutant releases to be ignored for the purpose of reporting if the material containing such pollutants could theoretically become part of a process again some time in the future. The applicants suggest that if it was not accepted that tailings and waste rock were captured by the notice for the purpose of reporting, then exemptions would not have been needed at all from 1993–2005.

[50] The applicants submit that the definitions of both "disposal" and "release" in the 2006 notice are sufficient to capture pollutants sent to TIAs and WRSAs for the purpose of requiring reporting, and that such an interpretation is entirely consistent with Environment Canada's own characterization of tailings and waste rock as the disposal of wastes from mining. The terms "disposal" and "release" are defined in the 2006 notice as follows:

"disposal" means the final disposal of a substance to landfill, land application or underground injection, either on the facility site or at a location off the facility site, and includes treatment at a location off the facility site prior to final disposal.

. . .

"release" means the emission or discharge of a substance from the facility site to air, surface, waters or lands and includes a spill or a leak.

[51] The applicants say that the Supreme Court of Canada has found that the CEPA firmly entrenches the principle of "polluter-pays" into federal law, meaning that those responsible for pollution should be held accountable for their activities in order to reduce pollution in Canada: *Imperial Oil.*

[52] The applicants also express concern that the mining industry's position on pollution reporting has become a default position of the Minister when consensus has not been reached amongst interested stakeholders regarding reporting to the NPRI.

[53] The applicants submit that the Minister has failed to promote the "polluter pays" principle under the CEPA. The intent of Parliament in making public reporting under the NPRI a legal requirement was to motivate industry to take responsibility for and reduce pollutant emissions. Parliament's intent was not to allow the Minister to cater to the economic interests of mining facilities when decisions are made under the CEPA. Subsection 2(2) of the CEPA stresses this intent by indicating that economic considerations are not to be used as a basis for limiting action to protect the environment or human health.

[54] The applicants also point out that the courts have utilized international agreements as tools of statutory interpretation and indicators of statutory intent: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 70 and *114957 Canada Ltée*, at paragraphs 30–31. Canada concluded an agreement with the U.S. in 1997, before the CEPA was re-enacted, to seek harmony with the United States on pollutant release reporting. When the CEPA was re-enacted in 1999, Parliament intended that the Minister strive to attain harmonization with the United States system of pollutant reporting (the Toxics Release Inventory) which, since 1998, has required the reporting of pollutant releases in relation to tailings and waste rock.

[55] The applicants say that, despite repeated commitments to achieve international harmony, the Minister has not required reporting of pollutant releases from mining to TIAs and WRSAs. This failure is inconsistent with paragraph 2(1)(*l*) of the CEPA which requires the Minister to "endeavour to act with regard to the intent of intergovernmental agreements and arrangements entered into for the purpose of achieving the highest level of environmental quality throughout Canada".

[56] The applicants submit that the Minister has failed since 1999 to provide the public with "as much information as possible" about "toxics" in their communities. Failure to act in accordance with a statutory duty within a reasonable amount of time has been found to be an error subject to judicial review. The applicants quote Professor William Wade who states that "a statutory duty must be performed without reasonable delay and this may be enforced by mandamus": *House of Commons Debates*, 36th Parl., 1st Sess., Vol. 135 (April 27, 1998), at pages 6124–6125; *North Vancouver (District of) et al. and National Harbours Board et al. (Re)* (1978), 89 D.L.R. (3d) 704 (F.C.T.D.)

and Sir William Wade and Christopher Forsyth, *Administrative Law*, 9th ed. (Oxford University Press, 2004), at pages 618–620.

[57] The applicants say that the Minister and the intervener have had extensive discussions with various public interest groups, industry and government departments since 1992 about reporting in relation to tailings and waste rock. However, the Minister is currently no closer to actually reporting on these pollutant releases. In fact, the Minister has indicated an intention to begin studying how this information ought to be collected and reported publicly in a system other than the NPRI. The applicants submit that the decision to not require reporting under the NPRI after 16 years of consultation is inconsistent with the CEPA.

[58] The applicants take the position that the Minister does not have an "unfettered" discretion in his decision-making capacity, but must exercise his or her discretion to promote the policy and objects of the CEPA: *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997 (H.L.), at page 1030 (*per* Lord Reid); *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, [1989] 1 F.C. 265 (C.A.), at pages 273–274; *Multi-Malls Inc. et al. and Minister of Transportation and Communications et al. (Re)* (1976), 14 O.R. (2d) 49 (C.A.); *Doctors Hospital and Minister of Health (Re)* (1976), 12 O.R. (2d) 164 (H.C.J.), at paragraph 43.

[59] The applicants contend that the purpose of judicial review is to constrain the use of government authority within its proper bounds and to ensure consistency and transparency in government decision making, as intended by the CEPA. The applicants further submit that courts have the jurisdiction to intervene where it is established that the government is using its statutory authority in a manner that was not intended by the enabling statute: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paragraph 128.

[60] The applicants conclude that the Minister has erred in deciding that the CEPA does not require the reporting of pollutant releases sent to TIAs and WRSAs. If the Minister is to fulfill the purpose and objects of the CEPA, and sections 48 and 50 in particular, the Minister must require reporting of pollutant release information and publish that information in the NPRI, absent an overriding public policy reason not to do so which meets the intent of the CEPA.

[61] In the alternative, the applicants submit that, if the Court is of the view that the Minister's failure to require reporting of pollutants sent to TIAs and WRSAs ought to be considered on the standard of reasonableness rather than correctness, then, given the context, the decision ought to be afforded low deference. The decision was unreasonable and, given the purpose of the CEPA, has resulted in an unacceptable outcome. The applicants state that there is no overriding public policy reason which would allow the Minister to exercise his discretion in a manner which directly contravenes the objects and purposes of the CEPA: *Dunsmuir*, at paragraph 47 and *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paragraph 56.

[62] The applicants also say that both the 2006 notice and the 2006 guide [Guide for Reporting to the National Pollutant Release Inventory—2006] published by the Minister under sections 46 and 47 of the CEPA appear, on their face, to require the reporting of pollutant releases sent to TIAs and WRSAs. The CEPA is designed to ensure transparency and accountability in achieving pollution reductions. Such an objective is not met when the Minister appears to have made a decision

requiring reporting that is outside the decision-making process provided for under the CEPA by directing mining facilities not to report their pollutant releases to TIAs and WRSAs for 2006.

[63] The applicants also submit that the respondent and the intervener have placed an inordinate amount of weight on section 46 of the CEPA which confers a broad power on the Minister to collect information from polluters. The broad powers provided by section 46 are necessary in order to ensure that the Minister has the necessary information in his possession to implement his duties under sections 2, 48 and 50 of the CEPA. Section 46 does not confer a discretion on the Minister to ignore his duties under those sections of the CEPA.

[64] The applicants submit that the position of the respondent and the intervener cannot be sustained for the following reasons:

(1) Sections 2, 48 and 50 of the CEPA make no distinctions between on-site and off-site releases and require the reporting and publication of pollutant releases regardless of where such releases occur;

(2) It runs counter to Environment Canada's characterization of tailings and waste rock generally as "solid wastes from mines" which are "disposed of on-site";

(3) It seeks to isolate mining facilities from the "environment" in which they are located, despite the fact that "environment" is defined in the CEPA as including all air, land and water and all interacting natural systems that include such components, while the NPRI is intended to provide "information on the release to the environment, disposal and transfers for recycling of pollutants";

(4) It seeks to ensure that the Minister ignores any pollutants under the NPRI if there is any possibility, however remote, that the disposed waste in which they are contained might be used at a later date for some process, or if it is controlled or managed through human activity, despite the intent of the CEPA to ensure that pollutant creation is minimized; and

(5) It effectively nullifies Environment Canada's decisions under the CEPA to date, which have been properly made, to require reporting on pollutants disposed of on-site by facilities generating similar types of industrial wastes to mining facilities containing NPRI listed pollutants, such as waste from processing at steel mills, waste from coal fire plants, and waste from hazardous waste treatment facilities.

Remedies

[65] The applicants submit that the appropriate remedies in this case are a declaration concerning the Minister's conduct and an associated order of *mandamus* requiring the Minister to direct mining facilities to report information on pollutant releases to TIAs and WRSAs and the publication of this information to the NPRI for the 2006 reporting year and subsequent years through the mechanisms set out under the CEPA.

[66] The applicants cite *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.), at pages 766–769 for the conditions that must be met to obtain a writ of *mandamus*:

(a) There must be a public legal duty to act;

(b) The duty must be owed to the applicant;

(c) There must be a clear right to performance of that duty and, in particular:

i. the applicant must satisfy all conditions precedent giving rise to the duty;
ii. there must be (1) a prior demand for performance of the duty; (2) a reasonable time to comply with the demand unless refused outright; and (3) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;

(d) Where the duty sought to be enforced is discretionary, certain rules apply;

(e) There must be no other adequate remedy available to the applicant;

(f) The order sought must be of some practical value or effect;

(g) The Court in the exercise of its discretion must find no equitable bar to the relief sought;

(h) On a "balance of convenience" the Court must decide whether an order in the nature of *mandamus* should (or should not) issue.

[67] The applicants submit that, where the Minister has failed to comply with the applicable regulatory regime, the Court should compel compliance using the existing regulatory structure: *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1990] 2 W.W.R. 69 (F.C.A.). The Minister's duty in this matter was to require reporting and publication of pollutant releases sent to TIAs and WRSAs under the CEPA.

[68] The applicants cite and rely upon *Distribution Canada Inc. v. M.N.R.*, [1993] 2 F.C. 26 (C.A.) [*Distribution Canada Inc.*], at page 39 for the requirements of when a duty is owed to an applicant:

. . . the matter raised by the appellant is one of strong public interest and there may be no other way such an issue could be brought to the attention of the Court, were it not for the efforts of the appellant.

[69] The applicants submit that this finding has been interpreted by the Federal Court of Appeal to permit public interest standing where "the matter raised . . . is one of strong public interest and there may be no other way such an issue could be brought to the attention of the Court, were it not for the efforts of the [public interest litigant]": *Harris v. Canada*, [2000] 4 F.C. 37 (C.A.), at paragraph 53 and *Apotex*, at paragraph 45. In the current case, this aspect of the *Apotex* test is conflated with the test for public interest. The applicants submit that in cases where environmental protection has been at issue, public interest groups have regularly been granted standing to seek *mandamus*: *Friends of the Oldman River Society* and *Sierra Club of Canada*, at paragraph 32.

[70] The applicants conclude that they have satisfied all conditions precedent giving rise to the performance of the duty in this case. There was a prior demand for performance of the duty, a reasonable time to comply with the demand has passed, and a subsequent refusal has resulted. The

applicants have made repeated demands to the Minister to fulfill his duties to require reporting and publication under the CEPA through letters to the Minister and at public consultation meetings, and reporting has not yet been required. The conditions precedent have been satisfied and the Minister is in violation of his statutory duties.

[71] The duties sought to be enforced in this case are mandatory and not discretionary. However, even if the Minister's decision was discretionary, it is submitted that his discretion was exercised in contradiction of the objects and purpose of the CEPA, and this is the type of case where a discretionary decision is subject to *mandamus*.

[72] The applicants point out that the mere existence of another remedy does not preclude the granting of *mandamus*. It is the adequacy of other remedies as a "better remedy" that must be assessed. The courts have found that adequacy requires "the most expeditious and secure method available": *Whitton v. Canada (Attorney General)*, 2002 FCA 46, [2002] 4 F.C. 126, at paragraph 36. In the present case, there are no applicable remedies set out in the CEPA. Nor are there any "better" remedies available elsewhere to force the Minister to comply with his statutory duties.

[73] The applicants submit that a remedy for the 2006 and subsequent reporting years will have utility. Mining facilities are required to collect data on pollutants sent to TIAs and WRSAs for the purpose of determining whether they have met the threshold for reporting to the NPRI. Hence, mining facilities will have information on such releases that can be provided to the Minister. There is no impossibility of compliance by the Minister or the mining facilities. As well, the 2006 notice allows for various collection methods, including estimation, for any facilities that have not specifically collected data on pollutants sent to TIAs and WRSAs. The 2006 notice remains operative until 2009, allowing the Minister to issue amendments and additional reporting requirements to facilities, a power which was used by the Minister in March 2007 to amend the 2006 notice.

[74] The applicants submit that there are no equitable bars in this case to enforcing the will of Parliament under the CEPA. Nor are the applicants barred in equity for any reason from bringing this application.

[75] The applicants point out that in *Apotex*, at pages 791–793, the Court set out three factual patterns in which the balance of convenience test has been acknowledged:

(1) Those where the administrative cost or chaos that would result from granting such relief is obvious and unacceptable;

(2) Instances where potential public health and safety risks are perceived to outweigh an individual's right to pursue personal or economic interests; and

(3) Those where a property owner has acquired a vested right to a building permit pending approval of a by-law amendment.

None of these scenarios is applicable to prevent the applicants from obtaining *mandamus* in the present case.

Consensus not precondition to ministerial decision

[76] The applicants say that their position has been misstated by the intervener. Nothing in the record indicates that the applicants undervalue or seek to overturn positions reached by consensus. The Minister, however, is not required to wait for consensus to carry out his duties under the CEPA. The Minister has confirmed that there is no consensus on the NPRI reporting of the pollutant releases that are the subject of this application.

The respondent

Standing of the applicants

[77] The respondent concedes that the applicants have standing to make this application.

Policy action not reviewable

[78] The respondent submits that Part 3 of the CEPA, which includes sections 43 to 55, imposes specific statutory duties on the Minister in subsections 44(1), 44(4), 47(1), 47(2) and sections 48, 50 and 54. These provisions, among other things, require the Minister to conduct certain types of research, to monitor environmental quality, and to establish and maintain a national inventory of releases of pollutants.

[79] The respondent says that Part 3 of the CEPA also gives the Minister the discretionary authority to perform certain tasks in subsections 44(2), 44(3), section 46 and subsection 47(3), including the discretionary authority to gather information for the issuing of objectives, guidelines and codes of practice.

[80] Specifically, the respondent looks to subsection 46(1) of the CEPA which provides the Minister with the discretionary power to issue a notice in the *Canada Gazette* requiring information for the purposes of:

(1) Conducting research;

(2) Creating an inventory of data;

(3) Formulating objectives and codes of practice;

(4) Issuing guidelines; or

(5) Assessing or reporting on the state of the environment.

[81] The respondent says that the Minister's decision not to require the reporting of tailings and waste rock to TIAs and WRSAs within a facility is not subject to judicial review because it is a policy decision. The imposition of reporting requirements, and what may be included in the *Canada Gazette* notice under section 46 of the CEPA is a discretionary decision in the nature of policy action. Such decisions are not subject to judicial review: *Maple Lodge Farms*; *Carpenter Fishing*

Corp. v. Canada, [1998] 2 F.C. 548 (C.A.) (*Carpenter Fishing Corp.)*; *Distribution Canada Inc.*; *Alberta v. Canada (Wheat Board)*, [1998] 2 F.C. 156 (T.D.), affd (1998), 13 Admin. L.R. (3d) 4 (F.C.A.) [*Canadian Wheat Board*]; *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2001 FCT 780, [2001] 4 F.C. 591 [*Moresby Explorers Ltd.*]; and *Goodwin v. Canada (Attorney General)*, 2005 FC 1185, 279 F.T.R. 100.

[82] The respondent also says that the only time policy actions or decisions are subject to judicial review is when they are tainted by bad faith, non-conformity with the principles of natural justice, or rely upon considerations irrelevant or extraneous to the statutory purpose: *Maple Lodge Farms*. The applicants have not made out a case for any of the above three vices which could render a discretionary policy decision reviewable.

[83] In the alternative, the respondent submits that the decision to publish a notice in the *Canada Gazette* and to require the reporting of certain data are legislative actions. Legislative actions are not subject to judicial review: *Maple Lodge Farms* and *Carpenter Fishing Corp*.

[84] The appellant in *Maple Lodge Farms* applied for a writ of *mandamus* ordering the Minister to issue permits for the importation of live chickens. The Supreme Court of Canada held that the permissive language of the legislation conferred a discretionary authority upon the Minister to issue import permits. The Court found that there was nothing improper or unlawful in the Minister formulating general policy requirements for the granting of import permits. Such decisions are not reviewable.

[85] The respondent also cites and relies upon *Canadian Wheat Board* where the Court held that the grain delivery program at issue was, by nature, more amenable to review through public consultation and the political process. As well, *Moresby Explorers Ltd.* held that the relevant sections in the *National Parks Act* [R.S.C., 1985, c. N-14] provided a wide discretion to the Minister to take whatever steps were necessary to ensure the maintenance of national parks. The Court adopted the Government of Canada's position that the setting of quota policies was not a matter for judicial review.

[86] The respondent takes the position that there is no legislative duty imposed on the Minister to either use the provisions of section 46 of the CEPA or to require specific data. The word "may" is used in section 46 and there is nothing in the context that would give it anything other than the permissive meaning ascribed to it in section 11 of the *Interpretation Act*, R.S.C., 1985, c. I-21.

[87] The respondent emphasizes that the Minister's choice of the scope of information required under the notice is a policy decision and the evidence shows that the scope is subject to change. The *Guidelines for the Use of Information Gathering Authorities under Section 46 of the Canadian Environmental Protection Act, 1999*, Environment Protection Service, Environment Canada, July 2001 (Guidelines) created pursuant to section 47 of the CEPA explain the process under which the policy is formed. Prior to issuing a notice requiring information under subsection 46(1), one of two processes will generally be followed. Under the first process, Environment Canada will undertake an assessment and pre-publish a notice. The assessment process is an internal decision-making tool which provides the Minister with the appropriate information to determine whether a notice should be issued and what information should be requested in the notice. The Minister will consider specific

criteria, outlined in the Guidelines, in order to determine the merits of gathering the information described in the assessment. The notice will be pre-published to allow public comment before a final decision is made by the Minister.

[88] The second process involves a multi-stakeholder consultative approach which engages potentially affected parties prior to issuing a notice. This allows stakeholders to comment on the need for the information, the uses to which it will be put, any costs associated with collecting the information, and the availability of the information elsewhere.

[89] The respondent submits that multi-stakeholder consultation is the process that has been followed for information gathering for NPRI purposes. The Minister has relied on this process to make modifications to the program, including adding and deleting substances to be reported. From time to time, there are proposed changes to the reporting requirements of the NPRI program. The proposed changes include those received from stakeholders that Environment Canada determines should proceed to consultation.

[90] The reporting requirements for the mining industry in the NPRI have been going through the multi-stakeholder consultation process. The removal of the mining exemption meant that mining extraction activities now fall within the scope of the NPRI reporting requirements. For mining facilities undertaking both extraction and processing activities, reporting is now required for extraction activities in addition to the previously required reporting on processing activities. For stand-alone mines without processing activities, the removal of the mining exemption meant that they are now required to report to the NPRI.

[91] The respondent says it is important to note that the removal of the mining exemption did not change the types of information to be reported by facilities that engage in the processing of mined materials. It meant that facilities were not required to also include mining extraction activities when reporting information to the Minister. Reporting the movement of tailings or waste rock inside a facility has never been required.

[92] The respondent submits that the NPRI work group and sub-group were unable to achieve consensus regarding reporting requirements for waste rock and tailings. Therefore, Environment Canada referred the issue to the Mining Sector Sustainability Table (MSST) to examine the issue from a broader vantage point. The general consensus at the MSST workshop was that there was a need for a mandatory, periodic reporting system for information that would help characterize the hazards associated with mine tailings and waste rock. The Minister agreed that, although information on mine waste is important to characterize and understand, the NPRI is not the appropriate tool to collect this information related to tailings and waste rock and that the department would examine options to put in place such reporting through another mechanism. The mechanism to be used for this reporting has yet to be decided upon by the Minister.

[93] The respondent concludes that the evidence shows that the issue of whether the tailings or waste rock being moved inside a mining facility should be reported under the *Canada Gazette* notice in the NPRI is a policy decision not subject to judicial review.

Legislative action not reviewable

[94] If this Court finds that the actions of the Minister are not a matter of policy, the respondent submits that the Minister's decision in determining what ought to be published in the *Canada Gazette* notice is a legislative act and it is not subject to judicial review.

[95] The respondent states that notices issued pursuant to the legislation are in the nature of legislative acts. They are also part of the creation of a general rule of conduct and, unless they are contrary to the Constitution, they are not reviewable: *Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans)*, [1987] 2 F.C. 93 (C.A.).

Mandamus

[96] The respondent submits that the applicants do not meet the criteria for a writ of *mandamus* because there is no public duty to act. The Minister is under no statutory or other duty to require notice in the *Canada Gazette* for tailings or waste rock that is moved inside a facility: *Northern Lights Fitness Products Inc. v. Canada (Minister of National Health and Welfare)* (1994), 55 C.P.R. (3d) 39 (F.C.T.D.).

The intervener

[97] The intervener submits that the fundamental argument advanced by the applicants is contrary to the terms of the NPRI and contrary to the statutory interpretation of key concepts and the fundamental provisions of the CEPA. No provision in the CEPA demands that the Minister treat a pollutant that is contained in material transferred into, and managed at, an on-site TIA or WRSA as synonymous with a pollutant that leaves such areas through air, land or water. It is inconsistent with the key concepts and provisions of the CEPA to treat the former scenario as any kind of pollutant release.

[98] The intervener agrees with the submissions of the Minister that:

(1) This application and its requested relief are an improper attack on legislative actions of the Minister to create and direct the NPRI under the CEPA;

(2) The application is out of time as the only action of the Minister that may be considered a "tribunal order" within the meaning of the *Federal Courts Act* and subject to review was the NPRI notice issued in February 2006 that does not require information on listed substances entering waste rock storage areas or tailings impoundment areas. This application was commenced in November 2007;

(3) The appropriate standard of review is reasonableness.

Statutory interpretation

[99] The intervener adds the following:

(1) The information-gathering provisions of the CEPA relevant to the NPRI provide the Minister with broad powers and discretion to request information, but include no minimum standards or

duties setting out what must be requested, and thus no duty to collect the waste rock and tailings information demanded by the applicants;

(2) Even if the Minister had collected the information demanded by the applicants, the Minister had no duty or power to expand the scope of the NPRI to include the information demanded by the applicants in the NPRI, as these actions do not involve "pollutants", "pollution", "releases" or "disposal"; and

(3) The statutory constraints affecting the Minister's duties respecting the NPRI do not prevent the Minister from establishing another national inventory to include information respecting TIAs or WRSAs, or collecting information relevant to the establishment and publication of such an inventory.

> The CEPA provides the Minister with broad discretion to request information and there is no duty to gather the kind of information demanded by the applicants.

[100] The intervener submits that the CEPA provides the Minister with a broad discretion to request information, including particularly broad powers in section 46, which are the powers cited in the provisions on the NPRI in section 48. Section 46 demonstrates that the powers are not in any way constrained by the NPRI duties set out in section 48 or section 50. The Minister may gather information for many purposes other than an inventory and, even under the inventory purpose, the Minister may gather information on a range of inventories for many substances and is not obliged to focus on, or address, a national inventory of pollutants. The Minister may decide to expand the scope of his national information request to gather information and/or create a new inventory requesting tailings and/or waste rock; however, section 46 does not oblige the Minister to gather this information and no aspect of sections 48 and 50 of the CEPA changes this legal situation.

> Minister has no duty or power to expand the scope of the NPRI to include substances transferred to WRSAs and TIAs as these actions do not involve "pollutants" or "releases" under the CEPA.

[101] The intervener further submits that no aspect of sections 46, 48 or 50 of the CEPA provides the Minister with any authority to alter or expand the meaning of the terms "national pollutant release inventory" or "pollutant" or "release". To determine the meaning of these terms, the Court should follow the principles of statutory interpretation set out by the Supreme Court of Canada in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at paragraph 106. These principles are important since the applicants have neglected to provide any specifics on how their interpretation accords with the words of the CEPA.

[102] In relation to "pollution prevention", the intervener submits that the definition in the CEPA is broad and "pollution" is broader then "pollutant". In relation to the term "release", the term signifies the end of human control and the return to control by natural forces. The meaning in the CEPA is narrower and covers what is released into the environment.

[103] The intervener submits that the grammatical and ordinary sense of the words used in sections 46 and 48 of the CEPA are fundamentally at odds with the applicants' case. Firstly, no

aspect of either section provides a minimum standard for what the Minister must obtain to establish the NPRI. Section 46 permits the Minister to request many types of information but provides no legal duty on the Minister to gather certain kinds of information related to the NPRI, such as information on tailings or waste rock. Section 48 only provides that the Minister use the information gathered in section 46 of the CEPA; it does not limit the NPRI information to information obtained via section 46. It adds that the Minister shall also use "any other information to which the Minister has access".

[104] The intervener takes the position that the creation of the NPRI was based upon stakeholder consensus and, prior to this application, stakeholder consensus supported the creation and amendment of the NPRI, including the 2005 change to eliminate the total mining exemption. Stakeholder consultation and input is formally recognized in the CEPA. Section 47 outlines that stakeholder input is formally part of the NPRI process and subsection 46(1) provides that the Minister shall issue guidelines respecting the exercise of power under subsection 46(1).

[105] The intervener points out that the history of requiring stakeholder consensus on the NPRI is directly relevant to this application since, as a rule, the Minister has only changed the NPRI scheme when stakeholder consensus has been reached. The Minister has never required the reporting of the controlled movement of substances into a TIA or WRSA inside a mining facility, particularly since there has been no stakeholder consensus on this issue.

[106] The intervener further submits that the applicants have no statutory basis for their claims that on-site management or storage of waste rock and tailings is really a "disposal" of these substances under the NPRI. The intervener points to the definition of "disposal" in the 2005 [*Notice with respect to substances in the National Pollutant Release Inventory for 2004 — Amendment*, *C. Gaz.* 2005.I.438] and 2006 *Canada Gazette* notices [at page 388 of the 2006 notice]:

> "disposal" means the final disposal of a substance to landfill, land application or underground injection, either on the facility site or at a location off the facility site, and includes treatment at a location off the facility site prior to final disposal.

[107] The term "final disposal" is not defined and the intervener submits that the on-site facilities involving tailings and waste rock involve ongoing management which is distinct from "final disposal". Therefore, as long as there is on-site management of TIAs and WRSAs, there is no "final disposal" as required by the definition in the *Canada Gazette.*

[108] The intervener also submits that a TIA and/or a WRSA is not a "landfill", "land application" or "underground injection". The on-site management of tailings and waste rock does not fall within the definition of "final disposal" in the *Canada Gazette* notices.

[109] The intervener says that a national inventory of pollutants is not the only national inventory contemplated by the terms of section 48 and, given the constraints on the CEPA's use of the terms "pollutant" and "release", it may be necessary for the Minister to give priority to creating another inventory to address core information respecting mine tailings and waste rock. Environment Canada has already signalled the Minister's intention to establish such an inventory.

Case not subject to judicial review

[110] The intervener takes the position that the provisions at issue in this litigation are legislative in nature and the Minister's exercise of discretion under the CEPA to request information, and his duty to establish and collect information for the NPRI, is a legislative decision. A decision is legislative rather than administrative when it is general rather than particular: *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735, at page 754 and *Ecology Action Centre Society v. Canada (Attorney General)*, 2004 FC 1087, 9 C.E.L.R. (3d) 161 (*Ecology*), at paragraphs 48–52 and 89–95.

[111] The intervener cites *Ecology*, at paragraph 50 for the following:

> A distinction often made between legislative and administrative acts is that between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.

[112] The intervener also cites and relies upon *Vancouver Island Peace Society v. Canada*, [1994] 1 F.C. 102 (T.D.) where the Court defined a legislative decision as follows [at page 131]:

> What constitutes a legislative decision that is beyond consideration by the Court, except in relation to issues of jurisdiction of the decision-maker, here the Governor in Council? At the very least it seems to me the decision must be discretionary, usually, but not always, general in its application, based on the exercise of judgment after assessing factors of general policy, of public interest and public convenience, morality, politics, economics, international obligations, national defence and security, or social, scientific or technical concerns, that is, issues of policy which lie outside the ambit of typical concerns or methods of the courts.

[113] The intervener adds that the Minister has a broad discretion under section 46 of the CEPA to request information to establish an inventory. The Minister's *Canada Gazette* publication outlines the scope of reporting under the NPRI and falls within the Minister's discretion under section 46. It constitutes a general rule that applies broadly to sectors that fall within the reporting threshold. The Minister's exercise of these powers under section 46 of the CEPA involves discretion and the consideration of broad factors which include the public interest, economics, scientific concerns and general policy. The subject matter of the NPRI is not an individual concern that applies to an individual or a small group. It is, rather, a regime which applies to a large range of industrial sectors in Canada. The Minister's exercise of discretion to require national reporting of pollutant releases under the NPRI is a legislative decision and not properly subject to judicial review under section 18.1 of the *Federal Courts Act*.

ANALYSIS

The applicants' objectives

[114] The applicants say that the Minister has failed to discharge his duties under the CEPA to provide information to the public regarding on-site releases and transfers by mining facilities of pollutants to TIAs and WRSAs. They say that this failure defeats the purpose of the CEPA which was brought into being to ensure public transparency and accountability in achieving pollution

reductions.

[115] The applicants take the view that, since 1993, when the NPRI was first established, the Minister has failed in this obligation and that such failure continues to the present time. They want the Court to intervene and declare the Minister to be in breach of the CEPA by his not requiring mining facilities to provide pollutant information for releases and transfers to TIAs and WRSAs in 2006 and subsequent years. They also want the Minister to publish the relevant information through the NPRI for 2006 and subsequent years. At the very least, the applicants want the Court to compel the Minister to make manifest to the public that he is, in effect, allowing an exemption to mining facilities in relation to this extremely important information on a major source of pollution in Canada.

The present impasse

[116] The applicants say that the Minister's failure to ensure the reporting of the on-site release and transfer of pollutants is contrary to the fundamental purpose and objectives of the CEPA, which legislation compels the Minister (in accordance with section 2) to:

(a) Encourage the participation of the people of Canada in the making of decisions that affect the environment;

(b) Facilitate the protection of the environment by the people of Canada;

(c) Provide information to the people of Canada on the state of the Canadian environment;

(d) Endeavour to exercise his/her powers to require the provision of information in a coordinated manner; and

(e) Apply and enforce the CEPA in a fair, predictable and consistent manner.

[117] In particular, the applicants point to Part 3 of the CEPA, which was brought into being in 1999, and which sets out the duties of the Minister to collect and publish pollutant release information through the NPRI (sections 44, 46–53) and to set objectives, guidelines and codes of practice to reduce pollution (sections 44, 54–55).

[118] The applicants' position is that sections 48 and 50 in Part 3 of the CEPA impose mandatory duties on the Minister to require reporting of major pollutant releases and to publish that information publicly to the NPRI in order to ensure that pollutant releases are reduced in Canada.

[119] Section 48 of the CEPA reads as follows:

> **48.** The Minister shall establish a national inventory of releases of pollutants using the information collected under section 46 and any other information to which the Minister has access, and may use any information to which the Minister has access to establish any other inventory of information.

[120] Although section 46 of the CEPA indicates that the Minister may exercise a discretion in

gathering information, the applicants say that section 46 cannot be used to thwart the duties of the Minister under section 48 and the entire purpose of the CEPA, as has occurred in this case, by exempting Canada's largest source of pollution from the information gathering and reporting process.

[121] Section 46 of the CEPA reads as follows:

46. (1) The Minister may, for the purpose of conducting research, creating an inventory of data, formulating objectives and codes of practice, issuing guidelines or assessing or reporting on the state of the environment, publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate a notice requiring any person described in the notice to provide the Minister with any information that may be in the possession of that person or to which the person may reasonably be expected to have access, including information regarding the following:

(*a*) substances on the Priority Substances List;

(*b*) substances that have not been determined to be toxic under Part 5 because of the current extent of the environment's exposure to them, but whose presence in the environment must be monitored if the Minister considers that to be appropriate;

(*c*) substances, including nutrients, that can be released into water or are present in products like water conditioners and cleaning products;

(*d*) substances released, or disposed of, at or into the sea;

(*e*) substances that are toxic under section 64 or that may become toxic;

(*f*) substances that may cause or contribute to international or interprovincial pollution of fresh water, salt water or the atmosphere;

(*g*) substances or fuels that may contribute significantly to air pollution;

(*h*) substances that, if released into Canadian waters, cause or may cause damage to fish or to their habitat;

(*i*) substances that, if released into areas of Canada where there are migratory birds, endangered species or other wildlife regulated under any other Act of Parliament, are harmful or capable of causing harm to those birds, species or wildlife;

(*j*) substances that are on the list established under regulations made under subsection 200(1);

(*k*) the release of substances into the environment at any stage of their life-cycle;

(*l*) pollution prevention; and

(*m*) use of federal land and of aboriginal land.

(2) The Minister may, in accordance with an agreement signed with a government, require that a person to whom a notice is directed submit the information to the Minister or to that government.

(3) An agreement referred to in subsection (2) shall set out conditions respecting access by the Minister or

other government to all or part of the information that the person is required to submit and may set out any other conditions respecting the information.

(4) A notice referred to in subsection (1) must indicate the period during which it is in force, which may not exceed three years, and the date or dates within which the person to whom the notice is directed shall comply with the notice.

(5) Every person to whom a notice is directed shall comply with the notice.

(6) The Minister may, on request in writing from any person to whom a notice is directed, extend the date or dates within which the person shall comply with the notice.

(7) The notice must indicate the manner in which the information is to be provided.

(8) The notice may indicate the period during which, and the location where, the person to whom the notice is directed shall keep copies of the required information, together with any calculations, measurements and other data on which the information is based. The period may not exceed three years from the date the information is required to be submitted to the Minister.

[122] All in all, the applicants say that the Minister's conduct, as demonstrated in the 2006 notice, has frustrated the purpose and objects of the CEPA in the various ways set out in their written submissions in that the Minister has:

(a) Hidden the largest source of pollution in Canada;

(b) Distorted the information currently reported on the NPRI;

(c) Mischaracterized a major pollutant release;

(d) Failed to promote the "polluter pays" principle which is essential to the scheme under CEPA;

(e) Failed to ensure Canada–U.S. harmony on pollutant release reporting;

(f) Delayed in requiring the reporting in accordance with his statutory duties.

[123] Behind all of this lies an extensive history of consultation and discussions between and among various public interest groups, industry and government departments, dating back to at least 1992, concerning how on-site transfers and releases by mining facilities to TIAs and WRSAs should be reported and made manifest to the public.

[124] No resolution of this issue has been achieved to date. Before I come to the legalities, it seems to me that the applicants' frustration and sense of urgency which has prompted this application is perfectly understandable. After more than 16 years of consultation with stakeholders and interest groups, there is still no clear indication from the Minister as to how and when this important information is going to be gathered and provided to the Canadian public.

[125] The Minister and the intervener appear to accept that all stakeholders now recognize the importance of reporting this information. The disagreement has arisen over the way it should be

reported. The applicants feel it should appear in the NPRI, while the intervener and the industry it represents feel that a separate and different reporting system is required in order to avoid confusion and distortions *vis-à-vis* the information that appears in the NPRI.

[126] In any event, the upshot is that the information from the mining industry on waste rock and tailings disposals on-site is not being gathered and reported by the Minister, even though other sectors are required to provide similar information that is reported through the NPRI.

[127] The applicants say that this amounts to an exemption for the mining industry that the Minister is hiding from the public. The Minister's failure to act means that the default position is pretty well the position taken by the industry, and the public does not really know what is being done to record, report and discourage a major source of pollution in Canada. In other words, whatever the merits of the debate as to how information regarding the on-site releases and transfers of pollutants by mining facilities should be gathered and reported, the end result is a stalemate that thwarts the objectives of the CEPA and that denies the Canadian public its rights to know how it is threatened by a major source of pollution.

[128] Generally speaking, the evidence shows that between 1993, the first NPRI reporting year, and 2005, the Minister, for various reasons, decided to exempt tailings and waste rock from reporting unless the pollutants were released from a disposal area.

[129] The evidence shows that, since the creation of the NPRI, the processing of mined materials has always been reportable and that, since 2006, NPRI reporting has also been required for mining extraction activities. Also, NPRI reporting is required for substances that leave a TIA or WRSA.

[130] What has not been reportable are the controlled movements of tailings and waste rock inside a mining facility to a TIA or WRSA. This issue has not been dealt with because there is, as yet, no consensus between stakeholders as to how such reporting should be done.

[131] It was in 2006 that the Minister accepted the consensus reached on mining extraction and removed the reporting exemption for that activity so that both processing and extraction were reportable.

[132] The Minister stipulates reporting requirements in NPRI notices that appear in the *Canada Gazette*. The Minister also issues guides and guidelines to the industry.

[133] The 2005 NPRI Guide for Reporting [Guide for Reporting to the National Pollutant Release Inventory —2005] indicated that [at page 71] the "[l]isted substances in tailings are not reported unless they left the tailings impoundment or other forms of on-site containment." However, the 2006 Guide for Reporting contained no such information.

[134] What happened in 2006 is significant from the applicant's perspective because, in that year, in accordance with section 46 of the CEPA, the Minister published the notice for the 2006 reporting year in the *Canada Gazette* on February 25, 2006 and removed the exemption for mining processes that take place prior to milling that had existed in previous notices. The Minister decided not to require the reporting of pollutants released to TIAs and WRSAs in 2006, but the applicants say it is

not clear in the notice published in the *Canada Gazette* in 2006 that such a decision was made.

[135] In accordance with section 47 of the CEPA, the Minister published a 2006 Guide for Reporting which did not include the statement used in previous years that "[l]isted substances in tailings are not reported unless they left the tailings impoundment or other forms of on-site containment."

[136] The applicants take the position that this omission suggests that reporting on tailings was recognized as a legal requirement in 2006. In fact, the applicants take the position that in removing the mining exemption in 2006, the Minister also imposed a legal requirement on mining facilities to include NPRI listed pollutants contained in waste rock for the purpose of determining whether they met the threshold for reporting. What is more, the applicants contend that the omission of the tailings exemption from the 2006 Guide for Reporting means that reporting on tailings also became a legal requirement in 2006.

[137] Either way, the applicants' position is that if there is no reporting of substances in tailings or waste rock moved inside a facility to a TIA or WRSA, then this is not clear to the public and the Minister should make his position manifest on this point. This is because, despite the language of the 2006 notice and Guide for Reporting, the Minister has communicated to mining facilities in consultation meetings (to which the broad public did not have access) that mines were not yet required to report pollutant releases to TIAs and WRSAs for the 2006 reporting year. This means that, unbeknownst to the public, mining facilities continue to be the only industrial sector not reporting on-site pollutant releases.

[138] The respondent says there is no confusion or subterfuge on this issue because, even though Schedule 3 of the 2006 notice in the *Canada Gazette* specified that information must be reported for disposals inside a facility to landfill, land treatment or underground injection, it did not specify "tailings impoundments" or "waste rock storage areas" as sub-categories for which reporting was required.

[139] In addition, the respondent says that, although the 2006 Guide for Reporting did not contain the reference in previous notices that the "[l]isted substances in tailings are not reported unless they left the tailings impoundment or other forms of on-site containment", it has been long understood and accepted that tailings should be reported only when leaving a TIA and stakeholders have been advised that a decision has not been made to require the reporting of tailings and waste rock within a facility.

[140] In addition, the respondent attempts to answer the applicants' position on this issue by pointing out that:

(a) Schedule 3 of the 2006 *Canada Gazette* notice (which takes precedence over a facility owner's or operator's Guide for Reporting) did not include a requirement for reporting on substances inside a facility to a TIA or WRSA;

(b) The omission from the 2006 Guide for Reporting of the statement that appeared in 2005 was simple inadvertence; and

(c) Because there is no consensus on the appropriate manner to report tailings and waste rock movements inside a facility, the applicants themselves continued to participate in consultations on this issue during 2006 and 2007.

[141] My review of the record leads me to conclude that there was no intention, when the mining exemption was removed in 2006, to include reporting substances in tailings and waste rock that remain inside a mining facility. The whole history of the discussion and consultative process shows that this issue has long been a problem and that, as yet, it has not been resolved through stakeholder consultation and consensus. The evidence also reveals that the applicants have taken part in the consultative process and are aware that no consensus exists on this issue and that the Minister has yet to make a decision on what form the reporting of these pollutants should take.

[142] Whether the Canadian public is aware of this residual problem and is being misled by the exclusion of the pollutants found in on-site tailings and waste rock is a different issue. The lack of consensus over the issue has meant that the consultative process has broken down and the Minister is currently studying how the relevant information ought to be collected and reported publicly in a system other than the NPRI.

[143] The end result is that all stakeholders appear to recognize that this information should be collected and reported, but cannot reach consensus on what form the reporting should take. There is no evidence as to how long it will take to devise a way of reporting this information to the public and, in the meantime, the information is not being reported through the NPRI system, and mining remains the only sector not required to report on-site disposals of pollutants identified in the CEPA to the NPRI.

[144] Legalities aside, this is a very unsatisfactory situation, and the impasse amongst stakeholders does not serve the needs of the Canadian public. The Minister conceded at the hearing that this information is not yet reported but that this was not the result of guile, and that the Minister was merely looking for the right reporting vehicle. While not being reported as yet, the Minister assured the Court that it is not the intention of the Minister to exempt this information from being reported.

[145] Notwithstanding these assurances, it is clearly unsatisfactory that such an important part of the pollution picture in Canada is not being reported to the public under the CEPA. The Minister and his predecessors have continued the incremental and consultative process envisaged under the CEPA, but the record shows that the debate concerning the need to report the information in question, and the form that such reporting should take in the mining sector, has been going on since at least 1992. At some point incremental becomes glacial, study becomes stasis, and stasis clearly favours those who are not required to report. The Canadian public is the loser and, without such information being readily accessible, cannot participate in the debate or gauge fully the environmental and health concerns that arise from the pollutants in on-site TIAs and WRSAs. At the time of the hearing of this application, there was no indication of when, or how, this information would be made available.

[146] In view of this impasse, and its consequences for Canadians, the present application is entirely understandable. The question is, however, whether there is any legal basis upon which the Court should intervene and grant the declarative and mandatory relief sought by the applicants.

Legal issues

[147] The applicants say that they seek judicial review of the ongoing course of action of the Minister who has failed, since 1993 when the NPRI was first established, to require reporting by mining facilities of releases or transfers of pollutants to TIAs and WRSAs. Their argument is, in essence, that the CEPA requires the Minister to provide this pollutant release information to the public and he has failed to do so.

[148] The applicants base their case upon the obligatory language found in sections 48 and 50 of the CEPA, as well as the general objects of the CEPA and its overall purpose, which is to protect the Canadian environment and human health from pollutants.

[149] The applicants are requesting the Court to engage in the exercise of statutory interpretation and, in this regard, the Court must follow the principles set out in several decisions of the Supreme Court of Canada but which are summarized in *C.U.P.E. v. Ontario (Minister of Labour)*, at paragraph 106:

> The appropriate approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the [CEPA], the object of the [CEPA], and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, frequently cited with approval in this Court, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21 and 23; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33). This contextual approach accords with the previously mentioned *dictum* of Rand J. in *Roncarelli, supra*, that "there is always a perspective within which a statute is intended [by the legislature] to operate" (p. 140), and Lord Reid's caution in *Padfield, supra*, that the particular wording of a ministerial power is to be read in light of "the policy and objects of the [CEPA]" (p. 1030).

[150] The scope and purpose of sections 48 and 50, as well as the understanding of all stakeholders regarding the reporting of tailings and waste storage pollutants, requires some appreciation of the legislative and consultative process that has led to the present NPRI system and what that system encompasses.

[151] The evidence reveals that at its inception in March 1993, under the original CEPA, the Minister applied a three-part framework to collect information relevant to establishing the NPRI: any person who owned or operated a facility described in Schedule II, who was engaged in any activity listed in Schedule III, and who possessed information of a type described in Schedule IV was required to provide the Schedule IV information to the Minister by June 1994. The information listed in Schedule IV included reference to 178 substances (set out in Schedule I). Schedule II generally applied to any facility involving more than 20 000 hours in employees' time in 1993, subject to eleven classes of exemption. Schedule III applied to the manufacture, processing or other use of a substance. Schedule IV demanded information on the on-site releases of listed substances to air, water, underground injection, and land. Through Schedule IV, the Minister also required information on wastes that were transferred off site.

[152] From the inception of the NPRI in 1993 until 2005, certain mining activities were exempt from NPRI reporting. Stakeholders and documents refer to this as the "mining exemption". The first *Canada Gazette* NPRI notice published in 1993 set out the mining exemption in the following terms:

Mining of materials which contain substances listed in Schedule I to this notice, but not those facilities engaged in further processing of these mined materials.

[153] Under the amended CEPA, Schedule 2 of the 2005 NPRI notice implemented the mining exemption using the following terms [*C. Gaz.* 2005.I.438, at page 450]:

3. (1) A substance listed in Schedule 1 shall not be included in calculating its prescribed mass reporting threshold if the substance is manufactured, processed or otherwise used in an activity listed below:

. . .

(*h*) mining, except processing or otherwise using mined materials;

[154] For greater assistance, the 2005 Guide for Reporting to the National Pollutant Release Inventory, issued by the Minister under the authority and direction of the CEPA, set out the scope and limits of the mining exemption [at page 71]:

The exemption for mining is for activities related to actual removal of ore, rock or overburden, up to and including primary crushing. The mining exemption, however, does not apply to Part 4 substances (CACs) [Critical Air Contaminants] or the Part 5 speciated VOCs [Volatile Organic Compounds] released from stationary combustion equipment. In this case, the mining operation must report any CAC and speciated VOC releases from its combustion equipment that meet the CAC and speciated VOC release thresholds. The exemption for CAC reporting explained in Question 6 may be valid if the only activities occuring at the mine were up to and including primary crushing.

Any NPRI substances manufactured, processed or otherwise used or released to the atmosphere in the further processing of the rock or ore, such as milling, concentrating, smelting and refining, would be reportable if the thresholds were met.

This would include, but not be limited to, NPRI substances found in the processed ore, solvents, acids, flotation agents, flocculation agents, dust suppressants, fuels used in power generation, particulate matter and combustion contaminants (e.g., NO_x, SO_2). Listed substances in tailings are not reported unless they left the tailings impoundment or other forms of on-site containment.

[155] So stated, the mining exemption did not prevent the Minister from demanding and receiving NPRI-related information on three types of releases from mining facilities: (1) Part 4 or 5 substances or VOCs released from stationary combustion equipment; (2) substances released through further processing of rock or ore; or (3) substances released from on-site tailings impoundment facilities or other forms of on-site containment.

[156] Tailings are produced when extracted ore is milled or ground in order to separate metals and minerals from the rock. Tailings are managed on site at mining facilities in TIAs. Other forms of on-site containment include waste rock stored at a mining facility in a WRSA or stockpile. Waste rock describes the rocks that are dislodged during mining activities, but do not contain economically recoverable metals or minerals.

[157] A key event in this multi-stakeholder consultation work was the Mining Sub-Group workshop on May 17-18, 2005. At this workshop, the Sub-Group reached consensus to remove the total mining exemption. This led the Minister to take action to implement this consensus. He

removed the total mining exemption from the 2006 NPRI notice in the *Canada Gazette*.

[158] It should be noted that many documents in the record and cited in this application describe the "elimination" of the "mining exemption". Technically, this is not accurate because an exemption remains for "mining related to pits and quarries". What was "eliminated" from the total mining exemption that was in place was only the exemption for mines where metals and other major industrial minerals of interest are extracted.

[159] This change involved changing the wording in Schedule 2 to the 2006 notice. The notice narrowed the wording of the exemption for mining from "mining, except processing or otherwise using mined materials" to "mining, related to pits and quarries".

[160] Similarly, the 2006 Guide provided the following explanation [at page 2]:

> The exemption for **mining** has been removed. All mining activities at a facility must be considered when reporting for Parts 1 through 5 of the NPRI except "mining related to pits and quarries". If "mining related to pits and quarries" occurs at the facility, only Part 4 and 5 emissions from the combustion of fuel in stationary combustion equipment need to be considered for those activities.

[161] The 2006 Guide also provided as follows [at page 13]:

> After discussions with Stakeholders in 2005, consensus was reached on the mining exemption, and Environment Canada agreed to remove the mining exemption for the 2006 reporting year. Therefore, for the 2006 reporting year, reporting to the NPRI must be based on ALL activities at a mining facility. The exemption will only apply to mining related to pits and quarries.

[162] Summing up these events, as of 2006, the NPRI notice no longer provided a total exemption for mining; instead, the exemption was limited to mining related to pits and quarries.

[163] As set out above, the NPRI obviously applies to releases from tailings facilities or other forms of on-site containment. During discussions about ending the mining exemption, a further topic of discussion was substances transferred into TIAs and WRSAs. In 2003, Environment Canada released a *Discussion Paper on Pollutant Release Reporting Requirements as it Relates to Mining Facilities* which illustrates the distinctions between reportable releases, the mining exemption, and non-reportable substances in tailings and other forms of on-site containment that would apply to waste rock:

> In summary, the exemption for mining is for activities related to the actual removal of ore, rock or overburden, up to and including primary crushing. However, releases and transfers of NPRI substances used in the further processing of rock ore, such as milling, concentrating, smelting and refining are reportable. NPRI also states that listed substances in tailings are not reportable unless they leave the tailings impoundment or other forms of on-site containment.

[164] The 2005 Guide addressed this third point as follows: "Listed substances in tailings are not reported unless they left the tailings impoundment or other forms of on-site containment."

[165] Inadvertently, the 2006 Guide omitted this language. The basis for considering this change inadvertent is not only the evidence of Environment Canada, but also the lack of any stakeholder

consensus to change the position from what had occurred in 2005 and before.

[166] In March 2007, Environment Canada and the MSST convened a workshop, entitled "Information Needs Associated With The Risks/Hazards of Mine Tailings And Waste Rock In Canada" on the specific issue of TIAs and WRSAs. This workshop was intended to respond to a statement of Environment Canada in the *Report of the National Pollutant Release Inventory Multi-Stakeholder Work Group on Substances* dated November 24, 2005, at page 23:

> Since consensus was reached on the removal of the mining exemption, EC [Environment Canada] agrees to remove the mining exemption for 2006 reporting year.. . .
>
> There has been no consensus on the issue of reporting requirements for disposal of waste rock and mine tailings. EC feels that this issue needs to be examined from a broader perspective — stakeholders will continue to be consulted during 2006 in an effort to come to a conclusion on this issue.

[167] The workshop resulted in a Workshop Proceedings document. This document sets out clearly the lack of consensus on these issues by workshop participants:

> The issue of what constitutes a release is the basis for the ENGO [Environmental Non-Government Organization] position that NPRI is the required management tool for the core information pertaining to mining tailings and waste rock. The position of the mining sector is equally clear that transfers to (and substances contained in) tailings and waste rock piles are sufficiently different to not constitute a release. This perspective is shared by some of the federal participants.

[168] This workshop also showed recognition by participants that there was a need for a national reporting mechanism concerning a "core set" of information in relation to waste rock and tailings. The executive summary of the Workshop Proceedings summarizes the following points of agreement at page 4:

> Participants generally agreed on the need for some type of mandatory regular reporting mechanism relating to the 'core set' of information needs relating to tailings and waste rock. Civil society participants were of the view that the National Pollutant Release Inventory (NPRI) was the appropriate information management mechanism while mining sector participants were of the view that NPRI was not the appropriate mechanism. The possibility of creating a new inventory using s. 48 of CEPA 1999 was raised for consideration.
>
> Participants generally agreed on the need to promote collaboration and cooperation across federal, provincial and territorial governments in collecting, managing and accessing information relating to mine tailings and crushed rock.
>
> All participants strongly agreed that further multi-stakeholder discussions pertaining to this topic would not be helpful in the absence of a government decision on the issue of inventory-based reporting for a 'core set' of information, and that Environment Canada must, within six months, make this decision.

[169] Following the workshop, the MSST held a meeting on June 5, 2007. At this meeting, Environment Canada presented an overview of the workshop results and recommendations. The MSST then asked Environment Canada to decide whether to implement "inventory-based" reporting for a "core set" of information relating to tailings and waste rock.

[170] At the next MSST meeting in October 2007, Environment Canada presented its response to

this MSST request. Its response advised that Environment Canada would not use the NPRI to collect this kind of information. Instead of adding tailings and waste rock to the NPRI, Environment Canada advised that it would establish a different national inventory for such reporting pursuant to section 48 of the CEPA. It also advised that the methods for data collection and reporting, the form of record keeping, together with the presentation of public information, remained to be worked out.

[171] The above account suggests to the Court that the applicants were well aware that no stakeholder consensus existed over the use of the NPRI to collect and report on tailings and waste rock pollutants that have not left their on-site containment areas. The applicants obviously feel that the NPRI system should be used and they have now turned to the Court to see if the wording of the CEPA can be used to force the Minister to collect and report this information in the way they feel it should be collected and reported. In other words, notwithstanding the whole history of incremental consultation and consensus that has characterized the incorporation of mining activities into the CEPA, does the CEPA as it was amended in 1999, solve the problem by mandating the Minister under sections 48 and 50 of Part 3 to collect and report this information through NPRI?

The relevant statutory provisions

[172] To begin with, it seems clear to me that section 48 compels the Minister to "establish a national inventory of releases of pollutants". In doing this, he is compelled to use "the information collected under section 46 and any other information to which the Minister has access".

[173] In addition, section 48 allows the Minister but does not compel him, to "use any information to which the Minister has access to establish any other inventory of information."

[174] It seems clear to me, then, that there has to be a "national inventory of releases of pollutants" that, subject to subsection 53(4), must be published in accordance with section 50.

[175] In other words, the "any other inventory" that the Minister "may" establish under section 48 is in addition to, and not an alternative to, the "national inventory" that must be established. This interpretation would appear to accord with Environment Canada's understanding as expressed at the MSST meeting in October 2007 and its decision to establish a "national inventory" for the reporting of on-site tailings and waste rock pollutants.

[176] The problem with such an approach, it seems to me, is that section 48 mandates "a" national inventory. It does not contemplate separate "national" inventories for separate sectors. In my view, there are good and obvious reasons why Parliament would mandate a single national inventory. One of them is embodied in section 2 of the CEPA which makes it a duty of the Government of Canada to apply and enforce the CEPA in a fair, predictable and consistent manner and to ensure that Canadians have ready access to information concerning pollutants that may impact the environment and health.

[177] In my view, then, sections 48 and 50 allow the Minister a discretion to establish and report "any other inventory of information", which would include separate sectorial inventories, but the Minister must establish "a national inventory of releases of pollutants" that will contain information collected under section 46 and "any other information to which the Minister has access". I do not see

how section 48 can be read to permit a sectorial or any other multiplication of "national" inventories. In other words, I believe the Minister is wrong if he interprets section 48 as allowing him to establish separate "national" inventories of releases of pollutants for different sectors, although it obviously permits him to establish separate sectorial inventories in addition to a national inventory. My understanding of the record is that the NPRI is the "national inventory" that the Minister has chosen to establish in order to fulfill his duty under section 48. In other words, the national inventory permitted under section 48 already exists.

[178] It also seems to me that the "national inventory" established under section 48 must contain "releases of pollutants". So the next issue is whether the on-site releases and transfers by mining facilities to TIAs and WRSAs constitute "releases of pollutants".

[179] Subsection 3(1) of the CEPA defines "release" as follows:

3. (1) . . .

"release" includes discharge, spray, inject, inoculate, abandon, deposit, spill, leak, seep, pour, emit, empty, throw, dump, place and exhaust.

[180] The intervener argues that the Court should read into this definition a requirement that all forms of "release" are "actions that signify the end of human control and the return to control by natural forces". I can find nothing in the CEPA and its full context that allows such a reading. It would mean that just because a "pollutant" has entered the environment does not mean that it has been released. It would also mean that pollutants could harm the environment but, because they remain within some form of human control, they would not be reportable under section 48.

[181] I find the intervener's gloss on the meaning of "release" impossible to apply conceptually. This is because of the way "environment" is defined in subsection 3(1):

3. (1) . . .

"environment" means the components of the Earth and includes

(*a*) air, land and water;

(*b*) all layers of the atmosphere;

(*c*) all organic and inorganic matter and living organisms; and

(*d*) the interacting natural systems that include components referred to in paragraphs (*a*) to (*c*).

[182] The intervener's view is that just because pollutants deposited or dumped in TIAs and WRSAs have the potential to harm the environment does not mean that they should be considered a "release" for the purposes of section 48. The intervener points out that multi-sector discussions since the 1990s have always regarded on-site releases and transfers as not being a release under the NPRI.

[183] As the history of the consultation process shows, however, environmental protection in

Canada has moved incrementally towards greater inclusiveness. The mining exemption has been removed over time and all stakeholders have agreed for some time now that information regarding the release and transfer of pollutants to TIAs and WRSAs should be collected and reported to the public. In addition, other sectors have to report this kind of information.

[184] As regards the mining sector, the debate has not been over whether such information should be collected and reported, but over what form a national inventory of such information should take. Although TIAs and WRSAs are on site, I do not see how this prevents some kind of release, in the sense of a deposit, seepage or interaction with air, land and water that is brought about because the natural environment has been transformed by human agency, and human agency has deposited, dumped, poured (or whatever word is appropriate) materials into TIAs and WRSAs. It may be that, for various economic and other reasons, the mining sector has been treated differently regarding reporting requirements under the CEPA, but I do not see how such treatment can be used to gloss the plain and obvious meaning of words in the context of a statute that is intended to protect air, land and water, and which compels the Government of Canada (see paragraph 2(1)(*o*)) to, among other things, "apply and enforce this Act in a fair, predictable and consistent manner."

[185] All stakeholders agree that this information should be collected and reported. The intervener wishes to read into the statute a distinction between "inside" and "outside" releases. This distinction appears to have had a meaning in the context of discussions about which aspects of mining should be reportable to the public. But the distinction does not mean that the terms that appear in the statute, or in the scheme and objects of the CEPA, must be given meanings that just happen to suit a particular sector. The rules of statutory interpretation require me to look at the plain and grammatical meaning of words in the entire context of the CEPA and the intentions of Parliament. The record reveals to me a general recognition that the information at issue in this application should be collected and reported.

[186] The residual debate is about the form of reporting. Were the Minister to agree that the information should be reported through the NPRI, the word "release" would not require amendment. This is because the release and transfer of pollutants to TIAs and WRSAs must already be encompassed by the terminology of the CEPA. The only reason this information has not been collected and reported is, as the Minister argues in this application, because the Minister has exercised a perceived discretion under section 46 not to require such reporting.

[187] Similar arguments apply in relation to the word "pollutants" as it appears in section 48. "Pollutant" is not defined in subsection 3(1) of the CEPA but its meaning is ascertainable from the definition of "pollution prevention", which is also the fundamental purpose of the CEPA as set out in the preamble:

3. (1) . . .

"pollution prevention" means the use of processes, practices, materials, products, substances or energy that avoid or minimize the creation of pollutants and waste and reduce the overall risk to the environment or human health.

[188] "Pollution prevention" has a very broad scope. A pollutant is something that, when released, contaminates the environment. It is a toxic substance. Webster's Dictionary defines pollutant to mean

(a) waste matter that contaminates the water or air or soil; (b) any substance introduced into the environment that adversely affects the usefulness of a resource or the health of humans, animals or ecosystems; and (c) physical, chemical or biological substance or factor that produces pollution, nuisance or a danger to health. The "environment" has already been defined above. So, once again, I cannot to see how toxic deposits, releases and transfers to TIAs and WRSAs are not a deposit or release of a pollutant into the environment in accordance with the ordinary and grammatical use of the word, as well as the scheme and objects of the CEPA as revealed by its full context.

[189] The stakeholders have already agreed that this information should be reported in a national inventory under section 48. Section 48 only requires the reporting of "releases of pollutants". It seems to me, then, that all stakeholders agree that the materials concerned are pollutants for the purposes of section 48. Once again, the fact that the mining sector is not reporting this information under the NPRI is not a disagreement over the statutory interpretation of "release" and "pollutant" as those words appear in section 48. It is a function of what the Minister argues is an exercise of ministerial discretion under section 46 not to collect the information for reporting in the NPRI under section 48, and a decision to consider reporting the information in a different national inventory.

[190] For these reasons, I think I must conclude that "releases of pollutants" in section 48 of the CEPA must, as a matter of statutory interpretation, include the releases and transfer of materials to TIAs and WRSAs that are the subject-matter of this application. This brings the Court to the meaning of section 46 and its relationship with sections 48 and 50 of the CEPA.

Section 46

[191] The respondent points out that the Minister has always required the reporting of substances listed in the NPRI *Canada Gazette* notice that leave a facility's TIA or WRSA but the Minister has never required the reporting of these substances in tailings or waste inside a facility to a TIA or WRSA.

[192] The basic reason for this state of affairs offered by the respondent is that the CEPA grants the Minister a discretion under section 46 of the CEPA, which means that there is no legislative duty imposed on the Minister to either use the provisions of section 46 or to require specific data.

[193] It is important to read section 46 together with section 47 which compels the Minister to "issue guidelines respecting the use of the powers provided for by subsection 46(1)". Subsection 47(2) also compels the Minister to consult with various parties in carrying out his/her duties under subsection 47(1).

[194] The respondent argues that the use of the word "may" in section 46 makes it clear that the section is wholly permissive, and the Minister's choice of the scope of information required under any notice sent out under section 46 is entirely the function of a policy decision formulated in accordance with section 47.

[195] The multi-stakeholder consultation process that is recorded in the record before me has been carried out under sections 46 and 47 of the CEPA, and the Minister has relied upon this process to make modifications to the reporting program, including adding and deleting substances to be

reported.

[196] What this means is that the respondent takes the position that section 46 of the CEPA permits the Minister a broad discretion on what information to collect. The nature, quantity, sectorial significance, and environmental impact are, from the respondent's perspective, entirely a matter of ministerial discretion.

[197] What is more, in the respondent's view, the duties of the Minister under sections 48 and 50 to establish a national inventory and publish information regarding "releases of pollutants" totally subservient to the ministerial discretion under section 46 to decide what to collect and from whom.

[198] If this interpretation were accepted, however, it would mean that, if the Minister chooses not to collect information under section 46 about any "releases of pollutants", either from a particular sector or otherwise, then any national inventory established under section 48 need not accurately or fully reveal to Canadians the environmental and health hazards they face.

[199] This interpretation is very difficult to reconcile with the obligations imposed upon the Government of Canada under other sections of the CEPA and, in particular, section 2 which, among other things, obliges the Government of Canada to protect the environment and to provide information to the people of Canada on the state of the Canadian environment.

[200] Simply put, I cannot see how the national inventory that must be established under section 48 can, when the full context of the CEPA is examined, be entirely governed by whatever information the Minister may, or may not, choose to collect under section 46.

[201] The discretion allowed under section 46 must, in my view, be exercised in a way that meets the obligations of the Government of Canada, as those obligations are defined in the CEPA, and that allows the various tools necessary to fulfill the general scheme and objects of the CEPA to be assembled and used in a meaningful way. A national inventory of releases of pollutants can hardly play the role ascribed to it by the CEPA if the Minister decides, under section 46, not to collect information so that the people of Canada are not provided with a full and accurate picture of the releases of those pollutants that pose environmental and health risks.

[202] In my view, then, section 46 cannot be used by the Minister to simply excuse or exempt any particular sector from providing information that, in the full context of the CEPA, as well as under specific provisions, is needed to allow Canadians to know what environment and health risks they are confronting.

[203] In the present case, all stakeholders agree that the Canadian public should have the pollutant information in question and that it should be presented in some kind of national inventory. The Minister has simply used section 46 to exempt mining facilities from reporting such information for historical, economic and procedural reasons.

[204] In my view, section 46 is a facilitating and enabling provision that gives the Minister wide powers to gather information required to carry out the Minister's obligations under other provisions of the CEPA.

[205] I can see that, in certain instances, there could be a dispute as to whether information is significant enough or appropriate for inclusion in a national inventory. But in the present case no such dispute arises. All stakeholders agree that the information in question belongs in a national inventory. And from my reading of section 48, the Minister is obliged to establish "a national inventory of releases of pollutants" and that national inventory already exists under the NPRI system.

[206] To read section 46 in the way the respondent invites the Court to read it would mean that the people of Canada will only, if ever, be informed in a national inventory about released pollutants including, in this case, pollutants that all stakeholders agree should appear in a national registry, as and when the Minister decides to collect and publish the relevant information. I cannot reconcile that position with the stated purpose and objectives of the CEPA and the obligations of the Government of Canada under the CEPA.

[207] It seems to me that the reason the Minister has issued notices and guides under sections 46 and 47 telling mining facilities not to report such information is because, if it is reported, then the Minister is obliged to publish it under section 48 in the established NPRI. But this approach amounts to turning a blind eye to relevant information that all stakeholders agree should appear in a national inventory. I see nothing in section 46 or the general scheme of the CEPA that allows the Minister to do this.

[208] Section 48 obliges the Minister to establish a national inventory of releases of pollutants using the information collected under section 46 "and any other information to which the Minister has access". The record shows that the Minister is well aware that information is readily available (indeed the Minister may already possess it) that should be collected and placed in a national inventory of releases of pollutants. Indeed, the only thing that would appear to be preventing this from occurring is that not all stakeholders want the relevant information to appear under the NPRI; some want a separate reporting and inventory system. Mr. Lavallée, for the respondent, opines that the "NPRI is not the appropriate tool to collect this information, and the Department would examine options to put in place this reporting through another mechanism. The mechanism to use for this reporting has not yet been decided by Environment Canada".

[209] The Court is not told how and when it will be decided. Nor is there evidence to suggest some practical difficulty in using the NPRI. Meanwhile, the Canadian public is deprived of information concerning a significant source of pollution in Canada and concerning the environmental and health risks that releases of such pollutants pose for Canadians. I do not see how such an approach can be reconciled with the obligatory language of section 48 or with the general scheme and objectives of the CEPA. There is nothing before me to suggest that this situation will be resolved any time soon or that the people of Canada will be told in a national inventory just what pollutants have been released into the environment from this source. The Court is simply told that it cannot review and interfere with the ministerial powers granted under section 46 of the CEPA to gather information.

Availability of judicial review

[210] Both the Minister and the intervener take the position that judicial review is not available to

the applicants in the circumstances of this case.

[211] The Minister says that the imposition of reporting requirements and what may be included in the *Canada Gazette* notice under section 46 of the CEPA, 1999, is a discretionary decision in the nature of policy action and, as such, is not subject to judicial review. The Minister cites the usual authorities for this proposition, including the Supreme Court of Canada decision in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2.

[212] In the alternative, the Minister says that the decision to publish a notice in the *Canada Gazette*, requiring the reporting of certain data, is a legislative action and is not subject to judicial review.

[213] The Minister's position is that there is no legislative duty imposed on the Minister to either use the provisions of section 46 or to require specific data. This is because the word "may" is used in section 46, and there is nothing in the context that would give it any other than the permissive meaning ascribed to it in section 11 of the *Interpretation Act*.

[214] I have already found that section 46 is an enabling provision that must be read in the full context of the CEPA. Part 3 of the CEPA imposes various duties upon the Minister that must be discharged under the terms of the CEPA. Section 44 is compulsory and has its own enabling provision under subsection 44(2). Likewise section 45, dealing with health issues, is compulsory and obliges the Minister to "distribute available information to inform the public about the effects of substances on human health."

[215] Sections 46 to 53 of Part 3 deal with "Information Gathering" and make it obligatory for the Minister, under sections 48 and 50, to establish a national inventory of releases of pollutants and, subject to subsection 53(4), to "publish the national inventory of releases of pollutants."

[216] Under section 50 the Minister has a discretion regarding the manner of publication of the national inventory of releases but, subject to 53(4), the national inventory must be published and, under the NPRI, this is what has occurred.

[217] The applicants have brought this application pursuant to section 48 of the CEPA, which obliges the Minister to establish a national inventory of pollutants. In doing this, the Minister must use the information collected under section 46 "and any other information to which the Minister has access".

[218] On the record before me, there is no doubt that, even if the Minister does not possess the information regarding tailings and waste rock disposal areas that are the subject of this application, the Minister certainly has access to that information. Section 46 gives the Minister all the access he needs. The Minister has simply chosen not to access the information by using sections 46 and 47 to exempt mining facilities from providing the information in question, and he has done so in a context where all stakeholders—including, to their credit, the mining sector represented by the intervener—agree that such information is available and ought to be reported in an inventory to the public.

[219] I see nothing in the scheme of Part 3, or the CEPA as a whole, that gives the Minister a

discretion to use sections 46 and 47 in this way.

[220] As the intervener points out, section 46 is not just attached to section 48. Information can be gathered under section 46 for a variety of purposes, including use in a national inventory under section 48. However, section 46 certainly makes it clear, and the history of consultation presented in evidence before me also makes it clear, that the Minister is able to access the relevant information. He has simply chosen not to do so in deference to those who do not wish to report the information under the NPRI. In my view, section 46 grants the Minister the powers he needs to access information required to fulfill his/her duties under the CEPA. There is nothing in section 46 that says the Minister may choose not to access relevant information required for a national inventory of releases of pollutants out of deference to a stakeholder who wishes not to have that information appear in the NPRI.

[221] In my view, then, this application is about the Minister's failure to include in the national inventory established under section 48 information to which he has ready access through the use of section 46, and that all stakeholders agree should be published. What is more, this is the kind of information that the Minister has already accessed from other sectors and has already published in the NPRI.

[222] The Minister has, in effect, taken the position that, in establishing a national inventory under section 48, he can choose not to include some releases of pollutants that he knows about and in relation to which, he can readily access information under section 46.

[223] Section 50 makes it clear that the national inventory established under section 48 "shall" be published. The manner of publication is for the Minister's discretion. But nowhere do I read that a discretion concerning the manner of publication can be used to forestall or avoid the publication of a national inventory of released pollutants that includes information readily accessible to the Minister under section 46. And that appears to be what has happened on the record placed before me.

[224] The preamble to the CEPA makes it clear that the Government of Canada "recognizes that the risk of toxic substances in the environment is a matter of national concern and that toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries", and the duties assumed by the Government of Canada under section 2 require the Government to "provide information to the people of Canada on the state of the Canadian environment" and to "apply and enforce this Act in a fair, predictable and consistent manner."

[225] Instead of adhering to these objectives and duties in the present case, the Minister has chosen not to publish information in a national inventory of releases of pollutants about mining facilities to which he has ready access while, at the same time, publishing similar information accessed from other sectors. The result is that the people of Canada do not have a national inventory of releases of pollutants that will allow them to assess the state of the Canadian environment and take whatever measures they feel are appropriate to protect the environment and facilitate the protection of human health.

[226] Publishing the information in question under the NPRI will not inhibit the Minister from continuing to study and collaborate on the issue of whether this information might not also need its

own inventory. The record suggests that the information is accessible to the Minister, yet the Minister has decided not to publish it through the NPRI and to explore other means to find an "appropriate tool". François Lavallée, on behalf of the Minister, opines as follows:

> General consensus was achieved on the need for a mandatory, periodic reporting system for information that would help characterize the hazards associated with mine tailings and waste rock.

[227] All stakeholders agree on the need for reporting this information. The Minister can access the information. Yet the Minister has chosen not to access and report it because he wants to find a more "appropriate tool" than the NPRI. Meanwhile, the hazards associated with tailings and waste rock held on site go unreported. Reporting the information under section 48 will not prevent the Minister from finding a more "appropriate tool" that all stakeholders can accept.

[228] The Minister's present approach is the equivalent of granting a sectorial exemption on the reporting of information that stakeholders agree should be reported to the Canadian public. This is not, in my view, reconcilable with the Minister's duties under section 48, or with the general scheme and purpose of the CEPA. Similarly, the Minister's position on section 46 is the equivalent of saying that the CEPA has left to the Minister, in his absolute discretion, the decision on whether or not to report to the Canadian public on environmental hazards that all stakeholders agree should be reported. Once again, I cannot reconcile such a position with the general scheme and purpose of the CEPA. In my view, this application does not ask the Court to interfere with the exercise of a statutory discretion granted under section 46 of the CEPA; it is concerned with the Minister's failure to carry out the mandatory obligations imposed on him under sections 2, 48 and 50 of the CEPA. My understanding is that judicial review is available to appropriate applicants in this kind of situation.

[229] The respondent and the intervener are of the view that this application for judicial review challenges the scope of the information collected under section 46 of the CEPA for the purpose of creating an inventory of data. They believe that section 46 is permissive and imposes no legislative duty on the Minister to either use the provisions of section 46 or to require specific data.

[230] If the decision in question is not policy action and so discretionary, then the respondent and the intervener say that it involves a determination of what ought to be published in the *Canada Gazette* notice ad, for this reason, is a legislative act that is not subjection to judicial review.

[231] My view of this application, as I have made clear in my reasons, is that its focus is the Minister's statutory duty under sections 48 and 50 of the CEPA to establish a national inventory of releases of pollutants and to publish that national inventory.

[232] The Minister has declined to carry out the obligations imposed by statute in this regard, relying upon what he perceives to be a broad discretion in section 46 of the CEPA to gather information.

[233] My conclusion is that the discretion and power to gather information under section 46 cannot be used to abrogate mandatory obligations under sections 48 and 50 of the CEPA. Hence, I believe that the conduct of the Minister complained of by the applicants is subject to judicial review. See *Middlesex (County) v. Ontario (Minister of Municipal Affairs)* (1992), 10 O.R. (3d) 1 (Gen.

Div.).

[234] I agree with the respondent and the intervener that a purely ministerial decision, on grounds of public policy, or a decision that is the exercise of legislative function may not be amenable to judicial supervision. But that is not the case in this application where the Court has been asked to review the actions of the Minister taken in the exercise of a statutory power. See *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at page 619; and *Sutcliffe v. Ontario (Minister of the Environment)* (2004), 72 O.R. (3d) 213 (C.A.), at paragraph 23.

Standing

[235] Both the applicants and the respondent have agreed that the applicants should have standing on this application. The intervener has not made any arguments in relation to why the applicants should not have standing; therefore, I conclude that the intervener is also in agreement with the applicants having standing on this application.

[236] I agree that the applicants have standing on this application. I see no other way that the matter could be brought before the Court.

STANDARD OF REVIEW

[237] The Court's view is that this application involves the Minister's misinterpretation of, in particular, sections 46 and 48 of the CEPA resulting in the Minister's failure to discharge his obligations under section 48 of the CEPA to require the reporting of releases of pollutants to TIAs and WRSAs and publication to the NPRI.

[238] The Court in *Nunavut Wildlife Management Board v. Canada (Minister of Fisheries and Oceans)*, 2009 FC 16, [2009] 4 F.C.R. 544 held at paragraph 61 that, "[a] failure to comply with a statutory requirement is an error of law subject to a standard of correctness."

[239] The applicant in *Environmental Resource Centre v. Canada (Minister of the Environment)* 2001 FCT 1423, 40 Admin. L.R. (3d) 217 argued at paragraph 52 that, "[f]ailure to comply with a mandatory requirement is an error of law reviewable on the standard of correctness": *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425, at pages 440 and 442 and *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263 (F.C.A.), affg [1998] 4 F.C. 340 (T.D.).

[240] Therefore based on the case law, I agree with the applicants that the standard of review on the failure to comply with the statutory requirement in this case is correctness.

Mandamus

[241] For the reasons stated by the applicants, I believe that the conditions laid down in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.), at paragraph 45, for the issuance of a writ of *mandamus* have been met in this case.

Delay

[242] The respondent and the intervener have submitted that this application is out of time because it is really about the Minister's decision not to require the reporting of certain mining data in the 2006 *Canada Gazette* notice dated February 25, 2006 and so should have been brought within 30 days of that notice.

[243] As my reasons make clear, I am convinced by the applicants' argument that this application is really about a challenge to an ongoing course of action by the Minister to exempt pollutants sent to TIAs and WRSAs from the reporting requirements under the CEPA and the Minister's ongoing failure to publish such information in the NPRI in accordance with his statutory duties under sections 2, 48 and 50 of the CEPA.

[244] As such, I believe that the application falls within the principles enunciated in *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.), at paragraphs 23–24 and *Canadian Assn. of the Deaf v. Canada*, 2006 FC 971, [2007] 2 F.C.R. 323, at paragraphs 71–72, so that the application is not time barred.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Minister has erred in his interpretation of the CEPA as not requiring him to provide pollutant release information to the public through the NPRI in relation to releases and transfers to tailings and waste rock disposal areas by mining facilities in 2006 and subsequent years;

2. An order in the nature of *mandamus* is hereby issued and the Minister is directed to publish pollutant release information to the public through the NPRI in relation to releases and transfers to tailings and waste rock disposal areas by mining facilities for the 2006 and subsequent reporting years in accordance with sections 48 and 50 of the CEPA;

3. The parties are free to address the Court on the issue of costs if necessary and should do so, initially, through written submissions.