

INTERNATIONAL ENVIRONMENTAL LAW IN CANADIAN COURTS

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the Unique Nature of Environmental Damage

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INTRODUCTION

International law has been a major force in the development of environmental law in the last half-century, as global solutions are sought for common problems, and treaty regimes are used to promote domestic implementation of international standards. Canada has been an active participant in this process, and has implemented numerous agreements in legislation, but the direct application of international environmental law in Canadian courts has at times been hesitant and confusing. This paper provides a brief overview of the use of this body of law in the courts, and an assessment of the prospects and challenges facing its application in the future.

PUBLIC INTERNATIONAL LAW IN CANADIAN COURTS

The principles governing the application of international law in Canadian courts is the subject of a separate paper in this symposium, and accordingly will not be addressed in detail here. However, it is necessary to note some general principles, prior to the discussion of international environmental law in particular.

First, Canada's obligations under international conventions "must be implemented by statute in order to alter domestic law".¹ Second, the existence of an international agreement, validly concluded by the federal government, does not confer legislative authority over the subject matter of the agreement on the federal legislature.² Third, "prohibitive" rules of customary international law are "adopted" into Canadian law without the necessity of any act of the legislature or executive (subject to the legislature's power to expressly reject or derogate from such rules).³ Fourth, for treaties which have been brought into Canadian law through implementation in a statute, the treaty obligations may become part of domestic law. The treaty text may constitute a "direct source of rights and obligations" if incorporated in the statute, or may be applied via a statute that "reflects the treaty's substance".⁴

Fifth, where a treaty has been implemented by legislation (which requires that the legislative intent be "manifest"),⁵ the "underlying" convention may be used to interpret

¹ Gibran van Ert, "Using Treaties in Canadian Courts" (2000) 38 Can YB Int'l Law 3 16. This rule, which would not be relevant to self-executing treaties, was stated by Lord Atkin in *Attorney General for Canada v Attorney General for Ontario (Labour Conventions Case)*, [1937] AC 326, 347 (PC) [*Labour Conventions Case*].

² *Labour Conventions Case*, *ibid*. There is no independent head of jurisdiction for "treaty implementation" in the *Constitution Act 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, except for "Empire" treaties under s 132. On the controversy over this decision see van Ert, *ibid* at 67-78.

³ *R v Hape*, [2007] 2 SCR 292 at para 39 [*Hape*].

⁴ Hugh Kindred, Phillip Saunders et al, *International Law: Chiefly As Interpreted And Applied In Canada*, 7th ed (Toronto: Emond Montgomery, 2006) at 2007.

⁵ *Macdonald et al v Vapor Canada Ltd*, [1977] 2 SCR 134 at 171.

the implementing statute, both determine whether there is any ambiguity between treaty and statute, and to resolve ambiguity where it is found.⁶ Furthermore, the international rules of treaty interpretation, as reflected both in the *Vienna Convention on the Law of Treaties*⁷ and customary law, should be applied in the interpretation of the treaty.⁸ Finally, treaties which have been concluded and ratified by Canada, but which remain unimplemented in domestic law, still have an impact through their application in the interpretation of legislation. The “presumption of conformity” requires courts to interpret federal statutes (where possible and in absence of an express contrary intent) to be in compliance with Canada’s international obligations.⁹

It is important to note that the presumption of conformity has taken on a dual aspect which can lead to confusion, particularly in the environmental context. In *Ordon Estate v. Grail* in 1998, the SCC expressed the rule as follows:

“Although international law is not binding upon Parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada’s obligations under international instruments and as a member of the international community. In choosing among possible interpretations of a statute, the court should avoid interpretations that would put Canada in breach of such obligations ...”¹⁰

This test held the statutory provision up against “obligations” binding on Canada in international law. In both *Hape* and *Baker*, by contrast, the Court at once accepted this more limited purpose and confirmed another, less precise element rooted in the Court’s general “contextual” approach to statutory interpretation: “... [T]he values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”¹¹ These cases leave open how far a Court might go in using the “values and principles” of international law¹² as part of the “contextual approach” to statutory interpretation, and whether this cuts the exercise loose from the firmer moorings of a definable “obligation” against which a statute might be measured.

⁶ *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1371-1372 [*Corn Growers*].

⁷ 27 January 1980, Can TS 1980 No 37.

⁸ See, e.g., *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at paras 51-52 [*Pushpanathan*]. This may lead, where appropriate, to use of the *travaux préparatoires* and other sources relevant to the purposes of the treaty.

⁹ *Hape* at para 53. See also *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 70-71 [*Baker*]. The legislature may, of course, still choose to act expressly in contravention of the international obligation.

¹⁰ [1998] 3 SCR 437 at para 137.

¹¹ *Baker* at paras 69-70.

¹² See *Hape* at para 53: “... [T]he legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them.”

INTERNATIONAL ENVIRONMENTAL LAW: APPLICATION IN CANADA

Despite the general applicability of the principles summarized above, there are certain unique characteristics of international *environmental* law, and the manner in which it has been incorporated in Canada. First, whereas much of the jurisprudence on international law has dealt with the application of *unimplemented* obligations or customary law, in the environmental context Canada has been quite active in statutory implementation. Second, environmental agreements often require complex programmes of action, which are only capable of implementation through legislation (as opposed to court decisions which interpret existing law). Third, the obligations set out in these agreements are primarily owed to other states,¹³ and generally do not create rights that allow challenges by individuals in domestic courts (as in the human rights setting). Finally, this is a field in which there is a great variety of international documents, often non-binding in a formal legal sense, but nonetheless influential as so-called “soft law”, or as evidence of policy directions at the international level.

Statutory Implementation

There has been an extensive practice in Canada of implementing environmental conventions (in whole or in part) in statutes — even a short list of examples of such instruments¹⁴ makes it clear that this is a significant source of substantive law:

- Part VII, Division 3 of the *Canadian Environmental Protection Act 1999*,¹⁵ implementing the Convention on the *Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972*.¹⁶
- The *Ozone-Depleting Substances Regulations, 1998* and subsequent amendments,¹⁷ made under *CEPA 1999*, implementing the *Montreal Protocol on Substances that Deplete the Ozone Layer, 1987* (as amended).¹⁸

¹³ See, e.g., the observation of Barnes J with regard to the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 2303 UNTS 148, to the effect that the agreement has its own “its own formal system of accountability”. *Friends of the Earth v Canada*, 2008 FC 1183 at note 3; aff’d 2009 FCA 297.

¹⁴ Provinces, within their jurisdiction, may also legislate for the implementation of international agreements, but given the space available this review is limited to examples of federal legislation.

¹⁵ SC 1999, c 33 [*CEPA 1999*]; *Disposal at Sea Regulations*, SOR/2001-275, as am by SOR/2003-295 and SOR/2009-256.

¹⁶ Can TS 1979/36 [*London Convention*] and *1996 Protocol*, 7 November 1996, Can TS 2006/5. The Regulations go further than the Convention, in that they apply to internal waters, beyond the scope of the Convention’s application.

¹⁷ SOR/99-7 [*ODSR*].

- Division 1 of the *Regulations for the Prevention of Pollution from Ships and for Dangerous Chemicals*,¹⁹ made under Part XV of the *Canada Shipping Act 2001*,²⁰ implementing the provisions of Annex I of the *International Convention for the Prevention of Pollution from Ships, 1973* as amended by the *Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships*.²¹
- The *Migratory Birds Convention Act, 1994*,²² implementing the *Convention for the Protection of Migratory Birds in Canada and the United States, 1916*.²³
- The *Coastal Fisheries Protection Act*²⁴ and regulations²⁵ which provide, *inter alia*, for the application of obligations arising under the *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 1978*²⁶ and other agreements.
- The *Species At Risk Act*,²⁷ implementing (in part) Canada's obligations under the *Convention on Biological Diversity, 1992*.²⁸

The *means* of implementation, and the sources which must therefore be consulted, are quite varied. For example, in *SARA* the direct mention of the *Biodiversity Convention* is limited to preambular statements “recognizing” that Canada has ratified and that protection for species at risk “will, in part, meet Canada’s commitments under that Convention.”²⁹ By contrast, the detailed scheme in Annex I of *MARPOL 73/78* is incorporated, along with other obligations, into the *Pollution Prevention Regulations*, and the *Migratory Birds Convention* is annexed as a Schedule to the *MBCA*. Moreover, legislation can provide for incorporation of the underlying international agreement as it may be amended over time,³⁰ requiring reference to the international sources to determine their current status. Nor is the incorporation process limited to the actual agreement itself

¹⁸ Can TS [Montreal Protocol]. The *Montreal Protocol* is a protocol to the 1985 *Vienna Convention for the Protection of the Ozone Layer*, Can TS 1988/23.

¹⁹ SOR/2007-86 [Pollution Prevention Regulations].

²⁰ SC 2001, c 26 [CSA]. As set out in s 29(1), Schedule 1 of the *CSA* lists various Conventions which the Minister of Transport “has determined should be brought into force, in whole or in part, in Canada by regulation.”

²¹ 1340 UNTS 61 [MARPOL 73/78].

²² SC 1994, c 22 [MBCA].

²³ UKTS 1917 No 17 [Migratory Birds Convention].

²⁴ *Coastal Fisheries Protection Act*, RSC 1985, c C-33.

²⁵ *Coastal Fisheries Protection Regulations*, CRC c. 413 (2012) [CFP Regulations].

²⁶ Can TS 1979 No 11 [NAFO Convention].

²⁷ SC 2002, c 29 [SARA].

²⁸ Can TS 1993 No 24 [Biodiversity Convention].

²⁹ *SARA*, Preamble.

³⁰ See, e.g., ss 1 and 33(4) of the *ODSR*, which make reference to the *Montreal Protocol* “as amended from time to time”, and a similar provision in s 2 of the *MBCA*.

— a number of instruments require reference to decisions which may be made by international bodies empowered by the relevant convention,³¹ or conservation schemes established by an international organization.³² If a treaty is determined to be implementing a convention, then the interpretive rules in *Pushpanathan* clearly apply, and any interpretation must conform to the treaty obligation. Perhaps less clearly stated is the approach to be taken to interpretation of such sources as conservation regulations, which do not have the status of a treaty and are not subject to any defined set of interpretation rules at international law.

Judicial Application Of International Environmental “Law”

When we move beyond the application of treaties implemented in legislation, the interpretive waters become somewhat murkier, and Canadian courts dealing with environmental law have been willing to look beyond well-defined conventional obligations. In the following sections some examples are considered which may make it possible to draw out a few general lessons.

From Crown Zellerbach to Spraytech

In a series of five cases beginning with *R. v. Crown Zellerbach Canada Ltd.*³³ in 1988, and ending with *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*³⁴ in 2001, the Supreme Court of Canada turned to the international level, with varying degrees of precision, in its consideration of domestic environmental law. While some have referred to developments in this period as “progressive” and ground-breaking,³⁵ other observers have been more skeptical about the inherent limitations of the Court’s approach.³⁶

In *Crown Zellerbach* the Court considered the constitutionality of the *Ocean Dumping Control Act*,³⁷ as it applied to internal waters within a province. The Act was passed in implementation of the *London Convention*, but this was not explicitly stated in the legislation, and the application to internal waters went beyond the Convention’s

³¹ See, e.g., the references to “Decisions” of the Parties to the *Montreal Protocol* at ss 1 & 33(4) of the *ODSR*.

³² See, e.g., the application of “NAFO measures”, “as amended from time to time”, in the *CFP Regulations*, s 1, and throughout the regulations.

³³ [1988] 1 SCR 401 [*Crown Zellerbach*].

³⁴ [2001] 2 SCR 241 [*Spraytech*].

³⁵ Jerry V DeMarco & Michelle Campbell, “The Supreme Court of Canada’s Progressive Use of International Environmental Law and Policy in Interpreting Domestic Legislation” (2004) 13:3 *RECIEL* 320 at 330, referring to the “enlightened approach” of the Court.

³⁶ See, e.g., Jutta Brunnée, “International Environmental Law in Canadian Courts” (1998) 7:1 *RECIEL* 47 at 50, 53.

³⁷ SC 1974-75-76, c 55, since repealed and replaced by Part VII, Division 3 of *CEPA 1999*.

provisions. In finding that the relevant section was valid federal legislation under the “national concern” branch of the “peace order and good government” power, the majority looked to the provisions of the Convention, but primarily as evidence that ocean dumping constituted a “distinct and separate form of water pollution”, so as to qualify as a “a single, indivisible matter”.³⁸

In *Friends of the Oldman River Society v. Canada (Minister of Transport)* in 1992,³⁹ the Court considered, *inter alia*, the statutory validity and mandatory status of the *Environmental Assessment and Review Process Guidelines Order*.⁴⁰ In support of the integration of environmental and economic concerns, La Forest, J. turned to a report of the Canadian Council of Resource and Environment Ministers, which referred to the Report of the World Commission on Environment and Development (WCED) (the “Brundtland Report”).⁴¹ Beyond this once-removed acknowledgement of a non-binding international document, and a brief mention of the work of international organizations, the decision took no further notice of the international level, and never mentioned international law.

In 1995, the SCC returned in passing to international matters in *Ontario v. Canadian Pacific Ltd.*⁴² In considering whether a statutory prohibition on “impairment of the quality of the natural environment for any use that can be made of it”, was unconstitutionally vague, the Court noted that an international panel of experts had recommended a definition of “use of natural resources”; this was just one piece of extrinsic evidence in support of the argument that “use” was capable of legal definition.⁴³ Again, no “international law” was applied, or even considered.

In *R. v. Hydro-Québec*⁴⁴ in 1997, La Forest, J., in considering whether jurisdiction for environmental protection (through regulation of PCBs) could be based on the criminal law power, turned to a number of sources of evidence, including views expressed by the WCED.⁴⁵ Further, he looked to a series of international scientific reports for confirmation that PCBs constituted a “significant danger to the environment or to human life or health”, as required by the statute.⁴⁶ No international obligations binding upon Canada were identified, but the majority was still able to conclude as follows:

³⁸ *Crown Zellerbach* at 436-438. The Court also considered international scientific reports for the same purpose.

³⁹ [1992] 1 SCR 3 [*Oldman River*].

⁴⁰ SOR/84-467.

⁴¹ *Oldman River* at 37.

⁴² [1995] 2 SCR 1031 [*Canadian Pacific*].

⁴³ *Canadian Pacific* at para 69.

⁴⁴ [1997] 3 SCR 213 [*Hydro-Québec*].

⁴⁵ *Ibid* at para 126.

⁴⁶ *Ibid* at para 157.

“I am confident that Canada can fulfil its international obligations, in so far as the toxic substances sought to be prohibited from entering into the environment under the Act are concerned, by use of the criminal law power.”⁴⁷

The final case of interest is *Spraytech*, which has perhaps had the most lasting impact. At the conclusion of her analysis of the statutory authority for the impugned pesticide by-law, L’Heureux-Dubé, J. observed that a reading of the statute to permit the town to regulate pesticide use would be “consistent with principles of international law and policy”, and that the “interpretation of By-law 270 contained in these reasons respects international law’s ‘precautionary principle’”, as “defined” in the non-binding 1990 *Bergen Ministerial Declaration on Sustainable Development*.⁴⁸ The decision listed a number of sources, mostly academic commentators, in support of the controversial contention that the “precautionary principle” had by 2001 attained the status of binding customary international law, and concluded that in “the context of the precautionary principle’s tenets, the Town’s concerns about pesticides fit well under their rubric of preventive action.”⁴⁹

These cases give rise to three general observations. First, despite the enthusiasm with which they were viewed by some at the time, there is not much by way of adoption of international law in the decisions. Only one, *Spraytech*, even purports to apply international law, and then in a clearly secondary manner, after the decision has been reached. Second, the cases did generally accept the idea that environmental protection was a “fundamental value of Canadian society”,⁵⁰ and this broad finding was rooted in part in the “values and principles” of international law and “policy”. Third, and perhaps most important, it seems clear that these cases turned to international sources as part of the contextual approach to interpretation, and not in seeking conformity with actual obligations. Even in *Spraytech*, the precautionary principle is only invoked to show that the Court’s interpretation was “consistent with principles of international law and policy”, and as part of the “legal context”.⁵¹

Post-Spraytech

In recent years Canadian courts have returned to the application of international environmental law in the domestic context, and similar issues have arisen. First, the line between a presumption of conformity with a binding obligation and a “contextual” analysis of international sources remains somewhat blurred. For example, in

⁴⁷ *Ibid* at para 127.

⁴⁸ *Spraytech* at paras 30-31.

⁴⁹ *Ibid* at para 32. The precautionary principle will be addressed by another paper in this symposium, and the question of its actual status in international law in 2001 will not be addressed further here.

⁵⁰ See, e.g., *Canadian Pacific* at para 55 and *Oldman River* at 16-17.

⁵¹ *Spraytech* at para 30.

Environmental Defence Canada v. Canada (Minister of Fisheries and Oceans),⁵² a judicial review application dealing with a Minister's decisions under SARA, Campbell, J. turned to Canada's obligations under the *Biodiversity Convention* for guidance. He found that section 38 requires the Minister, in preparing recovery strategies or action plans, to consider Canada's "commitment" to "the principle that, if there are threats of serious or irreversible damage to the listed wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty ...". In determining that this was a "mandatory interpretive principle" to be applied by the Minister, Campbell, J. took account of the fact that Canada had ratified the Convention and was therefore "committed to apply its principles."⁵³

What is unclear is whether the relevant provisions of the Convention (which are not identified) are being applied: a) as a binding obligation, subject to interpretation under treaty law; b) to enforce a rebuttable presumption of conformity with some unimplemented part of the Convention; or c) as part of the general context of interpretation. The answer may indeed be "all of the above", given the court's explicit approval of the formulation put forward by the Applicant.⁵⁴

"The *Convention* is a binding treaty, and SARA was enacted in part to implement Canada's treaty commitments. Furthermore, the *Convention* is part of the "entire context" to be considered in interpreting the SARA. Therefore, not only must the SARA be construed to conform to the values and principles of the *Convention*, but the Court must avoid any interpretation that could put Canada in breach of its *Convention* obligations."

Second, it is still the case that the application of international law often occurs in a secondary manner, to buttress a decision already supported on other grounds. In *Environmental Defence*, for example, section 38 contained a version of the precautionary principle as a required Ministerial consideration, and the wording of section 41 was similarly mandatory. Likewise, in *Adam v. Canada (Minister of the Environment)* (another SARA case), the court noted that section 38 was "enacted in part to satisfy Canada's obligations" under the Convention, but ultimately relied on the clear words of the statute.⁵⁵

⁵² 2009 FC 878, [2009] FCJ No 1052 [*Environmental Defence*].

⁵³ *Ibid* at paras 34-35. Campbell J also found at para 40, that s 41 of SARA, requiring the Minister to meet certain criteria in identification of critical habitat, was a mandatory provision — in this he applied the reasoning in *Alberta Wilderness Association v Canada (Minister of the Environment)*, 2009 FC 710 at para 25. The approach in *Environmental Defence* has been adopted and applied in a case dealing with judicial review of Ministerial actions to protect killer whales under SARA: *David Suzuki Foundation v Canada (Minister of Fisheries and Oceans)*, 2010 FC 1233 at paras 103-104; aff'd in part, 2012 FCA 40.

⁵⁴ *Environmental Defence* at para 38.

⁵⁵ 2011 FC 962 at para 71 [*Adam*]. See also *Imperial Oil Ltd v Quebec (Minister of the Environment)*, [2003] 2 SCR 624 at para 23, where the "polluter-pays" principle is applied because of its presence in the legislation, although it is also noted that the principle is "recognized" at the international level.

CONCLUSIONS: PROSPECTS AND REMAINING CHALLENGES

This review of experience with international environmental law as applied in Canadian courts suggests a few general conclusions about the experience to date, and the prospects and potential challenges for the future.

First, it seems clear that the most important substantive impacts will continue to be through direct implementation of international obligations in Canadian legislation, due to the nature of environmental agreements and their emphasis on positive programmes of action. As shown in the litigation under *SARA*, one important impact of the reference to international principles in interpreting such legislation is likely to be the limitations imposed on the exercise of discretion in environmental decision-making.

Second, as courts continue to address the interaction between international environmental law and its domestic implementation, some attention must be paid to the practical evidentiary problems in an area as fluid as environmental law. Although Canadian courts are presumed to be aware of international law, there has certainly been a practice of accepting expert evidence on its current state (especially with regard to customary law),⁵⁶ and this may be relevant in more complex situations in the environmental field as well.

Finally, where there is no implementing statute, or only partial implementation of a convention, clarity is needed as to the distinction between the rebuttable presumption of conformity with a binding obligation, and reference to international “policy” in a contextual approach to interpretation. There is, as noted above, a vast array of international documents of variable provenance and expressing extensive commitments, but which States explicitly chose to make non-binding. Further, some “obligations” within binding agreements are themselves aspirational and effectively non-binding. The use of such instruments in a loosely-structured contextual interpretation may obscure the real status of international law, and create binding commitments where none were intended. To date, it seems that this has been avoided by the secondary or supportive role assigned to this aspect of interpretation, but the issue still requires attention.

⁵⁶ See, e.g., *Bouzari v Islamic Republic of Iran* (2004), 243 DLR (4th) 406 (OCA), where expert evidence of customary law and Canada’s international obligations had been presented at trial.