

Federal Court Confirms Importance of the Precautionary Principle



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 is the foundation for many environmental laws in Canada, including the *CEPA*. In essence, 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 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. A recent federal decision confirms the importance of the precautionary principle when applying environmental statutes and regulations. Here's a look at the case.

THE CASE

What Happened: A fish farm in BC had a licence from the federal Minister of Fisheries and Oceans. The farm transferred salmon smolts that were infected with a virus from a hatchery to the farm. The farm's licence permitted the transfer of the diseased salmon provided the farm met certain conditions. But a biologist sued on the public's behalf, arguing that the licence conditions allowing the transfer conflicted with requirements under the *Fishery (General) Regulations* barring the transfer of fish in a way that would be harmful to the protection and conservation of fish or would adversely affect fish. Because the farm was located near wild salmon migratory routes, she claimed the infected smolts endangered the wild salmon by exposing them to the virus, which could result in heart and skeletal muscle inflammation. The Minister argued that the licence conditions were reasonable and reflected a precautionary approach.

What the Court Decided: The Federal Court invalidated certain conditions in the fish farm's licence.

The Court's Reasoning: The court invalidated some of the licence conditions on grounds unrelated to the precautionary principle, but went on to discuss the principle at length as a 'second basis' for invalidating these conditions. The court explained that the precautionary principle recognizes that, as a matter of sound public policy, the lack of complete scientific certainty shouldn't be used as a basis for avoiding or postponing measures to protect the environment because there are inherent limits in being able to predict environmental harm. Here, scientific evidence suggested that there may be a connection between the virus the smolts had, and heart and skeletal muscle inflammation in salmon. Thus, licence conditions permitting the transfer of fish infected with this virus do *not* reflect the precautionary principle, concluded the court. Rather, these conditions dilute requirements in the regulations that are designed to anticipate and prevent harm even in the absence of scientific certainty that

such harm will, in fact, occur [*Morton v. Canada (Fisheries and Oceans)*, [2015] FC 575 (CanLII), May 6, 2015].

ANALYSIS

The *Morton* case is a good example of the precautionary principle in action. But what does this concept mean in terms of environmental compliance? The best way for a company to avoid liability for environmental offences is to apply this principle to its own environmental programs and activities. In other words, your company should err on the side of caution when it's unclear whether a certain action should be taken or avoided to protect the environment. Although exercising caution toward potentially harmful activities and engaging in proactive efforts to keep the company's operations environmentally sound may cost some money in the short run, this conservative approach will likely pay off long-term.