



ENVIRONMENT IN THE COURTROOM

Edited by Allan E. Ingelson

ISBN 978-1-55238-986-7

THIS BOOK IS AN OPEN ACCESS E-BOOK. It is an electronic version of a book that can be purchased in physical form through any bookseller or on-line retailer, or from our distributors. Please support this open access publication by requesting that your university purchase a print copy of this book, or by purchasing a copy yourself. If you have any questions, please contact us at ucpress@ucalgary.ca

Cover Art: The artwork on the cover of this book is not open access and falls under traditional copyright provisions; it cannot be reproduced in any way without written permission of the artists and their agents. The cover can be displayed as a complete cover image for the purposes of publicizing this work, but the artwork cannot be extracted from the context of the cover of this specific work without breaching the artist's copyright.

COPYRIGHT NOTICE: This open-access work is published under a Creative Commons licence. This means that you are free to copy, distribute, display or perform the work as long as you clearly attribute the work to its authors and publisher, that you do not use this work for any commercial gain in any form, and that you in no way alter, transform, or build on the work outside of its use in normal academic scholarship without our express permission. If you want to reuse or distribute the work, you must inform its new audience of the licence terms of this work. For more information, see details of the Creative Commons licence at: <http://creativecommons.org/licenses/by-nc-nd/4.0/>

UNDER THE CREATIVE COMMONS LICENCE YOU MAY:

- read and store this document free of charge;
- distribute it for personal use free of charge;
- print sections of the work for personal use;
- read or perform parts of the work in a context where no financial transactions take place.

UNDER THE CREATIVE COMMONS LICENCE YOU MAY NOT:

- gain financially from the work in any way;
- sell the work or seek monies in relation to the distribution of the work;
- use the work in any commercial activity of any kind;
- profit a third party indirectly via use or distribution of the work;
- distribute in or through a commercial body (with the exception of academic usage within educational institutions such as schools and universities);
- reproduce, distribute, or store the cover image outside of its function as a cover of this work;
- alter or build on the work outside of normal academic scholarship.



Acknowledgement: We acknowledge the wording around open access used by Australian publisher, **re.press**, and thank them for giving us permission to adapt their wording to our policy <http://www.re-press.org>

Sustainable Development under Canadian Law

PAULE HALLEY AND PIERRE-OLIVIER DESMARCHAIS

Sustainable development represents a new paradigm, casting doubt on the belief that development can be based on sporadic and unlimited economic growth thanks to the planet earth's ability to perpetually provide adequate resources to keep pace with it. That belief has been replaced with uncertainty and concern in the face of deteriorating ecosystems, climate and biodiversity, and other risks associated with irreversible changes. Sustainable development is trying to become established for the long term and to sever its ties with any developmental approach that does not take into account the restricted nature of the planet earth's resources.¹

The implementation of sustainable development has mobilized most national and international organizations and a great number of participants. The task at hand is colossal and meets with much resistance. For legal experts, sustainable development remains a dynamic concept, the subject of much debate and reflection.² Here, we will content ourselves with introducing the origins of sustainable development, outlining significant milestones in its development on the international stage, and examining its implementation in Canadian law through its guiding principles.

Origins and Definitions of Sustainable Development

The concept of "sustainable development" first appeared on the international stage in 1980, in *World Conservation Strategy* published by the International Union for Conservation of Nature and Natural Resources: "For development to be sustainable it must take account of social and ecological factors, as well as economic ones."³ It then gained prevalence in 1987 with the publication of the

report *Our Common Future* by the World Commission on Environment and Development (the *Brundtland Report*): “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁴ The two main principles that inform these definitions are equity and integration, which have established the present-day model of sustainable development and influence the legislation and interpretations surrounding its scope, conditions of application, and implementation.

It was at the second *United Nations Conference on Environment and Development*, held in Rio de Janeiro in 1992, that the international community undertook to establish “a new and equitable global partnership” through the integration of the goal of sustainable development in policy and public decision making. The *Rio Declaration on Environment and Development*⁵ clearly defines the concept of sustainable development, most notably its conditions of equity: “the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”;⁶ and integration: “in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”⁷

Since then, this change in the approach to development has been reiterated by the international community on numerous occasions⁸ and has flourished in the areas of both international environmental law and international trade.⁹ For example, the preambles to the *Marrakesh Agreement Establishing the World Trade Organization*¹⁰ and the *North American Free Trade Agreement*¹¹ recognize that the rules governing international trade must favour the sustainable use of resources and that member states are obligated to promote sustainable development.¹²

The goal of sustainable development in international law is given concrete expression in guiding principles that set out its purpose, means of application and implementation. The *Rio Declaration*, for example, lays down 27 guiding principles, among which it is possible to distinguish those that are inherent to sustainable development from those that are operational principles.¹³ Today, these guiding principles represent the foundation for many international conventions. Thus, the principle of public participation is at the heart of the *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*;¹⁴ the precautionary principle was codified in the 1996 *Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*,¹⁵ while the prevention prin-

ciple is the basis for the *United Nations Convention on the Law of the Non-navigational Uses of International Watercourses*,¹⁶ and the procedure for evaluating environmental impact contained in the *Convention on Environmental Impact Assessment in a Transboundary Context*.¹⁷

International organizations have expressed opinions about these governing principles. In 1995, the United Nations Commission on Sustainable Development gathered together a group of experts with a mandate to identify the international legal principles applicable to sustainable development and to promote their translation into national legal systems.¹⁸ For its part, in 2002, the International Law Association adopted the *New Delhi Declaration of Principles of International Law Relating to Sustainable Development* setting out seven main principles necessary for meeting the goal of sustainable development.¹⁹

The International Court of Justice (ICJ) also played a significant role in the changes introduced in the area of sustainable development and its guiding principles, notably in the 1997 case of *Gabčíkovo-Nagymaros*,²⁰ which saw Czechoslovakia and Hungary locked in a litigation battle over the development of the Danube for a joint hydroelectric dam project. Examining the potential environmental impact of such a project, the ICJ stated that “in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.”²¹ For the court, sustainable development requires that new norms be taken into consideration when states engage in new activity:

Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.²²

In a separate opinion, Justice Weeramantry underlined the significance of sustainable development. He stated that it is a principle of international law in that it is “a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.”²³ The question of whether sustainable development is a legal concept or a principle has not yet been decided, and the issue continues to be the subject of much debate in legal doctrine.²⁴

Sustainable development has also been addressed in decisions of the Supreme Court of Canada. The court consults sources of international and environmental law to find the solutions best suited to common problems, citing, among other sources, the *Brundtland Report*, *Our Common Future*, the *Rio Declaration*, *Agenda 21*, and the *Bergen Ministerial Declaration on Sustainable Development*.²⁵

Sustainable Development in Canadian Law

Since the Rio Summit, Canada has signed numerous international declarations and agreements recognizing the need to ensure sustainable development. The concept has been rapidly integrated into Canadian legislation, both at the federal and provincial levels.²⁶ In 1995, Parliament introduced a definition of sustainable development in the *Auditor General Act* that echoes the principles of the *Rio Declaration*:

21.1 In addition to carrying out the functions referred to in subsection 23(3), the purpose of the Commissioner is to provide sustainable development monitoring and reporting on the progress of category I departments towards sustainable development, which is a continually evolving concept based on the integration of social, economic and environmental concerns, and which may be achieved by, among other things:

- a) the integration of the environment and the economy;
- b) protecting the health of Canadians;
- c) protecting ecosystems;
- d) meeting international obligations;
- e) promoting equity;
- f) an integrated approach to planning and making decisions that takes into account the environmental and natural resource costs of different economic options and the economic costs of different environmental and natural resource options;
- g) preventing pollution; and
- h) respect for nature and the needs of future generations.²⁷

As a result of this, the legislative definitions closely reflect the wording of the *Brundtland Report* and the *Rio Declaration*. For example, the *Canadian Environmental Protection Act, 1999*,²⁸ and the *Federal Sustainable Development*

Act reiterate: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”²⁹

Beyond its legislative definition, the goal of sustainable development raises the question of whether the concept has been effectively implemented within the Canadian legal system. It is through general principles that express its purpose, conditions of application, and the procedures for its implementation that a framework of norms and legal systems required for its successful completion is being built. The role of the principles of sustainable development is to guide any state intervention, whereby the legislator must translate them into law, the executive branch must include them in its strategies, plans, and policies, and the judiciary must interpret the law when deciding litigation.

When sustainable development principles play a deciding role, they grab the attention of national and international institutions and highlight the legal doctrine regarding important questions relating to their legal nature, scope, hierarchical organization, etc. To facilitate their presentation, we can divide the principles into two categories: inherent and operational. The first category contains those principles that can be described as inherent, essential, or basic to sustainable development (they represent its ultimate purpose) and are necessary for its attainment.³⁰ The second category comprises operational principles,³¹ which clearly identify the procedures for the implementation of sustainable development, such as prevention, precaution, the application of the polluter pays principle, and public participation. Despite this distinction, the interconnectedness of these two categories of principles means that the interpretation of operational principles must respect the principles inherent to sustainable development, which are health, quality of life, equity, and the integration of sustainability.

The Principles Inherent in the Concept of Sustainable Development

The principles that are inherent in sustainable development include its purpose and the conditions necessary for its successful application. Although they cannot be understood and interpreted in isolation from each other, they are discussed individually here.

HEALTH AND QUALITY OF LIFE: THE PURPOSE

The *Rio Declaration* clearly defines the purpose of sustainable development: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”³²

It refers to the right of human beings to live in a healthy environment, which was recognized by the international community in 1972 in the *Stockholm Declaration*.³³ The basic link between human rights and environmental rights has been repeated numerous times on the international stage.³⁴ It resides in the threat to human life and health posed by the destruction of the natural world.³⁵

Many countries have, in fact, drafted human environmental rights into their constitutions, expressed in different ways and revolving around the protection of such rights from any substantial modifications.³⁶ The Canadian Constitution does not recognize environmental rights. Nevertheless, Article 7 of the *Canadian Charter of Rights and Freedoms*³⁷ could be used as the basis for recourse against the state when its intervention infringes upon an individual's environmental rights and has an impact on his or her health and safety,³⁸ provided that the alleged impact is not considered speculative or fictitious.³⁹ By way of analogy, we could point to the fact that the European Court of Human Rights has established a link between the right to privacy in private and family life, guaranteed by the *Convention for the Protection of Human Rights and Fundamental Freedoms*,⁴⁰ and serious infringements of environmental law.⁴¹

In Canada, the federal Parliament and the provinces have introduced environmental rights into their legislation, along with the procedural rights intended to ensure their proper application.⁴² In the Yukon, for example, the public "is entitled to a clean and healthy environment" and every resident has the right to take legal action in order to protect the environment.⁴³ In Quebec, the *Charte québécoise des droits et libertés de la personne* has enshrined the right of every person to live in a clean environment that protects biodiversity.⁴⁴

From this perspective, it should be noted that the Supreme Court of Canada has stated that "environmental protection has become [...] a fundamental value in the life of Canadian society" and that "we are individually and collectively responsible" for its protection.⁴⁵ In 2004, the court recognized the state's right, in its role as *parens patriae*, to represent the public and enforce respect of "the public's interest in an unspoiled environment" and the "inescapable rights of the public with respect to the environment and certain common natural resources," by taking recourse on its behalf to grant injunctions and award compensation for environmental damage.⁴⁶

Environmental rights are applied by way of the principle of public participation, which is expressed in terms of three procedural rights, including access to information, participation in the decision-making process, and access to

justice.⁴⁷ The first two components are found in the procedures concerning the adoption of laws and regulations, and in the assessment procedures surrounding the environmental impact of large-scale development projects.⁴⁸ Environmental legislation includes a variety of provisions granting the public rights of access to environmental information, to take part in the decision-making process, and to initiate recourse to the justice system.⁴⁹ Quebec has strengthened the public's right to participate by passing the "anti-SLAPP" act in order to delegitimize strategic lawsuits against public participation, commonly known as SLAPPs.⁵⁰

THE PRINCIPLE OF EQUITY: AN ESSENTIAL CONDITION

International and Canadian law both recognize the moral and legal obligation to protect the environment in order to preserve the right to development for present and future generations.⁵¹ It is based upon an awareness of the threat to future generations posed by the exhaustion of natural resources and the destruction of the environment, ecosystems, and climate.⁵² On the subject, the Supreme Court of Canada recognizes that "[t]oday we are more conscious of what type of environment we wish to live in, and what quality of life we wish to expose our children to" and that this awareness "perhaps indicates the birth of a feeling of solidarity between generations and an environmental debt towards humanity and the world of tomorrow."⁵³

According to the *Stockholm Declaration*, the principle of equity applies to the protection of "the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, [which] must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate."⁵⁴ The principle of equity, which transcends the implementation of sustainable development, is difficult to apply. Protecting the rights of future generations is one of the most difficult things to do.⁵⁵ Who can take action? In 1994, the Philippines Supreme Court examined the question of the interest in acting for future generations and recognized the right of young children, representing the future generation, to take legal action in order to challenge forestry exploration permits "for themselves, for others of their generation and the succeeding generations":

Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of

their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.⁵⁶

This decision illustrates the link between intergenerational environmental and equity rights, including the natural right to survive and to self-perpetuate, “the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written into the Constitution for they are assumed to exist from the inception of humankind.”⁵⁷

The Court of Appeal for Newfoundland and Labrador, for its part, highlighted the existing link between the procedure for assessing environmental impacts and the rights of future generations:

If the rights of future generations to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of the [environmental assessment] legislation. Environmental laws must be construed against their commitment to future generations and against a recognition that, in addressing environmental issues, we often have imperfect knowledge as to the potential impact of activities on the environment.⁵⁸

THE PRINCIPLE OF INTEGRATION: ANOTHER ESSENTIAL CONDITION

In order to achieve sustainable development, the *Rio Declaration* states that “environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”⁵⁹ The principle of integration reflects the interrelationship of the social, economic, and environmental objectives of society.⁶⁰ In the *Brundtland Report*, this principle speaks to “the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.”⁶¹

The principle of integration is the subject of much discussion and remains equivocal. It is often represented by an iterative triangle or Venn diagram with the three dimensions, or pillars, of sustainable development overlapping. The crucial issue is finding the necessary balance between the three dimensions, as the principle is silent about whether we should reconcile diverging

interests, or rather measure the “sustainability” of development, or ensure the mutual support between the dimensions. In the absence of clear indications, the fear is that the integration exercise will create negotiation gaps between the players with differing interests, without regard to the sustainable nature of the development.

Since the beginning of the 1990s, studies have stressed the distinction between the concepts of sustainable development supporting “weak” sustainability and “strong” sustainability.⁶² This dichotomy rests mainly on the economic value we place on natural stock and environmental protection. For legislators, it is the opposition between the anthropocentric concept and the ecocentric concept that feeds debate about the significance of sustainable development.⁶³ The balance being sought between the diverging dimensions of development directly influences the decisions taken in the name of sustainable development and the interpretation of the rule of law.

So-called “weak” sustainability tends to favour economic development by allowing the substitution of natural stock with goods and wealth generated by human activity, with the justification that this wealth might then be invested in environmental protection. On this approach, environmental protection is not viewed as a condition of sustainable development;⁶⁴ it merely represents one pillar of sustainable development and is equal to the social and economic pillars.⁶⁵ This substitution between the different stocks contradicts the principle of intergenerational equity and the ability to attain the goal of sustainable development.

The assessment of the sustainability of development refers back to a conceptual framework based on the calculation of natural, economic, and social stock.⁶⁶ If the total of the sum of the capitals drops, development is not sustainable and the well-being of future generations will be inferior to that of present generations, which contravenes the principle of equity.⁶⁷ It is still not easy to assess the monetary value of natural stock, to set a price on air, the ozone layer, or a wetland.⁶⁸

From the perspective of “strong” sustainability, natural stock is not substituted by goods produced by humans.⁶⁹ On this approach, natural stock should remain intact or not diminish to such a level that it does not renew itself. Natural stock is given an intrinsic value, totally independent from the needs of humans; it is the condition of its development.⁷⁰ Strong sustainability promotes itself as being the only interpretation of sustainable development that is capable of guaranteeing equity between the generations.⁷¹ From this

perspective, the state is invited to become involved in order to restrict any negative impact on the environment and to establish indicators that would allow us to follow the evolution of natural stock.

The assessment of sustainable development leads governments to formulate plans for future action within a strategic framework. The experience of other states is also called upon.⁷² The trend is to legislate for the implementation of sustainable development, at the centre of power.⁷³ From this perspective, government action is neither free nor voluntary but mapped out by legislative deadlines, with the goal of sustainable development, guiding principles, periodical accountability, and compliance assessments being carried out by an independent commissioner. These framework laws are not immune from the trend towards “strong” sustainability, as witnessed by the definition of “sustainability” in the *Federal Sustainable Development Act*: “the capacity of a thing, action, activity or process to be maintained indefinitely.”⁷⁴

Ancillary to the principles inherent to sustainable development, operational principles represent the procedures to be implemented in order to attain this goal. They are integrated with one or several dimensions of sustainable development to which they lend a precise form. Thus, environmental integrity is expressed through the principles of prevention and precaution; economic efficiency through internalization of costs and the “polluter pays” principle; and the social dimension through the principle of public participation. The transposition of these principles into Canadian law is effectuated through special regimes, such as assessment procedures to measure the impact on the environment based on the principle of prevention⁷⁵ and site cleanup obligations based on the polluter pays principle.⁷⁶

We have set out here the general principles and requirements for the dynamic concept of sustainable development. Although the concept is widely accepted, its prescriptive implications seem today to be more complicated and radical than we could ever have expected back in the early 1970s. The devil is in the details! Thankfully, every day, practitioners and scientists in many disciplines are working to make sustainable development an enduring reality.⁷⁷

NOTES

- 1 Donella H Meadows, Dennis L Meadows & Jorgen Randers, *Beyond the Limits* (London: Earthscan, 1972).
- 2 See, for example, David R Boyd, *Unnatural Law: Rethinking Canadian*

Environmental Law and Policy (Vancouver: UBC Press, 2003); Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Burlington: Ashgate,

- 2008); [Bosselmann, “Principle of Sustainability”]; Bruce Pardy, “In Search of the Holy Grail of Environmental Law: A Rule to Solve the Problem” (2005) 1 McGill Int’l J Sust Dev L & Pol’y 29; Staffan Westerlund, “Theory for Sustainable Development: Towards or Against?” in Hans-Christian Bugge & Christina Voigt, *Sustainable Development in International and National Law*, ch 1.3 (Groningen, the Netherlands: Europa Law Publishing, 2008) at 49–66; Massimiliano Montini, “Revising International Environmental Law through the Paradigm of Ecological Sustainability,” in Federico Lenzerini & Ana Filipa Vrdoljak, eds, *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, ch 13 (Oxford, UK, and Portland, OR: Hart, 2014) at 271–287 [Montini, “Ecological Sustainability”]; Rakhyun E. Kim & Klaus Bosselmann, “Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm of International Law,” (2015) 24:2 Review of European Community and International Environmental Law, Special Issue: Public Participation and Climate Governance, 194–208.
- 3 International Union for Conservation of Nature and Natural Resources, *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (Gland: IUCN, 1980) para 3.
 - 4 World Commission on Environment and Development, *Our Common Future* (1987) (Montreal: Éditions du Fleuve, 1988) at 51.
 - 5 UNCED, *Rio Declaration on Environment and Development*, Off Doc AG UN, 1992, Doc UN A/CONF151/26 (Vol I).
 - 6 *Ibid*, principle 3.
 - 7 *Ibid*, principle 4.
 - 8 United Nations, *Agenda 21*, UN Doc A/CONF151/26 (Vol. I–III); *Agreement on Biodiversity*, 5 June 1992, 1993 QR Can 24 (effective date: 29 December 1993) [*Biodiversity*]; *United Nations Framework Convention on Climate Change*, 9 May 1992, 31 ILM 851 (effective date: 21 March 1994) [*Climate Change*]; *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification*, 5 June 1992, 1996 QR Can 51 (effective date: 26 December 1996); *Barcelona Convention for Protection against Pollution in the Mediterranean Sea*, 16 February 1976, 1102 UNQR 27 (effective date: 12 February 1978); United Nations, *Johannesburg Declaration on Sustainable Development*, Doc off AG UN, 2002, UN Doc A/CONF199/20, para 8; *Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement*, 13 December 2005, the preamble; *Declaration on the Establishment of the Arctic Council*, 19 September 1996, 35 ILM 1382, art 1(a).
 - 9 On this subject, see also Philippe Sands, *Principles of International Environmental Law*, 2d ed (New York: Cambridge University Press, 2003) at 253, 281 and 941 [Sands, “Principles of International Environmental Law”]; Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment*, 3d ed (Oxford: Oxford University Press, 2009) [Birnie et al, “International Law and the Environment”]; Jean-Maurice Arbour et al, *Droit international de l’environnement* (Montréal: Éditions Yvon Blais, 2016), at 106 and following [Arbour et al, “Droit international de l’environnement”].
 - 10 WTO, *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154, 33 ILM 1144; WTO, Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WTO Doc WT/DS58/AB/R paras 185–186.
 - 11 North American Free Trade Agreement between Canada, the United States of America and Mexico, 1 January 1994, QR Can 1994 No 2, 32 ILM 289 (effective date: 1 January 1994).
 - 12 WTO, Ministerial Decision on Trade and Environment, 15 April 1994.
 - 13 Philippe Sands, “International Law in the Field of Sustainable Development,”

- (1994) 65 Brit. Y.B. Int. L. 303–381 at 338 [Sands, “International Law in the Field of Sustainable Development”].
- 14 *Aarhus Convention*, 25 June 1998, 38 ILM 517 (effective date: 30 October 2001).
 - 15 17 November 1996, QR Can 2006 n° 5 (effective date: 24 March 2006). See also *Cartagena Protocol on Biosafety*, 29 January 2000, 39 ILM 1027 (effective date: 11 September 2003).
 - 16 Res AG 229, Off Doc AG UN, 51st Sess., Appendix n° 1, UN Doc A/51/229 (1997). See also *Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, 17 March 1992, 31 ILM 1312.
 - 17 25 February 1991, 1989 UNQR 309.
 - 18 United Nations, *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development*, 18 April–3 May 1996.
 - 19 International Law Association, *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, ILA Res 2/2002, 2–6 April 2002, New Delhi [New Delhi Declaration].
 - 20 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] CIJ rec 7.
 - 21 *Ibid* at para 140.
 - 22 *Ibid* at para 140.
 - 23 *Ibid*, separate opinion by Mr. Justice Weeramantry, Vice-President, at 95.
 - 24 On the debate surrounding the legal status of sustainable development, see Jaye Ellis, “Sustainable Development as a Legal Principle: A Rhetorical Analysis” in Hélène Ruiz Fabri, Rudiger Wolfrum & Jana Gogolin, eds, *Select Proceedings of the European Society of International Law*, vol 2 (London: Hart, 2008) at 641; Vaughan Lowe, “Sustainable Development and Unsustainable Arguments” in Alan Boyle & David Freestone, eds, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999) at 19; Sands, “International Law in the Field of Sustainable Development,” *supra* note 13 at 305; Ulrich Beyerlin, “Different Types of Norms in International Environmental Law: Policies, Principles, and Rules” in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007) at 425; Arbour et al, “Droit international de l’environnement,” *supra* note 9 at 109–110. Barral Virginie, *Le développement durable en droit international: Essai sur les incidences juridiques d’une norme évolutive* (Bruxelles: Éditions Bruylant, 2016) at 23–24 and 233–236.
 - 25 *R v Hydro-Québec*, [1997] 3 SCR 213 at para 41 [*Hydro-Québec*; 114957 *Canada Ltd (Spraytech, Sprinkler Company) v Hudson (Town)*, [2001] 2 SCR 241 at para 31 [*Spraytech*]; *Imperial Oil Ltd v Québec (Ministry of the Environment)*, [2003] 2 SCR 624 at para 24 [*Imperial*]; *St. Lawrence Cement Inc. v Barrette*, [2008] 3 SCR 392 at para 80.
 - 26 See, for example, *Loi sur le ministère de l’environnement et de la faune et modifiant diverses dispositions législatives* (SQ 1994, c 17); *Loi modifiant la Loi sur les forêts et d’autres dispositions législatives* (SQ 1996, c 14); *Loi modifiant la loi sur la protection du territoire agricole et d’autres dispositions législatives afin de favoriser la protection des activités agricoles* (SQ 1996, c 26); *Energy Authority Act* (SQ 1996, c 61); *Sustainable Development Act* (LM 1997, c 61, CPLM c S270) [Manitoba, LDD]; *Sustainable Development Act* (SQ 2006, c. 3) [Québec, LDD]; *Act to affirm the collective nature of water resources and to strengthen their protection* (SQ 2009 c 21), s 3; *Law on Sustainable Forest Management* (SQ 2010 c 32); *Loi modifiant la Loi sur les mines* (SQ 2013, c 32), preamble and s 17. See also Stepan Wood, Georgia Tanner & Benjamin J. Richardson, “What Ever Happened to Canadian Environmental Law?” (2010) 37:4 *Ecology Law Quarterly* 981–1040 at 1031.
 - 27 *Auditor General Act*, RSC 1985, c A-17, s 21.1.

- 28 *Canadian Environmental Protection Act*, 1999, SC 1999, c 33, s 3.
- 29 *Federal Law on Sustainable Development Act*, SC 2008, c 33, s 2 [Canada, FLSDA].
- 30 Sands, “International Law in the Field of Sustainable Development,” *supra* note 13. See also Sands, “Principles of International Environmental Law,” *supra* note 9 at 253; Philippe Sands, “Environmental Protection in the Twenty-First Century: Sustainable Development and International Law” in Richard L Revesz, Philippe Sands & Richard B Stewart, eds, *Environmental Law, The Economy and Sustainable Development: The United States, the European Union and the International Community* (New York: Cambridge University Press, 2000) 369; Birnie et al, “International Law and the Environment,” *supra* note 9 at 115.
- 31 Sands, “International Law in the Field of Sustainable Development,” *supra* note 13. See also Philippe Sands, “International Law in the Field of Sustainable Development: Emerging Legal Principles” in Winfried Lang, ed, *Sustainable Development and International Law* (Boston: Graham Trotman, 1994) 53 at 57; Rudiger Wolfrum, “International Environmental Law: Purposes, Principles and Means of Ensuring Compliance” in Fred L Morrison & Rudiger Wolfrum, eds, *International, Regional and National Environmental Law* (Boston: Kluwer Law International, 2000) 3 at 8.
- 32 *Supra* note 5, principle 1.
- 33 United Nations Conference on the Human Environment, *Stockholm Declaration*, 5–16 June 1972, principle 1 (“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”).
- 34 See the *World Charter for Nature*, 1982, 48th Plenary Session, Doc UN A/37/7 (1982), principle 6; OÉA, *Additional Protocol to the American Convention on Human Rights*, A-52, (1988), s 11(1); *African Charter on Human and Peoples’ Rights*, 27 June 1981, art 24; *World Conference on Human Rights, Declaration and Programme of Action from the Vienna World Conference on Human Rights*, 25 June 1993, Doc UN A/CONF157/23, art 11.
- 35 See Human Rights Commission, *Review of Further Developments in Fields with which the Sub-committee has been Concerned—Human Rights and the Environment—Final Report prepared by Mrs. Fatma Zohra Ksentini*, Special Rapporteur, Off Doc ESC UN, 1994, Doc UN E/CN4/Sub2/1994/9 at para 21 and following; Dinah Shelton, “Human Rights and the Environment: What Specific Environmental Rights have been Recognized?” (2006) 35 *Denv J Int’l L & Pol’y* 129; Klaus Bosselmann, “Human Rights and the Environment: Redefining Fundamental Principles?” in Brendan Gleeson & Nicholas Low, eds, *Governance for the Environment: Global Problems, Ethics and Democracy* (London: Palgrave, 2001) at 118–134; David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy*, 5th ed (St Paul, MN: Foundation Press, 2015) at 1323.
- 36 See David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012); Marie-France Delhoste, “L’environnement dans les constitutions du monde” (2004) 120 *RDP* 441; Earth Justice, *Issue Paper, Human Rights and the Environment, Materials for the 60th Session of the United Nations Commissions on Human Rights*, Geneva, 15 March–23 April 2004.
- 37 *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B of Act 1982 of Canada (UK), 1982, v 11.
- 38 On the link between art 7 and environmental rights, see Sophie Thériault & David Robitaille, “Les droits

- environnementaux dans la Charte des droits et libertés de la personne du Québec: Pistes de réflexion” (2011) 57:2 McGill LJ 211 at 240 and following; Andrew Gage, “Public Health Hazards and Section 7 of the Charter” (2003) 13 J Envtl L & Prac 1.
- 39 *Opération Dismantle Inc c R*, [1985] 1 RCS 441.
- 40 European Council, *Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS n° 005, art 8.
- 41 *López Ostra v Espagne* (1994) 303C Cour Eur DH (Sér A) 51 at paras 59–60; See also *Moreno Gómez v Espagne*, n° 4143/02, [2004] CEHR 1; *Deés v Hongrie*, n° 2345/06, [2010] CEHR 1.
- 42 See in Quebec, *Environment Quality Act*, CQLR c Q-2, ss 19.1–2, ss 118.5.1–3 [Québec, LQE]; *Charter of Human Rights and Freedoms*, CQLR c C-12, s 46.1 [Québec, CDLP]; in the Northwest Territories, *Environmental Rights Act*, LRTN-O 1988 c 83 (Supp), ss 4–6; in the Yukon, *Environment Act*, SY 2002, c 76, ss 6, 8, 14, 19, 21 [Yukon, LE]; in Ontario, *Environmental Bill of Rights*, SO 1993, c 28, ss 3 and following [Ontario, EBR]; and federally, *Auditor General Act*, *supra* note 27, ss 11 and following.
- 43 *Ibid*, Yukon, LE, ss 6 and 8.
- 44 *Ibid*, Québec, CDLP, s 46.1. See David Robitaille & Sophie Thériault, “Le droit à un environnement sain: normativité et limites d’un principe phare de la charte québécoise des droits,” in *Droits fondamentaux et environnement* (Montréal: Wilson & Lafleur, 2013) at 203–229.
- 45 *Friends of the Oldman River Society v Canada (Ministry of Transport)*, [1992] 1 SCR 3 at paras 16–17 [*Friends of the Oldman River Society*]; *Hydro-Québec*, *supra* note 25 at para 55; *Spraytech*, *supra* note 25 at para 1; *Imperial*, *supra* note 25, para 19; *Ontario v Canadian Pacific Ltd* [1995] 2 SCR 1028 at para 1075.
- 46 *British Columbia v Canadian Forest Products Ltd*, [2004] 2 SCR 75 at paras 64 and 76 (The majority rejected the claim which was filed late and based on a method of calculation considered to be “too arbitrary and simplistic”).
- 47 *Aarhus Convention*, *supra* note 14, s 1.
- 48 See, for example, Québec, LQE, *supra* note 42, ss 31.3.1–7; Ontario, EBR, *supra* note 42, Part II; *Canadian Environmental Assessment Act 2012*, SC 2012, c 19, s 52 and ss 4 (1)(e), 24 and following [Canada, LCEE]; *Environmental Management and Protection Act*, SS 2010, c E-10.22, s 98(4). On this topic, see Jamie Benidickson, *Environmental Law*, 3d ed (Toronto: Irwin Law, 2009) at 132 and following.
- 49 See cited laws, *supra*, note 42. See also Benjamin J Richardson & Jona Razzaque, “Public Participation in Environmental Decision-making” in Benjamin J Richardson & Stepan Wood, eds, *Environmental Law for Sustainability: A Reader* (Oxford: Hart, 2006) at 165; Jonas Ebbesson, “Public Participation” in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007) at 686 and following.
- 50 *Protection of Public Participation Act*, SBC 2001, c 19 [Repealed by *Miscellaneous Statutes Amendment Act*, 2001, SBC2001, c. 32, s. 28]; *Act to amend the Code of Civil Procedure to prevent misuse of the courts and promote respect for freedom of expression and citizen participation in public debate*, LQ 2009, c 12 (*Code of civil procedure*, CQLR c C-25.01); *Protection of Public Participation Act*, SO 2015, c 23 – Bill 52. For a precedential perspective, see *Daishowa Inc v Friends of the Lubicon*, [1998] OJ 1429 (Ont SCJ); *Fraser v Saanich (District)*, [1999] BCJ 3100 (BCCS) (LN/QL) and *Ugo Lapointe v Pérolia*, 2011 QCCS 4014.
- 51 See *International Convention for the Regulation of Whaling*, 2 December 1946, 161 UNTS 72, 10 UST 952, preamble; *Convention for the Protection of World Cultural and Natural Heritage*, 16 November 1972, 1037 UNTS 151 (effective date: 17 December 1975) art 4;

- Climate Change*, *supra* note 8, preamble;
Biodiversity, *supra* note 8, preamble.
- 52 Edith Brown Weiss, *Intergenerational Fairness and Rights of Future Generations* (Paris: UNU Press, 1993) at 35; Daniel Barstow Magraw & Lisa D Hawke, “Sustainable Development” in Daniel Bodansky, Jutta Brunnée & Ellen Hey, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007) at 630. Virginia Barral, “Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm” (2012) 23:2 *European Journal of International Law* at 380–381.
- 53 *Spraytech*, *supra* note 25 at para 1; *Imperial*, *supra* note 25 at para 19.
- 54 *Supra* note 33, Principle 2.
- 55 Sumudu A Atapattu, *Emerging Principles of International Environmental Law* (Ardsey: Transnational, 2006) at 116. In Canada, see Jerry V DeMarco, “Law for Future Generations: The Theory of Intergenerational Equity in Canadian Environmental Law” (2005) 15 *J Env'tl L & Prac't* at 28 and following. Malgosia Fitzmaurice, *Contemporary Issues in International Environmental Law* (Cheltenham, UK: Edward Elgar Publishing, 2009) at 110–169; Gail E. Henderson, “Rawls and Sustainable Development” (2011) 7:1 *RDPDD* at 1–31.
- 56 *Decision in Minors Oposa v Sec of DENR*, 30 July 1993, 33 *ILM* 173 at 185 (1994) (Philippines Supreme Court).
- 57 *Ibid* at 187.
- 58 *Labrador Inuit Association v Newfoundland (Minister of Environment and Labour)*, 1997 CanLII 14612 (NL CA) at paras 11 and 12.
- 59 *Supra* note 5, principles 12, 13 and 14.
- 60 New Delhi Declaration, *supra* note 19, principle 7.
- 61 *Supra* note 4 at 51.
- 62 David Pearce, Kirk Hamilton & Giles Atkinson, “Measuring Sustainable Development: Progress on Indicators” (1996) 1 *Environment & Development Economics* 85; Andrew Dobson, “Environment Sustainabilities: An Analysis and a Typology” (1996) 5:3 *Environmental Politics* 401 at 409–412.
- 63 Bosselmann, “Principle of Sustainability,” *supra* note 2 at 34 (“Clearly, the preservation of the natural stock determines the ability to meet the needs of present and future generations”). See also Montini, “Ecological Sustainability,” *supra* note 2 at 278–280.
- 64 Andrea Ross, “Modern Interpretations of Sustainable Development” (2009) 36 *JL & Soc'y* 32 at 35.
- 65 *Ibid*. See also Arbour et al, “Droit international de l’environnement,” *supra* note 9 at 111.
- 66 Statistics Canada, *A Proposed Approach to Sustainable Development Indicators Based on Capital*, paper submitted to joint ECE/EuroStat Work Session on Methodological Issues of Environment Statistics, 2001, online: Statistics Canada <<http://www.unec.org/fileadmin/DAM/stats/documents/2001/10/env/wp.9.e.pdf>>. See also National Round Table on the Environment and the Economy, *Environmental Indicators and Sustainable Development for Canada*, Ottawa, Library and Archives Canada, 2003.
- 67 OECD, *Measuring Sustainable Development: Integrated Economic, Environmental and Social Frameworks* (Paris: OECD) at 54.
- 68 See the concept of ecosystem services in *Millennium Ecosystem Assessment – MEA, Ecosystems and Human Well-Being: A Synthesis* (Washington, DC: Island Press, 2005), 137 pages, online: <<http://www.millenniumassessment.org/documents/document.356.aspx.pdf>>; United Nations Environment Programme (TEEB), *The Economics of Ecosystems and Biodiversity: Ecological and Economics Foundations*, ed by Pushpam Kumar (London and Washington, DC: Earthscan, 2010). About payments for ecosystem services, see Philippe Méral & Denis Pesche, eds, *Les services écosystémiques: repenser les relations nature et société* (Versailles: Éditions

- Quae, 2016) at 184–200; Jérôme Dupras & Jean-Pierre Révéret, eds, *Nature et économie: un regard sur les écosystèmes du Québec* (Québec: Presse de l'Université du Québec, 2015). For examples, see Québec, Ministère des Forêts, de la Faune et des Parcs, *Estimer la compensation financière lors d'une perte d'habitat faunique – Résumé de l'outil de calcul du ministère des Forêts, de la Faune et des Parcs*, Direction générale de la valorisation du patrimoine naturel, 2016, 10 pp; *Loi concernant la conservation des milieux humides et hydriques* (LQ 2017, c 14); Sophie Lavallée & Jérôme Dupras, “Regards sur les systèmes de paiements pour services écosystémiques en milieu agricole au Québec” (2016) 7:1 *Développement durable et territoires*, 18 pp; Fisheries and Oceans Canada, *Avoid, mitigate or offset harm to fish and fish habitat, including aquatic species at risk*, online: <<http://www.dfo-mpo.gc.ca/pnw-ppe/measures-mesures/offset-harm-dommage-comp-eng.html>>; Government of Alberta, Alberta Environment and Parks, *Alberta Wetland Mitigation Directive*, Water Policy Branch, Edmonton, 2017, online: <<http://aep.alberta.ca/water/programs-and-services/wetlands/documents/AlbertaWetlandMitigationDirective-Jun2017.pdf>>.
- 69 *Supra* note 62 at 37.
- 70 Klaus Bosselmann, “Rio+20: Any Closer to Sustainable Development?” (2002) 6 NZ J Env'tl L 297 at 301–302 (“[T]he natural sphere is paramount and cannot be compromised. The challenge of SD is, therefore, not to find the right ‘balance’ or ‘compromise’ between the natural sphere and the human sphere but to adjust the human sphere to the conditions set by the natural sphere”).
- 71 Herman E Daily, “Economics in a Full World” (2005) 29:3 *Scientific American* 1; Bosselmann, “Principle of Sustainability,” *supra* note 2 at 55.
- 72 See notably *Environment Act 1986* (NZ), 1986/127, 36 RS 223 (New Zealand) [enacted on 18 December 1986]; *Act on the coordination of Federal Sustainable Development Policy (Loi relative à la coordination de la politique fédérale de développement durable)* (BE), SC 97/21155, F 97/1176 (Belgium) [enacted on 5 May 1997]; *Commissioner for Environmental Sustainability Act 2003* (Vic) (State of Victoria, Australia) [enacted on 13 May 2003]; *Act of June 25, 2004 on the coordination of national sustainable development policy* (LU), 2 July 2004, JO A No 102/1621 (Luxembourg).
- 73 Canada, LCEE, *supra* note 48; *supra* note 28; Ontario, EBR, *supra* note 42; Manitoba, LDD, *supra* note 25, Schedules A and B (directions and principles); Québec, LDD, *supra* note 26, art 6 (16 principles); Newfoundland, *An Act Respecting the Sustainable Development of Natural Resources in the Province*, SNL 2007, c 8-34; Nova Scotia, *Environmental Goals and Sustainable Prosperity Act*, NSS 2007, c 7. See also Paule Halley & Denis Lemieux, “La mise en œuvre de la Loi québécoise sur le développement durable: un premier bilan,” *Conférence des juristes de l'État, XVIIIe Conférence: Vert, le droit ?*, Québec, 2009.
- 74 Canada, FLSDA, *supra* note 29, s 2.
- 75 *Friends of the Oldman River Society*, *supra* note 45 at 71.
- 76 *Imperial*, *supra* note 25 at para 24.
- 77 Jonathan M Harris, *Basic Principles of Sustainable Development*, Working Paper 00-04 (Medford, MA: Global Development and Environment Institute, June 2000).