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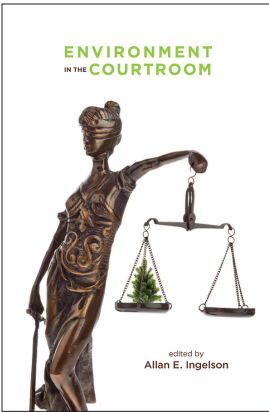
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ENVIRONMENT IN THE COURTROOM

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Applying International Law to Canadian Environmental Law

CHARLES-EMMANUEL CÔTÉ

Introduction

In order to understand how international law can be applied to Canadian environmental law,¹ we must first clarify certain basic concepts. By “international law,” we are referring to international public law, which is the law applicable to the international community made up of sovereign states and international intergovernmental organizations (IOs). This means the legal system out of which Canada’s obligations arise in its relationship with other sovereign states and IOs.

Canada’s international obligations basically originate from two main sources. On the one hand, they arise from customary international practices, or customary international law, which consists of general domestic practices accepted as law. The teaching methods for this customary practice are empirical and hard to pinpoint, as is unavoidable for Canada, which has established neither a specific procedure nor implicit consent for this. Generally speaking, it is international jurisdictions that ascertain the existence of any customary international rules. Otherwise, the existence of a customary rule is ascertained by way of scattered measures (national standards, national jurisdictions, non-binding IO resolutions, legal doctrine, etc.).

On the other hand, Canada’s international obligations flow from treaties entered into with other sovereign states or IOs. Treaties are voluntary agreements between sovereign states or IOs intended to have legal effect, regardless of their designation (agreement, convention, exchange of notes, understanding, protocol, treaty, etc.). For Canada to be bound by a treaty, it must have specifically consented to it. According to well-established governmental practice

and based on the principles of the *Constitution of the United Kingdom*, which are referred to in the preamble of the *Constitution Act, 1867*,² it is the federal government that has a monopoly over the correct procedures for entering into treaties, without any intervention on the part of the federal Parliament or the provinces.

Canada is bound by numerous customary or conventional international obligations concerning environmental protection. These international obligations can be applied as sources of positive law or as interpretive sources for Canadian environmental law.

International Law as a Source of Positive Law for Canadian Environmental Law

Canada's international obligations can be a source of positive law in Canadian environmental law. This means that they can give rise to rights and obligations that may then be relied upon as the foundation of a claim when pleading before a Canadian judge. This first application of international law respects specific rules depending on the customary or conventional nature of the obligation in question.

CUSTOMARY INTERNATIONAL LAW AS A SOURCE OF POSITIVE LAW

In the judicial ruling *R. v. Hape*³ rendered in 2007, the Supreme Court of Canada ended the uncertainty surrounding the status of customary international practice in Canadian law. It is now clear that this is automatically accepted into *common law*, without the requirement for any special procedure or action on the part of the federal or provincial government, provided that it is not incompatible with the Constitution, federal legislation, or provincial legislation.⁴ Only “prohibitive rules” in customary international law are automatically accepted: if a rule does not prohibit a course of conduct in Canada but rather the jurisdiction to act in a given manner, it is not automatically accepted and then requires the adoption of an Act on the part of the legislator having jurisdiction.

In order to decide whether a Canadian customary international obligation is part of the current law in effect in Canada, the Canadian judge must complete the following steps:

- (a) ascertain the existence of the prohibitive customary rule in international law based on a precedent established in an international jurisdiction, or else establish such a rule himself;

- (b) ascertain that the acceptance of the customary rule in Canadian law is not contrary to a constitutional or legislative provision that is incompatible with the customary rule.

If these steps are completed successfully, the customary rule will then form part of the current law in effect in Canada and the judge may proceed to apply it.

The automatic acceptance of customary international law in Canadian law raises the question of the evidentiary rules that apply. Under *common law*, the practice of Canadian courts stipulates that a judge must always have knowledge of customary international law, which means that it does not require evidentiary proof, unlike the law of a foreign state.⁵ Under Quebec Civil Law, a Quebec judge must also have knowledge of customary international law, but it must only be argued before the judge—without evidentiary proof—even if it is included in the current law in effect in Quebec.⁶ This special rule concerning evidentiary proof implies that a judge is not required to apply customary international law himself, if the parties to the claim do not request it.⁷

A Canadian judge thus becomes a compliance officer for customary international law in Canadian environmental law, watching over Canada's compliance to its international obligations. He can also contribute by verifying the existence of a customary rule concerning environmental protection, not only for the purposes of the case he must decide but also to advance international law for the benefit of environmental protection around the world. The challenges in his role are that these actions result in the establishment of the existence of a customary rule and its contents.

THE TREATY AS A SOURCE OF POSITIVE LAW

Contrary to international custom, treaties entered into by Canada cannot apply to Canadian law without the legislator's intervention. Only an Act can transform Canada's international obligations into a source of positive law under Canadian law.⁸ In its famous *Decision on the Conventions of the International Labour Organization*, in 1937, the Judicial Committee of the Privy Council decided that the legislative authority required to implement a treaty under Canadian law is an ancillary power to the normal division of legislative jurisdictions.⁹ There is no general authority for the implementation of treaties in Canada: the federal or provincial legislator has the authority according to the matter targeted by the treaty. In spite of an old controversy concerning the denial of a general federal jurisdiction for the implementation of treaties, the 1937 ruling still constitutes the leading decision on this issue.¹⁰

The concept of the implementation of a treaty by Canada reverts to the performance of its conventional international obligations. The legal status of a treaty under Canadian law depends on the legislative procedure applied in its implementation.

Treaty Applicable under Canadian Law

A treaty that is applicable under Canadian law is one whose very text forms part of the law in effect in Canada. The text of the treaty becomes a source of positive law that can be invoked before the Canadian judge as the basis for a claim. This first hypothesis is not the most common one in Canadian legislation. It assumes that the law governing the implementation of the treaty shows the “clear and unequivocal” intention by the legislator to incorporate the text of the treaty, or a portion thereof, into Canadian law. The incorporation of the treaty into Canadian law is a legal concept: it does not mean that the text of the treaty should be attached to the implementation legislation! If the implementation legislation does actually incorporate the treaty, it then becomes directly applicable under Canadian law. It then follows that it occupies the same rank as its incorporation legislation in the Canadian normative hierarchy.

INCORPORATION ACT WITH ANNEXATION OF THE TREATY TEXT

The competent legislator may want to incorporate a treaty and attach its text to the Incorporation Act. The determining legal criterion is always a clear and unequivocal indication of the intention to incorporate the text of the treaty into Canadian law. The annexation of the text alone is not enough. An example in federal legislation of an incorporation act with annexation of the text of a treaty is the *Foreign Missions and International Organizations Act*, which states that:

Articles 1, 22 to 24 and 27 to 40 of the Vienna Convention on Diplomatic Relations ... have the force of law in Canada in respect of all foreign states, regardless of whether those states are parties to those Conventions.¹¹

The integral text of the *Vienna Convention on Diplomatic Relations*¹² is reproduced in Appendix II of the Act. The incorporated provisions thus form an integral part of the law in effect in Canada and are directly applicable under Canadian law.

INCORPORATION ACT WITHOUT ANNEXATION OF THE TREATY TEXT

On the other hand, even if the treaty text is not annexed to the Act, this does not necessarily mean that the legislator did not express a clear and unequivocal intention to incorporate the treaty into Canadian law. The legislator might well express his intention to render the text directly applicable under Canadian law without annexing it to the Incorporation Act. An example in federal legislation of an incorporation act without annexation of the text of a treaty is found in the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, which states that:

If the Tribunal conducts an inquiry into a complaint, it shall determine whether the procurement was conducted in accordance with the requirements set out in whichever of NAFTA, the Agreement on Government Procurement, the CCFTA, the CPFTA, the CCOFTA, the CPAFTA, the CHFTA, the CKFTA, CETA, the CFTA or CUFTA applies.¹³

This regulatory provision simply refers back to Chapter 10 of the North American Free Trade Agreement between the government of Canada, the government of Mexico, and the government of the United States of America (NAFTA),¹⁴ which deals with procurement carried out by federal government entities or federal government business enterprises. The NAFTA text is not reproduced, but this does not prevent the text of its Chapter 10 from being incorporated into Canadian law and being invoked before a judge during an inquiry into a federal government contract.

As the incorporated treaties are part of the law in effect in Canada, a judge automatically has knowledge of their texts. Under *common law*, tribunals have knowledge of all treaties entered into by Canada, whether or not they have been incorporated into Canadian law. This rule contributes to the general evidentiary rule which requires that a *common law* judge have knowledge of all actions by the government carried out through the exercise of Crown prerogatives.¹⁵ Under Quebec civil law, the decision to annex or not annex the text of the treaty to the Incorporation Act has an effect on the applicable evidentiary rules. Unlike customary international law, a treaty whose text is not reproduced in the Incorporation Act must be submitted so that the judge automatically has knowledge of it.¹⁶ However, the judge cannot ask for evidence, unlike with the law of a foreign state. As for the treaty whose text is annexed to the Act, the

Quebec judge automatically has knowledge of it without the requirement for it to be claimed by a party.

Incorporation under Canadian law allows for the most extensive use of treaties as a source of positive law. These are considered to be part of the law in effect in Canada and are directly applicable, allowing for their texts to be invoked before a Canadian judge as the basis for a claim.

Treaty Inapplicable under Canadian Law

A treaty that is inapplicable under Canadian law is one whose text does not form part of the law in effect in Canada. This would include any treaty that was correctly entered into by Canada in the international legal system, but whose provisions have not been incorporated into Canadian law by way of an Act. It does not matter what Canada did to implement the treaty, in the performance of its conventional international obligations, if no clear and unequivocal intention to incorporate the treaty exists in federal or provincial legislation.

IMPLEMENTATION ACT WITHOUT ANNEXATION OF THE TEXT OF A TREATY

The most common hypothesis is that of a treaty that is the subject of an implementation Act on the part of the competent legislator, who has no intention to incorporate the treaty under Canadian law. The purpose of the implementing Act is to change Canadian law in such a way as to ensure the performance by Canada of its conventional international obligations. This could be either a new Act adopted specially for the implementation of a treaty, or else changes made to an already existing Act. The provisions of the treaty itself remain inapplicable in Canadian law: only the legislative provisions for implementation are part of the law in effect in Canada. The text of the treaty itself cannot under any circumstances be invoked before the judge as the basis for a claim.

An example of an Act adopted specifically for the purpose of implementing a treaty is the *World Trade Organization Agreement Implementation Act*, which states that “The purpose of this Act is to implement the Agreement” and “The Agreement is hereby approved.”¹⁷ The Act then sets forth over two hundred articles that aim to change the federal legislation in a surgical and timely manner, in order to fulfill Canada’s international obligations. In the matter of *Pfizer Inc. v. Canada (1st inst.)*,¹⁸ a private individual attempted to use this Act to directly invoke the implemented treaty in order to challenge the compatibility of the federal law respecting patents with Canada’s international obligations.

The Federal Court rejected this use of the implemented treaty, with approval from the Federal Court of Appeal, in the following terms:

Parliament, in my view, manifestly indicated its intention as to how it was implementing the WTO Agreement and its annexed TRIPS Agreement or any part thereof. Parliament gave legal effect to its WTO obligations by carefully examining the nature of those obligations, assessing the state of the existing federal statutory and regulatory law and then *deciding the specific and precise legislative changes which were required* to implement the WTO Agreement.¹⁹

A similar act was adopted in Quebec in order to implement several international trade agreements. The *Act respecting the Implementation of International Trade Agreements*²⁰ states that its purpose “is to implement the following agreements,” and it then goes on to list four agreements, including the *North American Agreement on Environmental Cooperation*.²¹ The Quebec Court of Appeal also rejected a similar attempt to invoke the text of one of the agreements implemented by the Act in the matter of *UL Canada v. Québec (AG)*.²²

IMPLEMENTATION ACT WITH ANNEXATION OF THE TEXT OF THE TREATY

Whatever the implementation method used by the legislator, the only criterion that counts when deciding whether the treaty is incorporated and forms part of the law in effect in Canada is that of the legislator’s clear and unequivocal intention. Even the annexation of the text of the treaty in an implementation Act is insufficient to conclude that this intention exists!²³ A rare example of this hypothesis is to be found in the *Canada-United States Free Trade Agreement Implementation Act*, which stipulates firstly that “The purpose of this Act is to implement the Agreement” and that “The Agreement is hereby approved.” It then proceeds to make more than one hundred changes to the federal legislation.²⁴ The integral text of the *Canada-United States Free Trade Agreement*²⁵ is then annexed to the Act.

The same evidentiary rules apply to the treaty that is inapplicable in Canadian law. A *common law* judge has knowledge of all of the treaties entered into by the Canadian government. A Quebec civil law judge also has knowledge of these treaties, except that the treaties whose texts are not reproduced in an Act must then be placed before the judge so that he definitely has knowledge of them.

International Law as a Source Of Interpretation for Canadian Environmental Law

Quite apart from the question of the applicability of a treaty under Canadian law as a source of positive law, a treaty may also be used as a source for the interpretation of Canadian law. It is no doubt a very useful tool to allow a Canadian judge to use international law in Canadian environmental law, independently of the question of the incorporation of the treaty and the changes made to Canadian law by the legislator to implement Canada's international obligations.

THE PRINCIPLE OF CONSISTENT INTERPRETATION

In the 2007 *Hape* ruling, the Supreme Court of Canada referred to the existence of the principle of consistent interpretation in Canadian law:

It is a well-established principle of statutory interpretation that *legislation will be presumed to conform to international law*. The presumption of conformity is based on the rule of judicial policy that, *as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result.*²⁶

This established principle, which was inherited from British constitutional law, means that the Canadian judge must choose the interpretation of Canadian law that most closely conforms to Canada's international obligations. This only applies to treaties entered into by Canada and international customary law, but it applies whether the nature of the treaty is applicable or not applicable or whether the custom has been accepted into Canadian law.²⁷ The principle of consistent interpretation allows the judge to complete the implementation of Canada's international obligations, while interpreting Canadian law; it does not, however, allow for changes in the case of obvious incompatibility.

The matter of *114957 Canada Ltd. (Spraytech, Sprinkler Company) v. Hudson (Town)*²⁸ presents an interesting case of application of the principle of consistent interpretation in environmental law. In order to reconcile her interpretation of the prescribed authority attributed to Quebec municipalities with empowering legislation, Justice L'Heureux-Dubé referred to the precautionary principle, which would from that day forward be included in customary international law.²⁹ In doing so, not only did the Supreme Court of Canada

use international environmental law to interpret Canadian law, but its ruling in and of itself constitutes a contribution to the development of customary international law.

THE INTERPRETATION OF IMPLEMENTATION LEGISLATION AS IT APPLIES TO A TREATY

The wording of the principle of consistent interpretation in the *Hape* decision does not include any reference to the condition of the existence of ambiguity in the provision of the Canadian law to be interpreted.³⁰ However, the lack of such a doubt blocked the application of the principle in earlier decisions of the Supreme Court of Canada, and certain lower courts continue to apply this condition.

The scope of any possible condition of preliminary ambiguity was, however, severely limited by the Supreme Court of Canada in 1992 in the matter of *National Corn Growers v. T.C.I.*³¹ Whenever the court has to interpret the implementation Act with respect to a treaty in accordance with the treaty, a Canadian judge does not first have to identify ambiguity in the Act: even clear legislative provisions must be interpreted in accordance with the implemented treaty, except in the case of obvious incompatibility.

When a Canadian judge applies an implementation Act with respect to an international environmental agreement, he must be able to make reference to the agreement in question to ensure that his interpretation of the Act is in accordance with Canada's international obligations. For example, a judge who applies the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*³² can make reference to the *Convention on International Trade in Endangered Species*.³³ The close relationship between a treaty and its implementation Act allows the judge to be proactive in the application of international law and to improve Canada's performance of its international obligations.

NOTES

- 1 The expression "Canadian environmental law" refers to both federal environmental law and provincial environmental law.
- 2 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.
- 3 [2007] 2 SCR 292 [*Hape*].
- 4 *Ibid* at 39, *per* LeBel J.
- 5 Gibran van Ert, *Using International Law in Canadian Courts*, 2d ed (Toronto: Irwin Law, 2008) at 45 [van Ert]; Ronald St. John Macdonald, "The Relationship between International Law and Domestic Law in Canada" in Ronald St. John Macdonald, Gerald L Morris & Douglas M Johnston, eds, *Canadian Perspectives*

- on *International Law and Organization* (Toronto: University of Toronto Press, 1974) 88 at 113.
- 6 *Québec Civil Code*, SQ 1991, c 64, art 2807, para 2 [QCC].
 - 7 Léo Ducharme, “Le nouveau droit de la preuve en matières civiles selon le code civil du Québec” in Barreau du Québec et Chambre des notaires du Québec, ed, *La réforme du Code civil*, v 3 (Québec : Presses de l’Université Laval, 1993), 443 at 445.
 - 8 *Canada (AG) v Ontario (AG)*, [1937] AC 326 at 347–348 (PC). (*Decision on the Conventions of the International Labour Organization*).
 - 9 *Ibid* at 351.
 - 10 In the matter of the controversy surrounding the *Decision on the Conventions of the International Labour Organization* and its outdated aspects, see Charles-Emmanuel Côté, “Applying international law to Canadian law” (“La réception du droit international en droit canadien”) (2010) 52 SCLR (2d) 483 at 513–521.
 - 11 SC 1991, c 41, s 3(1).
 - 12 18 April 1961, Can TS 1966 No 29.
 - 13 SOR/93-602, art 11.
 - 14 17 December 1992, Can TS 1994 No 2.
 - 15 van Ert, *supra* note 5 at 56. See *Pan-American World Airways Inc v Department of Trade*, [1976] 1 Lloyd’s Rep 257 at 261 (Eng CA).
 - 16 QCC, *supra* note 6, art 2807, para 2; Québec, Ministère de la Justice, *Commentaires du Ministre de la Justice : le Code civil du Québec*, v 2 (Québec : Publications du Québec, 1993) at 1757.
 - 17 SC 1994, c 47, arts 3 and 8. See *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 3.
 - 18 [1999] 4 CF 441, aff’d 1999 CanLII 8952 (CAF) [*Pfizer Inc*].
 - 19 *Ibid* at para 45 (CF) (emphasis added).
 - 20 RSQ, c M-35.2.
 - 21 *Ibid*, art 2; *North American Agreement on Environmental Cooperation*, 14 September 1993, Canada–United States–Mexico, 32 ILM 1499.
 - 22 [2003] QLR 2729 (CA Qué) at para 80, aff’d [2005] 1 RCS 143. See also *Entreprise de rebuts Sanipan v Québec (AG)*, [1995] QLR 821 at 846.
 - 23 See *Pfizer Inc*, *supra* note 18 at para 43 (CF).
 - 24 SC 1988, c 65, arts 3, 8, 23–148.
 - 25 2 January 1988, TR Can 1989 No 3.
 - 26 *Hape*, *supra* note 3 at para 53 (main reasons) [emphasis added].
 - 27 See *Daniels v White*, [1968] SCR 517; *Arrow River & Tributaries Slide & Boom Co v Pigeon Timber Co*, [1932] SCR 495.
 - 28 [2001] 2 RSC 241.
 - 29 *Ibid* at paras 30–32 (main reasons).
 - 30 See Côté, *supra* note 10 at 541–544.
 - 31 [1990] 2 SCR 1324 at 1371 (Gonthier J, main reasons).
 - 32 SC 1992, c 52, art 4.
 - 33 2 July 1974, TR Can 1975 No 32.