

THE LEGAL CONCEPT OF SUSTAINABILITY

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I. INTRODUCTION

Over 85 Canadian statutes now recognize the legal concepts of sustainability and sustainable development.¹ But accusations that the concept of sustainability is meaningless continue to mount. Ambiguous, vague, and amorphous are other frequently-voiced charges. Have over 85 Canadian laws been drafted or rewritten to incorporate a meaningless concept? The purpose of this paper is to argue that the legal concept of sustainability is meaningful and important. The challenges inherent in articulating the precise definition of the concept of sustainability do not rob it of meaning or legal significance.

Operationalizing sustainability does not require the articulation of a single, precise, limited and uncontroversial definition. To operationalize means to put something into effect, and it is here, at the operational stage, that sustainability has sputtered and stalled. Sustainability, like justice or democracy or equality, is a contestable concept.² This does not mean it lacks meaning. Rather, like other contestable concepts, the challenge is to interpret the meaning of sustainability in practice (i.e. to operationalize it). This is a task that courts have long undertaken with other contestable concepts and which this paper seeks to advance. Examples from Canadian law, domestic law in other jurisdictions and international law assist with explaining how the legal concept of sustainability can be better operationalized.

Of course, sustainability is about more than law. It is about moving society towards ecologically sustainable patterns of production and consumption. But law is an integral part of this shift.

This paper proceeds in six parts. Following this introduction, section II discusses how legal meaning can be gleaned from the concept of sustainability. It draws on both the history of the concept of sustainability and multi-disciplinary sources. It also further refines the concept of sustainability by pushing beyond the idea that sustainability is simply about “balancing” competing demands. The core principles or components of the legal concept of sustainability are the subject of Section III. Section IV discusses the integration of sustainability in Canadian statutes. Section V reinforces the legal significance of the international origins of the concept of sustainability. And Section VI concludes.

¹ See Appendix 1 — References to Sustainability and Sustainable Development in Canadian legislation.

² Michael Jacobs, “Sustainable Development as a Contested Concept” in Andrew Dobson, ed, *Fairness and Futurity* (Oxford: Oxford University Press, 2004) 21 at 25.

II. FINDING MEANING IN THE CONCEPT OF SUSTAINABILITY

Before engaging with the legal concept of sustainability in more depth, some introductory comments on the relationship between sustainability and sustainable development are needed. Sustainable development and sustainability are used interchangeably, although they have distinct meanings. Sustainability focuses on the capacity for humans to live within environmental constraints.³ It incorporates respect for ecological limits in affirming that economic activity must proceed within the limits of ecological systems. Indeed, ecological integrity is the very core of the concept of sustainability. Sustainability thus pre-dates the late-twentieth century concept of sustainable development.⁴ Sustainable development has emerged as the principal expression and application of sustainability. Sustainable development has become the favored way of framing concerns about sustainability in Canadian legislation.⁵ “Sustainable” development is economic development that is based on ecological sustainability.

The starting point for this discussion of the legal concept of sustainability is that sustainability is both meaningful and significant.⁶ The Ministry for the Environment in New Zealand expressed the primacy of sustainability in this way: “Sustainability is a general concept and should be applied in law in much the same way as other general concepts such as liberty, equality and justice”.⁷ By approaching sustainability like other fundamental concepts, we can at once appreciate the meaning that sustainability can have, despite the difficulty in categorically defining the concept.⁸ Thinking about sustainability in a similar way to how we think about justice is not misguided. Living at the expense of future generations and the natural environment is unsustainable and unjust.⁹

Sustainability involves recognition of “the importance of biodiversity and ecological life support systems”.¹⁰ The *legal concept* of sustainability begins with recognition that we are discussing *ecological* sustainability. This is made more explicitly clear in jurisdictions

³ John Robinson, “Squaring the Circle? Some Thoughts on the Idea of Sustainable Development” (2004) 48 *Ecological Economics* 369 at 370.

⁴ Klaus Bosselmann, “Sustainability and the Courts: A Journey Yet to Begin?” (2010) 3:1 *Journal of Court Innovation* 337 at 338 [Bosselmann, “Courts”].

⁵ See Appendix 1.

⁶ Klaus Bosselmann, *Principles of Sustainability: Transforming Law and Governance* (Abingdon, Oxon: Ashgate Publishing Group, 2008) at 9 [Bosselmann, “Principles”].

⁷ New Zealand, Ministry for the Environment, *Resource Management Law Reform: Sustainability, Intrinsic Values and the Needs of Future Generations*, Working Paper 24 (Wellington: Ministry for the Environment, 1989) at 9.

⁸ Bosselmann, “Principles”, *supra* note 6 at 9.

⁹ *Ibid* at 10.

¹⁰ Stephen Dovers & Robin Connor, “Institutional and Policy Change for Sustainability” in Benjamin J Richardson & Stepan Wood, eds, *Environmental Law for Sustainability* (Oxford: Hart, 2006) 21 at 32.

where “ecologically sustainable development” is the term of art used in legislation.¹¹ But it is equally evident from the history of sustainability as a legal concept.

Framing Sustainable Development: The *Brundtland Report* Definition

The definition of sustainable development advanced in the *Brundtland Report* — “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” — now dominates Canadian statutory definitions of sustainable development.¹² The *Brundtland Report* recognizes that human needs must be met within environmental limitations. A weak approach to interpreting sustainable development in the wake of the *Brundtland Report* frames sustainable development as requiring a consideration of environmental effects. A stronger approach to sustainable development mandates the integration of sustainability considerations in the development process. This stronger approach is more consistent with the international legal articulations of sustainable development that have followed the *Brundtland Report*, notably Principle 4 of the Rio Declaration which asserts that “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”.¹³ Such an approach is consistent with the *Brundtland Report* itself which urges the “merging” of environment and economics in decision making. This means, not only that environmental impacts be taken into account, but that the objective and substance of policies and legal approaches be modified to give effect to ecological integrity. The *Brundtland Report* definition offers guidance in asserting that, in order for development to be sustainable, “the ability of future generations to meet their own needs” cannot be compromised.

While the *Brundtland Report* serves as the basis for the definition of sustainable development in Canadian statutes, this Report is also the source of significant misunderstanding about the meaning of sustainable development. A common misperception about sustainable development is that it simply requires the balancing of three equally important “pillars” — economic, environmental and social. Formulated in such a way, it is easy to sympathize with critics who suggest sustainable development is an unhelpful concept, largely devoid of meaning. No guidance on this balancing appears to be given.

¹¹ For example, “ecologically sustainable development” is the preferred terminology in Australian statutes.

¹² World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1997) [*Brundtland Report*].

¹³ For a discussion of the principle of integration as articulated in other international instruments, see Alan Boyle & David Freestone, “Introduction” in Alan Boyle & David Freestone, eds, *International Law and Sustainable Development* (Oxford: Oxford University Press, 1999) 1 at 10.

Understanding Integration: Beyond Balancing

Asserting that sustainable development is simply about balancing conflicting interests admittedly does not get us very far. But, one of the greatest misconceptions about sustainability is that it implies that environmental, economic and social components are equally important.¹⁴

Some of the criticism that the *Brundtland Report* simply promotes “balancing” arises from the fact that the Report was written to respond to a particular *international* context. The *Brundtland Report* explicitly addresses the task of reconciling the needs of the global “North” and “South”. The emphasis on development thus emerges from a context of respect for the right of development in developing nations. But the focus on economic development in the Report has been speciously carried over to the domestic contexts of industrialized countries, trapping sustainable development in an unhelpful tripartite balancing of environmental, economic and social considerations.

Sustainability qualifies development. It requires development to be approached in a manner that is sustainable, meaning *ecologically* sustainable. There is a difference when a statute talks about “water resource management” versus “sustainable water resource management”. The intentional introduction of the word “sustainable” *cannot* be presumed to be without meaning. Sustainable modifies the term that follows, and signals that water resource management is to be based on ecological sustainability.

Finding meaning in the concept of sustainability (and its application through sustainable development) involves moving beyond the language of balancing and recognizing the ecological core of this concept. Sustainable development is development that can happen within the “carrying capacities” of the biosphere. This idea draws from two sources. First, it derives from the ecological concept of “carrying capacity”—which reflects the population that an ecosystem can support. The second source is the economic concept of “maximum sustainable yield” which reflects the upper limit of use of resources that will permit the same level of use in the future.¹⁵ Central to both the ecological and economic concepts here is that natural ecosystems can only sustain a certain amount and type of economic activity.

The meaning of sustainability lies in this recognition of the environmental limits within which economic activity takes place. Making sustainable development an operable concept means accepting that “development is sustainable if it tends to preserve the integrity and continued existence of ecological systems; it is unsustainable if it tends to

¹⁴ Bosselmann, “Principles”, *supra* note 6 at 23.

¹⁵ Jacobs, *supra* note 2 at 31-32.

do otherwise”.¹⁶ Simply put, ecological integrity is the core of the concept of sustainability and, thus, sustainable development.¹⁷

III. KEY COMPONENTS

Sustainability functions as an overarching principle that prioritizes ecological concerns. It has both procedural and substantive implications. The normative aspect of sustainability is rarely discussed absent reference to certain principles, including the principle of integration, the principle of intergenerational equity, the precautionary principle, the polluter pays principle, the principle of ecological integrity, and the principle of participation. This is not to suggest that sustainability is simply an umbrella term encompassing these other principles. Sustainability has legal meaning on its own. Vaughan Lowe suggests that a useful way to approach the relationship between sustainable development and its constituent parts is to think about sustainability as a meta-principle.¹⁸ Klaus Bosselmann writes:

“one premier role of the law is to promote fundamental principles, often expressed in constitutions and human rights catalogues, and ensure that the legal process is reflective of them. If sustainability is perceived as one of such fundamental principles, the legal process will have to be reflective of it. If, by contrast, the principle of sustainability is perceived as just one of any array of environmental principles, it will compete with these and almost certainly vanish in the politics of governments still fixated on economic growth and international competition.”¹⁹

For lawyers, a key question is the legal status of these principles, many of which derive from international law. A disciplined approach to using these principles acknowledges that their legal status differs. One example is the precautionary principle, which in some legal systems is a principle of law, and in other systems is an approach that guides decision-making. In European Union law, the precautionary principle has achieved constitutional recognition in the *Maastricht Treaty*.²⁰ In Canada, the precautionary principle is reflected in a growing number of statutes.²¹ Below, I highlight a number of principles that are especially pertinent to the Canadian context.²² Many of these principles will receive further elaboration through other presentations in this Symposium. They include:

¹⁶ Bosselmann, “Principles”, *supra* note 6 at 53.

¹⁷ *Ibid* at 54.

¹⁸ Vaughan Lowe, “Sustainable Development and Unsustainable Arguments” in Boyle & Freestone, *supra* note 13, 19 at 31.

¹⁹ Bosselmann, “Courts”, *supra* note 4 at 346.

²⁰ *Treaty on European Union*, 7 February 1992, 1757 UNTS 3, art 174, 31 ILM 247 (entered into force November 1993) [*Maastricht Treaty*].

²¹ See Chris Tollefson & Jamie Thornback, “Litigating the Precautionary Principle in Domestic Courts” (2008) 19:1 J Envtl L & Prac 33.

²² This is by no means a fixed or comprehensive list of sustainability’s guiding principles.

- a) *Precautionary Principle* – The precautionary principle means that, “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation”.²³ This principle asserts that in cases dealing with environmental harm, it is not necessary to await full proof or certainty of that harm. The principle has been widely accepted in many countries, including Canada.
- b) *Intergenerational Equity* – The theory of intergenerational equity forces today’s decision-makers to explicitly consider future generations. Central to the theory is the requirement that each generation use and develop its natural and cultural heritage in such a way that it can be passed onto future generations in no poorer condition than it was received.²⁴ The principle of intergenerational equity is central to the *Brundtland Report* definition of sustainable development: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.²⁵ This principle highlights the long-term timeframe inherent in sustainability decision-making. Intergenerational equity is operationalized in Canadian legislation through, for example, commitments to keep protected areas intact for future generations and requirements to sustain renewable natural resources.²⁶
- c) *Conservation of Biological Diversity and Ecological Integrity* – While the principles of conservation of biological diversity and ecological integrity are principles of sustainable development in their own right, the operation of other elements of sustainability, such as the precautionary principle and intergenerational equity, also serve to advance these principles.²⁷ Biological diversity describes genetic diversity, species diversity, and ecosystem diversity.²⁸ Ecological integrity is described as “the conservation of the earth’s life-support systems”.²⁹ It signals the need to maintain ecosystem health and ecosystem services.

²³ 114957 *Canada Ltée (Spraytech Société d’arrosage) v Spraytech (Town)*, 2001 SCC 40, [2001] 2 SCR 241 at para 31 citing *Bergen Ministerial Declaration on Sustainable Development*, GA Res 44/228, UN GAOR, 1990, UN Doc A/CONF 151/PC/10.

²⁴ See Edith Brown-Weiss, *In Fairness to Future Generations* (Dobbs Ferry, NY: Transnational Publishers, 1989).

²⁵ *Brundtland Report*, *supra* note 12 at 43.

²⁶ See Jerry DeMarco, “Law for Future Generations: A Theory of Intergenerational Equity in Canadian Environmental Law” (2005) 15 J Envtl L & Prac 1 at 27.

²⁷ Hon Justice Brian J Preston, “Judicial Implementation of the Principles of Ecologically Sustainable Development in Australia and Asia” (Paper delivered at the Law Society of New South Wales Regional Presidents Meeting, Sydney, 21 July 2006) (on file with author).

²⁸ The components of biological diversity are discussed in John Moffet & Francois Bregha, “The Role of Law in the Promotion of Sustainable Development” (1996) 6 J Envtl L & Prac 1 at 5.

²⁹ *Ibid* at 4.

- d) *Environment-Economy Integration* – The concept of integrating environmental considerations into economic planning is pivotal to sustainable development. One commentator goes so far as to suggest that this principle of integrated decision-making is what holds the other principles together.³⁰ The formal application of the principle of integration requires, at the very least, the collection of appropriate environmental information and the performance of appropriate environmental impact assessment.³¹ Integration takes seriously the need to “green” the economy and extends far beyond traditional environmental or resource management legislation.
- e) *Internalization of Environmental Costs* – Internalization of environmental costs requires accounting for both the short and long-term external environmental impacts of development.³² One aspect of the internalization of environmental costs, the polluter pays principle, has been described by the Supreme Court of Canada as “firmly entrenched in environmental law in Canada”.³³ However, the principle of internalization of environmental costs extends beyond the polluter pays principle to require pricing that reflects full life cycle costs of producing and disposing of goods, also known as the “user pays” principle.
- f) *Participation* – Participation is particularly critical to implementing sustainability. Sustainability depends, to a considerable degree, on the way that environmental, social and economic considerations are integrated in decision-making. Participatory rights have been articulated as including the opportunity to participate in decision-making processes, access to information and access to justice.³⁴

These principles do not exist in isolation from one another. Indeed, courts have advanced the legal concept of sustainability by recognizing the interaction of these principles. One example of this emerges from the Land and Environment Court in New South Wales. In *Gray v. The Minister for Planning*,³⁵ Justice Pain interpreted the legal concept of sustainability, through the precautionary principle and the principle of inter-generational equity, as requiring the provision of certain types of information in the environmental

³⁰ John Dernbach, “Achieving Sustainable Development: The Centrality and Multiple Facets of Integrated Decision-making” (2003) 10 Ind J Global Legal Stud 247 at 248.

³¹ Philippe Sands, “International Law in the Field of Sustainable Development: Emerging Legal Principles” in Winfried Lang, ed, *Sustainable Development and International Law* (London: Graham & Trotman, 1995) 53 at 61.

³² Preston, *supra* note 27 at 30.

³³ *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58 at para 23, [2003] 2 SCR 624 [*Imperial Oil*].

³⁴ These three pillars of participation have emerged from the *Aarhus Convention*, signed in 1998. *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 25 June 1998, 2161 UNTS 450, 38 ILM 517 [*Aarhus Convention*].

³⁵ *Gray v The Minister for Planning*, [2006] NSWLEC 720.

impact assessment process. She held that in order to account for intergenerational equity, as the statute required, an “assessment of cumulative impacts of proposed activities on the environment”³⁶ had to be included.

In Canada, the Commissioner of the Environment and Sustainable Development, Scott Vaughan, has recently criticized the absence of a number of principles in the federal government’s draft “federal sustainable development strategy”. In a letter to the Minister of Environment, the Commissioner noted the draft strategy’s failure to incorporate the precautionary principle and the principle of integration:

“The need to integrate economic, environmental, and social objectives in decision making is noted in section 5 of the Act as a basic principle of sustainable development. Section 9(1) says that the strategy is to be based on the precautionary principle. The draft strategy does not address either integration or the precautionary principle. We are therefore concerned that the draft strategy represents a departure from the basic principles of sustainable development referenced in the Act and may impede the integration of economic, environmental, and social objectives in decision making.”³⁷

This statement by the Commissioner of the Environment and Sustainable Development affirms the role of these principles in establishing the legal context in which decision making in Canada is to proceed.

IV. SUSTAINABILITY AND CANADIAN STATUTES

This is not the place for a detailed analysis of sustainability in Canadian statutes. But a few observations are in order. First, as the table of legislation in Appendix I reveals, the legal concept of sustainability has made inroads in Canadian statutes. The legislative landscape is certainly uneven, with Manitoba and Quebec integrating these principles in legislation far more than other provinces. While the table only includes legislative incorporation of sustainable development and sustainability, the key principles underlying these concepts are, at times, independently asserted in Canadian statutes.³⁸ Second, while references to sustainable development in Canadian legislation and government policy documents continue to grow, judicial discussion of this concept is largely absent or limited to a recitation of statutory language.

³⁶ *Ibid* ¶ 122.

³⁷ Letter from Scott Vaughan, Commissioner of the Environment and Sustainable Development, to Jim Prentice, Minister of Environment (7 June 2010), online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/cesd_fs_e_33888.html>.

³⁸ See e.g. incorporation of the precautionary principle in the *Canadian National Marine Conservation Areas Act*, SC 2002, c 18, s 9(3); in the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, ss 2(1), 6(1); in the *Canadian Environmental Assessment Act*, SC 1992, c 37, s 4(2); in the *Oceans Act*, SC 1996, c 31, s 30; in the *Federal Sustainable Development Act*, SC 2008, c 33, ss 2, 9(1).

It is perhaps unsurprising that little judicial ink has been spilt elaborating the meaning of sustainable development in Canadian legislation. Given the murkiness of the concept of sustainable development, adjudicating the significance of legislative references to sustainability is an unenviable task. This paper has sought to clarify the meaning of the legal concept of sustainability and, in so doing, allow the underlying principles to emerge, principles that assist with the task of interpreting this body of legislation.

While judicial consideration of Canadian statutory provisions on sustainability is not extensive, the ecological core of sustainability has been identified and affirmed by Canadian judges. The importance of ecological integrity as a “fundamental value in Canadian society” has been affirmed by the Supreme Court of Canada in a series of judgments. Justice Binnie, writing for the majority in *British Columbia v. Canadian Forest Products*, summarized this judicial history:

“As the Court observed in *R. v. Hydro-Québec*, [1977] 3 S.C.R. 213, at para. 85, legal measures to protect the environment “related to a public purpose of superordinate importance”. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, the Court declared at 16 that “[t]he protection of the environment has become one of the major challenges of our time”. In *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, “stewardship of the natural environment” was described as a fundamental value (para. 55; italics in original). Still more recently, in *114957 Canada Ltée (Spraytech Société d’arrosage) v. Spraytech (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40, the Court reiterated at para. 1: “... our common future, that of every Canadian community, depends on a healthy environment ... This Court has recognized that “[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment Environmental protection [has] emerged as a fundamental value in Canadian society””³⁹

Significantly, Canadian judges have used the concept of sustainable development to give legal meaning to other statutory requirements, such as the polluter pays principle. In *Imperial Oil v. Quebec (Minister of the Environment)*, Justice Lebel, writing for a unanimous full bench of the court, situated the polluter pays principle in the context of sustainable development:

“To encourage sustainable development, [the polluter pays] principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposed on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities.”⁴⁰

Importantly, Canadian judges and administrative decision makers have also rejected an approach to sustainable development that frames this concept as simply a balancing of competing pressures. The appellant in *Re Ainsworth Lumber Co.*⁴¹ argued that the principle of sustainable development requires that environmental protection measures be

³⁹ *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at para 7, [2004] 2 SCR 74 [*Canfor*].

⁴⁰ *Imperial Oil*, *supra* note 33 at para 24 (emphasis added).

⁴¹ *Ainsworth Lumber Co (Re)*, [2000] AEABD No 33.

weighed against economic factors. In this case, that would mean an abandonment of the requirement of best available technology as there were economic arguments to favour a lower cost approach. The Alberta Environmental Appeal Board firmly concluded that sustainable development did not support the use of the lowest cost emissions control alternative by the appellant.⁴² In so doing, the Board affirmed that the core of sustainable development requires “that resources should be developed in a manner that is sustainable for the use by future generations”.⁴³

The legal concepts of sustainability and sustainable development have not been introduced in a mere handful of Canadian statutes over the past two decades. They have been inserted into over 85 pieces of legislation. The cumulative impact of this re-writing of Canadian law to respect the concept of sustainability signals something greater than a requirement that competing interests be balanced. Rather, the density of references in Canadian legislation to sustainability and sustainable development suggests that legally significant expectations are crystallizing around these concepts.

V. A CONCEPT OF INTERNATIONAL RELEVANCE

International law is relevant in interpreting Canadian statutory approaches to sustainability for a number of reasons: first, because of the presumption of conformity with international law, a rule of legal interpretation that mandates that Canadian law be read consistently with international law wherever possible;⁴⁴ and second, through the incorporation of customary international law and the implementation of treaties.⁴⁵ The legal concept of sustainability is grounded in the historical development of international law and continues to operate in an international normative context.

More pragmatically, it is also instructive to look to the practice of international courts and tribunals to understand how to operationalize the legal concept of sustainability. I turn now to two such examples, one from the International Court of Justice and one from the Appellate Body of the World Trade Organization.

The *Gabčíkovo–Nagymaros Dam Case* (Hungary/Slovakia)

In the *Gabčíkovo–Nagymaros Dam Case*, the concept of sustainability is evoked by Judge Weeramantry of the International Court of Justice absent a specific treaty provision on sustainability or even arguments on sustainability by counsel. Judge Weeramantry

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *R v Hape*, 2007 SCC 26 at para 53.

⁴⁵ For a fuller discussion of the reception of international environmental law in Canada, see Natasha Affolder, “Domesticating the Exotic Species: International Biodiversity Law in Canada” (2006) 51 McGill LJ 217.

drew upon the legal concept of sustainable development as an element of legal reasoning at the discretion of the court. This use is consistent with the status of sustainability as a fundamental legal principle. Judge Weeramantry explains how sustainability forces us to depart from traditional approaches to decision-making:

“Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments, during the last two decades. 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.

For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant.”⁴⁶

Judge Weeramantry asserts that sustainable development demands “looking afresh” at environmental impacts that may have been acceptable in the past. This need to force decision making practices to catch up with the demands of sustainable development and the prioritization of ecological integrity is a theme that is affirmed by the Appellate Body of the WTO in its Shrimp-Turtle I decision.

Shrimp-Turtle I

The wording of the Preamble of the *Marrakesh Agreement Establishing the World Trade Organization* (“*WTO Agreement*”) provides that WTO Members’ relations in the field of trade and economic endeavors should be conducted in a way that “[allows] for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at difference levels of economic development”.⁴⁷

In the 1998 Shrimp-Turtle I dispute, the Appellate Body of the WTO was tasked with interpreting the meaning of “exhaustible natural resources” in Article XX(g) of GATT. The provision had been written 50 years earlier. The Appellate Body held that these words “must be read by a treaty interpreter in the light of contemporary concerns of the

⁴⁶ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7 at para 140.

⁴⁷ *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154, 33 ILM 1144, at preamble [*WTO Agreement*].

community of nations about the protection and conservation of the environment”.⁴⁸ It relied upon the preambular reference to sustainable development in the 1995 *WTO Agreement* quoted above in its decision: “As [the preambular reference to sustainable development] reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture, and shading to our interpretation of the agreements”.⁴⁹ Such a reading led to the interpretation that the protection of sea turtles fell within the meaning of exhaustible natural resources.

These two examples illustrate that the task of clearly articulating the legal concept of sustainability remains a work in progress. It is a task being taken up by judges and court practitioners around the world.⁵⁰ The legal concept of sustainability is an evolving concept, but one which, at its core, affirms that economic activity happens within ecological limits.

VI. CONCLUSION

Sustainability is a concept with legal meaning. It is a concept that recognizes the ecological limits on economic activity. The promotion of ecological integrity thus lies at its core. It is easy to understand how attempts to apply sustainability, through sustainable development, have obscured the legal meaning and significance of sustainability. Sustainable development has mistakenly been framed as containing only the normative content of mandating balancing, requiring compromise between economic, environmental and social demands.

This paper has sought to clarify these concepts and the key principles underlying sustainability. In so doing, examples of how Canadian, foreign and international courts and tribunals have sought to operationalize these principles have been provided. The task now is to move beyond simply recognizing that sustainability is a meaningful legal concept to demonstrating that it is a powerful concept in Canadian law.

⁴⁸ WTO, Appellate Body, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (1999) at para 129, online: WTO <<http://docsonline.wto.org>>.

⁴⁹ *Ibid* at para 153.

⁵⁰ In 2002 senior judges and chief justices from around the world signed the *Johannesburg Principles on the Role of Law and Sustainable Development*, affirming principles that should guide the judiciary. *Johannesburg Principles on the Role of Law and Sustainable Development* (Statement adopted at the Global Judges Symposium on Sustainable Development and the Role of Law, Johannesburg, South Africa, 18-20 August 2002), (2003) 15 J Env'tl L 107.

APPENDIX 1:

References to Sustainability and Sustainable Development
in Canadian Legislation

Jurisdiction	Name of Legislation	Section Number
Canada (Federal)	<i>Agreement on Internal Trade Implementation Act</i> , SC 1996, c 17	Preamble
	<i>Auditor General Act</i> , RSC 1985, c A-17	Section 2 (“Definitions”)
		Section 7(2)(f) (“Annual and additional reports [by the Auditor General] to the House of Commons”)
		Section 7.1(1)(e) (“Inquiry and report”)
		Section 21.1 (“Purpose”)
		Section 22(1) (“Petitions received”)
		Sections 23(2)(a) & (c) (“Commissioner’s report”)
	<i>Canada-Chile Free Trade Agreement Implementation Act</i> , SC 1997, c 14	Preamble
	<i>Canada-Colombia Free Trade Agreement Implementation Act</i> , SC 2010, c 4	Section 7(h) (“Purpose”)
	<i>Canada-Costa Rica Free Trade Agreement Implementation Act</i> , SC 2001, c 28	Preamble
	<i>Canada-Peru Free Trade Agreement Implementation Act</i> , SC 2009, c 16	Section 7(h) (“Purpose”)
	<i>Canada Foundation for Sustainable Development Technology Act</i> , SC 2001, c 23	Section 2 (“Definitions”)
		Sections 11(a)(i) & (c) (“Director representation and experience”)
		Sections 15(a)(i) & (c) (“Member representation and experience”)
		Section 32 (“Property to be divided [upon winding up of the Foundation]”)
	<i>Canada Marine Act</i> , SC 1998, c 10	Section 25(a)(iii) (“No appropriation”)
	<i>Canadian Environmental Assessment Act</i> , SC 1992, c 37	Preamble
Section 4 (“Purposes”)		
<i>Canadian Environmental Protection Act 1999</i> , SC 1999, c 33	Preamble	
	Section 3(1) (“Definitions”)	
	Section 54(2)(d) (“Scope of [Minister’s] objectives”)	
<i>Department of Industry Act</i> , SC 1995, c 1	Section 5(a) (“Objectives”)	

	<i>Department of Natural Resources Act</i> , SC 1994, c 41	Section 2 (“Definitions”) Section 6(a) (“General duties”)
	<i>European Bank for Reconstruction and Development Agreement Act</i> , SC 1991, c 12	Section 7 (“Annual report”)
	<i>Farm Income Protection Act</i> , SC 1991, c 22	Section 4(2)(e) (“Governor in Council authorization”) Section 5(2)(a) (“Environmental requirements to be provided for in agreements”)
	<i>Federal Sustainable Development Act</i> , SC 2008, c 33	Section 3 (“Purpose”) Section 5 (“Basic principle of Sustainable Development”)
	<i>National Round Table on the Environment and the Economy Act</i> , SC 1993, c 31	Section 2 (“Definitions”) Section 4 (“Purpose”) Section 5 (“Powers”) Section 6(3) (“Representative nature [of the Round Table]”)
	<i>Oceans Act</i> , SC 1996, c 31	Preamble Section 30 (“Principles of [national oceans] strategy”) Section 40(2) (“Encouragement of activities [by the relevant Minister]”)
	<i>Official Development Assistance Accountability Act</i> , SC 2008, c 17	Section 2(1) (“Purpose”)
	<i>Pest Control Products Act</i> , SC 2002, c 28	Preamble Section 4(2)(e) (“Primary objective”)
	<i>Standards Council of Canada Act</i> , RSC 1985, c S-16	Section 4(1) (“Mandate”)
	<i>World Trade Organization Agreement Implementation Act</i> , SC 1994, c 47	Preamble
Alberta	<i>Alberta Land Stewardship Act</i> , SA 2009, c A-26.8	Section 1(2)(d) (“Purposes of Act”)
	<i>Climate Change and Emissions Management Act</i> , SA 2003, c C-16.7	Preamble
	<i>Environmental Protection and Enhancement Act</i> , RSA 2000, c E-12	Section 2(c) (“Purpose”) Section 6(1) (“Purpose of [Sustainable Development] Co-ordinating Council”) Section 40(a) (“Purpose of environmental assessment process”)
British Columbia	<i>Fish Protection Act</i> , SBC 1997, c 21	Sections 6(2) & (6) (“Designation of sensitive streams for fish sustainability”)

Manitoba	<i>The Conservation Agreements Act</i> , SM 1997, c 59, CCSM c C17	Preamble
	<i>The Conservation Districts Act</i> , RSM 1987, c C175	Section 3(4) (“Appointing public representatives [to the Conservation Districts Commission]”)
	<i>The Contaminated Sites Remediation Act</i> , SM 1996, c 40, CCSM c C205	Section 1(1) (“Purpose”) Section 1(2) (“Principles of sustainable development”)
	<i>The East Side Traditional Lands Planning And Special Protected Areas Act</i> , SM 2009, c 7, CCSM c E3	Section 10(1) (“Agreement to develop a management plan”)
	<i>The Energy Act</i> , SM 1992, c 3, CCSM c E112	Section 2 (“Objects and purposes”) Section 3 (“Principles of sustainable development”) Sections 4(f) & (l) (“Functions of the department”)
	<i>The Mines and Minerals Act</i> , SM 1991-92, c 9, CCSM c M162	Section 2(1) (“Object and purpose of Act”) Section 2(2) (“Sustainable development”)
	<i>The Oil and Gas Act</i> , RSM 1987, c G30, CCSM c O34	Section 2(1) (“Objects and purposes of Act”) Section 2(2) (“Principles of sustainable development”) Section 113(3)(b) (“Consideration of application by minister”) Section 149(3)(b) (“Consideration of application by minister”) Section 153(4)(b) (“Consideration of application by minister”) Section 162(2)(b) (“Consideration of application by minister”)
	<i>The Provincial Parks Act</i> , SM 1993, c 39, CCSM c P20	Preamble
	<i>The Sustainable Development Act</i> , SM 1997, c 61, CCSM c S270	Section 1 (“Definitions”) Section 2 (“Purpose”) Section 4(1)(a) (“Manitoba Round Table established”) Sections 4(3)(c), (d), & (d.1) (“Powers of the Manitoba Round Table”) Sections 5(b), (c)(i) & (v) (“Responsibilities of the Department of Conservation”) Section 6(1) (“Principles of Sustainable Development enumerated”) Section 6(2) (“Guidelines for Sustainable Development enumerated”)

		Sections 7(2)(a) & (b) (“Purpose of the provincial [sustainable development] strategy”)
		Section 11(1)(a) (“Provincial [sustainable development] code shall be established”)
		Section 12(1)(c) (“Financial management guidelines and reporting”)
		Sections 12(2)(i) & (ii) (“Procurement guidelines”)
		Section 13 (“Crown corporations to adopt [sustainable development] code of practice”)
		Section 14(e) (“Crown corporations to adopt [sustainable development] guidelines”)
		Sections 16(1)(a), (b), & (c) (“Review may be required [by minister]”)
		Section 17(2)(b) (“Purpose of the [Sustainable Development Innovations] Fund”)
		Schedule A (“Principles of Sustainable Development”)
		Schedule B (“Guidelines for Sustainable Development”)
	<i>The Waste Reduction and Prevention Act</i> , SM 1989-90, c 60, CCSM c W40	Section 1(1) (“Purpose”)
		Section 1(2) (“Principles of sustainable development”)
	<i>The Water Resources Conservation Act</i> , SM 2000, c 11, CCSM c W72	Preamble refers to “sustainable water resource management”
	<i>The Water Protection Act</i> , SM 2005, c 26, CCSM c W65	Section 25(e) (“Responsibilities of water council”)
New Brunswick	<i>Environmental Trust Fund Act</i> , RSNB 2011, c 151	Sections 3(a)(iii) & (v) (“Uses of assets of Fund”)
	<i>Maritime Economic Cooperation Act</i> , SNB 1992, c M-1.11	Section 3(1)(d) (“Maritime Cooperation”)
	<i>Seafood Processing Act</i> , SNB 2006, c S-5.3	Section 79(c) (“Agreements”) Section 80(b) (“Policies, guidelines, programs and other measures”)
Newfoundland and Labrador	<i>Aquaculture Act</i> , RSNL 1990, c A-13	Section 4(6)(a)(ii) (“Aquaculture licence”) Section 11.2(a) (“Regulations”)
	<i>Cruiseship Authority Act</i> , SNL 1998, c C-44	Section 7(l) (“Powers of [cruiseship] authority”)
	<i>Environmental Protection Act</i> , SNL 2002, c E-14.2	Section 2(kk) (“Definitions”) Sections 5(a), (c), (e), & (f) (“Research”)

	<i>Forest Act</i> , RSNL 1990, c F-23	Sections 2(f), (r), & (s) (“Definitions”) Section 7(6) (“Forest management districts”)
Nova Scotia	<i>Endangered Species Act</i> , SNS 1998, c 11	Section 2(1)(b) includes the phrase “use biological resources in a sustainable manner” (“Purpose”)
	<i>Environment Act</i> , SNS 1994-95, c 1	Section 2(b) (“Purpose of Act”) Section 3(aw) (“Interpretation”) Section 8(2)(a) (“Minister responsible for Act”) Section 9(a)(iv) (“Advisory committees and experts”) Sections 9A(1) & (2) (“Round Table”) Sections 27(1)(a), (c), (e), & (f) (“Education and research”) Section 104(b) (“Lead agency”)
	<i>Environmental Goals and Sustainable Prosperity Act</i> , SNS 2007, c 7	Sections 3(2)(b) & (f) (“Foundation and principles of Act”) Section 4(1) & (2)(t) (“Long-term objectives of Province”) Section 4(1) (“Long-term objectives of Province”) Section 6(1) (“Review and annual reports”)
	<i>Maritime Economic Cooperation Act</i> , SNS 1992, c 7	Section 3(1)(d) (“Guiding principles”)
	<i>Mineral Resources Act</i> , SNS 1990, c 18	Section 1A (“Purpose of Act”)
	<i>Municipal Government Act</i> , SNS 1998, c 18	Schedule B (“Statements of Provincial Interests - Introduction”)
	<i>Public Service Act</i> , RSNS 1989, c 376	Section 38(b) (“Powers of Minister”)
	<i>Water Resources Protection Act</i> , SNS 2000, c 10	Preamble
Ontario	<i>Crown Forest Sustainability Act, 1994</i> , SO 1994, c 25	Section 1 (“Purposes”) Section 2 (“Sustainability”) Section 9(2) (“Criteria for approval”) Section 26(1) (“Sustainable forest licences”) Section 27(3)(a) (“Other licences”) Section 42(2) (“Exception [to the conduct of forest operations]”) Section 55(1) (“Damage by forest operations”) Sections 68(3)(b), (c), & (d) (“Forest Management Planning Manual”)

	<i>Environmental Bill of Rights, 1993</i> , SO 1993, c 28	Section 2(1)(b) (“Purposes of Act”)
	<i>Kawartha Highlands Signature Site Park Act, 2003</i> , SO 2003, c 6	Section 5(3) (“[Management Advisory] Board function”)
Québec	<i>Auditor General Act</i> , RSQ, c V-5.01	Section 17 (“The Auditor General”) Section 26(8) (“Audit and reports”) Section 43.1(2) & (3) (“Annual and special reports”)
	<i>An Act to affirm the Collective Nature of Water Resources and Provide Increased Water Resource Protection</i> , RSQ, c C-6.2	Section 3 (“Water, a collective resource”) Section 10 (“Action for damage to water resources”) Section 13 (“Water governance”)
	<i>An Act respecting commercial aquaculture</i> , RSQ, c A-20.2	Section 2 (“Frameworks for aquaculture development”)
	<i>An Act respecting the conservation and development of wildlife</i> , RSQ, c C-61.1	Preliminary provision
	<i>An Act respecting contracting by public bodies</i> , RSQ, c C-65.1	Section 2(4) (“Purpose and scope”)
	<i>An Act respecting La Financière agricole du Québec</i> , RSQ, L-0.1	Section 3 (“Establishment and mission”)
	<i>Forest Act</i> , RSQ, c F-4.1	Preliminary provision Section 124.17 (“Objects”)
	<i>James Bay Region Development and Municipal Organization Act</i> , RSQ, c D-8.2	Section 4 (“Constitution of the Société”)
	<i>An Act respecting the Institut de la statistique du Québec</i> , RSQ, c I-13.011	Section 3.1 (“Establishment, mission and functions”)
	<i>An Act respecting the Institut national des mines</i> , RSQ, c I-13.1.2	Section 5 (“Mission”)
	<i>An Act respecting Land use planning and development</i> , RSQ, c A-19.1	Section 2.24 (“Content of metropolitan plan”) Section 6(8) (“Contents of the plan”) Section 79.1 (“Planting or felling of trees”) Section 113(12.1) (“Zoning by-laws”)
	<i>An Act respecting the ministère de l’Agriculture, des Pêcheries et de l’Alimentation</i> , RSQ, c M-14	Section 2(1) (“The Minister and his functions”) Section 23 (“Development of the agricultural and food sectors”)
	<i>An Act respecting the ministère des Ressources naturelles et de la Faune</i> , RSQ, c M-25.2	Sections 11.1 & 11.3 (“Functions and powers of the minister”) Sections 17.1.1 & 17.1.7 (“Chief Forester”) Section 17.12.12 & 17.12.15 (“Natural Resources Fund”) in force 1 April 2013

	<i>An Act respecting the ministère du Développement durable, de l'Environnement et des Parcs</i> , RSQ, c M-30.001	Section 17.14 (“Regional development and other governmental policies”)
	<i>An Act respecting the ministère du Développement économique, de l'Innovation et de l'Exportation</i> , RSQ, c M-30.01	Section 10 (“Functions and powers”)
	<i>An Act respecting the preservation of agricultural land and agricultural activities</i> , RSQ, c P-41.1	Sections 15.1, 15.2, 15.4, & 15.5 (“Green Fund”)
	<i>An Act respecting the Régie de l'énergie</i> , RSQ, c R-6.01	Section 2 (“Minister’s responsibilities”)
	<i>Sustainable Development Act</i> , RSQ, c D-8.1.1	Section 1.1 (“Interpretation and scope”)
		Section 59.2 (“Applications of collective scope”)
		Section 5 (“Establishment”)
		Section 1 (“Object”)
		Section 2 (“Sustainable development”)
		Section 5 (“Implementation of sustainable development”)
		Section 6 (“Principles”)
		Section 7 (“Sustainable development strategy”)
		Section 11 (“First version [of the sustainable development strategy]”)
		Section 12 (“Indicators [of sustainable development]”)
		Section 13 (“Functions of Minister”)
		Section 14 (“Assistance”)
		Section 15 (“Publication of objectives and interventions”)
		Section 17 (“Annual report”)
	<i>Sustainable Forest Development Act</i> , RSQ, c A-18.1	Preamble
		Sections 12 (“Sustainable Forest Development Strategy”)
		Section 45 (“Chief Forester”)
		Section 48(1) (“Chief Forester”)
		Section 52 (“Responsibilities of the minister”)
		Section 88 (“Timber supply guarantees”)
		Section 119 (“Timber marketing”)
Prince Edward Island	<i>Maritime Economic Cooperation Act</i> , RSPEI 1988, c M-1.1	Section 3.1(d) (“Maritime cooperation”)

Saskatchewan	<i>The Litter Control Act</i> , RSS 1978, c L-22 <i>Planning and Development Act, 2007</i> , SS 2007, c P-13.2	Section 2.1(d)(iii) (“Litter control”) Section 97(b)(iii) Section 111(3)(e)
Northwest Territories	<i>Northwest Territories Business Development and Investment Corporation Act</i> , SNWT 2005, c 3	Section 5(3.1) (“Board of Directors”) Section 40(a) (“Regulations”)
Yukon	<i>Economic Development Act</i> , RSY 2002, c 60 <i>Environment Act</i> , RSY 2002, c 76 <i>Environmental Assessment Act</i> , SY 2003, c 2 <i>Forest Resources Act</i> , SY 2008, c 15 <i>Oil and Gas Act</i> , RSY 2002, c 162 <i>Parks and Land Certainty Act</i> , RSY 2002, c 165 <i>Wilderness Tourism Licensing Act</i> , RSY 2002, c 228 <i>Yukon Development Corporation Act</i> , RSY 2002, c 236	Section 1 (“Interpretation”) Section 5(c) (“Goals of the Government”) Section 2 (“Definitions”) Section 5(1)(c) (“Objectives”) Sections 41(1) & (2)(d) (“Powers and duties of the [Yukon Council on the Economy and the Environment]”) Section 44 (“Purpose of the Yukon Conservation Strategy”) Section 57 (“Incentives and assistance”) Section 82 (“Purpose of development approval process”) Section 141(b) (“Regulations concerning Part 3”) Preamble Section 1(1) (“Definitions”) Section 3(b) (“Purposes”) Section 27(4)(c) (“Cutting permits”) Section 2(b) (“Objectives of the Act”) Preamble Section 14(1)(c) (“Regulations”) Section 5(c) (“Goals of the Government”)