

THE SUPREME COURT OF CANADA APPLIES THE PRECAUTIONARY PRINCIPLE

In October of last year the Supreme Court of Canada decided *Castonguay Blasting Ltd. vs Ontario (Environment)*. That case was about defining the parameters of the duty to report an environmental incident. Significantly, the Court relied upon the precautionary principle in interpreting the applicable Ontario legislation. The Court found that the precautionary 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.”

The Court in *Castonguay Blasting* referred to an earlier decision of the Supreme Court of Canada, the 2001 *Spraytech* decision.

In *Spraytech* the Court applied a version of the precautionary principle contained in the 1990 Bergen Declaration:

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.

Accordingly, versions of the precautionary principle are now live instruments in the application of Canadian law. Of concern is that the Court did not apply the version of the precautionary principle that is now most commonly accepted. The most commonly accepted articulation of the precautionary principle is that contained in Principle 15 found in the 1992 United Nations Rio Declaration which states:

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.

As is immediately apparent, the last sentence of the version of the precautionary principle adopted by the Supreme Court of Canada in *Spraytech* is not the same as the last sentence of Principle 15 in the Rio Declaration. The difference is that the Rio Declaration refers to **cost effective** measures to prevent environmental degradation while the Bergen Declaration referred to in *Spraytech* does not.

Indeed, it is the Rio Declaration version of the precautionary principle (that is the version that refers to **cost effective** measures) that is most commonly found in Canadian legislation such as that contained in the preamble to the *Canadian Environmental Protection Act*.

Without doubt the meaning and application of the precautionary principle in Canada will be a live and debated issue in Canada both now and in coming years.