BC Board Rejects Application of the Precautionary Principle to Permitting Issues



We've often said that one of the foundations of environmental law in Canada is the 'precautionary principle,' which advocates taking preventive action to avoid harm to the environment, even if there's no 'scientific certainty' that there really is a threat. The idea is that it's better to be safe than sorry and take steps to protect the environment, even if there's no consensus on how great the threat is or whether a threat even exists at all. But the precautionary principle may not apply to *all* environmental issues or decisions. For example, a BC board recently rejected the application of this principle to permitting issues under BC environmental law. Here's a look at that decision.

THE CASE

What Happened: Two individuals who live and work in Kitimat, BC filed separate appeals of a Director's decision to amend a company's permit, which authorizes the discharge of effluent, emissions and waste from its aluminum smelter in Kitimat. The amendment, issued under the *Environmental Management Act* (EMA), authorized an increase in the smelter's maximum daily limit of sulphur dioxide (SO_2) emissions from 27 tonnes per day to 42 tonnes per day. The individuals argued, among other

things, that the Director failed to apply or improperly applied the precautionary principle, particularly in relation to the potential impacts of the increased SO_2 emissions on human health.

What the Board Decided: The BC Environmental Appeal Board dismissed the appeals, rejecting the application of the precautionary principle to permitting decisions under the EMA.

The Board's Reasoning: The individuals argued that when there's 'a real threat of serious or irreversible harm to human health' and there's a lack of full scientific certainty as to the nature of that harm and the efficacy and availability of mitigation options, decision-makers, such as the Director, shouldn't wait for definitive scientific certainty or causal proof of the harm. The Director argued that the amendment contained sufficient conditions for the protection of human health and the environment. He also claimed'and the company agreed'that he had no legal obligation to consider the precautionary principle. The Board agreed, noting that although the phrases 'precautionary principle' and 'precautionary approach' are used in international treaties and some Canadian environmental laws, neither of these phrases appears in the *EMA*. If the legislature had 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*, it would've expressly said so'but it didn't. And the Board had previously held that this principle doesn't inform the interpretation of the permitting provisions in the *EMA*, instead holding that a 'cautious approach involving a comprehensive technical analysis of the potential harm' to human health and the environment should be adopted when assessing permit applications under the *EMA* [*Toews v. Rio Tinto Alcan Inc.*, Decision Nos. 2013-EMA-007(g) and 2013-EMA-010(g), BC Environmental Appeal Board, Dec. 23, 2015].

ANALYSIS

In May 2015, a federal court confirmed the importance of the precautionary principle when applying environmental statutes and regulations. However, you shouldn't be lulled into thinking that that and similar decisions mean this principle will apply to any and all environmentally-related issues. The *Toews* decision shows that some environmental laws in some Canadian jurisdictions instead take a less stringent 'cautious approach.' Nonetheless, EHS professionals would be wise to keep the precautionary principle in mind when implementing and assessing their EHS programs. That is, if your company follows this principle when it's unclear whether a certain action should be taken or avoided to protect the environment, it's less likely to harm the environment or be faced with environmental violations.