ENVIRONMENTAL LAW CENTRE

Core Environmental Principles for Environmental Laws, Policies and Legal Processes

The Environmental Law Centre recognizes that the environment is a public good that must be protected. The Environmental Law Centre's *Strategic Plan 2012-2015* references several core environmental principles that are required for strong and effective environmental laws, policies and legal processes. These core principles are:

- sustainability,
- precautionary principle,
- pollution prevention,
- polluter pays,
- cumulative impacts,
- intergenerational equity and
- public participation.

In addition to these core environmental principles, environmental laws, policies and processes must be:

- constantly improving
- reflect and contribute to evidence based best practices
- open, transparent and accountable

The following document provides definitions of the core environmental principles that have been adopted by the ELC in its strategic plan. As well, there is a brief survey of case-law and statutes (federal and Alberta) that have referenced the core environmental principles. This document is intended only to provide definitions of the core environmental principles; it does not provide analysis of how successfully the core environmental principles have been implemented in Alberta.

Sustainability

Sustainable development is defined in the *Brundtland Report*[1] as follows:

> Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

[1] World Commission on Environment and Development (WCED). *Our Common Future*. Oxford: Oxford University Press, 1987 (hereinafter the "*Brundtland Report*").

- the concept of **needs**, in particular the essential needs of the world's poor, to which overriding priority should be given; and
- the idea of **limitations** imposed by the state of technology and social organization on the environment's ability to meet present and future needs.

The principle of sustainability refers to the need for development to be socially, economically and environmentally sound.

The principle of sustainable has been considered in several Canadian court decisions. The seminal decision in this regard is *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1992] 1 S.C.R. 3. At page 42, the Supreme Court of Canada echoed the definition of sustainability provided in the *Brundtland Report*:

> I cannot accept that the concept of environmental quality is confined to the biophysical environment alone; such an interpretation is unduly myopic and contrary to the generally held view that the "environment" is a diffuse subject matter; see *R.* v. *Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401. The point was made by the Canadian Council of Resource and Environment Ministers, following the "Brundtland Report" of the World Commission on Environment and Development, in the Report of the National Task Force on Environment and Economy, September 24, 1987, at p. 2:
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> > Our recommendations reflect the principles that we hold in common with the World Commission on Environment and Development (WCED). These include the fundamental belief that environmental and economic planning cannot proceed in separate spheres. Long-term economic growth depends on a healthy environment. It also affects the environment in many ways. Ensuring environmentally sound and sustainable economic development requires the technology and wealth that is generated by continued economic growth. Economic and environmental planning and management must therefore be integrated.
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> Surely the potential consequences for a community's livelihood, health and other social matters from environmental change are integral to decision-making on matters affecting environmental quality, subject, of course, to the constitutional imperatives, an issue I will address later.

The principle of sustainability has also been considered by the Alberta Court of Appeal in *Castle-Crown Wilderness Coalition* v. *Alberta (Director of Regulatory Assurance Division, Alberta Environment)*, 2005 ABCA 283. At paragraph 56, the Court stated:

> Although s. 40 of the *EPEA*, which deals with the purpose of the environmental assessment process, is more focused, it nevertheless continues the theme that the overall purpose of the *EPEA* is to balance environmental, economic and social concerns. All the provisions of this section of the *EPEA* engage this duality. They speak of goals of environmental protection and sustainable

> development, of integrating environmental protection and economic decisions, of predicting environmental, social, economic and cultural consequences of a proposed activity and of providing for involvement by the public, proponents, government, and government agencies.

The interaction between the principle of sustainability and conservation has been considered by Canadian courts. In *R.* v. *Tommy*, 2008 BCSC 1095, the B.C. Supreme Court considered whether restrictions on aboriginal fishing licenses imposed to support conservation measures were unconstitutional. In considering this question, the court stated that (paragraphs 57 and 58):

> In summary, I find the jurisprudence establishes that sustainability is an integral part of the concept of conservation. Sustainability requires enhancement of the resource for the future benefit of both aboriginal and non-aboriginal Canadians. The DFO is tasked with that management responsibility. In the context of both preserving and enhancing a resource, I am satisfied that conservation is a valid legislative objective.
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> The notion of conservation as including the objective of sustainability has also been adopted by other groups. The World Commission on Environment and Development has a forward-looking definition of sustainability, which it defines as "forms of progress that meet the needs of the present without compromising the ability of future generations to meet their needs" ("Our Common Future: Report of the World Commission on Environment and Development" (Oxford: Oxford University Press, 1987).

Aside from its recognition by Canadian courts as an important environmental principle, sustainability has also been incorporated into many pieces of Canadian legislation. For example, the purposes provision of the *Alberta Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 includes the principle of sustainability:

> 2. The purpose of this Act is to support the protection, enhancement and wise use of the environment while recognizing the following:
>
> > (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations.

The concept of sustainability is also referenced in the purposes provision of the *Alberta Land Stewardship* Act, S.A. 2009, c. A-26.8 (s. 1(2)):

> (b) to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably forseeable needs of current and future generations of Albertans, including aboriginal peoples;
>
> (d) to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavor and other events

Several pieces of federal legislation adopt the principles of sustainability: the *Federal Sustainable Development Act*, S.C. 2008, c. 33 (s.2); the *Canadian Environmental Assessment*

Act, S.C. 1992, c. 37 (preamble, s.4); the *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18 (s. 4(3)); the *Auditor General Act*, R.S.C. 1985, c. A-17 (ss. 2, 21.1)and the *Pest Control Products Act*, S.C. 2002, c. 28 (preamble, s. 2(a)). These pieces of legislation typically define sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

Precautionary Principle

The precautionary principle was enunciated as Principle 15 in the *United Nations Rio Declaration on the Environment and Development* (UNCED 1992):

> 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.

The Supreme Court of Canada considered the precautionary principle in *114957 Canada Ltée (Spraytech, Société d'arrosage)* v. *Hudson (Town)*, [2001] 2 S.C.R. 241. In considering a town by-law that restricted the use of pesticides, the Supreme Court of Canada commented on the precautionary principle as follows (paragraphs 31 and 32):

> The interpretation of By-law 270 contained in these reasons respects international law's "precautionary principle", which is defined as follows at para. 7 of the Bergen Ministerial Declaration on Sustainable Development (1990):
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> > 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.
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> Canada "advocated inclusion of the precautionary principle" during the Bergen Conference negotiations (D. VanderZwaag, CEPA Issue Elaboration Paper No. 18, CEPA and the Precautionary Principle/Approach (1995), at p. 8). The principle is codified in several items of domestic legislation: see for example the Oceans Act, S.C. 1996, c. 31, Preamble (para. 6); Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33, s. 2(1)(a); Endangered Species Act, S.N.S. 1998, c. 11, ss. 2(1)(h) and 11(1).
>
> Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment" (D. Freestone and E. Hey, "Origins and Development of the Precautionary Principle", in D. Freestone and E. Hey, eds., The Precautionary Principle and International Law (1996), at p. 41. As a result, there may be "currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law" (J.

> Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in ibid., at p. 52). See also O. McIntyre and T. Mosedale, "The Precautionary Principle as a Norm of Customary International Law" (1997), 9 J. Env. L. 221, at p. 241 ("the precautionary principle has indeed crystallised into a norm of customary international law"). The Supreme Court of India considers the precautionary principle to be "part of the Customary International Law" (A.P. Pollution Control Board v. Nayudu, 1999 S.O.L. Case No. 53, at para. 27). See also Vellore Citizens Welfare Forum v. Union of India, [1996] Supp. 5 S.C.R. 241. In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action.

The British Columbia Supreme Court, commented on the precautionary principle in *Blaney et al.* v. *British Columbia (The Minster of Agriculture Food and Fisheries) et al.*, (2005) BCSC 283. The Court stated that "the precautionary principle does not require governments to halt all activity which may pose some risk to the environment until that can be proven otherwise" (paragraph 45).

The precautionary principle was determined to be applicable in *Weir* v. *Canada (Minister of Health)*, (2011) FC 1322. In this case, the Federal Court considered whether the Federal Minister of Health ought to have ordered a special review of glyphosate containing POEA under the federal *Pest Control Products Act*, S.C. 2000, c. 28. Other cases that discuss the precautionary principle include *Pembina Institute for Appropriate Development et al.* v. *Canada (Attorney General) et al*., (2008) FC 302; *Hanna* v. *Ontario (Attorney General)*, (2011) ONSC 609; *Sierra Club Canada* v. *Ontario (Natural Resources & Transportation)*, (2011) ONSC 4655.

Aside from being adopted by the Canadian courts, the precautionary principle has been incorporated into some pieces of federal legislation. For example, the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (s. 4(1)(a)) provides that one of the purposes of the Act is:

> to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects

The precautionary principle also appears in the *Species at Risk Act*, S.C. 2002, c. 29 (preamble); the *Pest Control Products Act*, S.C. 2002, c. 28 (s. 20); the *Oceans Act*, S.C. 1996, c. 31 (preamble); and the *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18 (preamble).

Pollution Prevention

The Canadian Council of Ministers of the Environment defined pollution prevention in *A Strategy to Fulfil the CCME Commitment to Pollution Prevention* (May 1996) as follows:

> The use of processes, practices, materials, products or energy that avoid or minimize the creation of pollutants and wastes, at the source.

> Pollution prevention promotes continuous improvement through operational and behavioural changes. Pollution prevention is a shared responsibility among governments and individuals, industrial, commercial, institutional, and community sectors. It focuses on areas such as:
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> - substances of concern
> - efficient use and conservation of natural resources
> - operating practices
> - clean production processes which create less waste
> - training
> - equipment modifications
> - process changes
> - materials and feedstock substitution
> - product design and reformulation
> - product life-cycle
> - purchasing practices
>
> Pollution prevention is the preferred strategy for protecting the environmental. Pollution prevention does not include measures such as diluting constituents to reduce hazard or toxicity, or transferring hazardous or toxic contaminants from one medium to another or to the work place.

In Alberta, the key pollution prevention legislation is Part 5 of *Alberta Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and the related *Substance Release Regulation*, A.R. 124/1993. The reduction of greenhouse gas production is addressed by the *Climate Change and Emissions Management Act*, S.A. 2003, c. C-16.7. Other pieces of Alberta legislation deal with pollution control as an incidental matter: the *Coal Conservation Act*, R.S.A. 2000, c. C-17; the *Hydro and Electric Energy Act*, R.S.A. 2000, c. H-16; the *Pipeline Act*, R.S.A. 2000, c. P-15; and the O*il Sands Conservation Act*, R.S.A. 2000, c. O-7.

The key federal legislation dealing with pollution prevention is Part 4 of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33. There are other federal statutes that deal with pollution prevention: the *Canada Shipping Act*, S.C. 2001, c. 26; the *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12; and the *Fisheries Act*, R.S.C. 1985, c. F-14.

Polluter Pays

The principle of polluter pays was enunciated as Principle 16 in the *United Nations Rio Declaration on the Environment and Development* (UNCED 1992):

> National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

The Supreme Court of Canada commented on the polluter pays principle in *Imperial Oil* v. *Quebec (Minister of Environment)*, [2003] 2 S.C.R. 624. At paragraph 23, the Court states:

> Section 31.42 EQA, which was enacted in 1990 (S.Q. 1990, c. 26, s. 4), applies what is called the polluter-pay principle, which has now been incorporated into Quebec's environmental legislation. In fact, that principle has become firmly entrenched in environmental law in Canada. It is found in almost all federal and provincial environmental legislation…That principle is also recognized at the international level. One of the best examples of that recognition is found in the sixteenth principle of Rio Declaration on Environment and Development, UN Doc. A/Conf. 151/5/Rev. 1 (1992).
>
> To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities.

The Supreme Court of Canada confirmed its views on the polluter pays principle in *St. Lawrence Cement Inc.* v. *Barrette*, [2008] 3 S.C.R. 392. At paragraph 80, the Court stated that "[n]o-fault liability reinforces the application of the polluter pays principle, which this Court discussed in *Imperial Oil Ltd.* v. *Quebec (Minister of the Environment)*." In another case, the Supreme Court of Canada did not allow an amalgamated company to escape liability for its predecessor's actions under legislation that incorporates the polluter pays principle (see *British Columbia Hydro and Power Authority* v. *British Columbia (Environmental Appeal Board),* [2005] 1 S.C.R. 3).

Aside from being accepted by the Supreme Court of Canada, the principle of polluter pays has been adopted in both Alberta and federal legislation. The *Alberta Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 provides (s. 2):

> The purpose of this Act is to support the protection, enhancement and wise use of the environment while recognizing the following:
>
> (i) the responsibility of polluters to pay for the costs of their actions

The principle of polluter pays is incorporated into the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c.33 (preamble and s. 287); the *Antarctic Environmental Protection Act*, S.C. 2003, c. 20 (s. 50.9); the *Fisheries Act*, R.S.C. 1985, c. F-14 (s. 42); and the *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12 (ss. 6 and 7). In these pieces of legislation, the polluter pays principle appears as a factor in sentencing or as imposition of liability under the legislation.

Cumulative Impacts

On its website, the Canadian Environmental Assessment Agency states:

> assessments of cumulative environmental effects under the Act can extend to the effects of such changes on health and socio-economic conditions, physical and cultural heritage, and other matters described in the definition of "environmental effects" in section 2 of the Act

The principle of cumulative impacts has been considered by Canadian courts in the context of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. For example, in *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 FC 461 (FCA), the Federal Court of Appeal commented on cumulative effects as follows (paragraphs 40 to 42):

> "Cumulative effects" are not defined in the Act. The Agency has defined cumulative environmental effects as "the effects on the environment, over a certain period of time and distance, resulting from effects of a project when combined with those of other past, existing, and imminent projects and activities.
>
> Only likely cumulative environmental effects must be considered. Projects or activities which have been or will be carried out must be considered. However, only approved projects must be taken into account; uncertain or hypothetical projects or activities need not be considered. The Agency's Reference Guide on Cumulative Effects suggests, however, that "it would be prudent to consider projects or activities that are in a government approvals process as well."
>
> In order to assess cumulative environmental effects, advice from and consultation with relevant individuals, organizations and government departments and agencies should be consulted.

In a later decision, *Friends of West Country Assn.* v. *Canada (Minister of Fisheries and Oceans)*, [2000] 2 FC 263 (FCA), the Federal Court of Appeal stated (paragraph 34):

> Under s. 16(1)(*a*), the responsible authority is not limited to considering environmental effects solely within the scope of a project as defined in subsection 15(1). Nor is it restricted to considering only environmental effects emanating from sources within federal jurisdiction. Indeed, the nature of a cumulative effects assessment under paragraph 16(1)(*a*) would appear to expressly broaden the considerations beyond the project as scoped. It is implicit in a cumulative effects assessment that both the project as scoped and sources outside that scope are to be considered. Further, nothing in paragraph 16(1)(a) or subsection 16(3) limits the assessment to sources within federal jurisdiction. In order to trigger a federal environmental assessment, some aspect of federal jurisdiction must be engaged. However, once engaged, the federal responsible authority is to exercise its cumulative effects discretion unrestrained by its perception of constitutional jurisdiction.

The Court also stated that a finding that a project has insignificant environmental effects does not preclude the need for considering cumulative effects because "[i]t is not illogical to think that the accumulation of a series of insignificant effects might at some point result in significant effects" (paragraph 39).

The principle of cumulative effects has been adopted into some Alberta legislation: the *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8 (s. 2(1)(h)); the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (s. 49(d)); and the *Water Act*, R.S.A. 2000, c. W-3 (ss. 38(2)(b), 51(4)(b), 53(3)(b), 66(3)(b), 82(5)(b)).

Federally, the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 requires that any environmental assessment conducted under the Act consider "cumulative environmental effects that may result from the project in combination with other projects or activities that have been or will be carried out" (s.16). The Act does not provide a definition of cumulative environmental effects.

Intergenerational Equity

The Organization for Economic Cooperation and Development has defined intergenerational equity as:

> The issue of sustainable development referring, within the environmental context, to fairness in the intertemporal distribution of the endowment with natural assets or of the rights to their exploitation.

This principle is tied to the definition of sustainable development put forth in the *Brundtland Report*. The principle of sustainable development incorporates the concept of intergenerational equity: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

This principle is also tied to the principles of pollution prevention and polluter pays. The principle of pollution prevention is designed to prevent or, at least, minimize the use of pollutants that persist and bioaccumulate thereby affecting future generations. The principle of polluter pays is designed to ensure that liabilities are not deferred to future generations.

As discussed above, several pieces of legislation have adopted the principle of sustainability including the concept of not compromising the ability of future generations to meet their own needs. The clearest adoption of the principle of intergenerational equity appears in the federal *Pest Control Products Act*, S.C. 2000, c. 28 which expressly states that all consideration of children in the Act also applies to future generations (s. 5.1).

Public Participation

The Auditor General of British Columbia has enumerated principles for public participation in *Report 11: Public Participation – Principles and Best Practices for British Columbia* (2008) which is published on www.bcauditor.com. These principles are:

- Authenticity
  The decision has not been made and the decision-maker commits to be influences to a specific level that will be communicated in advance.

- Accountability
  The decision-maker will demonstrate that results and outcomes are consistent with the commitment that was made to stakeholder groups and the public at the outset of the initiative.

- Inclusiveness
  The decision-maker will make every reasonable effort to include the stakeholder groups and the public affected by the pending decision.

- Transparency
  The decision-maker will ensure that the stakeholder groups and the public that are affected understand the scope of the pending decision, the decision process and procedures, and any constraints facing the decision-maker.

- Commitment
  The decision-maker will provide appropriate time and resources to ensure that those involved can participate in a meaningful way.

- Integrity
  The decision-maker will address public and stakeholder group concerns in an honest and forthright way.

Public participation is a widely adopted principle in both federal and provincial legislation. Federally, the principle of public participation appears in the *Canadian Environmental Assessment Act* (preamble, s. 4(d)); the *Canadian Environmental Protection Act, 1999* (s. 29(1)(e)); the *Pest Control Products Act*, S.C. 2000, c. 28 (s. 4(2)(c), 5, 28); and the *Canada National Parks Act*, S.C. 2000, c. 32 (s. 12).

In Alberta, the principle is incorporated in the *Municipal Government Act* (Part 7); the *Environmental Protection and Enhancement Act* (s. 2, Parts 2, 4 and 5); the *Water Act* (s. 2, Part 8); and the *Alberta Land Stewardship Act* (s. 5(1), 19.2, 52). See also the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (ss. 26, 28); the *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3 (s.11); and the *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2 (s.9).

Public participation can be a feature of government policy decision-making processes and of administrative decision-making processes. For example, the public may be invited to participate in government policy decision-making in forums such as public consultations, advisory boards, open houses and so forth.

In other instances, the public may be able to participate in the decision-making processes of administrative tribunals. In Alberta, such participation is typically limited to only those persons who are "directly and adversely affected" (see *Kelly* v. *Alberta (Energy Resources Conservation Board),* 2009 ABCA 349 and 2011 ABCA 325).

Aside from the *opportunity* for participation, effective public participation requires access to sufficient *funding* and access to *information*. The courts have recognized the importance of public participation and dissent by disallowing strategic lawsuits against public participation (see *Scory* v. *Krannitz*, 2011 BCSC 674 and 2011 BCSC 936).