

The Precautionary Principle in Canada

A. Introduction

The 2009 film festival hit *A Chemical Reaction* popularized the precautionary principle by detailing, in part, the controversy in Hudson, Quebec that is immortalized in law circles in the *Spraytech v. Hudson* case.¹ The film features former Justice L'Heureux-Dube, writer of the *Hudson* decision, explaining the precautionary principle as “better safe than sorry,” and remarking that “in this case I don’t think any of us thought we were making history.” The story involves the small town of Hudson, Quebec that enacted one of the first municipal bans on the use of cosmetic pesticides in Canada after years of lobbying by a local physician and community members. Challenged by a lawn care company, the Supreme Court of Canada upheld the bylaw in the ultimate judgment of the case under the general health and welfare powers bestowed upon Quebec local governments.² The case is often cited in Canadian courts for former Justice L'Heureux-Dube’s adoption of the precautionary principle at paragraphs 31 and 32 (citations omitted):

The interpretation of By-law 270 contained in these reasons respects international law’s “precautionary principle”, which is defined as follows at para. 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990):

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.

Canada “advocated inclusion of the precautionary principle” during the Bergen Conference negotiations... The principle is codified in several items of domestic legislation...

Scholars have documented the precautionary principle’s inclusion “in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment”... As a result, there may be “currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law”... In the context of the precautionary principle’s tenets, the Town’s concerns about pesticides fit well under their rubric of preventive action.

¹ *114957 Canada Ltee (Spraytech) v Hudson (Town of)* [2001] 2 S.C.R. 241.

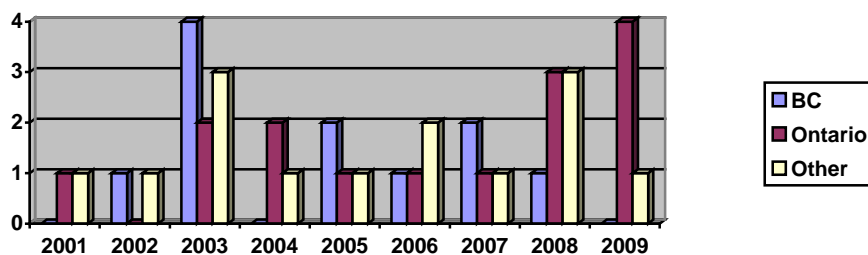
² Local governments in B.C. do not have the benefit of similar omnibus provisions. However, pursuant to sections 8(3)(j) and 9 of the *Community Charter*, S.B.C. 2003, c.26 and the *Spheres of Concurrent Jurisdiction – Environment and Wildlife Regulation*, B.C. Reg. 144/2004, municipalities may regulate, prohibit and impose requirements in relation to the application of pesticides for the purpose of maintaining outdoor trees, shrubs, flowers, other ornamental plants and turf on a parcel used for residential purposes.

This principle of informed prudence has a long folk history and has been applied from local to international fora over the past 20 years. From municipal bylaws to Principle 15 of the 1992 United Nations Earth Summit in Rio,³ the precautionary principle usually contains three elements:

1. Threat of environmental harm, which may be characterized as serious, irreversible or catastrophic;
2. Scientific uncertainty about the effect or scope of a substance, activity or development; and
3. A requirement to act to prevent environmental harm where the first two conditions are present.

Since the early 1980's the precautionary principle has been incorporated into nearly 100 international agreements and many domestic laws.⁴ A Canadian case law search reveals at least 50 reported cases in Canada that mention the precautionary principle.⁵ In addition, at least 70 administrative tribunal decisions refer to the precautionary principle, emanating primarily from the federal court, Ontario and BC Environmental Appeal Boards, and Ontario Municipal Board.

Figure 1: Number of cases mentioning the precautionary principle by jurisdiction and year (2001-2009)



Although there is a representative sampling of cases stemming from pesticide industry groups or businesses challenging local government pesticide control bylaws as per *Hudson*,⁶ recent cases where courts have referred to the precautionary principle span a broad range of environmental law topics including in the areas of municipal law,⁷ Crown liability (tort),⁸ *Fisheries Act* offences,⁹ challenge to

³ The text of Principle 15 is: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. 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.

⁴ Tollefson, Chris and Jamie Thornback (2008). *Litigating the Precautionary Principle in Domestic Courts* 19 J. Env. L. & Prac. 33 at 36. Hereafter "Tollefson and Thornback."

⁵ Online search conducted using search parameters "precautionary principle" through Westlaw and LexisNexis/Carswell on June 2 2010. Note that these are not 119 separate actions, but reported cases at different levels of court in Canada that refer to the precautionary principle. At least 67 administrative tribunal decisions have considered the precautionary principle.

⁶ In addition to *Spraytech v. Hudson*, see *Croplife Canada v. Toronto (City)* 75 O.R. (3d) 357; 2005 CarswellOnt 1877, *Peacock v. Norfolk (County)* 2006 CarswellOnt 3885; (Ontario Court of Appeal; June 28,2006),

⁷ *Imperial Oil Ltd. v. Vancouver (City)* 2005 CarswellBC 611; 2005 BCSC 387 (British Columbia Supreme Court, March 18 2005), *555816 Ontario Inc., Re* 2007 CarswellOnt 3572 (Ontario Superior Court of Justice Divisional Court June 06 2007), *Lake Waseosa Ratepayers' Assn. v. Pieper* 2008 CarswellOnt 985 (Ontario Superior Court of Justice Divisional Court February 25 2008).

⁸ *Budisukma Puncak Sendirian Berhad v. Canada* 2005 CarswellNat 2449; 2005 FCA 267 (Federal Court of Appeal; August 04 2005).

resource management decisions such as logging permits,¹⁰ challenges to other types of permitting,¹¹ species at risk,¹² electro magnetic radiation (high voltage electricity transmission),¹³ and environmental assessment.¹⁴ In many cases the court is referring to expert witnesses who invoke the precautionary principle.

What is striking about the range of these cases is that there is a steady mention, and thus inclusion in facta, of the precautionary principle in Canada. Also of note is that many of these cases are the result of appeals from an administrative tribunal that has applied the precautionary principle. However, even with an endorsement from the Supreme Court of Canada, ever since Justice L'Heureux-Dube adopted the precautionary principle it has often dangled, like the largest clump of blackberries at the top of a mass of thorny canes in August, within eyesight but somewhat out of reach of lawyers practicing public interest environmental law in Canada.

Given the increasing attention paid to the precautionary principle by courts and in the wording of legislation (at least in preambles), the purpose of this backgrounder is to canvass how the precautionary principles are embedded and used in Canadian law. Section B sets out the different areas of law where the precautionary principle emerges. Section C discusses issues that the use of the precautionary principle raises for its application in law in Canada. Section D invites the reader to consider questions posed in anticipation of the ELC Associates teleconference on Monday, June 14, 2010.

B. The Precautionary Principle in Canadian Law

The precautionary principle is argued by lawyers and used in a variety of ways by courts. It is discussed as a principle of international law. It is referred to as being codified in specific sections of domestic legislation. Finally, it is used most widely as an aid to statutory interpretation.

⁹ *Fletcher v. Kingston (City)*; 2004 CarswellOnt 1860; 70 O.R. (3d) 577; Ontario Court of Appeal; May 12 2004).

¹⁰ *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District)*; 2003 CarswellBC 1658; 2003 BCCA 403; (British Columbia Court of Appeal, July 08 2003), *Canadian Parks & Wilderness Society v. Canada (Minister of Canadian Heritage)* 2003 CarswellNat 1232; 2003 FCA 197 (Federal Court of Appeal; April 30 2003), *Alberta Wilderness Assn. v. Canada (Minister of Environment)* 2009 CarswellNat 2178; 2009 FC 710 (Federal Court; July 09 2009), *Western Forest Products Inc. v. Sunshine Coast (Regional District)* 2008 CarswellBC 1674; 2008 BCSC 1070 (British Columbia Supreme Court, August 07 2008).

¹¹ For example, issuing a permit to burn tires in *Dawber v. Ontario (Director, Ministry of the Environment)* 2008 CarswellOnt 3658 (Ontario Superior Court of Justice Divisional Court, June 18 2008) or hazardous waste permitting in *Canada (Minister of Environment) v. Custom Environmental Services Ltd.* 2008 CarswellNat 1466; 2008 FC 615 (Federal Court; May 16 2008).

¹² *Environmental Defence Canada v. Canada (Minister of Fisheries & Oceans)* 2009 CarswellNat 2698; 2009 FC (Federal Court, September 09 2009).

¹³ *Entreprises Tenlec inc. c. Québec (Commission de protection du territoire agricole, CPTAQ)* 2008 CarswellQue 11101; 2008 QCCQ 9661 (Cour du Québec; October 29 2008) and *Tsawwassen Residents Against Higher Voltage Overhead Lines Society v. British Columbia (Utilities Commission)* 2007 BCCA 211; 2007 CarswellBC 722 (British Columbia Court of Appeal; April 13 2007).

¹⁴ *Pembina Institute for Appropriate Development v. Canada (Attorney General)* 2008 CarswellNat 508; 2008 FC 302 (Federal Court, March 05 2008)

1. International Law

The majority of the court in the *Hudson* case accepted the precautionary principle as a tenet of customary international law and applied it as a factor in finding the municipal bylaw valid. The court used the principle, as one of international law, as an aid to the interpretation of municipal laws.

2. Domestic Legislation

The precautionary principle is incorporated into a variety of bylaws, provincial law and federal laws. It is primarily located in the preamble to legislation and may be codified in a specific section to give direction to a specific type of decision-making.

For example, the precautionary principle is found in the preamble to the *Canadian Environmental Protection Act*:¹⁵

...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;

The *Oceans Act* also includes a statement of precaution in the preamble:

...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;

Finally, the *Species at Risk Act* includes the precautionary principle in the preamble, as well as in specific sections:¹⁶

Recognizing that...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,

Section 38 requires the minister adhere to the principle that cost effective measures to prevent the reduction or loss of a species should not be postponed for a lack of full scientific certainty if there are threats of serious or irreversible damage to the listed wildlife species.

One can argue that the precautionary principle also plays a central role in the regulation of food, pharmaceuticals and pesticides where proponents are required to prove an absence of harm before having products licensed for use in Canada.

¹⁵ S.C. 1999 c.33.

¹⁶ S.C. 2002 c.29.

2. Case Law

In Canada there is no common law principle of precaution. Courts are applying the precautionary principle as an approach to statutory interpretation taken from international and domestic law. It is also applied directly through its incorporation into specific sections of domestic legislation or through international law commitments that have been incorporated into domestic legislation. Most recently, the courts have considered the precautionary principle in several cases in 2009 and 2010 in the areas of species at risk, aboriginal rights and title, and public health.

Species at Risk

The *Species at Risk Act (SARA)* cases include *Alberta Wilderness Assn. v. Canada (Minister of Environment)* (“*Sage Grouse*”),¹⁷ and *Environmental Defence Canada v. Canada (Minister of Fisheries & Oceans)* (“*Nooksack Dace*”).¹⁸ In *Sage Grouse*, the Federal Court allowed the judicial review application of a coalition of environmental groups challenging the decision of the Minister of Environment to refuse to identify critical habitat in the Greater Sage Grouse Recovery Strategy. The Minister concluded that, based on the available scientific evidence, no critical habitat could be identified with respect to any of these requirements. The facts, however, showed that critical habitat was identifiable for three of the four habitat types.

The Court agreed with the applicants that the Minister must identify as much critical habitat as possible in a recovery strategy, even if all critical habitat cannot be identified at the time the Ministry is developing the recovery strategy. In particular, the Court noted that the Ministry of Environment appeared to be seeking precision rather than using best available information in identifying critical habitat. While that information may change over time, the identification of critical habitat cannot be postponed for that reason alone. The court concluded that the Minister’s decision not to identify any critical habitat, despite such habitat being known, was unreasonable.

The parties agreed upon the interpretation of section 41 of *SARA*. In commenting on the meaning of this section the court invokes the precautionary principle as a statutory interpretation aid at paragraph 25:

The agreed upon interpretation, which I endorse to the extent that it is relevant to this application, is as follows. There is no discretion vested in the Minister in identifying critical habitat under the SARA. Subsection 41(1)(c) requires that the Minister identify in a recovery strategy document as much critical habitat as it is possible to identify at that time, even if all of it cannot be identified, and to do so based on the best information then available. I note that this requirement reflects the precautionary principle that "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," as it was put by the Supreme Court of Canada, citing the *Bergen Ministerial Declaration on Sustainable Development in 114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)*, [2001 SCC 40](#) (S.C.C.).

¹⁷ 2009 CarswellNat 2178; 2009 FC 710; 45 C.E.L.R. (3d) 48; 94 Admin. L.R. (4th) 81; 349 F.T.R. 63 (Eng.) (Federal Court July 09 2009).

¹⁸ 2009 CarswellNat 2698; 2009 FC 878; 45 C.E.L.R. (3d) 161; 349 F.T.R. 225 (Eng.) (Federal Court September 09, 2009).

In *Sage Grouse* the court relies on the Supreme Court of Canada's enunciation of the principle and does not make reference to it as stated in the preamble to the *SARA*.

A more fulsome discussion of the principle is found in *Nooksack Dace* where the applicants argued that the Minister of Fisheries and Oceans had failed to meet the requirements of *SARA* regarding the final recovery strategy for the Nooksack Dace. The Recovery Team that prepared the recovery strategy identified the geospatial location of critical habitat, but the Minister ultimately approved the removal of that information from the final recovery strategy by two Ministry staff (a Ms. Webb and Mr. Murray) and agreed to provide it in a separate document. Only a qualitative description of what critical habitat would consist of (the attributes of critical habitat) remained in the final recovery strategy. The rationale provided by the Minister was that the severed critical habitat document could then be scientifically peer-reviewed and used in an action planning process that would include socio-economic analysis as well as consultation with affected parties. The applicants argued this approach was contrary to *SARA*, and the Court agreed. As in *Sage Grouse*, the requirement to identify critical habitat in section 41(1)(c) of *SARA* was found to be mandatory and provided no ministerial discretion in identifying critical habitat.

In outlining points of agreement between the parties, the court noted that section 38 of *SARA* codifies the precautionary principle. Quoting the statement of the precautionary principle in the Act's preamble and the definition of the precautionary principle set out in the *Hudson* decision, the court found that Canada had ratified the *United Nations Convention on the Conservation of Biological Diversity (the Convention)* and, therefore, is bound to use it in domestic decision-making (at paragraphs 34 and 35):

Canada has ratified the *United Nations Convention on the Conservation of Biological Diversity (the Convention)* and, therefore, is committed to apply its principles. An important feature of the *Convention* is the "precautionary principle" which is stated by the Supreme Court of Canada as follows:

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.

(*114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)*, [2001] 2 S.C.R. 241 (S.C.C.) at para. 31)

It is agreed that s. 38 of *SARA* is a codification of the precautionary principle which, as stated in the Preamble, in part, meets Canada's commitments under the *Convention*:

Commitments to be Considered

38. In preparing a recovery strategy, action plan or management plan, the competent minister must consider the commitment of the Government of Canada to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to the listed 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.

[Emphasis added]

Therefore, s. 38 is a mandatory interpretative principle that applies during the preparation of recovery strategies...

The court went on to find that the precautionary principle is also mandated in Canada by international law (at paragraphs 38 and 39):

For clarification with respect to their position on the application of the Convention, the Applicants make the following argument:

The *Convention* is a binding treaty, and SARA was enacted in part to implement Canada's treaty commitments. Furthermore, the *Convention* is part of the "entire context" to be considered in interpreting the SARA. Therefore, not only must the SARA be construed to conform to the values and principles of the *Convention*, but the Court must avoid any interpretation that could put Canada in breach of its *Convention* obligations.

(Applicants' Further Reply Submission, para. 25)

As the Minister does not disagree with this argument, I find it is correct in law.

Finally, the court concludes by impugning Ministry action as a contravention of *SARA* and the precautionary principle (at paragraph 40):

Therefore, as argued by the Applicants, I find that Ms. Webb's direction and Mr. Murray's approval of her direction [in removing critical habitat designations from the recovery strategy] are actions contrary to law. The result of these actions is that the Minister failed to meet the mandatory requirements of s. 41(1)(c) in the Final Recovery Strategy. The totality of this conduct is fundamentally inconsistent with the precautionary principle as codified in *SARA*.

The *Nooksack Dace* case is remarkable for the court's use of the precautionary principle in three different ways. It adopts it as a principle of statutory interpretation. It accepts that it is law in Canada as imposed through international obligations and codified in domestic laws. Finally, the court applies it as a statutory requirement under *SARA* that the Minister failed to meet.

Aboriginal rights and title

Abousabt Indian Band v. Canada (Attorney General) involved, in part, a claim by five bands with territory on the west coast of Vancouver Island to an aboriginal right to fish commercially.¹⁹ In finding that the plaintiffs possessed an aboriginal right to fish for any species of fish in their territories, the court noted that their right to sell fish commercially did not encompass the right to an industrial scale fishery. In addition to the aboriginal rights analysis of pre- and post-contact activities, the court undertook a broad analysis over 35 pages of fisheries regulation for a variety of species when considering whether fisheries regulation infringed the Plaintiff's aboriginal right. The court found that one of the causes of a dramatic decline in Plaintiff member's participation in the commercial fishery was the regulatory regime, which prevented them from exercising their aboriginal rights by

¹⁹ 2009 CarswellBC 2939; 2009 BCSC 1494 (British Columbia Supreme Court November 03 2009).

their preferred means and imposed unreasonable limitations on the Plaintiffs. Rather than making an order for the government to remedy the regulatory regime, which it believed to be outside the appropriate function of a court, the court directed the parties to negotiate over a two-year period after which the court would consider the Crown's justification argument.

The court referred to the precautionary principle in the context of expert witnesses evaluating the various management schemes for different fish species. At paragraph 579 the court reported on evidence by a Dr. Groot whose report outlined the difficulty of estimating the abundance of small herring runs outside major assessment regions. Given this difficulty, the court noted that the precautionary principle is used for these minor stocks, with maximum fishing levels set at 10 per cent (compared with 20 per cent in the major assessment regions).

Public health

Finally, in the public health realm, in the tort case of *MacIntyre v. Cape Breton District Health Authority* the court quotes an expert witness who refers to the precautionary principle in the context of applying different standards of concern depending on the severity of concentration of exposure to potential toxins.²⁰ The expert witness concludes his report by writing:

On the whole, the results do not reflect unusual exposures, although the application of the precautionary principle (i.e., due diligence) warrants a low level of concern for some of the reported concentrations and their donors and a first-tier follow-up has been suggested in such instances.

The court does not deal any further with the precautionary principle in *MacIntyre*. The expert is invoking the precautionary principle to direct the level of scrutiny an action or harm could have depending on the severity of the action or harm, in this case exposure to heavy metals in dust from renovations in a hospital.

C. Issues

In summary, the precautionary principle continues to influence the way in which courts apply legislation and bylaws in Canada. However, it is not an independent common law principle for legislation and judicial use in the realm of environmental law. Its nascent and limited use raises several issues about the way in which it should ideally be applied in a judicial setting to protect the environment in a rigorous and comprehensible manner. Some commentators have indicated that for it to be useful in litigation and to supervise administrative action, the precautionary principle must be *trained* to play a role in judicial review.²¹

1. Proof of Risk of Harm and Scientific Uncertainty

Critics of the precautionary principle point to the inherent difficulty in its application given the rigors of evidence law and traditional approaches to proof of harm. What degree of potential harm or risk will trigger the application of the principle in decision making? Likewise, what amount of uncertainty makes the precautionary principle relevant in a particular decision?

²⁰ 2009 CarswellINS 365; 2009 NSSC 202; 887 A.P.R. 327; 279 N.S.R. (2d) 327 (Nova Scotia Supreme Court June 30 2009).

²¹ Tollefson and Thornback at 48; Elizabeth Fisher "Is the Precautionary Principle Justiciable?" (2001) 13 *Journal of Environmental Law* 315.

In *Telstra Corporation Ltd. v. Hornsby Shire Council*, the case that to date that has most carefully considered the application of the precautionary principle, the court set out a process for applying the precautionary principle.²² Meeting the conditions precedent of threat of harm and scientific uncertainty activates the precautionary principle. The burden of proof then shifts to the proponent to refute, and the decision-maker must weigh the presumption of environmental damage against the benefit of the project. Indeed, the precautionary principle and environmental effects must be considered equally with social and economic factors. It is important to note that the court was willing to consider a variety of views on harm, but concluded that the basis of proving environmental damage must be scientific evidence. The court also commented on scientific uncertainty and suggested a standard of “reasonable scientific plausibility” when considering theoretical risk of harm for which there is no precedent.

2. Principle of Interpretation or Substance

When encouraged to use the precautionary principle in making decision, or to justify an impugned decision, courts usually accept that it is a principle of statutory interpretation but that “...the precautionary principle does not serve to confer jurisdiction that is otherwise absent.”²³ Without direct statutory incorporation of the principle, it guides decision-makers in some cases but does not direct them. There is some ambiguity from case to case about from where the principle arises; whether it can be relied on as a principle of international law that is relied upon as a principle of statutory interpretation, or a substantive requirement as incorporated into domestic environmental legislation.

3. Procedural Applicability

The precautionary principle has a significant procedural role with decision-makers regulating environmental and resource management activities. If government staff must take it into account, questions arise as to what weight to give the principle when faced with a specific level of risk and knowledge about a risk. Some courts have imposed a duty to take into consideration adequate information about the costs of activities, such as in the Australian case of *Leatch v. National Parks and Wildlife Service*. The court, in finding the precautionary principle a principle of common sense, ruled there had been insufficient information before the decision-maker when he or she issued a permit to take endangered species during the building of a road.²⁴ The court found that the precautionary principle did not impugn road building *per se*, but it required sufficient information so the decision maker could weigh impacts and costs of proposals.

4. Recognition in Other Jurisdictions

It is important to note that although Canadian courts have been somewhat slow to apply the precautionary principle in a robust manner, it is regularly applied as a domestic legal principle in some jurisdictions. These jurisdictions include the New South Wales Land and Environment Court

²² [2006] NSWLEC 133 (Australia).

²³ *Imperial Oil Ltd. v. Vancouver (City)* 2005 CarswellBC 611; 2005 BCSC 387 (British Columbia Supreme Court March 18 2005).

²⁴ (1993) 81 L.G.E.R.A. 270.

in Australia that applies the precautionary principle as a common law principle,²⁵ and the Supreme Court of India that, as a rule of international law, has applied it directly in the domestic arena.

To date, few courts have accepted that the precautionary principle, as a rule of international law, can be directly applied in domestic litigation. One prominent exception is the Supreme Court of India.²⁶

D. Discussion

This paper is a modest attempt to identify some of the recent developments in the use of the precautionary principle in Canadian law. This area of law raises interesting questions that challenge traditional regulatory (command and control) approaches to environmental law that rely on proof of harm or proof of safety for approval of a wide variety of activities that have environmental impact. It also challenges principles of evidence, in particular proof of harm. We invite Associates to consider the following questions at our next teleconference on Monday, June 14, from 4pm to 6pm:

1. Place in Law

In a liberal judicial climate what is the appropriate place for the precautionary principle in Canada? Is it destined to be relegated to the role of statutory interpretation, or can it be elevated to the status of a legal rule, for example akin to “impossibility of dual compliance” in the constitutional law realm? How can legislatures and the judiciary engage with the principle as a systematic doctrine?

What threshold level of threat would activate the application of the precautionary principle in a decision-making process? What standard of proof of harm is needed?

Is there a case (fact pattern) that could push the precautionary principle out of the realm of interpretation and into a substantive role under the common law?

2. Precautionary Principle and Public Interest Decision Making

Many decisions makers have an explicit public interest mandate attached to their functions. For example, in the local government realm subdivision approving officers and councils can deny applications on the basis of public interest. In many cases these denials are not explicitly spelled out in bylaws and policies, but amount to the sum total of “not quite right for our community.” Can and should this type of approach be adopted as an application of the precautionary principle? How can public interest lawyers assist decision-makers to avoid a use of precautionary principle that mimics the current scope of the “duty to consult” in aboriginal law where the procedural right rarely results in substantive remedies?

3. Use in Instruments and Agreements

The precautionary principle has been adopted into many international agreements. Are any Associates incorporating the principle into agreements or other instruments they are drafting for clients?

²⁵ For a discussion of these cases see Tollefson and Thornback beginning at page 48.

²⁶ *Vellore Citizens Welfare Forum v. Union of India*, WP 914/1991 (1996.08.28) , affirmed in *M.C. Mehta v Kamal Nath* (1997) 1 SCC 388.

For More Information:

Legislation

Canadian Environmental Protection Act, S.C. 1999 c.33

Oceans Act, S.C. 1996, c.31

Species at Risk Act, S.C. 2002 c.29

Books, Articles and Reports

Fisher, Elizabeth (2001). "Is the Precautionary Principle Justiciable?" 13 *Journal of Environmental Law* 315.

Goldstein, BD & R.S. Carruth (2004). Implications of the Precautionary Principle: is it a threat to science? 17(1) *Int J Occup Med Environ Health* 153-61.

Tollefson, Chris and Jamie Thornback (2008). Litigating the Precautionary Principle in Domestic Courts 19 *J. Env. L. & Prac.* 33.

Other

A Chemical Reaction (film)