

## Guiding Principles for the PEI Water Act

Submitted by: The Coalition for the Protection of PEI Water

Montague, November 3, 2015

On behalf of the Coalition for the Protection of PEI Water, we would like to thank you for the invitation to make our presentation today. My name is Catherine O'Brien and I am the Chair of the Coalition for the Protection of PEI Water. With me is Professor Emeritus Marie-Ann Bowden, University of Saskatchewan, College of Law.

She taught Environmental Law, Property Law for 30 years plus Aboriginal Resource Development Law, Municipal Law, and Environmental Law to Engineers.

The Coalition for the Protection of PEI Water is a non-profit volunteer organization comprised of many interest groups and individuals on PEI dedicated to protecting and preserving PEI water.

The Coalition was formed during the lead-up to the presentations to the Standing Committee on Environment on the issue of high capacity wells. A list of our member organizations is found at the back of our written submission.

### INTRODUCTION

So far, there have been many wonderful presentations that cover a wide variety of concerns regarding our water. The objective in the White Paper, and we assume the consequent legislation, is to protect our water quality and quantity. This is a goal that is shared by all Islanders. But you, the members of the Environmental

Advisory Committee have the honourable task of wading through all the information you have gathered and presenting it to our Government, who will then have the difficult job of drafting a Water Act.

The question for you is how to draw these seemingly disparate interests and issues together and establish common threads within the presentations and additional information before you. We hope we can make your job easier as we come here today to really make only one point.....and perhaps a couple of sub-suggestions

OUR POINT.....

#### STATEMENT OF PURPOSE

Beyond the stated objectives of the new PEI statute, any water legislation must incorporate within the text a Statement of Purpose. The purpose section in any piece of legislation sets out the guiding principles in interpreting all of the disparate sections of the Act which follow: from runoff, to well digging, to licences for industrial water use. At the same time it links those specific provisions back to our overall objective and promotes the seminal value that Islanders place on the protection of water quality and quantity. A purpose section weaves the common thread.

So just as this act needs a provision which states the objective of the Act, we believe it also needs legally enforceable *principles* in a purpose provision in order to

reach the objective and contextualize the various processes within the body of the legislation.

## OTHER BENEFITS OF A PURPOSE SECTION

A Statement of Purpose within the Act, and not simply motherhood statements in a Preamble, will guide both the Government in decision-making, and Islanders in their applications or requests for licences, approvals, assessments or other procedural processes. It operates much like a Pilot boat in a harbour. If you follow the pilot boat, you won't run aground. Everyone has to follow the pilot boat, from tankers to cruise ships to oyster boats. So to apply the metaphor, our piloting purpose section is a constant: providing the aids to navigation to get from an idea to a project or licence approval, or from controversy to a resolution. Everyone is aware of, understands, and follows the same fundamental underlying rules; from cruise ship mega project to oyster licences, parity is established in the system. Everyone plays by the same rules that reflect our fundamental values.

## CONTENTS OF A PURPOSE SECTION

We have borrowed from the Quebec Sustainability Act of 2006, and from other sources to give you an example of a purpose section and its list of essential guiding principles:

(shown in slide)

## SECTION 6 OF THE SUSTAINABLE DEVELOPMENT ACT (QUEBEC 2006)

6. In order to better integrate the pursuit of sustainable development into its areas of intervention, the Administration is to take the following set of principles into account when framing its actions:

*(a)* “Health and quality of life”: People, human health and improved quality of life are at the centre of sustainable development concerns. People are entitled to a healthy and productive life in harmony with nature;

*(b)* “Social equity and solidarity”: Development must be undertaken in a spirit of intra- and inter-generational equity and social ethics and solidarity;

*(c)* “Environmental protection”: To achieve sustainable development, environmental protection must constitute an integral part of the development process;

*(d)* “Economic efficiency”: The economy of Québec and its regions must be effective, geared toward innovation and economic prosperity that is conducive to social progress and respectful of the environment;

*(e)* “Participation and commitment”: The participation and commitment of citizens and citizens' groups are needed to define a concerted vision of development and to ensure its environmental, social and economic sustainability;

*(f)* “Access to knowledge”: Measures favourable to education, access to information and research must be encouraged in order to stimulate innovation, raise awareness and ensure effective participation of the public in the implementation of sustainable development;

*(g)* “Subsidiarity”: Powers and responsibilities must be delegated to the appropriate level of authority. Decision-making centres should be adequately distributed and as close as possible to the citizens and communities concerned;

*(h)* “Inter-governmental partnership and cooperation”: Governments must collaborate to ensure that development is sustainable from an environmental, social and economic standpoint. The external impact of actions in a given territory must be taken into consideration;

*(i)* “Prevention”: In the presence of a known risk, preventive, mitigating and corrective actions must be taken, with priority given to actions at the source;

***(j)* “Precaution”: When there are threats of serious or irreversible damage, lack of full scientific certainty must not be used as a reason for postponing the adoption of effective measures to prevent environmental degradation**

*(k)* “Protection of cultural heritage”: The cultural heritage, made up of property, sites, landscapes, traditions and knowledge, reflects the identity of a society. It passes on the values of a society from generation to generation, and the preservation of this heritage fosters the sustainability of development. Cultural heritage components must be identified, protected and enhanced, taking their intrinsic rarity and fragility into account;

*(l)* “Biodiversity preservation”: Biological diversity offers incalculable advantages and must be preserved for the benefit of present and future generations. The protection of species, ecosystems and the natural processes that maintain life is essential if quality of human life is to be maintained;

*(m)* “Respect for ecosystem support capacity”: Human activities must be respectful of the support capacity of ecosystems and ensure the perennality of ecosystems;

*(n)* “Responsible production and consumption”: Production and consumption patterns must be changed in order to make production and consumption more viable and more socially and environmentally responsible, in particular through an ecoefficient approach that avoids waste and optimizes the use of resources;

*(o)* “Polluter pays”: Those who generate pollution or whose actions otherwise degrade the environment must bear their share of the cost of measures to prevent, reduce, control and mitigate environmental damage;

*(p)* “Internalization of costs”: The value of goods and services must reflect all the costs they generate for society during their whole life cycle, from their design to their final consumption and their disposal.

2006, c. 3, s. 6.

In addition to these principles, two others are worthy of mention:

Q) INTRINSIC VALUE –the inherent and intrinsic value of the environment.

## **R) INTERGENERATIONAL EQUITY**

We cannot, of course review each of these in the time allotted today but would simply highlight two of these principles, by way of example: the

Precautionary Principle and Intergenerational Equity.

## A) THE PRECUTIONARY PRINCIPLE

In 2001 the Supreme Court of Canada adopted the following definition of the

Precautionary Principle:

“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.”<sup>1</sup>

Where evidence-based scientific information is lacking, often government decisions can be based on remedial action and mitigation plans, --after the fact responses that can result in serious health risks and/or irrevocable environmental damage. The precautionary approach recognizes that because there are limits to being able to determine and predict environmental impacts with scientific certainty, we must anticipate and prevent environmental degradation without waiting for proof that the natural environment has, in fact, been impaired. It requires a preventative approach.

So, to apply that principle to PEI: there is a need for more scientific research on our water extraction limits, water quality and long-term effects of contaminants in our drinking water. There are still many uncertainties. By applying the precautionary principle to our *Water Act*, we will be able to assess and identify potential hazards, promote further investigation, and prevent adverse affects on our health and our ecosystem prior to decision-making. Precaution should be applied where available scientific information is incomplete or contradictory. Such an

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<sup>1</sup> 114957 Canada Ltd. (Spray-Tech, Societe d'arrosage) v. Hudson (Town) [2001] 2 S.C.R. 241

approach does not preclude action but requires that we err on the side of caution and demand that full scientific rigour apply to actions involving our water.

How does inclusion of such a principle in the Act make for a better law? If decision-making regarding proposed actions and policies are prepared and reviewed considering the tenet of precaution, our resource management is oriented from the beginning towards prevention rather than mitigation or adaptation. Long-term positive outcomes will benefit all stakeholders, because the “rules of the game” are known right up front, resulting in both effective and efficient implementation of the Act.

This is not a radical notion. The precautionary principle is accepted in international environment and health law. Nor is it a new concept in Canadian environmental law. Canada’s 11 year old *Oceans Act, 2006* articulates the principle and judgments in approximately 80 environmental cases in Canada<sup>2</sup> have cited the precautionary principle as a tenet of statutory interpretation, labelling it an “over-arching consideration” or a “guiding principle.” Accepted by the Supreme Court of Canada over 10 years ago as an applicable principle in this country, judges have recognized that they are bound by precedent and have applied the precautionary principle in a variety of circumstances including most recently (2015) an application for an aquaculture licence.<sup>3</sup>

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<sup>2</sup> *Canlii* search by author October 31, 2015. For recent Supreme Court of Canada discussion of the principle see: *Castonguay Blasting Ltd. v. Ontario (Environment)*, [2013] 3 SCR 323.

<sup>3</sup> (*Morton v Canada (Fisheries and Oceans)*, 2015 FC 575)

**The second principle** that we would like to mention is

#### INTERGENERATIONAL EQUITY

This principle is perhaps more cutting edge but has been part of the recent discourse in Canadian environmental law, and more specifically in litigation before the Supreme Court of Canada in the *Canfor* case of 2004 and an earlier case, *Imperial Oil*<sup>4</sup>. The principle can also be found in international law and some domestic legislation, such as our *National Parks Act*, (2000).<sup>5</sup>

However, the reason why we would highlight this particular principle as worthy of specific inclusion as one of the guiding provisions in the new *Water Act* is that we believe that the principle articulates a value Islanders already strongly support, and far from cutting edge, is one that has governed our relationship with the natural environment for generations.

The principle of intergenerational equity states,

“each generation has an obligation to future generations to pass on the natural and cultural resources of the planet [or in our case, Island] in no worse condition than received and to provide reasonable access to the legacy for the present generation.”<sup>6</sup>

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<sup>4</sup> *British Columbia v. Canadian Forest Products Ltd* [2004] 2 S.C.R. 74 *Imperial Oil v. Quebec (MOE)* [2003] 2 S.C.R. 624

<sup>5</sup> Within the Act, section 4 reads as follows:

The national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

2000, c.32, s4.

<sup>6</sup> David Boyd, *Elements of Effective Environmental Bill of Rights*, 27 JELP 201 at 222.

In many respects, this exemplifies the philosophy of those who use and enjoy the water and other dependent resources in PEI right now: the oyster fisher who wants access to the beds of estuaries but respects the necessity to protect the ecosystem so that his children may also harvest the shellfish; the dairy farmer who works hard to manage his animals' manure and keep his pastures productive so that his children may take over healthy and productive land; the recreational users of our waterways who volunteer to assist in stream enhancement on weekends; and, the owner of tourist cabins who, mindful of the aquifer beneath her property, introduces water conservation technologies. All of these examples reflect the underlying and closely held common belief that it is important to preserve, protect, and hopefully improve our natural resources for our children while at the same time allowing our own generation to access that legacy.

In many respects this principle is like sustainable development.... "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs"<sup>7</sup> but it is in fact more. It is more concrete and orients our thinking and decision-making. Intergenerational equity supports sustainable development but helps better define the meaning of "sustainable" in a way that we believe is consistent with Island values by asking us to:

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<sup>7</sup> World Commission on Environment and Development (1987). *Our Common Future*. Oxford: Oxford University Press. p. 27

- a) examine our efforts to protect our water so as not to unduly restrict the option of future generations in solving their problems and satisfying their own values
- b) ensure we maintain the quality of the water so that it is passed on in no worse condition than the present generation received it: AND
- c) allow our own generation to enjoy equitable rights of access to the water while we conserve access for future generations.<sup>8</sup>

It is our belief that this is not a radical new idea. To the contrary, it is a value that Islanders have long held and respected. It is a principle worthy of specific inclusion in the new legislation to acknowledge and enshrine that value as part of the rubric for management of our water.

#### SUMMARY

Time prevents us from looking at each of the principles in detail. Some are so well known and reflected in legislation and the common law here and throughout Canada that we do not feel they need further explanation-- the polluter pays principle and pollution prevention, for example.

So why include the purpose provision at all if so many of these principles are already “given”? As we have outlined there are a number of reasons:

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<sup>8</sup> For an excellent discussion of the principle see, Jerry V. DeMarco, Law for Future Generations: The Theory of Intergenerational Equity in Canadian Environmental Law. (2004) 15 JELP 1.

1. A statement of purpose and inclusion of such principles within environmental legislation is accepted practice in Canada and provides context for the regime that follows.

2. The articulation of principles will guide decision makers, stakeholders and those with a vested interest in using, preserving and enhancing our water (i.e. in meeting your already articulated objective).

3. The use of such principles promotes efficiency and streamlines the operation of the legislation since the criteria for decision making is known to all and minimizes conflict.

4. Many of these principles are within the common law and articulating them within the Act shares that already legally enforceable norm—again no surprises.

5. The inclusion of “newer” principles would reinforce the commitment of this government to progressive environmental protection and resource management on Prince Edward Island.

6. Many of the principles reflect long held values presently held by Islanders who would wish to see them as fundamental underlying tenets of any management regime.

In conclusion, we are requesting the Government to include a specific Purpose provision outlining these essential guiding principles within the PEI Water Act.

Thank you,

Catherine O'Brien – Chair, The Coalition for the Protection of PEI Water

Marie-Ann Bowden – Member, The Coalition for the Protection of PEI Water

Our members include:

Environmental Coalition of PEI  
The Cooper Institute  
Cornwall and Area Watershed Group  
Citizens' Alliance of PEI  
Blue Dot PEI  
Don't Frack PEI  
Pesticide Free PEI  
The Council of Canadians  
Save Our Seas and Shores PEI  
National Farmers Union, Region 1, District1  
Green Party of PEI  
New Democratic Party of PEI  
Winter River- Tracadie Bay Watershed Association  
PEI Group- Sierra Club Canada  
Ellen's Creek Watershed Group  
CUPE PEI  
Hunter-Clyde Watershed Group  
Latin American Mission Program (LAMP)  
PEI Food Security Network

c/o Voluntary Resource Centre  
81 Prince Street, Charlottetown, PE C1A 4R3  
[www.peiwater.com](http://www.peiwater.com)  
(902) 569-4449

References:

SECTION 6 OF THE SUSTAINABLE DEVELOPMENT ACT (SQ 2006, c.3., latest version  
CQLR c D-8.1.1)

6. In order to better integrate the pursuit of sustainable development into its areas of intervention, the Administration is to take the following set of principles into account when framing its actions:

(a) "Health and quality of life": People, human health and improved quality of life are at the centre of sustainable development concerns. People are entitled to a healthy and productive life in harmony with nature;

(b) "Social equity and solidarity": Development must be undertaken in a spirit of intra- and inter-generational equity and social ethics and solidarity;

(c) "Environmental protection": To achieve sustainable development, environmental protection must constitute an integral part of the development process;

(d) "Economic efficiency": The economy of Québec and its regions must be effective, geared toward innovation and economic prosperity that is conducive to social progress and respectful of the environment;

(e) "Participation and commitment": The participation and commitment of citizens and citizens' groups are needed to define a concerted vision of development and to ensure its environmental, social and economic sustainability;

(f) "Access to knowledge": Measures favourable to education, access to information and research must be encouraged in order to stimulate innovation, raise awareness and ensure effective participation of the public in the implementation of sustainable development;

(g) "Subsidiarity": Powers and responsibilities must be delegated to the appropriate level of authority. Decision-making centres should be adequately distributed and as close as possible to the citizens and communities concerned;

(h) "Inter-governmental partnership and cooperation": Governments must collaborate to ensure that development is sustainable from an environmental, social and economic standpoint. The external impact of actions in a given territory must be taken into consideration;

(i) "Prevention": In the presence of a known risk, preventive, mitigating and corrective actions must be taken, with priority given to actions at the source;

(j) "Precaution": When there are threats of serious or irreversible damage, lack of full scientific certainty must not be used as a reason for postponing the adoption of effective measures to prevent environmental degradation; SEE ALSO *Ontario Endangered Species Act (2007) Preamble*; *Nova Scotia Endangered Species Act 1998 (Purpose section)*;\*\*\**Water Resources Act Nova Scotia 2000 Preamble*:

(k) "Protection of cultural heritage": The cultural heritage, made up of property, sites, landscapes, traditions and knowledge, reflects the identity of a society. It passes on the values of a society from generation to generation, and the preservation of this heritage fosters the sustainability of development. Cultural heritage components must be identified, protected and enhanced, taking their intrinsic rarity and fragility into account;

(l) "Biodiversity preservation": Biological diversity offers incalculable advantages and must be preserved for the benefit of present and future generations. The protection of species, ecosystems and the natural processes that maintain life is essential if quality of human life is to be maintained; *Nova Scotia Endangered Species Act 1998 (Purpose section)*

(m) "Respect for ecosystem support capacity": Human activities must be respectful of the support capacity of ecosystems and ensure the perenniality of ecosystems;

(n) "Responsible production and consumption": Production and consumption patterns must be changed in order to make production and consumption more viable and more socially and

environmentally responsible, in particular through an ecoefficient approach that avoids waste and optimizes the use of resources;

(o) "Polluter pays": Those who generate pollution or whose actions otherwise degrade the environment must bear their share of the cost of measures to prevent, reduce, control and mitigate environmental damage;

(p) "Internalization of costs": The value of goods and services must reflect all the costs they generate for society during their whole life cycle, from their design to their final consumption and their disposal.

2006, c. 3, s. 6.

In addition to these principles, two others are worthy of mention found in other Canadian legislation (examples noted):

Q) INTRINSIC VALUE –the inherent and intrinsic value of the environment. *Ontario Endangered Species Act (2007) in the Preamble,*

R) INTERGENERATIONAL EQUITY- *National Parks Act (2000); Ontario Endangered Species Act (2007) in the Preamble*

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## NS ENVIRONMENT ACT, 1994-95

### Purpose of Act

2 The purpose of this Act is to support and promote the protection, enhancement and prudent use of the environment while recognizing the following goals:

(a) maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society;

(b) maintaining the principles of sustainable development, including

(i) the principle of ecological value, ensuring the maintenance and restoration of essential ecological processes and the preservation and prevention of loss of biological diversity,

(ii) the precautionary principle will be used in decision-making so that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation,

(iii) the principle of pollution prevention and waste reduction as the foundation for long-term environmental protection, including

(A) the conservation and efficient use of resources,

(B) the promotion of the development and use of sustainable, scientific and technological innovations and management systems, and

(C) the importance of reducing, reusing, recycling and recovering the products of our society,

(iv) the principle of shared responsibility of all Nova Scotians to sustain the environment and the economy, both locally and globally, through individual and government actions,

(v) the stewardship principle, which recognizes the responsibility of a producer for a product from the point of manufacturing to the point of final disposal,

- (vi) the linkage between economic and environmental issues, recognizing that long-term economic prosperity depends upon sound environmental management and that effective environmental protection depends on a strong economy, and
- (vii) the comprehensive integration of sustainable development principles in public policy making in the Province;
- (c) the polluter-pay principle confirming the responsibility of anyone who creates an adverse effect on the environment that is not de minimis to take remedial action and pay for the costs of that action;
- (d) taking remedial action and providing for rehabilitation to restore an adversely affected area to a beneficial use;
- (e) Government having a catalyst role in the areas of environmental education, environmental management, environmental emergencies, environmental research and the development of policies, standards, objectives and guidelines and other measures to protect the environment;
- (f) encouraging the development and use of environmental technologies, innovations and industries;
- (g) the Province being responsible for working co-operatively and building partnerships with other provinces, the Government of Canada, other governments and other persons respecting transboundary matters and the co-ordination of legislative and regulatory initiatives;
- (h) providing access to information and facilitating effective public participation in the formulation of decisions affecting the environment, including opportunities to participate in the review of legislation, regulations and policies and the provision of access to information affecting the environment;
- (i) providing a responsive, effective, fair, timely and efficient administrative and regulatory system;
- (j) promoting this Act primarily through non-regulatory means such as co-operation, communication, education, incentives and partnerships.

1994-95, c. 1, s. 2; 2006, c. 30, s. 1; 2011, c. 61, s. 1.

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#### OTHER EXAMPLES OF ENVIRONMENTAL LEGISLATION THAT INCORPORATES SOME OF THESE PRINCIPLES

Environmental Bill of Rights, Ontario 1993  
 Endangered Species Act Ontario 2007  
 Canada Marine Conservation Areas Act 2002  
 Canadian Environmental Assessment Act.  
 Canadian Environmental Protection Act  
 National Parks Act, 2000  
 Water Resources Conservation Act, Manitoba 2006