

# SUSTAINABLE DEVELOPMENT UNDER CANADIAN LAW

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Sustainable development represents a new goal in the realm of development, casting doubt on the belief that it is based on sporadic and unlimited economic growth thanks to the planet earth's ability to perpetually provide adequate resources to keep pace with it. Such beliefs have been replaced with uncertainty and concern in the face of deteriorating eco-systems, climate, biodiversity and the 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 which does not take into account the restricted nature of the planet earth's resources.<sup>1</sup>

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 subject challenged by numerous debates and questions.<sup>2</sup> Without attempting to exhaust the subject, we will present here the origins of sustainable development, important timelines that relate to it on the international stage and its positioning in Canada by way of its guiding principles.

## ORIGINS AND DEFINITION 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".<sup>3</sup> It then became a popular concept in 1987, with the report *Our Common Future* by the World Commission on Environment and Development (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".<sup>4</sup> The two main principles that run through 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

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<sup>1</sup> Donella H Meadows, Dennis L Meadows & Jorgen Randers, *Beyond the Limits* (London: Earthscan, 1972).

<sup>2</sup> 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"].

<sup>3</sup> International Union for Conservation of Nature and Natural Resources, *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (Gland: IUCN, 1980) para 3.

<sup>4</sup> World Commission on Environment and Development, *Our Common Future* (1987) (Montreal: Éditions du Fleuve, 1988) at 51.

development in policy and public decision-making. The *Rio Declaration on Environment and Development*<sup>5</sup> 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”<sup>6</sup> 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.”<sup>7</sup>

Since then, this change in the approach to development has been reiterated by the international community on numerous occasions,<sup>8</sup> and has flourished in the areas of both international environmental law and international trade.<sup>9</sup> For example, the preambles to the *Marrakesh Agreement Establishing the World Trade Organization*<sup>10</sup> and the *North American Free Trade Agreement*<sup>11</sup> recognize that the rules governing international trade must favour the sustainable use of resources and member states are obligated to promote sustainable development.<sup>12</sup>

In international law, the goal of sustainable development is expressed in a precise manner through guiding principles that set forth its ultimate purpose, means of application and implementation. The *Rio Declaration*, for example, sets out 27 principles amongst which it is possible to distinguish those that are inherent to sustainable development from those

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<sup>5</sup> UNCED, *Rio Declaration on Environment and Development*, Off Doc AG UN, 1992, Doc UN A/CONF 151/26 (Vol I).

<sup>6</sup> *Ibid*, principle 3.

<sup>7</sup> *Ibid*, principle 4.

<sup>8</sup> United Nations, *Agenda 21*, UN Doc A/CONF 151/26 (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/CONF 199/20, 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).

<sup>9</sup> On this subject, see also Philippe Sands, *Principles of International Environmental Law*, 2 ed (New York: Cambridge University Press, 2003) at 253 [Sands, “Principles of International Environmental Law”]; Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment*, 3<sup>rd</sup> ed (Oxford: Oxford University Press, 2009) [Birnie et al, “International Law and the Environment”]; Jean-Maurice Arbour & Sophie Lavallée, *Droit international de l’environnement* (Cowansville, Qc: Yvon Blais, 2006) at 65 and onwards.

<sup>10</sup> WTO, *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994; *United States — Import Prohibition of Certain Shrimp and Shrimp Products (Complaints filed by India et al)* (1998), WTO Doc WT/DS58/AB/R paras 185-186 (Report of the WTO Appellate Body).

<sup>11</sup> *North American Free Trade Agreement between Canada, the United States of America and Mexico*, 1 January 1994, QR Can 1994 n° 2, 32 ILM 289 (effective date: 1 January 1994).

<sup>12</sup> WTO, *Ministerial Decision on Trade and Environment*, 15 April 1994.

that are operational principles.<sup>13</sup> 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*;<sup>14</sup> 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*,<sup>15</sup> while the prevention principle is the basis for the *United Nations Convention on the Law of the Non-navigational uses of International Watercourses*,<sup>16</sup> as well as recourse to the previous impact study in the *Convention on Environmental Impact Assessment in a Transboundary Context*.<sup>17</sup>

International organizations have spoken out about its 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.<sup>18</sup> 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.<sup>19</sup>

The International Court of Justice (ICJ) also became involved in the changes being introduced in the area of sustainable development and its guiding principles, in the 1997 matter of *Gabčíkovo-Nagymaros*,<sup>20</sup> which locked Czechoslovakia and Hungary in a litigation battle over the signing of an agreement concerning the development of the Danube for a joint hydro-electric 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

<sup>13</sup> Sands, “Principles of International Environmental Law”, *supra* note 9 at 253.

<sup>14</sup> 25 June 1998, 38 ILM 51 (effective date: 30 October 2001).

<sup>15</sup> 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).

<sup>16</sup> Res AG 229, Off Doc AG UN, 51<sup>st</sup> 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.

<sup>17</sup> 25 February 1991, 1989 UNQR 309.

<sup>18</sup> United Nations, *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development*, 18 April-3 May 1996.

<sup>19</sup> 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.

<sup>20</sup> *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] CIJ rec 7.

reparation of this type of damage”.<sup>21</sup> 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.”<sup>22</sup>

In a separate opinion, Justice Weeramantry shared his comments on 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.”<sup>23</sup> 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.<sup>24</sup>

The Supreme Court of Canada is also very aware of sustainable development. In its decisions, it turns to the sources of international and environmental law to find the solutions best suited to common problems; citing the Brundtland Report, *Our Common Future*, *The Rio Declaration*, *Agenda 21*, the *Bergen Ministerial Declaration on Sustainable Development*, etc.

## 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.<sup>25</sup> In 1995, Parliament introduced a definition of sustainable development in the *Auditor General Act* which echoes the principles of the *Rio Declaration*:

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<sup>21</sup> *Ibid* at para 140.

<sup>22</sup> *Ibid* at para 140.

<sup>23</sup> *Ibid*, separate opinion by Mr. Justice Weeramantry, Vice-President, at 95.

<sup>24</sup> On the debate surrounding the legal status of sustainable development, see Jaye Ellis, “Sustainable Development as a Legal Principle: A Rhetorical Analysis” in H  l  ne Ruiz Fabri, Rudiger Wolfrum & Jana Gogolin, eds, *Select Proceedings of the European Society of International Law*, vol 2 (London: Hart, 2008) 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; Philippe Sands, “International Law in the Field of Sustainable development” (1994) 65 *Brit YB Int’l L* 303; Ulrich Beyerlin, “Different Types of Norms in International Environmental Law: Policies, Principles, and Rules” in Daniel Bodansky, Jutta Brunn  e & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007) at 425.

<sup>25</sup> See, for example, *Act respecting the Minist  re de l’Environnement et de la Faune*, LRQ c M-30.001 (amended in 1994); *Forestry Act*, RSQ c F-4.1 (amended in 1996); *Act to Preserve Agricultural Land and Activities*, RSQ c P-41.1 (modified in 1996); *Energy Authority Act*, RSQ c R-6.01(amended in 1996);

“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.”<sup>26</sup>

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*<sup>27</sup> 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”.<sup>28</sup>

Beyond its legislative definition, the goal of sustainable development raises the question of whether the concept has been implemented within the Canadian legal system. It is through general principles that express its ultimate 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.

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*Sustainable Development Act*, LM 1997, c 61, CPLM c S270 [Manitoba, LDD]; *Sustainable Development Act*, RSQ c D-8.1.1, s 2 [Québec, LDD]; *Act to affirm the collective nature of water resources and to strengthen their protection*, RSQ c C-6.2, art 3; *Law on Sustainable Forest Management*, RSQ c A-18.1. See also Stepan Wood, Georgia Tanner & Benjamin J. Richardson, “What Ever Happened to Canadian Environmental Law?” (2011) 37:4 Ecology SQ 981 at 1032.

<sup>26</sup> *Auditor General Act*, RSC 1985, c A-17, s 21.1.

<sup>27</sup> *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, s 3.

<sup>28</sup> *Federal Law on Sustainable Development Act*, SC 2008, c 33, s 2.

When sustainable development principles play a deciding role, they grab the attention of national and international institutions and the legal doctrine regarding important questions relating to their legal nature, scope, hierarchical organization, etc. To facilitate their presentation, we distinguish those principles that can qualify as inherent, essential or basic to sustainable development; they represent its ultimate purpose and the conditions necessary for its successful completion.<sup>29</sup> The second group of principles is made up of operational principles<sup>30</sup> 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. This distinction is intended to highlight the consistency of these principles in relation to each other, notably that the interpretation of operational principles must respect the principles inherent to sustainable development which are health and quality of life, equity and the integration of sustainability.

### **The Principles Inherent to the Concept of Sustainable Development**

The principles that are inherent to sustainable development include its ultimate purpose and the conditions necessary for its successful application. Although they cannot be understood and interpreted in isolation from each other, we will examine them in a distinctive manner to facilitate this presentation.

#### *Health and Quality of Life: The Ultimate Purpose*

The *Rio Declaration* clearly defines the ultimate 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”.<sup>31</sup> 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*.<sup>32</sup> The basic link between human rights

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<sup>29</sup> Sands, “Principles of International Environmental Law”, *supra* note 9 at 253. See also 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.

<sup>30</sup> 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. See also 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.

<sup>31</sup> *Supra* note 5, principle 1.

<sup>32</sup> 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”).

and environmental rights has been repeated numerous times on the international stage.<sup>33</sup> It rests on the threat to human life and health posed by the destruction of the natural world.<sup>34</sup>

Many countries have, in fact, drafted human environmental rights into their constitutions, expressed in different ways and revolving around the right to protect such rights against any substantial modifications.<sup>35</sup> The Canadian Constitution does not recognize environmental rights. Furthermore, Article 7 of the *Canadian Charter of Rights and Freedoms*<sup>36</sup> 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 health and safety<sup>37</sup> provided that it is not considered speculative or fictitious.<sup>38</sup> As an analogy, we should highlight 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*,<sup>39</sup> and serious infringements of environmental law.<sup>40</sup>

In Canada, the Federal Parliament and the provinces have introduced environmental rights into their legislation, along with the procedural rights intended to ensure their

<sup>33</sup> See the *World Charter for Nature*, 1982, 48<sup>th</sup> 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/CONF 157/23, art 11.

<sup>34</sup> See Human Rights Commission, *Review of Further Developments in Fields with which the Subcommittee 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/CN 4/Sub 2/1994/9 at para 21 and up; 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.

<sup>35</sup> See David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: University of British Columbia Press, 2011); 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.

<sup>36</sup> *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.

<sup>37</sup> On the link between Article 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.

<sup>38</sup> *Opération Dismantle Inc c R*, [1985] 1 *RCS* 441.

<sup>39</sup> European Council, *Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS n° 005, art 8.

<sup>40</sup> *López Ostra v Espagne* (1994), 303C *Cour Eur DH* (Sér A) 51 paras 59-60; See also *Moreno Gómez v Espagne*, n° 4143/02, [2004] *CEHR* 1; *Deés v Hongrie*, n° 2345/06, [2010] *CEHR* 1.

proper application.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

From this perspective, it should be noted that the Supreme Court 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.<sup>44</sup> 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 apply injunctions and award compensation for environmental damage.<sup>45</sup>

Environmental rights are applied by way of the principle of public participation which is stated in three procedural rights including access to information, participation in the decision-making process and access to justice.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> Quebec has strengthened the public’s right to

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<sup>41</sup> See in Quebec, *Environment Quality Act*, RSQ c Q-2, ss 19.1-2, ss 118.4-5 [Québec, LQE]; *Charter of Human Rights and Freedoms*, RSQ 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 1991, c 28, 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 Fédéral, *supra* note 27, ss 11 and following.

<sup>42</sup> *Ibid*, Yukon, LE, ss 6 and 8.

<sup>43</sup> *Ibid*, Québec, CDLP, s 46.1.

<sup>44</sup> *Friends of the Oldman River Society v Canada (Ministry of Transport)*, [1992] 1 RCS 3, para 16-17 [*Friends of the Oldman River Society*]; *R v Hydro-Québec*, [1997] 3 RCS 213, para 55; 114957 *Canada Ltd (Spraytech, Sprinkler Company) v Hudson (Town)*, [2001] 2 RCS 241, para 1 [*Spraytech*]; *Impérial Oil Ltd v Québec (Ministry of the Environment)*, [2003] 2 RCS 624, para 19 [*Impérial*]; *Ontario v Canadian Pacific Ltd*, [1995] 2 RCS 1028, para 1075.

<sup>45</sup> *British Columbia v Canadian Forest Products Ltd*, [2004] 2 RCS 75, 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”).

<sup>46</sup> *Supra* note 14, s 1.

<sup>47</sup> See, for example, Québec, LQE, *supra* note 41, s 31.3; Ontario, EBR, *supra* note 41, Part II; *Loi canadienne sur l'évaluation environnementale*, LC 1992, c 37, s 21.2 [Canada, LCEE]; *Environmental Management and Protection Act*, SS 2002, c E-10.21, s 81(3). On this topic, see Jamie Benidickson, *Environmental Law*, 3<sup>rd</sup> ed (Toronto: Irwin Law, 2009) at 132 and following.

<sup>48</sup> See, cited laws, *supra*, note 41. See also Benjamin J Richardson & Jona Razzaque, “Public Participation in Environmental Decision-making” in Benjamin J Richardson & Stepan Wood, eds, *Environmental Law*

participate by passing the “anti-SLAPP” act in order to legitimize strategic lawsuits against public participation, commonly known as SLAPP.<sup>49</sup>

### *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 uphold the right to development for present and future generations.<sup>50</sup> It is based upon the awareness of the threat to future generations posed by exhausting natural resources and the destruction of the environment, eco-systems and climate.<sup>51</sup> On the subject, the Supreme Court recognizes that “Today 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 this awareness “perhaps indicates the birth of a feeling of solidarity between generations and an environmental debt towards humanity and the world of tomorrow”.<sup>52</sup>

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.”<sup>53</sup> 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.<sup>54</sup> Who can take action? In 1994, The Philippines

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*for Sustainability: A Reader* (Oxford: Hart Publishing, 2006) at 165; Jonas Ebbesson, “Public Participation” in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (London: Oxford University Press, 2007) at 686 and following.

<sup>49</sup> *Protection of Public Participation Act*, SBC 2001, c 19; *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* (*Loi modifiant le Code de procédure civile pour prévenir l'utilisation abusive des tribunaux et favoriser le respect de la liberté d'expression et la participation des citoyens au débat public*), LQ 2009, c 12. For a precedential perspective, see *Daishowa Inc v Friends of the Lubicon*, [1998] OJ 1429 (Ont SCJ); *Fraser v Saanich (District)*, [1999] BCI 3100, (BCCS) (LN/QL) and *Ugo Lapointe v Pétrolia*, 2011 QCCS 4014.

<sup>50</sup> 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.

<sup>51</sup> 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 Brunnées & Ellen Hey, *The Oxford Handbook of International Environmental Law* (London: Oxford University Press, 2007) at 630.

<sup>52</sup> *Spraytech*, *supra* note 44, para 1; *Impérial*, *supra* note 44, para 19.

<sup>53</sup> *Supra* note 32, principle 2.

<sup>54</sup> Sumudu A Atapattu, *Emerging Principles of International Environmental Law* (Ardsey: Transnational Publishers, 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 1 28 and following.

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.”<sup>55</sup>

This decision illustrates the link between intergenerational environmental and equity rights, including the natural right to survive and to self-perpetuate: “concerns nothing less than self-preservation and self-perpetuation [...] 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 in the Constitution for they are assumed to exist from the inception of humankind.”<sup>56</sup>

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 legislation [environmental assessment]. 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.”<sup>57</sup>

### *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.”<sup>58</sup> The principle of integration reflects the interrelationship of the social, economic and environmental objectives of society.<sup>59</sup> In the Brundtland Report, this principle speaks to “the idea of limitations imposed by the state

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<sup>55</sup> *Decision in Minors Oposa v Sec of DENR*, 30 July 1993, 33 ILM 173, 185 (1994) (Philippines Supreme Court).

<sup>56</sup> *Ibid* at 187.

<sup>57</sup> *Labrador Inuit Association v Newfoundland (Minister of Environment and Labour)*, 1997 CanLII 14612 (NL CA), paras 11 and 12.

<sup>58</sup> *Supra* note 5, principles 12, 13 and 14.

<sup>59</sup> *Supra* note 19, principle 7.

of technology and social organization on the environment's ability to meet present and future needs."<sup>60</sup>

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 deciding question is to find the necessary balance between the three dimensions, as the principle does not state it clearly: should we reconcile diverging interests, or rather measure the "sustainability" of development, or ensure the mutual support between the dimensions? In the absence of clear markers, the fear is that the integration exercise will create negotiation gaps between the players with differing interests, without regard for the sustainable nature of the development.

Since the beginning of the 1990's, studies have stressed the distinction between the concepts of sustainable development supporting "weak" sustainability and "strong" sustainability.<sup>61</sup> This dichotomy rests mainly on the economic value we place on natural stock and environmental protection. For legislators, it is the opposition of the anthropocentric concept and the eco-centric concept that feeds debate about the significance of sustainable development.<sup>62</sup> The balance being sought between the 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. According to this concept, environmental protection is not a condition of sustainable development;<sup>63</sup> it only represents one pillar of sustainable development and is equal to the social and economic pillars.<sup>64</sup> 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.<sup>65</sup> If the total of

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<sup>60</sup> *Supra* note 4, at 51.

<sup>61</sup> 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.

<sup>62</sup> 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").

<sup>63</sup> Andrea Ross, "Modern Interpretations of Sustainable Development" (2009) 36 *JL & Soc'y* 32 at 35.

<sup>64</sup> *Ibid.*

<sup>65</sup> 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.unece.org/fileadmin/DAM/stats/documents/2001/10/env/wp.9.e>.

the sum of the capitals drops, development is not sustainable and the well-being of future generations will be lower than that of present generations, which contravenes the principle of equity.<sup>66</sup> It is still not easy to assess the monetary value of natural stock, to set a price for air, the ozone layer or a wetland.

From the perspective of “strong” sustainability, the natural stock is not substituted by goods produced by humans.<sup>67</sup> According to this concept, 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.<sup>68</sup> Strong sustainability promotes itself as being the only interpretation of sustainable development that is capable of guaranteeing equity between the generations.<sup>69</sup> 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 plan out their actions within the framework of strategies and action plans, and based on the experience of several States.<sup>70</sup> The trend is to frame the implementation of sustainable development in a legislative manner, within at the heart of the State.<sup>71</sup> From this perspective, government action is neither free nor voluntary but mapped out by legislative deadlines, the goal of sustainable development, guiding principles, periodical accountability and compliance assessments carried out by an independent commissioner. These framework laws do not escape the trend of ensuring a turn towards “strong” sustainability, as witnessed by the

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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.

<sup>66</sup> OECD, *Measuring Sustainable Development: Integrated Economic, Environmental and Social Frameworks* (Paris: OECD) at 54.

<sup>67</sup> *Supra* note 61 at 37.

<sup>68</sup> Klaus Bosselmann, “Rio+20: Any Closer to Sustainable Development?” (2002) 6 NZ J Envtl 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”).

<sup>69</sup> Herman E Daily, “Economics in a Full World” (2005) 293:3 *Scientific American* 1; Bosselmann, “Principle of Sustainability”, *supra* note 2 at 55.

<sup>70</sup> See notably *Environment Act 1986* (N-Z), 1986/127, 36 RS 223 (New Zealand); *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); *Commissioner for Environmental Sustainability Act 2003* (Vic) (State of Victoria, Australia); *Act of June 25, 2004 on the coordination of national sustainable development policy* (LU), 2 July 2004, JO A n° 102/1621 (Luxembourg).

<sup>71</sup> Canada, LCEE, *supra* note 47; *supra* note 28; Ontario, EBR, *supra* note 41; Manitoba, LDD, *supra* note 25, Schedules A and B (directions and principles); Québec, LDD, *supra* note 25, art 6 (16 principles); Newfoundland, *An Act Respecting the Sustainable Development of Natural Resources in the Province*, SNL 2007, c S-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.

definition of “sustainability” in the *Federal Sustainable Development Act*: “the capacity of a thing, action, activity or process to be maintained indefinitely”.<sup>72</sup>

Peripheral to the inherent principles of sustainable development, operational principles represent the procedures to be implemented in order to attain this goal. They are attached to one or several dimensions of sustainable development and they translate them more precisely. 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 with the principle of public participation. Transposing these principles into Canadian law is carried out through special regimens, such as assessment procedures to measure the impact on the environment based on the principle of prevention<sup>73</sup> and the site clean-up obligations based on the polluter pays principle.<sup>74</sup>

We have presented 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 would ever have expected at the outset. The devil is in the details! Thankfully, every day practitioners and scientists in many disciplines are transposing sustainable development into real-life situations.<sup>75</sup>

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<sup>72</sup> *Supra* note 28, s 2.

<sup>73</sup> *Friends of the Oldman River Society*, *supra* note 44 at 71.

<sup>74</sup> *Impérial*, *supra* note 44, para 24.

<sup>75</sup> Jonathan M Harris, *Basic Principles of Sustainable Development*, Working Paper 00-04 (Medford, MA: Global Development and Environment Institute, June 2000).