THE PRECAUTIONARY PRINCIPLE AS A JUSTIFICATION FOR LIMITING CONSTITUTIONAL RIGHTS

ÉRIK LABELLE EASTAUGH*

This article examines the use of the precautionary principle in the context of section 1 of the Canadian Charter of Rights and Freedoms *(*Charter*) during the COVID-19 pandemic. The author argues that the definitions of the precautionary principle used in the COVID-19 cases are unacceptably vague and that the propositions labelled in this way do not, for the most part, have a valid role to play when assessing a rights limitation under section 1. Only the "weakest" form of the principle, which states that scientific uncertainty does not preclude state action, should be allowed to play a role in section 1 analysis — although any contribution it makes at this level will likely be negligible. All other forms of PP — more specifically, "strong" forms asserting that scientific uncertainty about the probability or magnitude of a potential harm constitutes a justification for state action, or that there exists a duty to act in the face of such uncertainty — should be granted no free-standing role in the section 1 analysis. Continued uncritical use of the precautionary principle in this context would be a mistake as it risks weakening the justification for rights limitations under the* Charter.

TABLE OF CONTENTS

I. INTRODUCTION

During the COVID-19 pandemic, measures that imposed limitations on rights under the *Canadian Charter of Rights and Freedoms*[1] were frequently found to be justified, in part, through reliance on the precautionary principle (PP).[2] While this term has a long

* BA(Hons), LLL, LLB (Ottawa), MSt, DPhil (Oxon), Dean and Associate Professor, Faculty of Law, Université de Moncton. I wish to thank Samuel Gagnon and Gabrielle Leblanc for their invaluable research assistance, as well Gabriel Arsenault and Bruno Gélinas-Faucher for their comments on earlier drafts of this text.

1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 See e.g. *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 at paras 411, 467ff [*Taylor*], aff'd on grounds of mootness 2023 NLCA 22, leave to appeal to the Supreme Court of Canada granted, 40952 (25 April 2024) [*CCLA* SCC]; *Ontario v Trinity Bible Chapel et al*, 2022 ONSC 1344 at paras 142–47

pedigree, especially in the context of environmental law,[3] widespread use of such a principle for the purpose of justifying constitutional rights limitations is a mostly novel development in Canadian law. The meaning and effect of this practice is not immediately apparent, not least because there is in fact no single principle to which this label applies. Instead, a variety of different rules or frameworks with radically different implications for public decision-making have been described using the same term.[4] Unfortunately, this fact — and, more importantly, its implications for *Charter* review — went unremarked upon in the COVID-19 cases, as well as in the legal scholarship applauding or encouraging use of PP in this setting.[5] As a result, a number of important questions remain largely unexamined, foremost among them being whether PP is compatible with the proportionality analysis required by section 1 of the *Charter*, and if so, what role it ought to play in this context.[6]

This article offers a preliminary answer to both questions. I argue that, on the whole, the COVID-19 cases adopted definitions of PP that are unacceptably vague, and that the propositions labelled in this way do not, for the most part, have a valid role to play when assessing a rights limitation under section 1 of the *Charter*. As things currently stand, only the "weakest" form of PP, which holds that scientific uncertainty does not *preclude* legitimate state action aimed at preventing a serious potential harm, should be allowed to play a role in section 1 analysis — although any contribution it makes at this level will likely be negligible, given that the case law already adheres to the functional equivalent of this rule. All other forms of PP — more specifically, those asserting that scientific uncertainty about the probability or magnitude of a potential harm constitutes a *justification* for state action, or that there exists a *duty to act* in the face of such uncertainty — should be granted no particular recognition by the courts. That is, the various formulations of PP found in the COVID-19 cases should not be viewed as providing a free-standing

[*Trinity Bible* ONSC], aff'd 2023 ONCA 134 at paras 105–15 [*Trinity Bible* ONCA]; *St Thomas (Municipality) v Neudorf*, [2023] OJ No 3407 at para 25 [*Neudorf*]; *Canadian Constitution Foundation v Attorney General of Canada*, 2021 ONSC 2117 at paras 66–67 [*Canadian Constitution Foundation*]. See also *Toronto District School Board v CUPE Local 4400* (2022), 337 LAC (4th) 408 (ON) (Arbitrator: William Kaplan Member) (holding that there was no violation of section 7 of the *Charter* based on analysis informed by PP); *Beaudoin v British Columbia (Attorney General)*, 2022 BCCA 427 [*Beaudoin*] (dealing with a decision based on an ethical framework which included a PP, though the it was not explicitly mentioned in the *Charter* section 1 analysis).

3 See e.g. *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, ss 2(1)(a)(ii), 3(1), 76.1(1) [*CEPA*]; *Federal Sustainable Development Act*, SC 2008, c 33, s 5(a.1)(iii) [*FSDA*]; *Canada National Marine Conservation Areas Act*, SC 2002, c 18, s 9(3) [*CNMCAA*]; *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, s 4(2) [*CEAA*]; *Impact Assessment Act*, SC 2019, c 28, s 1, s 6(2) [*IAA*]; *Pest Control Products Act*, SC 2002, c 28, s 20(2) [*PCPA*]; *Endangered Species Act, 2007*, SO 2007, c 6, ss 11(3), 48(a) [*ESA*]; *Ontario Water Resources Act*, RSO 1990, c O.40, s 34.4(2) [*OWRA*]; *Species at Risk Act*, RSNB 2012, c 6, s 3 [*SARA*]; Jocelyn Stacey, "Preventive Justice, the Precautionary Principle and the Rule of Law" in Tamara Tulich et al, eds, *Regulating Preventive Justice: Principle, Policy and Paradox* (Abingdon: Routledge, 2017) 23 at 28–29; Hélène Trudeau, "Du droit international au droit interne: l'émergence du principe de précaution en droit de l'environnement" (2003) 28:2 Queen's LJ 455; Juli Abouchar, "The Precautionary Principle in Canada: The First Decade" (2002) 32:12 Envtl L Reporter News & Analysis 11407.

4 Joakim Zander, *The Application of the Precautionary Principle in Practice: Comparative Dimensions* (Cambridge: Cambridge University Press, 2010) at 26; Cass R Sunstein, "Beyond the Precautionary Principle" (2003) 151:3 U Pa L Rev 1003 at 1011–18 [Sunstein, "Beyond the Precautionary Principle"].

5 Misha Boutilier, "Limiting Freedom of Religion in a Pandemic: The Constitutionality of Restrictions on Religious Gatherings in a Response to COVID-19" (2022) 59:4 Alta L Rev 949 at 986–87; Colleen M Flood, Bryan Thomas & Kumanan Wilson, "Civil Liberties vs. Public Health" in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 249 at 264.

6 Flood, Thomas & Wilson set out to address this issue, but mention neither the multiplicity of forms that the "precautionary principle" has taken, nor the substantial controversy surrounding its use: *ibid* at 253–56.

justification for, or a reason in support of, the adoption of preventative measures. Courts should rely on such a principle only if its content has been further specified, and its merits and relevance sufficiently justified with appropriate reasons and evidence, neither of which was done in those cases.

The article is structured as follows. Part I outlines the origins of PP and explores some of the differences between its many versions. In doing so, it previews some of the objections to judicial recognition of PP as a free-standing principle of political morality. Part II examines the specific definitions of PP used in the COVID-19 cases and other relevant Canadian decisions in order to better discern how this principle has been used by the courts thus far. Finally, Part III examines whether PP has a legitimate role to play in determining whether a precautionary measure that limits a *Charter* right is justified under section 1 of the latter.

Before delving into the heart of the matter, it bears noting that the purpose of this article is not to condemn any of the actors involved in the decisions under review, be it governments, public health officials, or courts. The decisions made during or in the wake of the COVID-19 pandemic, whether judicial or administrative, were made under difficult and — for the present generation at least — unprecedented circumstances, and my sense is that Canada was, on the whole, very well-served in this respect. My aim here is merely to suggest that there are some lessons to be drawn from this experience regarding the way in which the conceptual tools used by governments engaged in risk management interact with those relied upon by the courts in assessing the validity of such measures under the *Charter*. More specifically, I want to suggest that the courts should in future adopt a more rigorous and probing approach when presented with terms like PP so as to ensure that the integrity of *Charter* section 1 analysis is not compromised should such challenging circumstances (or worse) arise again in future.

II. WHAT IS THE PRECAUTIONARY PRINCIPLE?

The concept of PP was first developed in the context of Swedish and German environmental law before spreading to international environmental law[7] and then public health policy.[8] As the name suggests, its general purpose is to guide public decision-making with respect to potential but uncertain harms. Because of this, it is sometimes assumed that PP merely stands for the proposition that governments should take precautions to avoid serious harm to the public — or to a public good, such as a fragile ecosystem — when doing so seems reasonable.[9] However, the taking of precautionary measures is a generic response that might be justified using a variety of different risk management strategies and ethical frameworks; it is not a distinctive public policy approach worthy of its own name.[10]

7 Cass R Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005) at 16 [Sunstein, *Laws of Fear*]; Mathilde Boutonnet & Anne Guégan, "Annexe 1: Historique du principe de précaution" in Philippe Kourilsky & Geneviève Viney, *Le principe de précaution: rapport au premier ministre* (Paris: Odile Jacob, 2000) 253 at 253–57. See also Zander, *supra* note 4 (which traces the origins of PP in a number of jurisdictions).

8 Flood, Thomas & Wilson, *supra* note 5 at 252.

9 For example, the Privy Council Office explicitly conflates the terms "precaution," "precautionary principle," and "precautionary approach": Canada, *A Framework for the Application of Precaution in Science-Based Decision Making About Risk*, Catalogue No CP22-70/2023 (Ottawa: Privy Council Office, 2003) at 2, online: [perma.cc/LGT5-9UYA] [*Precaution in Science-Based Decision Making*].

10 For instance, Zander notes that "governmental intervention before the emergence of scientific certainty is far from a modern concept. What is unique about the precautionary principle is that it appears to treat precautionary action in a more conceptual fashion, and, in some cases, it aims to elevate precautionary

The PP I am concerned with here is instead a proposition that purports to offer more specific guidance on a particular issue, namely, how scientific *uncertainty* regarding the probability or the severity of a specific harmful outcome ought to affect public decision-making. I say "purports" because it is often difficult in practice to distinguish between PP as a distinct legal principle and the generic idea that *precautions are sometimes warranted*, but I will return to this point later in Part III.

The question of what is meant by "uncertainty" in the context of PP is quite complex, not least because the concept has been described in a variety of different ways.[11] A full exploration of this topic is beyond the scope of this article, but one point that needs to be addressed here is the relationship between *uncertainty* and *probability*. A lay person may think that the results of a coin toss or a dice roll are "uncertain" given that the probability of each possible result is substantially less than 100 percent, which would make the event "certain" to occur. However, PP is normally understood as being designed to address a different type of situation. Put succinctly, "uncertainty," in a PP context, refers to a situation in which the state of the available evidence precludes the possibility of arriving at a confident judgment as to the *distribution of probabilities*.[12] In other words, when discussing PP, saying that an event is *uncertain* is different from saying that it is *unlikely*.[13] Under this definition, a coin toss or a dice roll does not give rise to uncertainty, because the probability of each possible result is well-known.

This distinction has significant implications for decision-making. A risk for which the likelihood is known can, in most cases, be managed using standard tools of risk management. For instance, the probability of a given negative event occurring can, in combination with its estimated cost, be used to establish the present-day value of preventing it, thus enabling one to determine whether such a measure would be justified. Using this approach, even highly unlikely events will be worth preventing if the potential downside costs are significant enough. However, the problem posed by *uncertainty*, as understood in the PP literature, is different. When uncertainty of this type obtains, the problem is not the low probability of the event, but rather the *impossibility of estimating*

action to the status of legal principle": Zander, *supra* note 4 at 2. Zander further notes that in the World Trade Organization context, the United States uses the term "precautionary approach" rather than "precautionary principle" in order indicate that it *aff*ords it less legal weight (*ibid* at 3). The notion that precautions are sometimes reasonable amounts at most to a "vague [generalization] about what our society considers to be ethical or moral" that is not worthy of recognition as a legal principle: *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 591 [*Rodriguez*].

11 Zander, *supra* note 4 at 14–17. For a general discussion of the relationship between "risk" and "uncertainty," see Hauke Riesch, "Levels of Uncertainty" in Sabine Roeser et al, eds, *Handbook of Risk Theory: Epistemology, Decision Theory, Ethics, and Social Implications of Risk* (Dordrecht, Netherlands: Springer, 2012) 87.

12 For instance, Richard Stewart argues that PP aims to guide decision-making when "uncertainties are sufficiently great that probability estimations based upon long run frequencies in data and models validated by such data are of only limited utility": Richard B Stewart, "Environmental Regulatory Decision Making under Uncertainty" (2002) 20 Research in L & Econ 71 at 91. Daniel Steel's definition is broadly similar: uncertainty (in a PP context) is "the absence of a model whose predictive validity for the task in question is empirically well confirmed": Daniel Steel, *Philosophy and the Precautionary Principle: Science, Evidence, and Environmental Policy* (Cambridge: Cambridge University Press, 2015) at 12. See also Geneviève Cartier, "Le principe de précaution et la déférence judicaire en droit administratif" (2002) 43:1 C de D 79 at 85.

13 This was the definition adopted by the Court of Appeal for Ontario in one pre-COVID-19 case, where it held that PP-style uncertainty is an instance where "it is possible to identify outcomes but not to assign probabilities": *R v Michaud*, 2015 ONCA 585 at para 95 [*Michaud*], citing Cass R Sunstein, "The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)" (2014) 114:1 Colum L Rev 167 at 168–69.

that probability in a reliable way. In the absence of such an estimate, one cannot establish the present-day value of preventative measures and thereby determine whether they are warranted. Decision-makers must therefore use a different approach when determining whether preventative action is justified.

One approach — or rather, one family of approaches — is to apply PP. References to this principle in the case law almost always use the definite article — *the* precautionary principle — indicating that it is believed to be a single, commonly accepted principle. However, while this is certainly a widespread practice, it is misleading. The concept of a PP has been defined in a variety of different ways,[14] and, though each version relates to the taking of *precautionary* measures to manage risk in the face of uncertainty, they vary significantly in their implications and should not be conflated with one another.[15]

As a general matter, the various forms of PP fall along a spectrum running from "weak" to "strong" versions.[16] The typology developed by Richard Stewart can be used to illustrate this.[17] The first version (PP1) holds that scientific uncertainty is not, by itself, a bar to regulating an activity that presents a risk of significant harm.[18] The second (PP2) holds that, should the state decide to regulate an activity, the activity should be limited to levels at which no adverse effect has been observed or predicted (in other words, below a "margin of safety").[19] The third version (PP3) holds that the state should impose a "best technology available" requirement on all activities presenting an uncertain potential for significant harm, unless the proponent can demonstrate that there is no meaningful risk of harm.[20] Finally, the fourth version (PP4) holds that the state should prohibit activities with an uncertain potential for significant harm, unless the proponent can demonstrate that there is no meaningful risk of harm.[21]

As one can see, the practical implications of these principles are very different. The first version, PP1, which seems to be the least controversial, is strictly "negative" in character in that it simply eliminates a barrier to action.[22] Its underlying purpose is to override the view that uncertainty with respect to the likelihood or severity of harms precludes the legitimate imposition of restrictions on social or economic activity.[23] In other words, PP1 does not hold that uncertainty, as such, provides a *justification* for state action,

---

14 Per Sandin, "A Paradox out of Context: Harris and Holm on the Precautionary Principle" (2006) 15:2 Cambridge Q Healthcare Ethics 175 at 175–76. By one count, there are possibly more than 20 definitions: Sunstein, *Laws of Fear*, *supra* note 7 at 18.

15 In response to this observation, which is quite common, Steel has proposed an interpretation of PP that, he argues, unifies many of its different variations and enables one to account for the differences between them. However, he acknowledges that his theory, which is framed not in legal terms but from the perspective of the philosophy of science, is a novel contribution to the debate: Steel, *supra* note 12 at 45. Moreover, Canadian courts have generally not engaged in such an effort before invoking what is presented as a singular precautionary principle (Part III, below).

16 Sunstein, "Beyond the Precautionary Principle," *supra* note 4 at 1011–12; Julian Morris, ed, *Rethinking Risk and the Precautionary Principle* (Oxford, UK: Butterworth-Heinemann, 2000) at 1; Zander, *supra* note 4 at 29.

17 Stewart's typology picks out general trends. Specific formulations of these versions can vary substantially when it comes to the criteria for determining whether the harm threshold has been met, such as the probability of harm required, the nature or character of the harm at issue, and its magnitude: Stewart, *supra* note 12 at 79.

18 *Ibid* at 76.

19 *Ibid*.

20 *Ibid*.

21 *Ibid*.

22 *Ibid*.

23 *Ibid* at 77.

merely that uncertainty does not *preclude* it. The second version, PP2, is slightly stronger, in that it sets out a duty to adopt a specific policy response (imposing a margin of safety), but this obligation applies only *after* the decision to regulate has been made, and PP2 itself does not speak to when or whether regulations should be adopted in the first place.[24] Thus, like PP1, PP2 primarily serves to authorize, rather than to require or justify, the taking of preventative measures when faced with uncertainty.[25] By contrast, the third and fourth versions, PP3 and PP4, hold uncertainty, as such, to justify the taking of specific actions. Under PP3, uncertainty justifies a requirement to adopt the best available technology, while under PP4, uncertainty warrants outright prohibition of an activity unless the activity's proponent has shown it to be safe.[26] Thus, a defining feature of a "strong" PP is that uncertainty, as such, gives rise to a duty to act.[27] According to Stewart:

> The normative core of the strong versions of PP, which distinguishes PP-based regulation from preventive regulation generally, *is the principle that uncertainty regarding risks is an affirmative justification for adopting regulatory controls or adopting more stringent controls than would be appropriate in the case of activities posing more determinate risks*. In the face of uncertainties regarding risk, PP holds that decision makers should err on the side of precaution and environmental protection and, in effect, make "worst case" presumptions about the probability and magnitude of harm that an activity poses.[28]

This basic distinction between a *strong* and *weak* PP, which is widely acknowledged, is sufficient to establish the need to be careful when referring to PP. While the weakest versions, like PP1, seem eminently sensible — even self-evident — the stronger versions are more contestable and require further justification before providing a reasonable basis for public decision-making. For instance, the versions of a strong PP canvassed by Stewart have two distinguishing features which demand some form of justification before they can be accepted.[29] First, they hold that one *must* adopt the worst-case scenario when determining how or whether to regulate under such conditions, once a minimal threshold of plausibility is met.[30] Second, they provide a mandatory decision rule that *must* be applied whenever this threshold is met.[31] In essence, the position of these versions of PP is that, when faced with an uncertain risk of serious (or, on some formulations, catastrophic) harm, the state should assume that the harm will occur unless preventative steps are taken, and also take any such steps as are needed to prevent the harm from occurring. Yet uncertainty by itself does not warrant assuming that the probability of the harmful event is 100 percent, or that the harm will be substantial enough to justify the costs of preventative measures.[32] A strong PP thus "introduces deliberate and serious error into the assessment of risk in order to generate more conservative risk management decisions."[33] Whatever the merits of

---

24 *Ibid*.

25 As Stewart notes, the first two versions are "weaker" than the latter two because they do not mandate state action and do not make uncertainty, as such, a justification for taking action. By contrast, the latter two "require regulators to regulate, or regulate more stringently, activities that pose risks that are more uncertain relative to risks that are less uncertain": *ibid* at 78.

26 *Ibid*. For a discussion of the implications of this version of PP in a "preventive justice" context, see Carol S Steiker, "Proportionality as a Limit on Preventive Justice" in Andrew Ashworth, Lucia Zedner & Patrick Tomlin, eds, *Prevention and the Limits of the Criminal Law*, 1st ed (Oxford: Oxford University Press, 2013) 194 at 208.

27 See e.g. Sunstein, "Beyond the Precautionary Principle," *supra* note 4 at 1011–18, who relies heavily on this distinction.

28 Stewart, *supra* note 12 at 79–80 [emphasis added].

29 *Ibid* at 80.

30 *Ibid*.

31 *Ibid*.

32 *Ibid* at 96.

33 *Ibid* at 94.

such an approach, which has its defenders, it must be acknowledged that it hardly represents the only rational way to respond to the challenge of determining how to reason when faced with scientific uncertainty as to the probability distribution of future events.[34] This problem can be addressed using a range of different strategies, such as Bournelli's principle, which holds that, in the face of uncertainty regarding the probability of a range of outcomes, one should apply a flat probability distribution, or a Bayesian approach, which provides that the regulator should estimate the relative probabilities using its "best judgment."[35] Any decision to select a strong PP over these rival approaches requires at least some justification, the cogency of which will be highly context-dependent.

Moreover, when assessing the inherent persuasiveness or moral authority of a strong PP, one must consider the fact that it is subject to powerful objections that cast serious doubt on its viability as a principle of political morality.[36] To give one well-known example, Cass Sunstein has argued that a strong PP is effectively self-refuting and thus provides no real practical guidance.[37] In his view, any preventative action one might take to avert a possible harm likely gives rise to the possibility of other serious harms.[38] A coherent application of PP would thus require that one also take a precautionary approach to the risks posed by these measures, in other words, that one take steps to prevent such harms.[39] Yet as the Federal Court of Appeal once noted, this makes PP "paralysing."[40] One will often be left with contradictory moral imperatives, the conflict between which can only be settled by having recourse to *other* principles and values capable of establishing a hierarchy of preferences. Even graver doubts are cast on the moral validity of PP by considering the consequences of applying it more generally — for instance, as a means of justifying the preventative detention of individuals suspected of planning or of being susceptible to undertaking serious crimes.[41]

The literature on PP is quite vast, and a full assessment of a strong PP's merits and flaws cannot be undertaken here. For present purposes, it suffices to say that PP's weaknesses have been well-canvassed,[42] and many of them are, to a certain extent, fairly obvious, as are the conceptual and practical problems that result from failing to acknowledge that the principle being relied upon has taken on a multiplicity of forms, as was done in the COVID-19 cases. Indeed, there is no consensus as to the basic function of

---

34 *Ibid*.

35 *Ibid* at 91. For a more detailed exploration of Bayesian approaches to risk management, see Claus Beisbart, "A Rational Approach to Risk? Bayesian Decision Theory" in Sabine Roeser et al, eds, *Handbook of Risk Theory: Epistemology, Decision Theory, Ethics, and Social Implications of Risk* (Dordrecht, Netherlands: Springer, 2012) 375.

36 For an excellent overview of these issues that is generally sympathetic to PP, see Steel, *supra* note 12 at 3–5 (Steel outlines some of the possible responses to the objection raised by Sunstein, and their weaknesses).

37 Sunstein, "Beyond the Precautionary Principle," *supra* note 4 at 1003ff.

38 *Ibid* at 1023; Sunstein, *Laws of Fear*, *supra* note 7 at 14ff.

39 See also Flood, Thomas & Wilson, *supra* note 5 at 254.

40 *Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage)*, 2003 FCA 197 at para 24 [*Canadian Parks*]. See also Todd L Archibald, Kenneth Edgar Jull & Kent Roach, *Regulatory and Corporate Liability: from Due Diligence to Risk Management* (Aurora, Ont: Canada Law Book, 2004) s 1:60 at 1–16.2 (though it should be noted that these authors appear to endorse some version of PP).

41 Steiker, *supra* note 26 at 208.

42 For critical takes on the precautionary principle, see e.g. Sunstein, "Beyond the Precautionary Principle," *supra* note 4; Sunstein, *Laws of Fear*, *supra* note 7; Morris, *supra* note 16; Stewart, *supra* note 12; Zander, *supra* note 4; Frank Furedi, "Precautionary Culture and the Rise of Possibilistic Risk Assessment" (2009) 2:2 Erasmus L Rev 197; Marjolein BA Van Asselt & Ellen Vos, "The Precautionary Principle and the Uncertainty Paradox" (2006) 9:4 J Risk Research 313.

PP, which has been described variously as a procedural requirement, a decision rule, an epistemic rule (relating to the drawing of inferences when there is a risk of error),[43] or indeed simply the end point of the decision-making process.[44] Mere invocation of "PP" therefore cannot, by itself, make a meaningful contribution to discharging the state's burden of justification, especially when it comes to imposing limitations on constitutionally protected rights. Further specification is required before such a principle can validly be granted a role in such an exercise. Accordingly, the default starting position of any analysis ought to be that courts cannot reflexively grant propositions labelled in this way moral authority or persuasive value.[45] They should instead require that governments offer a specific and detailed definition of the principle and provide some demonstration of its relative merits as a basis for public decision-making.

III. THE PRECAUTIONARY PRINCIPLE ACCORDING TO COVID-19 CASES

Unfortunately, none of the numerous COVID-19 cases that invoke or rely on PP ever directly confront the issues raised in the previous section. Indeed, these decisions exhibit no explicit awareness of the fact that the term "precautionary principle" can have different meanings, nor that many versions of it are highly contestable, especially in a *Charter* section 1 context, and thus never justify the choices they are implicitly making in this respect. Furthermore, there is a clear pattern of courts adopting definitions of PP that blur the essential distinction between "weak" forms of PP, which merely open the door to state action, and "strong" forms which directly justify such action. In many cases, it appears as though PP1, the least objectionable form of PP, has been fused — perhaps unwittingly — with a "stronger" form which imposes some duty to act that is triggered by the presence of uncertainty. The practical effect of this is to allow a stronger version of PP to piggyback on PP1's intuitive appeal and thus gain acceptance without the need for any critical assessment of its merits.

To illustrate the problem, consider the differences between the following two definitions of PP (both of which, in fact, predate the COVID-19 pandemic). In *Michaud*, a 2015 case dealing with the constitutionality of a regulation requiring the use of speed limiters on certain types of heavy vehicles, the Ontario Court of Appeal held that the "'precautionary principle' … 'tackles the problem of an absence of scientific certainty in certain areas of risk, and directs that this absence of certainty should *not bar* the taking of precautionary measures in the face of possible irreversible harm.'"[46] The PP was thus

---

43 Steel, *supra* note 12 at 10–11. Relatedly, Sandin distinguishes between "argumentative" versions (that affect the range of acceptable reasons for decision), "prescriptive" ones (that prescribe a specific course of action), and "epistemic" ones (Sandin, *supra* note 14 at 177–78).

44 EC, *Communication From the Commission on the precautionary principle*, COM 2000–1 [2000] at 7 online: [perma.cc/6C9M-2FD9] [European Commission on Precautionary Principle]. Further discussion on this point will be found at Part IV(B)(3), below.

45 An exception to this would be in instances where a PP has been made directly applicable by statute or regulation. When faced with such a provision, the courts will have no choice but to take notice of the relevant principle and, if the provision at issue is valid, apply it. However, this does not truly settle the matter, since many of the statutory references to PP in Canada are vague or ambiguous in much of the same way as the versions used in the COVID-19 cases (as outlined below). See also Abouchar, *supra* note 3 at 11420. Any particular interpretation of the principle, especially one that views it as imposing a duty to act in some way, would therefore have to be justified based on sources and considerations extrinsic to the text of the provision.

46 *Michaud*, *supra* note 13 at para 102 [emphasis added] citing Archibald, Jull & Roach, *supra* note 40, s 1:40.

viewed as opening the door to regulation in conditions of uncertainty, without constituting a justification for such measures in its own right.[47] By contrast, in *Canadian Blood Services/Société Canadienne du Sang v. Freeman*,[48] a 2010 case dealing with a discrimination claim against Canadian Blood Services for having excluded gay men from the pool of eligible blood donors, the Ontario Superior Court of Justice, relying on the Krever Commission report, defined PP as holding

> that in the face of some evidence of a potential health hazard, we *need to implement policies to avoid that health hazard*, even though we may not have complete knowledge of the hazard…. *The precautionary principle is the justification for acting in the face of uncertainty*. It is a tool for avoiding possible future harm associated with suspected, but not conclusive, risks.[49]

Thus, unlike the *Michaud* definition, this version of PP combines the idea that uncertainty should not prevent the state from acting with the notion that it has some obligation to act under such circumstances.[50] Many of the COVID-19 cases adopted definitions of PP that exhibit the same apparent fusion of authorization and obligation. For instance, in *Schuyler Farms Limited v. Dr. Nesathurai*,[51] the Ontario Superior Court of Justice held:

> The precautionary approach embodies the principle that reasonable action to reduce risk *should not await* scientific certainty or proof.... As the Honourable Justice Archie Campbell stated in the SARS Commission Report:
>
> > The challenge of this new disease overcame the extent of their current scientific understanding…That is why it is better to follow the precautionary principle that reasonable action to reduce risk *should not* await scientific certainty…If the Commission has one single take-home message it is the precautionary principle that safety comes first, that reasonable efforts to reduce risk *need not* await scientific proof.[52]

In the quoted passage from the *SARS Commission Report*, Justice Campbell uses both the terms "should not await" and "need not await" to describe PP.[53] This creates ambiguity,

---

47 Accordingly, the issue of whether or not the regulation was justified under section 1 of the *Charter* was determined using the standard tools of the *Oakes* framework, and PP played no direct role in establishing the existence of an affirmative justification. In *Di Cienzo v Attorney General of Ontario*, 2020 ONSC 4347, the Court relied on *Michaud* in holding that a rule excluding all individuals with only one eye from meeting the vision requirements for obtaining a driver's licence was not justified under section 1, despite the government's contention that it was justified by "the precautionary principle" (*ibid* at paras 277–90, 298, 322–23). The Court noted that "[t]he precautionary principle allows Ontario to pre-empt harm with its legislation. However, the fact that Ontario is owed deference does not protect its laws absolutely from constitutional scrutiny" (*ibid* at para 323). Thus, the measure had to be independently justified, which was not the case. Similarly, in *Association québécoise des vapoteries c Procureure générale du Québec*, 2019 QCCS 1644 the Court held that invoking PP was not sufficient on its own to establish minimal impairment under the *Oakes* test. The Court noted that "[d]éclarer agir par précaution ne suffit pas surtout qu'on allègue des risques potentiels et inconnus face à une entrave démontrée" ("declaring that one is acting out of precaution is not sufficient, especially when one is alleging the existence of risks that are merely potential and unknown to justify a demonstrated rights breach") (*ibid* at para 331) [translated by author]).

48 2010 ONSC 4885 [*Freeman*].

49 *Ibid* at para 27 [emphasis added].

50 This fusion of authorization and obligation is seen in many definitions of PP: Boutonnet & Guégan, *supra* note 7 at 253–57.

51 2020 ONSC 4711 [*Nesathurai*].

52 *Ibid* at para 108 [emphasis added], citing Justice Archie Campbell, *The SARS Commission Report* (Toronto: Commission to Investigate the Introduction and Spread of SARS in Ontario, 2006). This passage from *Nesathurai* was relied on in *The Fit Effect v Brant County Board of Health*, 2021 ONSC 3651 at paras 60–61.

53 *Nesathurai*, *ibid*, citing Justice Archie Campbell, *ibid*.

given that use of "should not," unlike "need not," can be read as implying the existence of some duty to act. The Court in *Nesathurai* failed to pick up on this and only used the expression "should not await" rather than the weaker "need not await," and the context in which this discussion occurred indicates that the Court viewed PP as constituting an affirmative justification for the measures at issue.[54] Similarly, in *Spencer v. Canada (AG)*,[55] the Federal Court stated the following:

> The precautionary principle is a foundational approach to decision-making under uncertainty, that points to the *importance of acting* on the best available information to protect the health of Canadians. The Order is a public health measure that was adopted based on available scientific evidence from Canada and abroad, and it gives effect to the precautionary principle in a manner that reflects the Government of Canada's overall assessment of the risks posed by the previously circulating virus and variants, and the lack of alternatives to mitigate it given the current state of knowledge of the virus.[56]

Here again, PP is defined in terms that emphasize action (as opposed to removal of a barrier to action) and thus imply the existence of a duty to act. Similarly, virtually all of the COVID-19 cases I reviewed in which a PP was relied upon defined PP in terms that are vague but which appear to imply that uncertainty gives rise to a duty to act — or provides a reason for action — when faced with risk of serious harm.[57] The relevant definitions are reproduced below:

- "[T]he government follows the precautionary principle of *taking measured steps* to put up shields that protect Canadians from incoming bursts of COVID-19 and its variants."[58]

- "[P]ublic health measures in Ontario must consider the precautionary principle. The [Ontario's Health Plan for an Influenza Pandemic] states '[t]he [Ministry of Health and Long-Term Care] *does not await* scientific certainty before taking action to protect health.'"[59]

---

54 The Court held that this principle was relevant to determining whether the official having originally adopted the measures had "reasonable and probable grounds" for doing so, and that the reviewing body whose decision was under review erred in failing to consider it: *Nesathurai*, *ibid* at para 110. In light of the concern I am raising here regarding the lack of a clear definition for the term "precautionary principle," it is interesting to note that *Nesathurai* was based, in part, on the *Health Protection and Promotion Act*, RSO 1990, c H7, s 77.7(2) [*HPP Act*], which provides that "[i]n issuing a directive under subsection (1), the Chief Medical Officer of Health shall consider the precautionary principle." The term "precautionary principle" is defined at s 77.7(6) as having "the meaning prescribed in regulations made by the Lieutenant Governor in Council," thus recognizing the need for a definition, and yet no regulation appears to have actually defined the term (*HPP Act*, *ibid*, s 77.7(2)).

55 2021 FC 361.

56 *Ibid* at para 113 [emphasis added].

57 I say "virtually" because there are some possible exceptions: see e.g. *Banas v HMTQ*, 2022 ONSC 999 at para 20 [*Banas*] (the affidavit evidence offered a definition that appears in line with PP1, drawn from the Ontario's Health Plan for an Influenza Pandemic). See also *Trinity Bible* ONCA, *supra* note 2 at para 105 (the Court of Appeal for Ontario adopted a definition that is somewhat less clear in its implication that PP justifies or requires action, though its definition arguably amounts to an implied duty to act: "Conceived in connection with climate change, [the precautionary] principle is a key factor in matters of public health. It recognizes that, where there are threats of serious, irreversible damage, lack of full scientific certainty *is not a reason to postpone* harm reduction strategies" [emphasis added] (followed in *Neudorf*, *supra* note 2 at para 25)). This statement might be read as suggesting that PP affirmatively *excludes* uncertainty as a reason for not acting, thus giving rise to an implied duty to act. For a more detailed explanation of this point, see my discussion of Jocelyn Stacey's work in Part IV.B.3, below.

58 *Canadian Constitution Foundation*, *supra* note 2 at para 54 [emphasis added].

59 *Banas*, *supra* note 57 at para 20 [emphasis added]. This definition is found in a passage quoted from the affidavit of an expert witness describing the rationale underlying the public health measures adopted by the Ontario government. The court appears to have accepted this rationale wholesale as part of its section 1 analysis (*ibid* at paras 40–42).

- "[I]n public health decision making the 'precautionary principle' *supports the case* for action before confirmatory evidence is available … the public health response is to *err on the side of caution* until further confirmatory evidence becomes available; the precautionary principle."[60]

- "[T]he [Provincial Health Officer] necessarily relies on the generally accepted scientific and epidemiological evidence available to her at the relevant time, as well as the precautionary principle i.e., *reasonable measures* to avoid threats that are serious and plausible, when making public health orders under the [*Public Health Act*]."[61]

- "[The government] did not have the luxury of debate in the context of a raging pandemic. They were *required to act* promptly and effectively, applying the precautionary principle."[62]

- "*Precautionary Principle*: In the face of scientific uncertainty, it is this principle that *warrants* public health interventions when there is the theoretical risk of harm to the population even before all scientific data are obtained."[63]

The ambiguity these statements contain appears to have gone unnoticed in the rulings in which they were made. This is perhaps unsurprising, given that the same feature is present in the way in which PP has been formulated by the Supreme Court of Canada. In *Spraytech, Société d'arrosage v. Hudson*,[64] the Supreme Court, relying primarily on the *Bergen Ministerial Declaration on Sustainable Development*,[65] defined PP as follows:

> 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.[66]

Like the statements quoted above, this definition is quite vague, but the language used emphasizes action and appears to be prohibitory ("should not"), thus implying the existence of a duty to act (or at the very least creating an ambiguity to this effect). Indeed, some courts have interpreted *Spraytech* and the *Bergen Declaration* in this way,[67] though as

---

60 *Taylor*, *supra* note 2 at paras 411, 467 [emphasis added]. However, the picture emerging from *Taylor* is confused by the fact that the Court also makes statements that are more in line with a Bayesian, "best judgment" approach (*ibid* at paras 60, 67, 468). For further analysis of *Taylor*, see Part IV.C, below.

61 *Canadian Society for the Advancement of Science in Public Policy v British Columbia*, 2022 BCSC 1606 at para 163 [emphasis added].

62 *Grandel v Saskatchewan (Chief Medical Officer)*, 2022 SKKB 209 at para 99 [*Grandel*] [emphasis added].

63 *Beaudoin*, *supra* note 2 at para 73, citing BC Centre for Disease Control, *BCCDC Ethics Framework in Decision-Making Guide*, (British Columbia: Provincial Heath Services Authority, May 2015) at 5, online: [perma.cc/V4VZ-U5HM], which was relied upon in making the contested decision.

64 *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 [*Spraytech*].

65 UNGA, 1st Sess, UN Doc A/CONF.151/PC/10 (1990) [*Bergen Declaration*].

66 *Spraytech*, *supra* note 64 at para 31 [emphasis added].

67 Relying on *Spraytech*, the Federal Court has described PP as imposing a duty to "[err] on the side of caution" when faced with uncertainty about the existence of risk, ruling that a provision that prohibited the Minister from issuing a licence if disease or disease agents are present that "may be harmful to the protection and conservation of fish" reflects "the precautionary principle": *Morton v Canada (Fisheries and Oceans)*, 2015 FC 575 at paras 46, 97. Similarly, the Federal Court of Appeal once defined PP as holding that the government should refrain from authorizing (and thus effectively prohibiting) a project "if it *may* have serious adverse environmental consequences, even if it is not possible to prove with any degree of certainty that these consequences will in fact materialize": *Canadian Parks*, *supra* note 40 at

Jocelyn Stacey notes, there is confusion on the matter, with some judges viewing the relevant principle as more — and, in her view, exaggeratedly — constraining, and others defining it so loosely that it has nothing of independent value to contribute to the analysis, amounting merely to the exercise of common sense.[68]

Such confusion seems inevitable, absent a more detailed and authoritative definition of PP. Indeed, Stacey's own account suffers from the very same kind of ambiguity, despite her intention being to dispel it. On the one hand, she writes that the *Rio Declaration on Environment and Development*[69] — made shortly after the *Bergen Declaration* and which defines PP in much the same way[70] — "does not compel decision-makers to take any action. It is simply an admonition to attend to the unavoidable limits of our ability to predict the effects of actions on the environment."[71] Stated this way, the principle appears to hold merely that governments ought not presumptively conclude that the existence of uncertainty makes any action on their part illegitimate, given the limits of scientific knowledge.[72] However, Stacey also claims that "the precautionary principle promises to help overcome a lack of political will to protect the environment" by "*eliminating uncertainty as a legitimate basis* for inaction," further noting that "the command imposed by the Rio Declaration version of precaution is that decision-makers *cannot use uncertainty* as a basis for inaction."[73] Thus, Stacey appears to assert that PP holds that uncertainty categorically *cannot constitute* a legitimate reason to refrain from acting.[74] The distinction between this proposition and the less demanding one, that uncertainty does not *preclude* legitimate action, is elided.[75]

---

para 24 [emphasis in original]. *Canadian Parks* does not mention *Spraytech*, but its definition of PP was fused with the *Spraytech* definition by the Federal Court in *Pembina Institute for Appropriate Development v Canada (AG)*, 2008 FC 302 at para 32 (the Court contrasted PP with the concept of "adaptive management," which "permits projects with uncertain, yet potentially adverse environmental impacts to proceed based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exists"). In a later case, the Supreme Court of Canada, citing *Spraytech*, stated that the "precautionary principle … recognizes that since there are inherent limits in being able to determine and predict environmental impacts with scientific certainty, environmental policies *must anticipate and prevent* environmental degradation" (*Castonguay Blasting Ltd v Ontario (Environment)*, 2013 SCC 52 at para 20 [*Castonguay*] [emphasis added]). Use of the word "prevent" again implies the existence of a duty to act, though the provision at issue in that case dealt with a notification requirement, which merely ensured "that the Ministry of the Environment is notified and has the ability to respond once there has been a discharge of a contaminant out of the normal course of events, without waiting for proof that the natural environment has, in fact, been impaired" (*Castonguay*, *ibid* at para 20).

68 Stacey, *supra* note 3 at 8–9. See also my discussion of *Michaud*, *supra* note 13, above.

69 UNCED, 1992, UN Doc A/CONF.151/26 (Vol I) Annex agenda item 1 [*Rio Declaration*].

70 "[I]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capability. 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": European Commission on Precautionary Principle, *supra* note 44 at 10, citing *Rio Declaration*, *ibid*, Principle 15.

71 Stacey, *supra* note 3 at 7.

72 Stewart, *supra* note 12 at 76.

73 Stacey, *supra* note 3 at 28 [emphasis added].

74 This is sometimes referred to as the "argumentative" version of PP, which holds that the "uncertainty surrounding a [given] risk should not be allowed to be used as an argument in favour of inaction": Zander, *supra* note 4 at 28. See also Sandin, *supra* note 14 at 178, 180–81; Valérie Beloin, "Public Policies Guided by the Precautionary Principle" (Quebec: National Collaborating Centre for Healthy Public Policy, 2009) at 3–4, online: [perma.cc/H3JP-JEHF].

75 A similar ambiguity is found in Flood, Thomas & Wilson, *supra* note 5 at 252.

This ambiguity is significant, not least because the second formulation amounts to an obligation to act when faced with uncertainty. If uncertainty must be eliminated "as a legitimate basis for inaction," then the government is prohibited from basing its decision on the fact that the evidence supporting the hypothesis that ϕ (nil) will occur may be relatively poor. In other words, if there is (sufficiently) plausible but weak evidence that ϕ will occur, the government cannot rely on its weakness to conclude that no action should be taken, and must instead assume that it will occur (what Stewart describes as the duty to assume the "worst case scenario").[76] If that is so, only reasons having nothing to do with the quality of the evidence, such as the cost or feasibility of preventative measures, or (presumably) conflict with other public interests, would be capable of excusing inaction at that point.[77]

As I will show in the following section, the existence of such ambiguities makes uncritical reliance on definitions of PP like those offered in the COVID-19 cases quite troubling in the context of a *Charter* section 1 analysis. Describing PP as a singular, recognized "principle" gives the impression that there is some degree of pre-existing consensus as to both the content and legitimacy of the proposition at issue, and thus that it is reasonable to assume that it can usefully assist in evaluating the moral acceptability of a given public policy measure. Yet this is clearly not the case, as even widely respected formulations, like that found in the *Rio Declaration*, are vague, subject to conflicting interpretations, and (I will argue further below) in need of additional justification to be considered persuasive in a *Charter* section 1 context. Under these circumstances, courts should adopt a skeptical posture and critically assess whether the "principle" at issue has a relevant role to play in conducting a section 1 analysis.

---

76 Stewart, *supra* note 12 at 79–80.

77 There is in fact a deeper problem with such an approach, which is that it does not provide any meaningful guidance. As noted above, this form of PP typically includes a threshold condition requiring evidence meeting a minimum level of plausibility for the risk at issue (since it would obviously be unreasonable to hold governments to be under a duty to act under *any* situation of uncertainty, no matter how weak the evidence of possible harm). Only once this threshold is met is "uncertainty" set aside as a "legitimate basis for inaction." Yet while this may appear to provide practical guidance on how to react when faced with uncertainty, it is little more than a shell game, since PP (at least as stated in the *Rio Declaration* and *Bergen Declaration*) provides *no guidance on how to determine whether the evidence is sufficiently plausible* to warrant triggering the "worst case scenario" presumption. Decision-makers thus have no choice but to make some independent judgment as to whether evidence that the event will occur is sufficiently strong, in light of its potential consequences, to warrant preventive action (on this point, see my discussion of the European Commission's analysis of PP in Part IV.B.3 below), leaving PP with no work to do. What's more, as Stewart points out, this approach requires that one endorse mutually exclusive positions. One is required to assume that regulators possess sufficient risk-assessment capability to distinguish between those risks that meet the triggering criteria for PP and those that do not, but also to assume that they lack the ability to reasonably estimate the probability of various outcomes, and that they must instead assume the worst-case scenario when faced with minimally plausible evidence (*ibid* at 99). These clear contradictions support the claim that, in the absence of a more detailed and sophisticated defence, a strong PP is not suitable as a basis for a *Charter* section 1 justification, as outlined below.

IV. THE PRECAUTIONARY PRINCIPLE AND *CHARTER* PROPORTIONALITY

A. HOW DOES THE PRECAUTIONARY PRINCIPLE INTERACT WITH PROPORTIONALITY?

In order to determine what role PP can or should play in the context of a *Charter* section 1 analysis, we must first describe in greater detail the way in which these concepts interact from a legal standpoint. More specifically, we need to determine whether PP is itself a rights-limiting "measure" to which the requirements set out in the *R. v. Oakes*[78] test must be directly applied, or whether its relationship to proportionality should be characterized in some other way. The answer to this question is not straightforward and will vary from one context to another.

There are certainly cases where PP might need to be analyzed as a free-standing measure, since there are some laws and regulations that explicitly require its application.[79] However, the degree to which such instantiations of PP would be directly subject to proportionality analysis would depend on the context. For the question to arise, one would first have to demonstrate that the formulation of PP at issue violates a *Charter* right. For example, if the formulation prescribes a specific approach in some detail (like Stewart's PP3 or PP4), and if that approach is the ultimate source of the rights breach, one might plausibly argue that the latter can be directly attributed to PP itself. In such a case, the formulation of PP at issue would be directly subject to a section 1 analysis. The government would therefore bear the burden of defending the rationality of PP and explaining its merits compared to other (less rights-limiting) risk management strategies. Simply asserting that it has been recognized as a "principle" in the fields of public health or environmental policy would clearly not suffice.

On the other hand, many formulations of PP (most notably those found in the COVID-19 cases) do not dictate any specific course of action, at least on their face, leaving the state with considerable discretion. If other options exist that would be compatible with PP, any rights violation that results from the decision implementing this principle would likely have to be attributed to the state's choice of measure rather than PP itself. Only in those circumstances where, as a practical matter, the seemingly open-ended formulation of PP leaves the state with only a single option could one reasonably argue that PP is itself the source of the breach.

The measure at issue in the COVID-19 cases was (generally) not PP itself, but some other measure intended to reduce the rate of infections.[80] In those cases, PP was merely a component of the state's justification for the rights breach. It thus seems inappropriate to

---

78 1986 CanLII 46 (SCC) [*Oakes*]. Administrative measures applied to specific individuals would of course be reviewable instead under the framework set out in *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*]. Nevertheless, I have opted to structure the following discussion along the lines of the *Oakes* test. While there are some differences between the two, the demarcated steps of the *Oakes* test are easiest to work with for my purposes. Moreover, since they provide the key conceptual building blocks of both tests, my observations would be relevant in either case (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 80–82).

79 See e.g. *CEPA*, *supra* note 3; *FSDA*, *supra* note 3; *CNMCA3*, *supra* note 3; *CEAA*, *supra* note 3; *IAA*, *supra* note 3; *PCPA*, *supra* note 3; *ESA*, *supra* note 3; *OWRA*, *supra* note 3; *SARA*, *supra* note 3.

80 See e.g. *Nesathurai*, *supra* note 51 at para 109 (noting that the *HPP Act* required use of the "precautionary principle"). However, the *HPP Act* did not define "precautionary principle": *supra* note 54.

subject it directly to the full proportionality analysis, at least at first glance. The question in such cases instead appears to be whether PP can legitimately contribute to the state's justification under the relevant analytical framework. However, as we will see, this distinction becomes difficult to sustain when the concrete effects of PP on the process of justification are examined in greater detail.

B. CAN THE PRECAUTIONARY PRINCIPLE VALIDLY CONTRIBUTE TO SECTION 1 JUSTIFICATION?

1. WEAK PRECAUTIONARY PRINCIPLE

As a preliminary matter, let us recall that, because the purpose of proportionality review under section 1 is to determine if a rights limitation is justified, the focus of the *Oakes* test is on points that actively contribute to constructing a *justification*; that is, with points that provide *a valid reason to do something*.[81] For instance, the requirement that there be a "pressing and substantial objective" is concerned with determining whether the measure has an underlying purpose that is, by its nature, capable (at least in principle) of justifying a rights limitation.[82] The "rational connection" branch is concerned with establishing that this objective is, in fact, *available* as a justification by testing whether the measure can be expected to achieve its purported aim.[83] The minimal impairment or "least drastic means" requirement, though not contributing an affirmative component to the measure's justification, tests whether the impairment to the right can (at least in principle) be morally *forgiven* or *tolerated* on the grounds that it has been made as small as possible (or at least reasonably minimal), and thus bears directly on the issue of justification broadly understood.[84] Finally, proportionality *stricto sensu* determines whether the importance of the objective and its positive benefits are morally sufficient to outweigh the harm that the rights limitation can be expected to cause.[85]

With this in mind, we can see that Stewart's PP1, the least controversial form of PP, contributes little or nothing in the way of justification. PP1 merely removes a possible objection, namely, that lack of certainty about the probability or severity of a potential harm *precludes* legitimate state action. While avoiding the specific harm at issue may well be a valid objective, PP1 itself — which assumes rather than demonstrates the existence of the risk at issue — sheds no direct light on that question, or on the other main components of proportionality, such as the effectiveness of the measure at issue, the extent to which it minimizes the rights infringement, and the overall balance of positive and negative effects.

---

[81] *Oakes*, *supra* note 78 at para 64.

[82] *Ibid* at para 69.

[83] *Ibid* at para 77.

[84] As Martin Luterán has argued, the modern test of proportionality can be traced back to the "doctrine of double effect" developed by Thomas Aquinas, amongst others. According to this doctrine, a prima facie wrongful action, such as the killing of another person, is justified only if, *inter alia*, their death is not the intended purpose of the action, but merely a necessary side effect of (legitimate) self-defence. In other words, necessity renders an otherwise wrongful action acceptable: Martin Luterán, "The Lost Meaning of Proportionality" in Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press, 2014) 21 at 29–30. The minimal impairment requirement, which is referred to as the necessity requirement in some formulations of the proportionality test and which prevents the state from engaging in more of the harmful activity than is otherwise required to achieve the purpose which excuses the injury, is descended from this moral argument: see also Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (New York: Cambridge University Press, 2012) at 317ff.

[85] *Dagenais v Canadian Broadcasting Corp*, 1994 CanLII 39 at 887 (SCC).

In short, PP1 is of no immediate relevance to the core factors in the *Oakes* analysis, though it may have some relevance to the evidentiary threshold to be applied.

On this latter point, PP1 does in fact seem compatible with existing case law, which does not hold governments to a standard of certainty. As a general matter, the standard applied under section 1 is the balance of probabilities, and the Supreme Court of Canada has further held that courts may deviate from ordinary standards of evidence if the nature of the question at issue is such that it cannot reasonably be answered in this way.[86] The circumstances prevailing during the early stages of a pandemic — in which the limited available evidence indicated that COVID-19 was highly infectious and had a high mortality rate, meaning that governments had little or no time to conduct further research — certainly seem to fit the bill. In such a context, PP1 can be viewed as reflecting the current state of the law, though it adds little to the discussion.

Stewart's PP2 suffers from a similar problem. While it provides a justification for imposing a certain type of requirement if its triggering condition is met — that is, if the state has decided to regulate — it does not provide a justification for the decision to regulate itself, which operates as a condition precedent on the principle's applicability. Since the need to regulate — and the reasons underlying the conclusion that such a need exists — cannot be assumed, PP2 provides no more help in conducting the *Oakes* analysis than PP1. Of course, it might conceivably play a role in supporting a claim that a measure is rational or that it minimally impairs the affected right, given that it sets a floor to valid regulatory intervention (the "margin of safety" approach). In effect, PP2 asserts that, *if* one chooses to regulate, the *only* acceptable way in which to do so, given the requisite level of uncertainty, is by using this approach. This not only stipulates that such a measure is rational, but also that no lesser intervention will suffice. However, for the same reasons outlined below in relation to a strong PP, it would be necessary to justify the adoption of such a mechanical decision rule, since neither its usefulness nor its moral validity can be assumed.

2. STRONG PRECAUTIONARY PRINCIPLE

Unlike a weak PP, a strong PP purports to offer an affirmative basis for taking specific steps and provides "the justification for acting in the face of uncertainty."[87] However, this makes it unacceptable to rely on such a principle when conducting the *Oakes* analysis unless it can be independently shown to meet the requirements of section 1.

First, it is important to recall that section 1 is concerned with *rights* limitations. The *Oakes* analysis is undertaken only after having established that a *Charter* right has been breached, and its overarching purpose is to assess the moral relationship between the rights breach, on the one hand, and the advantages that the state claims will accrue from engaging in it, on the other. A strong PP, by contrast, does not purport to resolve an acute moral dilemma of this kind. Instead, it merely establishes a general rule for the use of discretionary regulatory power under conditions of uncertainty. In other words, a strong PP does not assume the existence of a constitutional right to undertake the activity at issue, nor is it designed to assess the importance of that right in relation to the benefits of the required precautionary policy. Rather, it merely holds that general utility (or some other public interest) is best served by holding the state to be under a duty to regulate an activity

---

86 *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 18.
87 *Freeman*, *supra* note 48 at para 27.

(in whatever manner is prescribed by that specific formulation of PP) when the triggering conditions of uncertainty are met. Thus, even if one were to conclude that a strong PP constitutes a reasonable approach to the general regulation of activities presenting uncertain environmental or public health risks, it does not follow that it is suited to regulating the limitation of fundamental rights, which imposes special burdens on the state. Indeed, some versions of strong PP, like Stewart's PP4, reverse the burden of proof and require the proponent of an activity to demonstrate its safety,[88] which is diametrically opposed to the approach taken when a policy would limit *Charter* rights. Holding that such a principle is morally binding in the context of the *Oakes* analysis would simply short-circuit the requirements of section 1, and should thus only be done if the principle at issue can independently pass the proportionality test.

While none of the COVID-19 cases adopted a definition of PP that was quite as aggressive as PP4, many did rely on definitions falling on the "strong" side of the spectrum, insofar as they viewed the principle as providing an affirmative justification for action or as the source of a duty to take preventative action. While not presenting as direct a conflict with the *Oakes* test as Stewart's PP4, such formulations risk short-circuiting the proportionality analysis in a similar way, since they could in principle meet many of the requirements of a section 1 analysis, thereby lowering the state's burden. For instance, the need to discharge a moral duty to act, should it exist, could in principle count as a legitimate objective.[89] Furthermore, any measure that reduced the risk of the harm at issue would, by definition, be rationally connected to this objective, and a sufficiently aggressive formulation of PP would automatically justify substantial violations under minimal impairment, as I outline further below when discussing *Taylor v. Newfoundland and Labrador*.[90] Because of this, accepting these formulations without requiring any kind of supporting evidence or reasoning risks absolving the government of substantial parts of its duty to justify the rights limitation. Accordingly, any formulation of PP that purports to provide an affirmative justification for state action should be relied upon by a court only if the government has shown that it can independently meet the requirements of section 1.

3. RECOGNIZING "PRINCIPLES" UNDER THE *CHARTER*

Another way of framing the question, which sheds additional light on the problem, would be to ask whether PP merits direct legal recognition under the *Charter*. Given that various forms of PP have been recognized under international law,[91] Canadian law, and the law of many countries with similar legal and political systems, one might argue that it ought

---

88 This was also the interpretation of PP adopted in at least one Australian case: Stacey, *supra* note 3 at 31–32, citing *Telstra Corp Ltd v Hornsby Shire Council*, (2006) NSWLEC 133 (Austrl).

89 Though the Supreme Court of Canada suggests that caution would be required: see e.g. *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 53 [*Frank*] ("[a]lthough moral philosophy doubtlessly has some role to play in the legislative sphere, it cannot readily serve as a source for a pressing and substantial objective in relation to an infringement of *Charter* rights, and any argument to that effect will require careful scrutiny").

90 *Supra* note 2.

91 PP is explicitly recognized in a number of international instruments: European Commission on Precautionary Principle, *supra* note 44 at 10–11. It has even been argued that it now forms part of customary international law: *Spraytech*, *supra* note 64 at para 32; *Castonguay*, *supra* note 67 at para 20. However, a recent study has concluded that while "relatively widespread international agreement seems to exist on the importance of acting in a precautionary fashion when dealing with the environment," this "*de minimis* version of the precautionary principle" is "without direct legal effects" and "is more reminiscent of a policy goal than a legal principle" (Zander, *supra* note 4 at 72).

to be recognized as a "general principle of law"[92] or something analogous, such that it can be validly applied without extensive independent justification when conducting a proportionality analysis. I am not aware of any cases explicitly dealing with such a question under section 1 of the *Charter*.[93] However, whether a given legal or moral principle should be granted constitutional recognition has been addressed by the case law dealing with the recognition of new principles of fundamental justice under section 7 of the *Charter*. Though not directly applicable, this case law provides relevant insight, since the role of principles of fundamental justice in justifying a deprivation of protected interests is analogous to that of section 1 proportionality in various ways.[94] In the event, this case law suggests that PP (as formulated in the COVID-19 cases) ought not to be recognized as a free-standing principle capable of contributing to the justification of a rights limitation.

The general standard for recognizing new principles of fundamental justice was summarized by the Supreme Court in *Rodriguez*:

> A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. *Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result.* They must also, in my view, be legal principles.[95]

I will set two of these requirements — that a proposed principle of fundamental justice be a "legal principle" and that there be "consensus" or general acceptance — to one side for the moment, since their application in the present context raises some obvious complications that I cannot properly address here.[96] However, the third requirement, that the principle not merely be a vague generalization, seems quite apposite.

In order to be useful, a principle must be sufficiently precise to provide meaningful guidance in specific situations. In other words, it must be capable of providing a cogent reason for preferring option A over option B (or C, or D). A principle that is too vague can be interpreted as supporting rival courses of action and is thus of little use in choosing

---

92 *Statute of the International Court of Justice*, 24 October 1945, 33 UNTS 993, art 38(1)(c). See also European Commission on Precautionary Principle, *supra* note 44 at 10 (characterizes PP as a "general principle of international law").

93 Though it should be noted that the Supreme Court of Canada dealt with the use of "social contract theory" to justify a *Charter* rights limitation and offers some parallels with the argument I develop below: *Frank*, *supra* note 89 at para 53.

94 Though one must be careful to distinguish between the respective functions of the principles of fundamental justice: *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 124–29.

95 *Supra* note 10 at 590–91 [emphasis added].

96 First, PP has been given legal form multiple times, making it at the very least contentious to argue that it lacks the character of a "legal principle": see e.g. *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 9 [*Canadian Foundation*]. Second, imposing a requirement of consensus or general acceptance under section 1 would substantially narrow the range of valid limitations. Any legislative or administrative policy that is subject even to moderate levels of public debate, including many that have been upheld under section 1 over the years, like the criminalization of marijuana or medical assistance in dying, would be excluded.

between them.[97] In *R. v. Malmo-Levine*,[98] considerations of this nature led the Supreme Court to reject John Stuart Mill's "harm principle" as a principle of fundamental justice.[99] The Supreme Court of Canada's reasons are worth quoting at some length:

> Even those who agree with the "harm principle" as a regulator of the criminal law frequently disagree about what it means and what offences will meet or offend the harm principle. In the absence of any agreed definition of "harm" for this purpose, allegations and counter-allegations of non-trivial harm can be marshalled on every side of virtually every criminal law issue, as one author explains:
>
> > The harm principle is effectively collapsing under the weight of its own success. Claims of harm have become so pervasive that the harm principle has become meaningless: the harm principle no longer serves the function of a *critical principle* because non-trivial harm arguments permeate the debate. Today, the issue is no longer *whether* a moral offense causes harm, but rather what type and what amount of harms the challenged conduct causes, and how the harms compare. On those issues, the harm principle is silent.
>
> [As a result,] it is the "hidden normative dimensions ... [that] do the work in the harm principle, not the abstract, simple notion of harm." In other words, the existence of harm (however defined) does no more than open a gateway to the debate; it does not give any precise guidance about its resolution.[100]

There is also a clear parallel between this conclusion and the rule that excessively vague laws are contrary to the principles of fundamental justice, though the Supreme Court of Canada did not make the observation itself.[101] Under this standard, a law that fails to provide "an adequate basis for legal debate" and "analysis," that "does not sufficiently delineate any area of risk," "is not intelligible," or fails to "offer a 'grasp to the judiciary,'" will be held to be impermissibly vague.[102]

While raised in the context of section 7, these considerations dovetail with those underpinning section 1 of the *Charter*, which imposes a "stringent standard of justification."[103] Limits to *Charter* rights must be "demonstrably justified," which requires that the courts subject the government's justification to "a process of *demonstration*" and "not one of mere intuition, nor … of deference to Parliament's choice."[104] This suggests that in order to contribute to the process of section 1 justification, a principle must be capable of providing real guidance to decision-makers in a transparent manner, rather than disguise the true basis of the impugned decision. Such a requirement can also be viewed as grounded in the general principles of legality.[105]

---

97 On this point, see also *Frank*, *supra* note 89 at para 53 (the Supreme Court of Canada criticized the "social contract theory" advanced by the government to defend a rights limitation under section 1 as being "devoid of content, and problematically vague" and suffering from "analytical failings: it is at once too general, providing no meaningful ability to analyze the means employed to achieve it").

98 2003 SCC 74 [*Malmo-Levine*].

99 *Ibid* at para 129.

100 *Ibid* at para 127 [citations omitted, emphasis in original], citing Bernard E Harcourt, "The Collapse of the Harm Principle" (1999), 90:1 J Crim L & Criminology 109 at 113. See also *Canadian Foundation*, *supra* note 96 at para 11 (the Supreme Court of Canada declined to recognize the "best interests of the child" as a principle of fundamental justice for similar reasons).

101 I am grateful to one of the anonymous reviewers for drawing this to my attention.

102 *Canadian Foundation*, *supra* note 96 at para 15.

103 *Oakes*, *supra* note 78 at 137; *R v KRJ*, 2016 SCC 31 at para 91.

104 *RJR-MacDonald Inc v Canada (Attorney General)*, 1995 CanLII 64 at para 128 (SCC) [emphasis in original] (reasons of Justice McLachlin, Justice Sopinka, and Justice Major, concurring with Chief Justice Lamer and Justice Iacobucci on the section 1 issue).

105 *Cf Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 81; David Dyzenhaus, "Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security" (2003) 28 Austl J Leg Philosophy 1 at 8 [Dyzenhaus, "Humpty Dumpty Rules"]. See also

Applied to PP, these considerations suggest that the various formulations one finds in the COVID-19 cases, or in the *Bergen Declaration* and *Rio Declaration*, should be denied recognition as a "principle" for the purposes of *Charter* proportionality analysis. These propositions are so vague as to provide no meaningful guidance. In fact, their application constitutes a *decision* which itself must be justified, rather than reflecting adherence to a moral duty.

To illustrate why, let us consider the official communication on PP issued by the European Commission, which takes as its primary reference point the version of PP found in the *Rio Declaration*,[106] making it especially relevant here. The purpose of this communication is to define and explicate the principle, which is directly applicable to public decision-making under European Union law; and, running to over 25 pages, it provides substantially more detail on its content and operation than any of the COVID-19 cases.[107] However, far from supporting the usefulness of PP in a *Charter* context by helping to overcome its vagueness problem, as some have argued,[108] the Commission's work serves to demonstrate how little a *Rio Declaration* style of PP has to contribute in the context of a section 1 analysis.

First of all, the Commission ultimately concludes that whether or not to "invoke" PP is a *decision*, not a *duty*.[109] In its view, "[j]udging what is an 'acceptable' level of risk for society is an eminently *political* responsibility," not a matter of expert opinion.[110] It goes on to explain that "[i]n some cases, *the right answer may be not to act* or at least not to introduce a binding legal measure" and instead merely to pursue further research.[111] In other words, PP — as the European Commission understands it — does not dictate any specific course of action, or even that action must be taken. Indeed, while the European Commission asserts that PP is a "a full-fledged and general principle of international law,"[112] and that the aim of its communication is to clarify how to "apply" this principle, at no point does it ever attribute any real effect to PP, other than ruling out the claim that scientific uncertainty prevents the state from acting (PP1). Everything else of interest, including selecting the appropriate "level of protection" against uncertain risks (that is, how restrictive the policy should be), is left to the political judgment of those in charge, largely because the European Commission acknowledges that sensible risk management is not something that can be distilled into a single general principle.[113] Indeed, it explicitly states that "reliance on the precautionary principle is no excuse for derogating from the general principles of risk management."[114]

In other words, this formulation of PP provides no guidance whatsoever on whether any particular measure ought to be taken, and thus *cannot provide independent support for*

David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17:1 Rev Const Stud 87.

106 PP has been incorporated, but not defined, in the European Union treaties: European Commission on Precautionary Principle, *supra* note 44 at 10.

107 *Ibid*.

108 See e.g. Flood, Thomas & Wilson, *supra* note 5 at 254, 264.

109 European Commission on Precautionary Principle, *supra* note 44 at 7.

110 *Ibid* at 3 [emphasis in original].

111 *Ibid* [emphasis added].

112 *Ibid* at 10.

113 *Ibid* at 17.

114 *Ibid*.

any particular decision.[115] It is the end point of a decision-making process, not a reason in favour of a particular course of action.[116] Thus, even if Canadian courts were to adopt a more elaborate framework inspired by the European Commission's (or the Privy Council's, which is ultimately no more specific),[117] PP's usefulness in conducting a section 1 analysis would not be improved.

Given that such a vague formulation of PP adds little or nothing specific to one's ability to reason about the appropriate decision to make when faced with conditions of uncertainty, one cannot help but wonder what purpose it serves to invoke it. Answers to this question will vary, but it seems clear that the effect of doing so in a given context is inevitably to assert that the "cautious," "prudent," or "responsible" approach is to minimize the probability of the outcome *to which PP attaches* (environmental harm, damage to public health, and so on), thus implicitly excluding caution about other types of outcomes from consideration (or at least granting them less importance).[118] Given that public decision-makers can generally be expected to want to be (or at least appear to be) cautious and responsible, the effect of treating PP as morally authoritative is thus to bind them to a specific *order of priorities* by treating the primacy of PP-protected value as axiomatic.

And this, I think, is the true nub of the problem. While it is certainly legitimate for governments to establish or assert a preferred order of priorities through legislation or policy, it would be unreasonable to claim that this preference has some inherent constitutional or moral force independent of any specific arguments that might be made in its defence, especially in the context of a *Charter* section 1 review. And yet, treating the application of PP in a given context as axiomatic, as some courts have done, does precisely that. The effect is to present as a moral imperative what is in fact a policy choice, and thus to hide the true "normative work" on which the decision-maker based its decision, namely, the work by which it arrived at the decision to apply PP to the outcome at issue. Since this decision is the very thing that must be tested under a proportionality analysis, allowing governments to rely on PP by means of a bare assertion of its moral authority effectively circumvents the requirements of section 1 and violates the injunction that the justification of rights limitations be demonstrated in a transparent way.

C. *TAYLOR V. NEWFOUNDLAND AND LABRADOR*

To illustrate the concerns I am raising in more concrete terms, let us consider one case in greater detail: *Taylor*,[119] which dealt with Newfoundland's interprovincial travel ban.[120]

---

115 See also Zander, *supra* note 4 at 2 (Zander claims that in the European Union "it [sometimes] appears to be used as 'a magic wand', the invocation of which can justify virtually any policy choice").

116 Similarly, in the context of a wide-ranging comparative analysis of PP across multiple jurisdictions it is "difficult to treat it as a legal principle" and that "the application of the precautionary principle is perhaps best treated as a policy choice": *ibid* at 31. It is also interesting to note that, while the European Commission sets out a number of "general principles of application" (namely, proportionality, non-discrimination, consistency, examination of the benefits and costs of action or lack of action, examination of scientific developments), which are meant to provide PP with some distinctive content, these are simply generic principles of good public decision-making, which already have a place in the *Oakes* test: European Commission on Precautionary Principle, *supra* note 44 at 3, 17.

117 *Precaution in Science-Based Decision Making*, *supra* note 9.

118 See e.g. Stacey, *supra* note 3 at 13 (Stacey describes the effect of PP as "recognising a margin of error in risk assessment or 'weighting the risk of error in favour of the environment'").

119 *Supra* note 2.

120 This case is of particular interest since it has been cited approvingly by a number of other courts for its handling of *Charter* section 1 issues: *Trinity Bible* ONSC, *supra* note 2 at paras 144–45; *Trinity Bible* ONCA, *supra* note 2 at paras 122, 124 (with extensive discussion of PP at paras 105–15); *Beaudoin*,

Having concluded that the ban was contrary to interprovincial mobility rights under section 6 of the *Charter*, the Supreme Court of Newfoundland and Labrador was required to determine whether it was a reasonable limit under section 1.[121] In doing so, Justice Burrage relied substantially on PP, especially when determining whether the measure was minimally impairing.

At the minimal impairment stage, the Court in *Taylor* first noted that the government was required — in principle — to establish that no other measures would be "an effective substitute for the travel restriction, or that the travel restriction itself [could not] be tweaked to accommodate a less intrusive infringement on mobility."[122] However, this burden is potentially quite difficult to discharge, given that lawyers and judges can, especially with the benefit of hindsight, easily imagine minor alterations to the policy that would make it less restrictive while having little adverse impact on the desired outcome.[123] Because of this, a strict adherence to such a rule might make it impossible for governments to justify any measure under section 1. The Supreme Court of Canada has therefore emphasized that courts must generally defer to the opinion of the executive and legislative branches and confine themselves to determining whether the measure limits the right "as little as is reasonably possible."[124] The Court in *Taylor* took note of this admonition and followed a deferential approach, emphasizing that the decision to impose the travel ban was "medical" in nature, and thus within the expertise of the Chief Medical Officer of Health (CMOH), rather than the courts.[125] One effect of this was to lead the Court to adopt "the precautionary principle" — which it concluded was the essence of "the public health response" — as the lodestone of its analysis.[126] The primary consequence of this move, from an analytical standpoint, was to shape the Court's perception of the range of adequate policy responses in a particular way.[127]

In order to challenge the travel ban, the applicants had argued that a requirement to self-isolate upon arrival (like the one in place prior to the travel ban), coupled with a narrower ban targeted at higher risk individuals (and supported with a cluster of other less burdensome measures, like testing and contact-tracing), would have achieved a similar effect, thus making the actual policy excessively intrusive.[128] While the Court acknowledged that this combination of measures would reduce the number of COVID-19 cases, it concluded that this approach was not an adequate substitute for the impugned

supra note 2 at para 122; *Grandel*, *supra* note 62 at paras 82, 101. It will also be heard on appeal in 2025 by the Supreme Court of Canada: *CCLA* SCC, *supra* note 2.

121 *Taylor*, *supra* note 2 at para 493. Interestingly, while the travel ban was imposed by means of an administrative decision, and thus arguably subject to the *Doré* framework (*Doré*, *supra* note 78), it was reviewed using the *Oakes* analysis (*Taylor*, *ibid* at paras 419–86). The Court does not address this point in its reasons, but it may be that it chose to apply *Oakes* because the ban was adopted through delegated legislation, which is arguably not subject to the *Doré* analysis: see generally Andy Yu, "Delegated Legislation and the *Charter*" (2020) 33:1 Can J Admin L & Prac 49.

122 *Taylor*, *supra* note 2 at para 453.

123 *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at para 96.

124 *R v Edwards Books and Art Ltd*, 1985 CanLII 12 at paras 122, 131, 148–49 (SCC). A deferential attitude is considered appropriate in such matters because deciding which approach minimally impairs constitutional rights usually requires the exercise of policy judgment, for which the courts are institutionally ill-suited (*ibid* at para 18). See also *Harvey v New Brunswick (Attorney General)*, 1996 CanLII 163 (SCC).

125 *Taylor*, *supra* note 2 at paras 457, 464.

126 *Ibid* at para 467.

127 The decision to invoke PP also appears to have affected the Court's understanding of the government's burden of proof. However, this is a less pressing issue, for the reasons I set out in Part IV.B.1, above.

128 *Taylor*, *supra* note 2 at para 465.

policy, in part because the precautionary principle implicitly narrowed its understanding of the government's objective. At the first stage of the *Oakes* test, the Court had held that the travel ban's aim was "to protect those in Newfoundland and Labrador from illness and death arising from the importation and spread of COVID-19 by travelers."[129] While this was a valid objective, so far as it went, it required further refinement before providing a useful basis for the later stages of the test, since it provided no indication as to what specific *level* of protection had been selected. For instance, measures that aim to reduce individuals' average risk of infection by 20 percent versus 90 percent would both aim to protect them from illness and death, but may have radically different implications on a practical level. Without knowing which of these is the ultimate objective (and why), one cannot determine whether the selected policy is minimally impairing.[130] Though the Court never explicitly grapples with this point, a close reading of its reasons indicates that it took the view that the policy's objective was essentially a *maximal* reduction of infection rates or the full eradication of COVID-19. This conclusion appears to have been based in part on the premise that the policy was intended to apply PP, and that the latter required a policy of maximal suppression.[131] As a result, any strategy that was less than maximalist in its aims, like that proposed by the applicants, was contrary to PP and thus inadequate.[132]

This way of using PP illustrates some of the concerns I outlined in the previous section. First, the Court provides little or no substantive justification for the adoption of such a principle. Instead, it treats PP like a well-established decision rule whose merits and legitimacy need not be explained in detail. This might be somewhat less concerning had the parameters and merits of PP been established in the record, but no additional detail or meaningful justification is to be found in the supporting affidavits mentioned by the Court. Only one of these, that of Dr. Brenda Wilson (an expert witness on public health decision-making), actually mentions PP by name, and her definition contains the same ambiguous (and ultimately unaddressed) blend of "strong" and "weak" versions outlined above.[133]

---

129 *Ibid* at para 436.

130 If the underlying objective of a measure has been stated at too high a level of generality, it is trivially easy to show that there are less restrictive means to attain it: Peter W Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed, supplemented (Scarborough, Ont: Carswell, 2023) at § 38:12, discussing *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

131 *Taylor*, *supra* note 2 at paras 466–71.

132 This raises another concern mentioned by Hogg and Wright, namely, that if the objective of a measure is defined too narrowly, proportionality is left with no work to do: Hogg & Wright, *supra* note 130 at § 38:12. Given that there were other reasons offered for adopting a policy of maximal suppression, which did not rest entirely on PP, the risk posed by reliance on the latter is mitigated somewhat here. Nevertheless, PP does (in this case at least) appear to place its finger on the scale by purporting to provide (ultimately ungrounded) support for the narrowest possible definition of the objective (that is, risk protection must be maximized), thus implicitly favouring the government's position. This seems inconsistent with the central thrust of the Supreme Court's ruling in *Alberta v Hutterian Brethren of Wilson Colony*, which rules out mechanical ("blind or absolute") deference (2009 SCC 37 at para 55).

133 The affidavit of Dr. Janice Fitzgerald, the Chief Medical Officer of Health of Newfoundland and Labrador and the official responsible for adopting the travel ban, does not mention the term "precautionary principle": *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 (Affidavit, Dr. Janice Fitzgerald) [Dr. Fitzgerald Affidavit]. Instead, Dr. Fitzgerald outlines a complex multi-factorial analytical framework, which includes a concept she labels as a "precautionary/protective approach" (*ibid* at para 76). This is defined as an approach that is

> particularly applicable in the early stages of a pandemic when evidence-informed decision-making is not possible due to lack of data and the uncertainty of an evolving event. This means taking timely and reasonable preventive action, proportional to the threat and evidence-informed to the extent possible. This does not mean that in the absence of evidence, all actions must be taken; rather, it means that as emerging evidence reduces uncertainty, evidence informed actions may supersede those precautionary measures taken at the outset (*ibid*).

While her (very short) affidavit does make some attempt at justifying reliance on PP through the use of a historical example and the conclusions of the Krever Commission, the justification is quite superficial and makes no mention of the controversy surrounding PP in the literature on the subject.[134]

Furthermore, one struggles to see what work PP is actually doing in the Court's account of the decision to impose the travel restrictions. Ultimately, the CMOH concluded that the travel ban had a higher likelihood of succeeding, since there was some (limited) evidence to suggest that the alternative measures advocated by the applicants in *Taylor*, like a self-isolation requirement for travellers — which could in principle achieve comparable effects — might not produce the anticipated effects due to imperfect compliance.[135] Though the difference between the expected effects of the two alternate policies appeared marginal at first glance (since the evidence suggested that non-compliance numbers would have been quite low), the benefit of the preferred policy was potentially quite large, given that it was realistic at the time to think that the province could more or less completely suppress the disease, at least temporarily, if new outbreaks could be kept sufficiently rare. In short, the CMOH used what Stewart calls the "best estimate" approach to assess the likelihood of various consequences based on the evidence before her, and then exercised her discretionary power to select a "level of protection" based on her judgment that the risk presented by less restrictive measures was too high.[136] The version of PP invoked by the Court — which offers no guidance on how to weigh the various uncertainties involved, or what level of risk to tolerate — could be of no assistance here, other than providing rhetorical cover. Thus, the ultimate effect of the Court's reliance on PP to explain the basis of the decision is simply to (partially) disguise a discretionary judgment call — which ought to be assessed on its merits — as adherence to a recognized moral duty.

This brings us to a further and arguably deeper problem, which is that justifying reliance on PP on the grounds that the decision at issue requires medical expertise, as the Court in *Taylor* did, is in fact incoherent. As Geneviève Cartier has noted, the precautionary principle is meant to apply in situations where the contribution of experts has been *exhausted*:

> When scientific evidence is insufficient or contested, the issue becomes a social one, which primarily concerns the citizenry. The precautionary principle applies in situations that fall outside the "domain of

This is quite different from the definition of the "precautionary principle" found in the Court's reasons, which appears to be based primarily on Dr. Brenda Wilson's affidavit (*Taylor v Newfoundland and Labrador*, 2020 NLSC 125 (Affidavit, Dr. Brenda Wilson) [Dr. Wilson Affidavit]): *Taylor*, *supra* note 2 at para 60.

134 In fact, a close examination of Dr. Wilson's affidavit further confuses matters. The term "precautionary principle" is footnoted with a reference to "Public Policies Guided by the Precautionary Principle" (Beloin, *supra* note 74): Dr. Wilson Affidavit, *supra* note 133 at 3. This document provides a definition of PP that quite clearly includes an obligation to act (*ibid* at 3). However, Dr. Wilson ultimately offers a definition of PP that most closely resembles what Stewart describes as a Bayesian approach rather than true PP: "the more serious the consequences of under-reaction, the more that decision-making is likely to be driven by the precautionary principle: in the absence of clear evidence, use *best judgement* to prevent potential harm" (*ibid* at 5 [emphasis added]).

135 Dr. Fitzgerald Affidavit, *supra* note 133 at paras 89, 96; *Taylor*, *supra* note 2 at paras 472–75.

136 *Taylor*, *ibid* at para 334; Stewart, *supra* note 12 at 82.

> academic science [and enter] the uncertain margins that serve political decision-making, *the essence of which is debate*.[137]

In other words, the decision to invoke PP in the face of uncertainty is political in nature, as the European Commission acknowledged.[138] While a decision-maker's reasoning may of course be informed by technical expertise at various points, the true question at issue is not a technical one, but rather what level of risk society should tolerate. It thus makes no sense to imply, as the Court in *Taylor* did, that adherence to PP is required as part of the deference owed to the expertise of the CMOH.[139] Doing so merely increases the degree to which the true basis of the decision is being concealed.

In sum, claiming that the government's choice of strategy or measure was based on a PP does nothing more than confuse the overall picture. Indeed, because the merits of the putative principle are never clearly explained — and its weaknesses never clearly addressed (such as its propensity to be self-refuting)[140] — the decision emerges from the process appearing somewhat arbitrary. In the specific context of the *Taylor* case, which dealt with measures adopted early on in the pandemic, when there was near-unanimous agreement that some preventative measures were called for, this may not seem like a very great problem. However, the precedent this case creates will encourage other courts and decision-makers to adopt the same practice,[141] while discouraging much-needed skepticism about PP, which therefore risks taking on a life of its own as a free-standing justification for rights limitations. This would be cause for concern.

D. LONGER-TERM RISKS

While there will doubtless be circumstances in which the risk to public health is so great as to warrant substantial limitations on individual rights, some level of risk must necessarily be accepted in a "free and democratic society."[142] Would the interprovincial travel ban at issue in *Taylor* have been justified if COVID-19's fatality rate were only 50 percent higher than that of influenza, rather than ten times, as was the case early on?[143] Given that we regularly experience severe flu seasons — during which the overall mortality rate can climb substantially above the long-term average — without enacting COVID-19-style lockdowns, I would imagine that most people think not. However, the "duty to act" mentality that is mechanically promoted by a strong PP provides us with no tools for distinguishing between the two situations, or those in between. Using it as a primary

---

137 Cartier, *supra* note 12 at 86 ("lorsque les preuves scientifiques sont insuffisantes ou contestées, les questions deviennent alors des questions sociales, qui concernent, au tout premier chef, les citoyens. Le principe de précaution s'applique dans des situations qui sortent du 'domaine de la science académique [pour entrer dans] celui des marges incertaines qui servent à la décision politique, *dont le débat constitue l'essence*'" [emphasis in original, translated by author]).

138 European Commission on Precautionary Principle, *supra* note 44 at 3.

139 *Taylor*, *supra* note 2 at paras 456–64.

140 Sunstein, "Beyond the Precautionary Principle," *supra* note 4 at 1023; Sunstein, *Laws of Fear*, *supra* note 7 at 14ff; Steel, *supra* note 12 at 4. One author has proposed an impossibility theorem (that is, a logical proof) that PP is self-refuting: Martin Peterson, "The Precautionary *Prin*ciple Is Incoherent" (2006) 26:3 Risk Analysis 595 (though for a response, see Steel, *ibid* at 39–42).

141 The beginnings of this process can be observed in *Trinity Bible* ONCA, *supra* note 2 at paras 105–15.

142 Not least because measures taken to counter some risks simply create others: Archibald, Jull & Roach, *supra* note 40, s 1:60.

143 This was the estimate provided to the Court in *Taylor*: Dr. Wilson Affidavit, *supra* note 134 at 4.

touchstone when determining when to limit constitutional rights therefore risks making it too easy for the government to do so.

To illustrate the problem, consider the following example from New Brunswick, where I live. Early in the pandemic, the government (like that of most provinces) adopted a range of measures that imposed sweeping limitations on *Charter* rights. At the time, these measures were easily justified using a broadly "precautionary" (in other words, prudential) approach. The new virus was known to cause serious illness and death, and there was good reason to think that the risk it posed was substantially higher than that of comparable endemic diseases like influenza, even if the exact mortality rate was uncertain. Moreover, there was little time to conduct the research needed for greater certainty, given the speed at which the virus propagated, and given that the available tools for managing this downside risk were very limited, as there were no known treatments capable of lowering the rate of serious illness or death to an acceptable level. Over time, however, the overall risk profile of the disease changed substantially as immunity spread, effective treatments became widely available, and the population-level effects of the virus became more clearly quantified. Despite this, New Brunswick was slow to repeal many rights-infringing measures, and occasionally reimposed them when case counts flared, without ever attempting to quantify the level of risk relative to baseline, at least in its public communications.[144]

Further, the publicly stated rationale for these later decisions — generally quite brief and lacking in detail — often differed substantially from the original reasons used to justify such an aggressive precautionary approach. For instance, the government reimposed lockdown measures in January 2022 on the grounds that this was necessary to protect the health care system.[145] According to the CMOH, the aim was to reduce contacts by 30 percent in order to lower hospitalizations from 220 to about 150, so as to "offset the impact of staff shortages for those caring for hospitalized patients and for critical infrastructure staff."[146] In other words, protecting the public from infection was presented as a means to achieving a different end (protecting the health care system), rather than being an end in itself, as it was early on in the pandemic.

There is no doubt that the government was faced with a difficult situation when case counts flared again, since exceeding the capacity of the health care system to respond would likely have led to an increase in mortality. Nevertheless, one must admit that the circumstances at that point were very different from those in which lockdown measures were first imposed, and that the scale of the underlying threat to public health was substantially smaller. Furthermore, these differences necessarily have some bearing on the acceptability of such measures. Had the COVID-19 pandemic never occurred, and had the stay-at-home orders and business closures instead been ordered because of the appearance of a new variant of the influenza virus with a comparable mortality rate to the one prevailing for COVID-19 in January 2022 (which was much lower than early on in pandemic, as a result of vaccination and natural immunity), it seems unlikely, or at the very least highly questionable, that such measures would have seemed acceptable. As a general matter, the effect of staff or bed shortages on the health care system is not, by itself,

[144] Public communications records are available online or by request from the Government of New Brunswick.

[145] Government of New Brunswick, Office of the Premier, News Release, "New Brunswick moving to Level 3 of winter plan Friday at 11:59 p.m." (13 January 2022), online: [perma.cc/7BBG-3DTD].

[146] *Ibid* at 1–2.

something one would normally think of as capable of justifying such a sweeping restriction of civil liberties, even though it may tragically lead to a certain number of deaths. However, these issues were never clearly addressed by the government when explaining its decision.

All of this suggests that the precautionary mindset that governed the response to the pandemic's early stages continued to shape the policy response, even though the initial conditions that gave rise to it no longer obtained.[147] While eminently understandable on a human level, this kind of drift — which is encouraged by use of a vaguely formulated "PP" — poses a serious risk to the conceptual and procedural mechanisms created to preserve civil liberties, especially in the context of a longer-lasting pandemic. As David Dyzenhaus noted in the context of the early 2000s "war on terror": "[O]ne cannot … confine the exception. If it is introduced into legal order and treated as such, it will spread."[148] This leads to a serious risk that "[t]he temporary will be made permanent, threatening civil liberties well beyond the period of the emergency."[149] As a result, it is critical to distinguish between true (that is, transient) emergencies and metaphorical ones, like the "war on terror" or the "war on cancer," which represent a "condition" rather than an emergency.[150] In such cases, "the proper response for legal analysis," Mark Tushnet notes, "is to think through what the more or less permanent balance between liberty and security should be," rather than apply an emergency mindset.[151] While new infectious diseases like COVID-19 can clearly represent a genuine emergency, especially in the early stages, they also represent a "condition" which is likely to persist over a significant amount of time (unless they can be quickly and fully eradicated). This means that pandemics represent a special risk to civil liberties, one which must be managed very carefully, not least because the transition point between the two states is often unclear to the public, whose perceptions are partly clouded by fear.

Unfortunately, PP — at least as formulated in the COVID-19 cases — is not up to the task. A public culture in which such a principle were granted free-standing moral authority, and viewed as capable of justifying substantial limitations on individual freedoms, would be one in which the default position has been moved closer to that of a state of emergency, making it more difficult to resist government error, carelessness, incompetence or abuse, even when the true emergency phase has passed. Similarly, case law requiring (or even simply encouraging) the courts to defer to the mere invocation of this principle when assessing rights limitations weakens their ability to ensure that governments uphold their obligation to justify such limits with reasons and evidence, especially since the courts will already be inclined to show considerable deference to the executive under such circumstances.

V. CONCLUSION

The COVID-19 pandemic required governments and courts to make decisions under difficult and unprecedented circumstances, often with very limited evidence as to the consequences of choosing one path over another. It is not only understandable but indeed

[147] This kind of drift is not limited to the COVID-19 context. Flood, Thomas & Wilson point to the example of the ban on blood donations by gay men, which was kept in place long after the scientific justification for it had withered away: Flood, Thomas & Wilson, *supra* note 5 at 255.

[148] Dyzenhaus, "Humpty Dumpty Rules," *supra* note 105 at 29.

[149] Mark Tushnet, "Emergencies and the Idea of Constitutionalism" in Mark Tushnet, ed, *The Constitution in Wartime: Beyond Alarmism and Complacency* (Durham: Duke University Press, 2005) 39 at 44.

[150] *Ibid* at 44–45.

[151] *Ibid* at 45.

commendable that, when faced with this challenge, many decision-makers sought to rely on recognized decision-making frameworks to structure their thinking and arrive at more clearly reasoned conclusions. However, reliance on the precautionary principle when conducting a *Charter* section 1 analysis was, I think, a mistake, given the limited evidence and arguments at the courts' disposal in the COVID-19 cases. As presented, the version of PP used in these cases is simply not up to the task of assisting the courts in determining whether a *Charter* rights breach was justified. Both international practice and the academic literature reveal the existence of substantial variation in the way the PP — which is, in fact, a multiplicity of different principles — is understood and applied. Moreover, most versions of PP are subject to serious objections, which none of these decisions attempted to address. While a synthesis and defence of the various strands of PP may be possible,[152] a proposition labelled in this way currently has no valid free-standing role to play in the context of section 1 proportionality — save perhaps the weakest form, that is, a non-preclusive PP (PP1) — absent a much more detailed explanation of its practical operation and its underlying justification as a decision-making framework. Treating PP as a recognized principle of political morality for the purposes of justifying limits to *Charter* rights risks seriously weakening the culture of justification by which these rights are protected, especially when formulated as vaguely and ambiguously as it was in the COVID-19 cases, and thus ought to be avoided.

[152] See generally Steel, *supra* note 12.