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ONTARIO'S CLEAN WATER ACT, 2006: CELA FAQ #3

Prepared by
Richard D. Lindgren, Counsel
Kaitlyn Mitchell, Counsel
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QUESTION: What is the precautionary principle, and how should it be applied during the source protection planning process under the *Clean Water Act, 2006*?

ANSWER: Because the *Clean Water Act, 2006* is aimed at anticipating and preventing degradation of drinking water sources, the legislation is inherently precautionary. While the source protection planning process is intended to be science-based, there may be inevitable data gaps or scientific uncertainty at the local level as Source Protection Committees identify, assess, and address drinking water threats. In such circumstances, the precautionary principle mandates that where activities or conditions may create serious or irreversible impacts upon groundwater or surface water, the lack of full scientific certainty should not be used as a reason for postponing or avoiding measures to prevent contamination or depletion of drinking water sources.

ANALYSIS:

Evolution of the Precautionary Principle

Over the past two decades, the precautionary principle has emerged as a fundamental concept that promotes proactive and prudent environmental decision-making to ensure pollution prevention and sustainable development.

For example, the precautionary principle has been entrenched within numerous international agreements¹ and “soft law” documents.² Moreover, Canada has endorsed and supported the precautionary principle in a variety of international forums, advocating its inclusion in many international environmental agreements and declarations.

¹ Montreal Protocol on Substances that Deplete the Ozone Layer September 16, 1987, [26 I.L.M. 1541 at 1551 \(1987\)](#); the Framework Convention on Climate Change, May 9, 1992, [31 I.L.M. 849 \(1992\)](#); the Biodiversity Convention, June 5, 1992, [31 I.L.M. 818 \(1992\)](#); Article 10 of the Cartagena Protocol on Biosafety, Montreal, Jan. 29, 2000; 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972; Article 1 of the Stockholm Convention on Persistent Organic Pollutants, May 2004.

² Principle 15 of the Rio Declaration on Environment and Development, June 14, 1992, [31 I.L.M. 874 \(1992\)](#); Agenda 21; the Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests. For general articulations of the precautionary principle, see also the Lowell Statement on Science and the Precautionary Principle (2001) and the Wingspread Statement on the Precautionary Principle (1998).

The precautionary principle has been increasingly recognized as a principle of international law.³ Indeed, the precautionary principle has arguably reached the status of customary international law, due to the practice of states such as Canada, and its general acceptance by the international community.⁴ Thus, Canadian statutes should be interpreted in a manner that is consistent with the precautionary principle, unless the legislature clearly intends otherwise.⁵

Status of the Precautionary Principle in Canadian Law

Numerous provincial⁶ and federal⁷ statutes in Canada expressly incorporate the precautionary principle. Similarly, the precautionary principle is also reflected in numerous policy statements at both the federal and provincial level.

The precautionary principle has also been recognized by the Canadian courts. Most notably, in Supreme Court of Canada's *Spraytech* decision, L'Hereux-Dubé J. adopted the following definition of the precautionary principle:

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.* [emphasis added]

Since the *Spraytech* decision was rendered, the precautionary principle has been discussed in several Canadian court decisions in environmental law matters.⁸

³ David VanderZwaag, "The Precautionary Principle in Environmental Law and Policy: Elusive Rhetoric and First Embraces" (1998), 8 *Journal of Environmental Law and Practice*, 355-375; James Cameron and Juli Abouchar, "The Status of the Precautionary Principle in International Law", Chapter 3 in Freestone and Hey, eds., *The Precautionary Principle and International Law*, Kluwer Law International, 1996, pp.29-52.

⁴ *114957 Canada Ltée (Spraytech, Société d'arrosage) and Services des espaces verts Ltée/Chemlawn v. Town of Hudson*, 2001 SCC 40 at para. 32 [*Spraytech*]; Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (Kluwer Law International: 2002, the Netherlands), pp.260-284.

⁵ *Reference re Powers to Levy Rates on Foreign Legations & High Commissioners' Residences*, [1943] S.C.R. 208.

⁶ *Endangered Species Act*, S.O. 2007, c.6, Preamble and s.11(3); *Endangered Species Act*, S.N.S. 1998, c. 11, ss. 2(1)(h) and 11(1); *The Water Resources Conservation Act*, S.M. 2000, c.11, Preamble; *Environment Act*, S.N.S. 1994-95, c.1, s.2(b)(ii); *Water Resources Protection Act*, S.N.S. 2000, c.10, Preamble; *Wildlife Act*, S.Nu. 2003, c.26, ss.1(2)(e), 130(3), 132(2), 134(2), and 135(3); *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7, s.77.7(2); *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, s.34.4(2) (acknowledging the recognition of the precautionary principle in the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement of 2005. This Agreement must be considered by Source Protection Committees: see s. 14 of the CWA and ss. 4.2 and 5 of O.Reg.287/07).

⁷ *Oceans Act*, S.C. 1996, c. 31, Preamble; the *Canadian Environmental Protection Act, 1999*, S.C., 1999, c.33, ss.2(1)(a), 6(1.1), and 76.1; *Canadian Environmental Assessment Act*, S.C. 1992, c.37, s.4(2); *Canada National Marine Conservation Areas Act*, S.C. 2002, c.18, Preamble and s.9(3); *Pest Control Products Act*, S.C. 2002, c.28, s.20.

⁸ *Croplife Canada v. Toronto (City)* (2005), 14 C.E.L.R. (3d) 207 at paras. 68-71 (Ont. C.A.); *Fletcher v. Kingston (City)* (2004), 70 O.R. (3d) 577 at para. 86 (Ont. C.A.); *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District)* (2003), 15 B.C.L.R. (4th) 229 at para. 80 (B.C. C.A.); *Lake Waseosa Ratepayers' Association v. Pieper*, 2008 CarswellOnt 985 at para. 18 (Ont. Div. Ct.); *Weir v. British Columbia (Environmental Appeal Board)*; 2003 BCSC 1441 at para. 38 (B.C.S.C.).

Precautionary Nature of the CWA

The precautionary principle is not expressly referenced in the *Clean Water Act, 2006* (“CWA”). However, the above-noted jurisprudence makes it clear that domestic statutes such as the CWA should be interpreted in a manner that is consistent with the precautionary principle.

In addition, the importance of the precautionary principle in the context of drinking water safety was strongly endorsed by Mr. Justice O’Connor in his Part II Report of the Walkerton Inquiry:

[The precautionary principle] addresses situations in which risk cannot be estimated with any reliability and in which uncertainty prevails regarding the relationship, if any, between cause and supposed effect. Under such circumstances, precautionary measures such as investments in risk mitigation, alternative technologies, and research are called for... Although this prudent approach must still take account of costs, *when the potential consequences of the hazard in question are large, the precautionary principle has a role to play in practical risk management and should be an integral part of decisions affecting the safety of drinking water* (emphasis added).⁹

As the CWA was being debated in the Ontario Legislature, the former Minister of the Environment articulated the importance of the precautionary principle as follows:

This legislation sets prevention — above all else — as its fundamental principle. Preventing problems from occurring in the first place is far better than having to fix them after the fact...

In his report of the Walkerton Inquiry, Justice O’Connor made it clear that the precautionary principle must play an integral role in decisions affecting the safety of drinking water. *The proposed Clean Water Act is inherently precautionary and as regulations are developed under the act, we will be mindful of the precautionary principle.*

The Clean Water Act is precautionary because it is proactive. Communities would look at vulnerable sources of drinking water and evaluate potential threats. The Source Protection Plans would propose measures to reduce those threats. Under the act, watershed communities would monitor and evaluate how threats are being reduced and prevented. Source protection plans would be reviewed and amended over time to respond to new threats and to better protect against existing threats (emphasis added).¹⁰

After the CWA was enacted, the Ministry of the Environment has stated that the precautionary principle is an important component of the source protection planning process:

The precautionary principle is a basis for and an important part of the implementation of the CWA. Fundamentally, the approach of using a threats identification process, which is

⁹ See Part II Report of the Walkerton Inquiry, at p.77.

¹⁰ See: <http://www.ene.gov.on.ca/envision/news/speeches/082106.htm>

based on assessing the potential for an activity or condition to pose a risk to drinking water, is to seek to avoid problems rather than react to them.¹¹

Applying Precaution in Source Protection Planning

Applying the precautionary principle under the CWA generally means that caution should be exercised in favour of groundwater or surface water protection, rather than waiting for irrefutable scientific proof that a particular land use activity or condition has adversely affected source water quality or quantity.

At the provincial level, the precautionary principle should be applied as CWA regulations, rules and guidelines are developed to prescribe drinking water threats, evaluation criteria, Great Lakes targets, and other matters of provincial interest.

At the local level, as Source Protection Committees draft Assessment Reports and develop policies within Source Protection Plans under the CWA, it is likely that they will encounter information/data gaps or scientific uncertainty. Where this occurs, the precautionary principle mandates that the lack of full scientific proof should not be used as an excuse for inaction in addressing known or suspected significant drinking water threats. Where such threats are present, it would be contrary to the public interest to defer preventative or mitigative measures until Source Protection Committees obtain conclusive proof of the causal connection between a particular activity and source water contamination or depletion.

In summary, where there is a risk of significant harm to municipal water supplies, the precautionary approach must be implemented if the CWA's overall purpose is to be achieved (i.e. protection of existing and future sources of drinking water). Among other things, this means that Source Protection Committees should:

- recognize and respond appropriately to existing uncertainties and risks when defining vulnerable areas, assigning hazard scores, assessing drinking water issues, or considering climate change impacts;
- act presumptively in favour of protecting human health and the environment;
- assess a reasonable range of alternative options for meeting local source protection needs through mandatory or voluntary measures as may be necessary on an interim or permanent basis;
- shift the burden of proof to those seeking to engage in activities which are potentially harmful to drinking water sources;
- ensure openness and transparency in the decision-making process, particularly during threat assessment and policy development under the CWA;
- integrate local and aboriginal knowledge with relevant specialist expertise; and
- incorporate adequate environmental monitoring and reporting mechanisms.¹²

¹¹ Letter to CELA from Ian Smith, MOE Source Protection Programs Branch (August 5, 2008), pp.1-2.

¹² “Late Lessons from Early Warnings: the Precautionary Principle 1896-2000”, European Environment Agency, Copenhagen, 2001; CELA, “Implementing Precaution: An NGO Response to the Government of Canada’s Discussion Document” (April, 2002), at pp.24-25.