BRIEF SENIOR MANAGEMENT: What the ‘Precautionary Principle’ Is and How It Affects You

A Qu□bec town charged two landscaping companies with violating a bylaw restricting the use of pesticides within the town for purely aesthetic reasons. The companies argued that the bylaw was invalid. Qu□bec law lets towns enact bylaws to regulate ‘toxic’ materials. The companies claimed that the pesticides in this case weren’t ‘toxic materials.’ The Supreme Court of Canada acknowledged that the town hadn’t produced evidence showing that the pesticides were actually toxic, but still ruled that the bylaw was valid. The town had the authority to regulate the ‘general welfare’ of residents and the environment, the Court explained. The pesticides bylaw was an exercise of that authority because it was designed to protect the health of residents and the local environment. The Court relied in part on the ‘precautionary principle,’ which advocates taking preventive action to prevent harm to the environment, even if there’s no ‘scientific certainty’ that there really is a threat [*114857 Canada Lt□e (Spraytech, Soci□t□ d’arrosage) v. Hudson (Town)*].

THE PROBLEM

Government has the authority to protect public health and safety. Enacting laws to protect the environment is an application of that power. So when a substance or activity poses a clear threat to the environment, the government’s

authority to regulate that substance or activity is beyond dispute. But sometimes the harmful effect of a substance or activity isn't clear or is in dispute. Should the government still be allowed to step in and regulate the substance or activity' Or should regulation be allowed only when there's scientific certainty that the substance or activity is actually a threat' One answer to these questions comes from a concept of international law called the precautionary principle. The *Hudson* case explained this 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 precautionary principle has influenced environmental regulation in Canada and has been codified in various laws, including the *CEPA*, the *Oceans Act* and the *Endangered Species Act*. But the *Hudson* case is important because it's the first time the Supreme Court of Canada officially endorsed the precautionary principle and relied on it to interpret an existing environmental law.

THE EXPLANATION

In layman's terms, the precautionary principle embodies the 'better safe than sorry' approach. That is, when in doubt, it's best to err on the side of caution and let the government take steps to protect the environment, even if there's no consensus on how great the threat is'or whether a threat exists at all. There are 11 guiding principles that relate to making precautionary decisions and implementing precautionary measures. Highlights:

- Precautionary decisions should be guided by Canada's chosen level of protection against the potential risk;
- Although scientific uncertainty may exist, there must

still be some sound scientific basis for a precautionary decision;
- The scientific evidence required for a precautionary decision should be relative to the chosen level of protection;
- Precautionary measures should be reconsidered in light of evolving scientific knowledge; and
- Precautionary measures should generate an overall benefit for society at the least cost and, where more than one precautionary measure is available, the least trade-restrictive option should be chosen.

The town's enactment of the pesticide bylaw in the *Hudson* case is a perfect example of the precautionary principle in action. Even though scientific proof of harm from pesticides wasn't conclusive, the Court felt that there was enough of a risk to residents and the local environment to justify the bylaw's restriction on the nonessential use of pesticides.

THE LESSON

How does the precautionary principle affect the company or members of senior management' Because the decision in the *Hudson* case comes from Canada's highest court, it clearly signals judicial acceptance of the precautionary principle. So you can expect the courts of every jurisdiction to give governments at all levels broad discretion to regulate substances and activities that have the *potential* to harm the environment. The same basic principle applies to government agencies or officials who apply the precautionary principle when enforcing environmental laws and regulations. Stated simply, the current feeling in Canada right now and for the foreseeable future is that protecting the environment is so important that it justifies allowing the government to be proactive instead of reactive in this area.

Given this mindset, the best way for a company to avoid liability is to adopt the same philosophy regarding its own

environmental programs and activities. One of the most effective things senior management can do is make sure that the company errs on the side of caution when it’s unclear whether a certain action should be taken or avoided to protect the environment. Exercising caution toward potentially polluting activities and engaging in proactive efforts to keep the company’s operations environmentally sound may cost the company some money in the short run. But it will pay dividends in the long run.

SHOW YOUR LAWYER

114857 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241, June 28, 2001