Caution with precaution

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Municipal and environmental decision-making can be frustrating experiences for both participants and the decision makers. Inaccurate information and "junk science" are often dumped on committees. The members, who are usually laypersons, are then stuck with trying to separate the wheat from the chaff in the midst of what is often an adversarial process. The latest, hot "buzz-words" are thrown into the mix, often incorrectly. (The term "due diligence," for instance, is one that is being beaten about beyond all recognition – probably by the same people who use "disrespect" as a verb.) The term that I want to focus on in this article is the "precautionary principle."

The use of the "precautionary approach" or "precautionary principle" in decision-making had become commonplace even before the term was featured in the 1992 *Rio Declaration on Environment and Development*. The precautionary principle has received considerably more local attention since the principle was mentioned (albeit in a non-binding part of the decision) in the Supreme Court of Canada's 2001 judgment in *Spraytech* v. *Hudson* and in the subsequent Ontario Court of Appeal decisions in *R.* v. *City of Kingston* and in *Crop Life* v. *Toronto*. Since *Spraytech*, it has cropped up in a whole range of municipal reports, environmental review commission findings and terms of reference and in more and more legislation and court decisions.

The term "precautionary principle" is often not fully understood by our decision-makers and political representatives. The precautionary principle does not mean, "prohibit something unless it can be proven safe." It is not a NIMBY (not in my backyard) equivalent. The most universally accepted statement of the principle is set out in the *Rio Declaration* as follows:

> *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.*

What it means is that if there is good scientific evidence of possible serious or irreversible environmental harm, the fact

that science cannot be completely prove that the harm will occur is not a reason to put off taking cost-effective preventative steps.

An excellent discussion of the principle can be found in the Government of Canada publication *A Canadian Perspective on the Precautionary Approach/Principle*. It emphasizes the following key elements of the principle.

First, the principle is both science-based and risk-based. It requires the application of sound, scientific decision-making as to what the probable risk of an activity is and an evaluation as to what level of risk is acceptable. Sound scientific information is to be the basis for making a decision as to whether or not there is a need to take action and what the appropriate action should be. Particular weight is to be given to peer-reviewed science and reasonableness in judgment. Societal issues and the public tolerance for risk must also be weighed.

Second, the decision-making process needs to be fair and transparent and involve the public. All positions should be examined and subject to cold, hard scrutiny, based on the facts and on the weight of recognized opinion, not fancy or conjecture and not on political expedience. While the burden of proof may be placed on the proponent of an activity, it should also be remembered that no one can be expected to categorically prove that any activity will have absolutely no risk of harm or show with certainty that nothing bad will ever happen.

Third, any measures that are adopted to deal with the identified risk should be proportionate to the severity of the risk, non-discriminatory as between those carrying out the same or similar activities and the most cost-effective alternative for all affected. Decision makers often forget this part of the equation. Why prohibit an activity, if there is a cost-effective way to reduce the risk? Make sure that you treat everyone doing things that involve the same risks the same way. If you need to take action, do what is most cost-effective for the affected person and for the municipality. Where there are alternatives, pick the one that restricts trade the least.

Fourth, restrictions should be reviewed as new information is received and as the community's desired level of protection changes. If the risks are proven more or less likely or if the consequences are seen as being of greater or lesser concern, then the appropriate changes to any regulatory measures should be made.

Let's look at a not so imaginary scenario. Mrs. Jones uses rose dust to keep the aphids off of her rose bushes. Health Canada and Environment Canada say, based on their studies, that her use of the product is not harmful to health or the environment. What kind of information and expertise should a municipality need before it tells her otherwise? If the municipality thinks that she will use an unsafe amount of rose dust, should it ban rose dust altogether or should it make her hire an applicator who is licensed by the Province (or get a license herself)? What kind of information and expertise should a municipality have before it then tells the licensed applicator that the Province's restrictions are not good enough? Should it then ban the activity, and put the applicator out of work, or should it set up its own restrictions? How far should those restrictions go? Is there another reasonably priced, equally effective product that is safer to use? Farmer Brown sprays his crops with a product that contains one of the same ingredients as the rose dust. Do the same rules then apply to both Mrs. Jones and Mr. Brown?

When applied properly, the precautionary principle is a valuable tool for managing risk and protecting the environment without unnecessarily restricting legitimate activities or compromising economic development. So, use frequently – apply with caution.