

A PRECAUTIONARY APPROACH TO THE PRECAUTIONARY PRINCIPLE

On December 23, 2015, the British Columbia Environmental Appeal Board (the “EAB”) delivered its decision in *Toews v. Director, and Rio Tinto Alcan Inc.* (2013) EMA-007(g) dismissing an appeal related to the issuance of an air emission permit issued by the BC Ministry of Environment to Rio Tinto Alcan Inc. In the course of that decision the EAB discussed the precautionary principle and the precautionary approach. The precautionary principle has also been considered, and applied, in a series of Ontario Environmental Review Tribunal decisions, including *CCCTE v. Director, Ontario (Environment and Climate Change)*, 2015 CanLII 86925 (ON ERT).

Before reviewing the analysis of the EAB in *Toews*, and by way of context, it is helpful to examine how the precautionary principle has been articulated in Canada and what it means. It is now a quarter century since the 1990 Bergen Ministerial Declaration on Sustainable Development stated the precautionary principle in this way:

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.

The United Nations Rio Declaration which followed a few years later, in 1994, articulated the precautionary principle somewhat differently:

In order to protect the environment, the precautionary approach shall be widely applied by the 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.

Two Supreme Court of Canada decisions, the *Spraytech* decision (114957 *Canada Ltée. (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40) and the *Castonguay Blasting* decision (*Castonguay Blasting Ltd. v. Ontario (Environment)* 2013 SCC 52) have referred to the precautionary principle. In *Spraytech*, the court applied the first articulation, that contained in the Bergen Declaration. In *Castonguay Blasting*, the court presented what might be seen as a reorganization of that found in the Bergen Declaration when the court said:

This emerging international law principle recognizes that since there are inherent limits in being able to determine and predict environmental impacts with scientific certainty, environmental policies must anticipate and prevent environmental degradation.

Section 4(2) of the *Canadian Environmental Assessment Act* mandates that, in the administration of that Act, government authorities must exercise their powers, *inter alia*, in a manner that applies the precautionary principle. (The precautionary principle is not defined). The *Canadian Environmental Protection Act* (“CEPA”) in Section 2(1)(a) includes a similar provision that powers must be exercised in a manner that applies the precautionary principle. CEPA does define the precautionary principle in a way that is similar to the Rio Declaration (although in a way that supplements what is said in the Rio Declaration) so that Section 2(1)(a) states:

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;...

Section 2(1.1) states:

2. (1.1) The Government of Canada shall consider the following before taking any measure under paragraph (1)(a.1):

(a) the short- and long-term human and ecological benefits arising from the environmental protection measure;

(b) the positive economic impacts arising from the measure, including those cost-savings arising from health, environmental and technological advances and innovation, among others; and

(c) any other benefits accruing from the measure.

The precautionary principle is also included in the preamble to CEPA; “*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;*”

Notwithstanding the references in the two Supreme Court of Canada decisions, and in some Canadian statutes, as we begin 2016, the meaning and application of the precautionary principle and the precautionary approach remain somewhat uncertain. Are these concepts to be applied as an assist in statutory interpretation or as a statutory direction necessarily implied to be part of a statute? Does the precautionary principle represent a standard of care governing environmental decision making including project assessment? Is the precautionary principle relevant to the admissibility of expert evidence? Is it relevant to the burden of proof?

One of the animating aspects of the principle focuses on “lack of full scientific certainty” not being used as a reason to postpone environmental protective actions. What does that add to the environmental decision making mix? There are, after all, few things upon which there is scientific certainty. Environmental decisions are, or should be, based on a weight of evidence or balance of probabilities analysis, not on the basis of scientific certainty, much less, full scientific certainty.

The words just recounted are capable of two dramatically different meanings. Do they mean that the absence of full scientific certainty should not, of itself, be permitted to foreclose environmentally protective measures? Or do they mean that the presence of uncertainty surrounding a threat of serious environmental impacts should, of itself, mandate environmental protection measures to address the potential, although uncertain, for harm? The ordinary meaning of these words supports the first view. Some of the authorities, most notably *Morton v. Minister of Fisheries and Oceans*, 2015 FC 575 (“*Morton*”) in the Federal Court, incline to the second view. *Castonguay Blasting* can also be said to support this second view.

Then, there is the issue of whether the inclusion of “cost-effective” (bringing with it the principle of proportionality) to modify environmentally protective measures in the Rio Declaration, which came after the Bergen Declaration, should be considered or whether the Bergen Declaration version without the term “cost-effective” to define measures is the principle that governs. Parliament has chosen the Rio Declaration version in the preamble to CEPA.

Adaptive management also has a place in the mix. In *Concerned Citizens of Brant*, (March 31, 2016), the Ontario Review Tribunal said:

[96] The Tribunal finds that the above Tribunal and court cases are not contradictory, yet each party puts the emphasis on the aspects most favourable to their position. Where scientific uncertainty exists as to whether an activity could have an adverse effect, precaution requires that it should be considered to be as hazardous as it could possibly be (Davidson and CCCTE), and the Director must take appropriate measures to prevent possible harm (Spellman). This may include refusing approvals until scientific uncertainty can be eliminated. Greenspace applies to a different situation where environmental risk is unlikely and, therefore, there is little scientific uncertainty. In such cases, precaution may permit the Director to approve the activity while including measures to prevent harm or confirm the predictions. This is when adaptive management approaches are applied, as clarified in Pembina Institute.

Turning now to what the EAB said in *Toews* with respect to the application of the precautionary principle and the precautionary approach in the context of B.C.’s *Environmental Management Act* (the “EMA”), this is what the EAB said:

[225] The Board has previously held that the precautionary principle does not inform the interpretation of the permitting provisions in the EMA. Rather, the Board has consistently held that a “cautious” approach should be adopted in assessing applications to emit waste under the EMA: (for example, see:

Cranbrook, at pp. 9 to 11; and *Shawnigan Residents' Association et al v. Director, Environmental Management Act (Decision Nos. 2013-EMA-015(c), 2013-EMA-019(d) 2013-EMA-020(b) 2013-EMA-021(b), March 20, 2015)* (“*Shawnigan*”), at pp. 50 to 52). In those previous decisions, among others, the Board found that the phrases “precautionary principle” and “precautionary approach” are used in international treaties and some Canadian environmental statutes, but neither of these phrases is found in the EMA (or its predecessor, the Waste Management Act). In *Cranbrook*, the Board explained the difference between the precautionary principle and a precautionary approach. In both cases, the Board concluded that, had the legislature intended for decision-makers to apply the precautionary principle or use a precautionary approach in exercising their discretion to issue or amend permits under the EMA, the legislature could have expressly indicated that, but it has not.

[226] In addition, the Board noted in those previous decisions that the precautionary principle and precautionary approach have each been defined in more than one way in different international treaties and Canadian statutes, and therefore, it is unclear which definition or version would apply in the context of the EMA ...

In *Toews*, the EAB also referred to, and distinguished, Australian authorities, principally, *Telstra Corporation Limited v. Hornsby Shire Council* (2006) NSWLEC 133, and the Federal Court decision in *Morton*.

Toews also goes on to say, following earlier EAB decisions, that, while zero risk is not practicable in the administration of an environmental regulatory scheme, a precautionary approach, meaning a cautious and rigorous approach, is appropriate.

Is the application of the precautionary principle corrosive to the principle of sustainability which involves a balancing? Recall what was said by the Supreme Court of Canada in *Oldman River* where the Court was called upon to consider the four corners of the concept of “environmental quality”:

I cannot accept that the concept of environmental quality is confined to the biophysical environment alone; such an interpretation is unduly myopic and contrary to the generally held view that the "environment" is a diffuse subject matter; see R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401. The point was made by the Canadian Council of Resource and Environment Ministers, following the "Brundtland Report" of the World Commission on Environment and Development, in the Report of the National Task Force on Environment and Economy, September 24, 1987, at p. 2:

Our recommendations reflect the principles that we hold in common with the World Commission on Environment and Development (WCED). These include the fundamental belief that environmental and

economic planning cannot proceed in separate spheres. Long-term economic growth depends on a healthy environment. It also affects the environment in many ways. Ensuring environmentally sound and sustainable economic development requires the technology and wealth that is generated by continued economic growth. Economic and environmental planning and management must therefore be integrated.

Surely the potential consequences for a community's livelihood, health and other social matters from environmental change are integral to decision-making on matters affecting environmental quality, subject, of course, to the constitutional imperatives, an issue I will address later.