LAW AND SUSTAINABILITY: THE CANADIAN CASE

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Keywords: sustainability, sustainable development, private law, public law, environmental rights, rule of law, Constitution, Charter of Rights and Freedoms, nuisance, tort, governance, private prosecutions, class actions, subsidies, globalization, environmental registries, Cabinet, Parliament, legislatures, departments, ministries, agencies, treaties, courts, administrative tribunals

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Summary

This chapter examines the relationship between law and sustainability; particularly the role law and the Canadian legal system play in promoting or impeding sustainable development. Key legal concepts such as private and public law, the rule of law, and environmental rights are also defined.

The chapter begins by briefly examining the potential roles law may play in promoting sustainable development. The article then provides an overview of the Canadian legal system, including the key institutions and actors that create, influence, interpret and apply domestic and international laws. Canadian private law is then examined with emphasis on its failure to contend with environmental issues. The article then critically examines the development of Canadian public law and its effectiveness in addressing the failures of private law. This section includes a summary of the major legal and policy initiatives employed in Canada over the course of the last thirty years and emerging legislative strategies. Particular challenges in implementing sustainability, including declining budgets and enforcement for environmental matters, and the deficiencies in information available to guide decision-makers are then discussed. Legal mechanisms to aid in implementing sustainability, particularly by involving the public in the decision-making process are described. Initiatives to infuse environmental values at the governmental level and in the civil service, and the potential impacts of

globalization and Canada's international trade and environmental commitments are then discussed.

The authors determine that the Canadian legal system is not neutral in terms of supporting sustainability, but in fact, presents significant barriers. The transformation towards sustainability will require that, over time, these barriers be removed or addressed. The potential role of law reform in reshaping domestic laws in Canada to reflect the key characteristics of sustainability and its promotion are then discussed, and future directions identified. The authors conclude that while some change is apparent, the pace of reform is too slow and may not be sufficient to respond effectively to the environmental challenges of the twenty-first century.

1. Introduction

Canada has a complex system of environmental and other laws and policies regarding protection of the biophysical elements of the environment (land, air and water, and plants and animals), natural resources, pollution, and environmental assessment. Despite this wealth of legislation and policy, Canadians have made limited progress toward becoming a more sustainable society in the past twenty years.

One of the primary findings of the Brundtland Commission's pathbreaking report, *Our Common Future*, is that promoting sustainability requires environmental, social and economic considerations to be fully integrated into policy and decision-making processes. Many Canadians are frustrated by government inaction in many areas of environmental policy as we approach the end of the first decade of the twenty-first century. Indeed, citizens, corporations and other actors (such as civil society organizations) are challenging Canada's legal, governmental and administrative systems to provide creative solutions to our urgent problems in environmental and resource management and to begin to develop a new synthesis that responds to international treaties such as the Kyoto Protocol and other similar regional, bioregional and national initiatives. As we will try to show, many of the approaches that have been undertaken in the past are inadequate. In addition, while many of the necessary policies to effect progress towards sustainable development have been identified, such as increased integration of sustainable development policies across sectors and ministries, the political will and funding to implement them remains weak. Various stakeholders are demanding that institutions and actors develop more effective procedures and establish new goals for environmental law and policy based on emerging concepts such as the precautionary principle, full cost pricing and pollution prevention. In part, these stakeholders' demands reflect the growing recognition that many environmental and resource management issues can only be addressed through coordinated, and often international, effort. An additional complexity arises upon recognizing that these international solutions must be sought in the context of the large, and growing, economic disparities between developed and developing nations and the constant expansion of global trade. Moreover, many stakeholders realize that the costs of remedying the environmental problems that Canadians have helped to create, such as global warming, will be massive. At the same time, public expenditures on environmental programs in Canada have declined steadily in the past decade, and may continue to shrink because of pressure to diminish the government's role and reduce

taxes.

This article aims to identify the advancements in sustainability that governmental, economic, and environmental interests, working together, can achieve. In particular, the role of Canadian law reform in achieving this goal is examined. Through a discussion of how and why the efforts of past Canadian decision-makers have thus far been unsuccessful, it suggests possible directions for addressing environmental and resource management issues in a manner that will contribute to a sustainable environment.

1.1. Law and Sustainability

The term “sustainable development” was defined by the World Commission on Environment and Development (Brundtland Commission) in 1987 as, meeting "the needs of the present without compromising the ability of future generations to meet their own needs." The principle proposes that if the earth's biosphere is to continue to support life while the human population grows and the earth's capacity and its resources do not, humans must develop strategies and methods for living off of the "interest" from the environment without depleting the "capital". To achieve sustainability, stakeholders with interests in ecological, economic and social reform must work together to create a future where prosperity and opportunity increases, especially for residents of developing nations. This message was strongly reinforced in March 2005 when the Millennium Assessment, a comprehensive study by thousands of environment experts, was released. This stunning and detailed report shows that current human activities are permanently harming global ecosystems and risking the welfare of future populations.

An assessment of Canada’s performance in addressing environmental concerns and in its effort toward achieving sustainability revealed Canada has made very little progress since the Brundtland report was released in 1987. The 2001 study by the University of Victoria, using data published by the Organization for Economic Cooperation and Development (OECD), compared 25 key environmental indicators among the 29 OECD nations. The study found that overall, Canada ranked second last, with only the United States ranking worse. Canada did not rate among the top five countries in *any* of the 25 categories surveyed, but rather, was found to be one of the five worst in seventeen categories. The study did provide some positive news; Canada has made progress in several areas not surveyed, and its record is improving in ten of the categories evaluated. In addition, in 2002, the World Economic Forum’s Environmental Sustainability Index (ESI), which measures a nation’s potential to achieve sustainability, ranked Canada fourth out of 142 countries, a position which slipped to sixth in the 2005 ESI report. Thus, it is apparent that Canada has some work to do to improve its performance.

When discussing the means of achieving sustainability, it is necessary to examine applicable legal systems and their ability to support such a cooperative and progressive concept. Laws may be simply viewed as a set of publicly recognized rules that prescribe external behavior and the conduct of persons, corporations and government, are backed by socially accepted sanctions, and are justiciable in court. However, laws may serve many functions. Laws may set out processes and procedures for resolving conflicts, determine whether and how retribution and restitution will be discharged, and define the

various rights and obligations that individuals, groups, corporations and government bodies must uphold and respect in dealings with each other. Laws can also be used in a variety of innovative ways to foster sustainable development. Laws can be used to require that standards are met or that standards be set higher in the future (such as requirements that coal-burning electric power generation facilities reduce pollution levels) or set out principles, goals and priorities to guide decision-making. Laws can also overcome jurisdictional fragmentation by consolidating decision-making responsibility. Laws may establish institutions and set out their composition and mandate, or provide for funding, financial mechanisms and incentives. Laws may also declare or recognize publicly held values, and may even help shape new attitudes and drive social change (pay equity laws, and recycling programs are two examples). By legislating in this manner, legal systems and related governmental and administrative institutions guide decision-making and inherently foster and sustain patterns of economic, cultural, social and political behavior by establishing and reinforcing social norms and customs.

This article posits that a meaningful shift to sustainability will require significant changes to the definition of the rights and obligations of individuals, corporations and government, and a transformation in the interactions between all societal actors and the environment. Given the role law plays in defining rights and obligations, institution-building, recognizing and affirming public norms, mediating disputes and guiding decision-making, law reform will be a central mechanism to effecting this transformation. However, laws are not the primary social force that influences behavior. Many social and cultural norms are established and reinforced through morality and cultural traits, which in turn are fostered through means such as family relationships, interactions with peers, education, religion, and increasingly, the media. Law provides a means for influencing behavior, but does not usually determine what that behavior should be.

The ability of laws and the legal system to implement the changes needed to effect sustainability is thus limited by the social and political context in which they are situated. Therefore, each society must evaluate what changes are required and feasible in the context of its own domestic social and political climate. This article examines the Canadian case. As described in Section 2, individualism and restrictions on government action are strong currents in Canadian society. The actions required to implement sustainability are not easily reconciled with these principles. While many of our efforts appear to be taking us in the right direction, it is doubtful that they are taking us there fast enough.

2. The Canadian Legal System and Sustainability

2.1. Principles Underlying the Canadian Legal System

The Canadian government includes a Parliament of elected representatives that is empowered to pass laws, an independent judiciary to administer and interpret these laws, and an executive branch of government that implements and enforces laws.

Canada has a written constitution, which divides the government into two primary

levels, federal and provincial. Each level of government (federal, whose laws apply country-wide, and the ten provinces) is empowered to pass laws within specific enumerated subject areas to the exclusion of the other level of government. The legislative authority of these two levels of government with respect to sustainable development will be discussed in Section 2.2. Canada's three northern territories also enjoy some law-making powers, as do municipalities. However, these law-making powers derive solely from the authorization provided by a senior level of government (the federal government for the territories, provincial governments for municipalities) and are thus subject to change or withdrawal at any time.

Statutes, regulations, orders-in-council and instruments of legal effect, passed by legislatures, are considered law. Similarly, by-laws passed by municipalities are considered law. Canadian law also includes the common law, which consists of judicial decisions and, in the province of Quebec, the civil code. Other bodies, including First Nations, may also be authorized by a senior level of government to exercise law-making powers. Policies, guidelines, codes of practice, voluntary agreements, and procedures are usually intended to provide guidance rather than enforceable rules and are not generally enforced by courts or tribunals. These latter documents are usually approved or adopted by different governmental authorities, agencies, or departments, at all levels of the Canadian governmental structure.

In addition, Canada is subject to a growing body of international law. For example, Canada is signatory to international treaties and agreements concerning trade and economic issues, human rights, labour standards, and other matters, and to over 230 international environmental agreements. In Canada, international treaties are negotiated and signed by the federal government but are not automatically binding on the provinces and other legislative bodies even where the subject matter of the treaty falls under provincial jurisdiction. International treaties are usually given effect through the adoption of legislation, or amendments to existing statutes, at the federal and/or provincial levels depending on the subject matter of the treaty.

In 1982 the Constitution was amended, providing the inclusion of the *Canadian Charter of Rights and Freedoms*. Similar in many respects to the American Bill of Rights, the Charter sets out basic individual rights and freedoms, such as free speech, equality rights, and the right to due process. It dictates that these rights may not, as a general rule, be restricted by government action. However, the Charter has a distinct Canadian flavour; some of these rights may be impinged by government action where "demonstrably justified in a free and democratic society." Moreover, a provincial or federal government is empowered to pass legislation contrary to the Charter prefaced by an acknowledgment that the law in question has been drawn up "notwithstanding" the Charter.

Another essential principle of the Canadian legal system is the doctrine of liberalism, which holds that individuals have natural rights that exist independently of government. A foundational concept embedded in liberalism, linking together Canada's legal and political systems, is the legal principle known as the rule of law. The rule of law dictates that a person's freedoms should not be restricted except as set out by law, and that governments and citizens alike are subject to laws supervised by the courts.

The evolution of liberalism and the rule of law has resulted in an important distinction, in law, between private and public law. Private law involves the definition, regulation and enforcement of rights and obligations that exist between individuals, associations and corporations. Public law, on the other hand, involves the definition and administration of rights and obligations that govern the operation of government, or the relationships between the government and individuals, associations and corporations. The foundations of private law - property, contract, tort, and corporate law - play a critical role in upholding individual freedoms in Canadian society, especially economic freedoms, which in turn support the development of the market economy and capitalism. Decisions made in the private law sphere may have a tremendous impact on sustainability. For example, if a large company requires its suppliers to meet certain waste reduction and energy conservation performance standards, and specifies these requirements in contracts with its suppliers, it can encourage essential improvements in environmental performance. Conversely, a Canadian firm operating to the standards of a foreign jurisdiction, with lower environmental requirements, can diminish overall sustainability.

The restraints placed on government power by Canada's federal structure, the rule of law as set out under the Canadian Constitution, and the orientation of the courts, have important implications for sustainability. For example, the Charter may limit a government's ability to take actions that support sustainability where these actions would violate the rights of individuals (including corporations). The government must first consider whether it has the proper jurisdiction and whether it is infringing Charter rights and freedoms before implementing legal reforms that restrict the available actions and decisions in order to promote sustainability. In addition, Canadian governments may also be restricted by international legal obligations, particularly trade agreements such as the North American Free Trade Agreement (NAFTA) or by decisions of bodies such as the World Trade Organization (WTO), discussed in more detail in Section 6.2. Very often, government bodies will determine that they cannot take the necessary steps to promote sustainability due to the limitations of the Canadian public and private law system, or as a result of the limitations imposed by our international obligations.

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D.S. McRobert is In-House Counsel and Senior Policy Advisor at the Environmental Commissioner of Ontario. He joined the ECO in November 1994 and was involved in the establishment of the office. David has a B.Sc. in Biology from Trent University (1980) and a Master's degree in Environmental Studies (MES) from York University (1984). He graduated with an LL.B. degree from Osgoode Hall Law School (1987) and was admitted to the Ontario Bar in 1990.

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