THE PRECAUTIONARY PRINCIPLE:
Will lack of full legal certainty prevent its use?

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The Precautionary Principle

- The acceptance of the Precautionary Principle in international law is relatively recent;
- There does not appear to be clear consensus on its exact definition;
- The 1990 Bergen Ministerial Declaration on Sustainable Development is often referenced to establish its scope:
  
  “In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent, and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.”
Legislation

• Referred to in several statutes:
  • CEPA, 1999
    • “Whereas the Government of Canada is committed to implementing 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”;
    • “2. (1)(a) In the administration of this Act, the Government of Canada shall, ... exercise its powers in a manner that... 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”.

• **Oceans Act**

  • “WHEREAS Canada promotes the wide application of the precautionary approach to the conservation, management and exploitation of marine resources in order to protect these resources and preserve the marine environment.”
Legislation

• Referred to in several statutes:
  • CEAA
    • s.4(2) In the administration of this Act, the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities, shall exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.
  • SARA
    • The Government of Canada is committed to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to a wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty.
Legislation

- Referred to in several statutes:
  - **Sustainable Development Act** (Quebec)
    - Precaution is one of 16 principles of sustainable development.
      
      "When there is a threat of serious or irreversible damage, lack of scientific certainty must not be used as a reason for postponing the adoption of effective measures to prevent environmental degradation".
114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town) [2001] 2 S.C.R. 241

- Court decided that by-law, which severely restricted the use of pesticides, was a valid exercise of the Town’s authority to adopt by-laws to secure health and general welfare in its territory conferred by its enabling legislation.
- The majority of the Court made reference to the precautionary principle as a basis for interpreting the municipal by-law adopted by the Town of Hudson.
- Madam Justice L’Heureux Dubé mentioned that the interpretation of the by-law respects the precautionary principle and suggested that there may be a good argument that principle is part of customary international law.
“To conclude this section on statutory authority, I note that reading s. 410(1) to permit the Town to regulate pesticide use is consistent with principles of international law and policy. My reasons for the Court in Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, at para. 70, observed that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”

The majority in Spraytech appear to use the principle as a means to provide justification and context for the Town’s concerns with respect to pesticides rather than providing the legal basis for the validity of the by-laws.
114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town) [2001] 2 S.C.R. 241

• The discussion in Spraytech has been used as a basis to claim that the Precautionary Principle is a mandatory rule of statutory construction that must be considered by the courts or in administrative decision making.
Wier v. Environmental Appeal Board et al, 2003 BCSC 1441

- Application for judicial review of decision to issue a Pesticide Use Permit by BC Minister of Forests.
- Applicant argued that a conclusive presumption that use of federally registered pesticide in accordance with instructions will not have an adverse effect is contrary to Spraytech and precautionary principle.
- Court reviewed Spraytech and applied principle to the extent that it should help inform the contextual approach to judicial review and statutory interpretation.
- In the case, the principle would favour an interpretation that would allow to extend the scope of evidence to be considered.
Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District) [2003 BCCA 403]

- The Ministry was charged with deciding whether a Forest Development Plan (FDP) for four logging cutblocks would “adequately manage and conserve forest resources” (in this case the spotted owl) as required by applicable British Columbia forest legislation.
- While the applicability of the precautionary principle was raised before the Ministry, it did not state whether it took it into account in reaching its decision.
- The Court interpreted the terms “adequately manage” used in the statute to require that the Ministry consider some element of risk.
Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District) [2003 BCCA 403]

• Although the Ministry did not refer to the precautionary principle in its decision, the Court concluded that the Ministry’s decision “reflects a degree of caution akin to that reflected in the precautionary principle”.

• Since the precautionary principle is not incorporated into the statute, and since the statute does not preclude the approval of an FDP if there is an element of risk to a forest resource, the Court was unable to find that Ministry’s failure to give full effect to the precautionary principle renders the decision, patently unreasonable.

• Suggests the application of the principle is not mandatory unless provided for in the statute.
R. v. Kingston (Corporation of the City), (2004) 187 O.A.C. 143 (Ont. C.A.); leave to appeal to the Supreme Court refused

- Intervenor Pollution Probe arguing that based on *Spraytech* s. 36 (3) of the *Fisheries Act* must be interpreted in light of the precautionary principle.
- *Ont. C.A.: Spraytech* only indicates that the precautionary principle *may help inform* the contextual approach to statutory interpretation.
- Because the meaning of s. 36(3) is clear and unambiguous, the judge saw no need to resort to the precautionary principle as an interpretive guide.
Croplife Canada v. City of Toronto (2005), OAC 35 (Ont. C.A.)

- Whether the City of Toronto had the authority under its enabling legislation to adopt a by-law limiting the application of pesticides within the City.
- Court of Appeal concluded that the City did indeed have the authority to pass the by-law, it agreed that if there was no credible research basis for enacting the by-law, and if the municipality did not otherwise have the power to enact the by-law, then the precautionary principle could not be used as authority for upholding the effectiveness of the by-law.
Blaney et al. v. British Columbia (Minister of Agriculture Food and Fisheries) et al, 2005 BCSC 283

- Application for judicial review on behalf of the Homalco Indian Band with respect to a decision by the Minister to approve a fish farm license for the operation of an aquaculture facility adjacent to the Homalco’s Indian Reserve.
- Ministry failed to properly consider evidence of potential adverse impacts on the marine resources to the Homalco territory and that the application of the precautionary principle requires the Ministry to take steps to avoid identified risks until further research allows the uncertainty with respect to the extent of those risks to be reduced or eliminated.
Blaney et al. v. British Columbia (Minister of Agriculture Food and Fisheries) et al, 2005 BCSC 283

• Ministry responded that the Homalco misunderstood the precautionary principle, in that it does not mean that governments are bound to prevent all activities which might cause harm, however low or speculative the risk may be, until it is proven that there is no risk.

• The Court agreed with the government position that the principle does not require a halt to all activity that may pose a risk to the environment until proven otherwise.
Citizens argue that permits which allowed for the operation of the landfill were void.

The argued that in making decisions important principles of interpretation including the precautionary principle were not considered.

The citizens maintained the project should not have been approved if the long term effects of its operation are not sufficiently known.

The citizens argued that lack of evidence of damage or a causal relationship between exposure and damage should not serve to reject their argument.

Court: The issues raised by the citizens were considered as part of the EIA process the results of which were transmitted to Cabinet.
• **Court:** In order to apply the principle there must be possibility of serious and irreversible damage to the environment. It was not proven that such effects would result if the landfill was operated in compliance with the permit conditions.

• **Court:** The precautionary principle has not been integrated into Quebec law through legislation. This does not mean that it cannot be used to interpret legislative provisions such that it applies to situations of potential risk to the environment or to human health.

• **Court:** Although the concepts of sustainable development and the precautionary principle are laudable, they do not have the force of law unless a competent parliament transforms them into rules of domestic law.
One of the grounds of appeal of TRAVHOLS was that the BCUC failed to apply the precautionary principle in interpreting legislation and that it was required to do so as the principle was a *mandatory* rule of statutory construction.

In the decision on the appeal, much of the discussion centred around whether it was open to TRAVHOLS to reframe the issue such that the court would be required to decide whether the precautionary principle is a mandatory rule of construction generally, without specific reference to the facts of the case.
In this way, TRAVHOLS sought a general declaration of the normative force of the precautionary principle.

Court stated that it was not open to the Court to make such a broad declaration given that the court was faced with an appeal and not an application for a declaration.

The Court did not deal with whether the precautionary principle was a mandatory rule of construction.

It only went so far as to conclude that the precautionary principle had not been engaged because the BCUC had considered the issue of health risks related to Electrical Magnetic Fields and concluded that there was no significant risk.

- There is no “standard” to be met with respect to the precautionary principle.
- It is a policy consideration that provides that where there is a risk of serious or irreversible environmental damage, one should err on the side of caution even when there is not full scientific certainty with respect to the risk.
Section 4(2) of CEAA

An approach that has developed in conjunction with the precautionary principle is that of “adaptive management”.

In *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2003 FCA 197 (CANLII), [2003] F.C.J. No. 703, at para. 24, Evans J.A. stated that “[t]he concept of “adaptive management” responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge” and indicated that adaptive management counters the potentially paralyzing effects of the precautionary principle.
Adaptive Management permits projects with uncertain, yet potentially adverse environmental impacts to proceed based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exists.

“The scope of the duties incumbent upon a panel must be viewed through the prism of these guiding tenets: the precautionary principle and adaptive management".
Other cases

- **Lafarge Canada v. Ontario** [2008] O.J. No. 2460
  - Leave to appeal granted based on failure to consider Precautionary Principle in decision.
- **Ontario (Natural Resources) v. 555816 Ontario Inc.** 2007 CanLII 20785.
- **Canada v. Berhed**, 2005 FCA 267
  - Principle not applied as risks were considered in decision making.
- **Imperial Oil Limited v. City of Vancouver** 2005 BCSC 387
  - Principle does not serve to confer jurisdiction where it is otherwise absent.
Conclusions

• Since *Spraytech* there have been many attempts before the courts to give the Precautionary Principle a normative quality.

• These attempts have been centred on making the precautionary principle a mandatory rule of statutory interpretation.

• Interesting to note that the courts have been less reluctant to give substance to the polluter-pay principle, which is also one of the ‘significant principles of environmental policy’ (see *Imperial Oil Limited v. Quebec* [2003] 2 S.C.R. 624.

• By contrast, the precautionary principle appears to suggest a reversal of the traditional evidentiary burden of proof and thereby challenges accepted legal principles.
Conclusions

• Generally, the courts have remained true to the wording of Spraytech, where L’Heureux-Dubé, J. states that principles of international law and policy ‘may help inform the contextual approach to statutory interpretation and judicial review’.

• It does not appear to have been the intent of the majority of the Supreme Court in Spraytech to make the precautionary principle into a mandatory rule of law and this has been understood by the lower courts who have been asked to interpret its meaning. The Supreme Court of Canada’s refusal to grant leave to appeal in the Tsawwassen case is an indication of that reluctance.
Conclusions

• Since *Spraytech*, the courts appear to acknowledge that in making decisions, governments do consider and assess risks and in so doing there is no need to have recourse to the precautionary principle.

• Often the decision to grant approval will be the result of an assessment of risks associated with the approval. In this context, the courts are reluctant or see no need to have the principle engaged given that the threshold for application of the precautionary principle, based on most definitions, is elevated in that it requires that there be ‘serious or irreversible damage’.
Conclusions

• When it comes to the Precautionary Principle, have been reluctant to give it normative value unless it is incorporated in legislation.
• This is perhaps most clearly stated by Duval-Hesler J. in the Presqu’île-Lanaudière decision where she states the precautionary principle does not have the force of law unless it becomes a rule of domestic law and that it is the role court is only to control the legality of government decisions not their opportunity.
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