CHAPTER FIVE

INTERNATIONAL LAW INFLUENCES

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I. INTRODUCTION

International law has significantly influenced the design and the application of domestic environmental law in Canada in two main ways. First, as some environmental challenges affecting the country transcend national frontiers, Canadian laws to address these challenges have been shaped through international legal cooperation. By signing onto bilateral legal agreements to address environmental problems with a transboundary nature (for example, the Canada–US *Boundary Waters Treaty*, 11 January 1909, 36 US Stat 2448 (entered into force 1910), as well as multilateral treaties to confront global challenges like climate change (for example, the *Paris Agreement*, 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1 (entered into force 4 November 2016)), Canada has devised national laws and policies to comply with the international obligations to which it agrees before other nations. Second, as the relatively new area of Canadian environmental law has developed concurrently with the body of public

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international law to protect the environment, it has been greatly affected by international environmental law (IEL) principles, norms, and institutions.

This chapter examines the various ways in which IEL has helped to shape the design and the application of Canadian domestic environmental law. It first provides an overview of the importance and the evolution of international law responses to current and emerging environmental challenges before reviewing concrete cases in which Canadian environmental norms and principles can be directly linked to IEL. Finally, it reviews how Canadian courts are engaging with international environmental law principles. Note that this chapter does not purport to address or to summarize the important elements of IEL as a branch of international law. To learn about characteristics of IEL when compared with other areas of international law, sources of IEL, and actors engaged in the making of IEL, or for a full history of the discipline, see the list of further readings at the end of this chapter. The goal here is to emphasize that the broader international context in which Canada's environmental laws are embedded helps to illuminate how environmental regulations came to be and how they continue to be designed and interpreted today. Other examples of how international law has influenced Canadian environmental law can be found throughout the chapters in this book.

II. THE IMPORTANCE AND THE EVOLUTION OF IEL

The excerpt below, from Philippe Sands and Jacqueline Peel, discusses the reasons behind the existence of a substantial and growing body of international norms, principles, and institutions to protect the environment, and describes how those principles and norms have evolved in the last 50 years. Sands and Peel also discuss how IEL has been an important driver for national states creating domestic environmental laws. This discussion is followed by an excerpt from a 2018 report by the United Nations Environmental Programme (UNEP) on environmental rule of law. The UNEP report recognizes that despite the dramatic expansion in the number of international and national environmental laws since the 1970s, the world remains far from adequately responding to long-standing environmental problems like air pollution and water contamination. Meanwhile, our societies now face new environmental challenges, such as climate change, which puts our legal systems even more to the test. The UNEP report suggests that there is a considerable gap between existing environmental laws and their implementation and enforcement, emphasizing the importance of taking environmental justice into account in domestic systems in order to protect the environment.

PHILIPPE SANDS & JACQUELINE PEEL, "THE ENVIRONMENT AND INTERNATIONAL SOCIETY: ISSUES, CONCEPTS AND DEFINITIONS"

in *Principles of International Environmental Law*, 4th ed (Cambridge: Cambridge University Press, 2018) ch 1 [footnotes omitted]

INTRODUCTION: THE ENVIRONMENTAL CHALLENGE

It is widely recognised that the planet faces serious environmental challenges that can only be addressed through international cooperation. Climate change and ozone depletion, loss of biodiversity, toxic and hazardous pollution of air and sea, pollution of rivers and depletion of freshwater resources are among the issues that international law is called upon to address. … [E]nvironmental threats are accompanied by a recognition that ecological interdependence does not respect national boundaries and that issues once considered to be matters of national concern have

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international implications—at the bilateral, subregional, regional or global levels—that can often only be addressed by international cooperation, including by law and regulation.

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THE INTERNATIONAL LEGAL ORDER

Environmental issues pose significant challenges for the traditional international legal order, in at least three ways. They pose challenges, first, for the legislative, administrative and adjudicative functions of international law; second, for the manner in which international legal arrangements are organised (i.e. along territorial lines); and, third, for the various actors who are considered to be members of the international community and participants in the various processes and practices of the international legal order. …

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The international legal order regulates the activities of an international community comprising states, international organisations and non-state actors. States have the primary role in the international legal order, as both international lawmakers and holders of international rights and obligations. Under international law, states are sovereign and have equal rights and duties as members of the international community, notwithstanding differences of an economic, social, political or other nature. …

The sovereignty and exclusive jurisdiction … over their territory means, in principle, that [states] alone have the competence to develop policies and laws in respect of the natural resources and the environment of their territory, which comprises:

(1) the land within its boundaries, including the subsoil;
(2) internal waters, such as lakes, rivers and canals;
(3) the territorial sea, which is adjacent to the coast, including its seabed, subsoil and the resources thereof; and
(4) the airspace above its land, internal waters and territorial sea, up to the point at which the legal regime of outer space begins.

Additionally, states have limited sovereign rights and jurisdiction over other areas, including: a contiguous zone adjacent to the territorial seas; the resources of the continental shelf, its seabed and subsoil; certain fishing zones; and the exclusive economic zone. It follows that certain areas fall outside the territory of any state, and in respect of these no state has exclusive jurisdiction. These areas, which are sometimes referred to as the "global commons," include the high seas and its seabed and subsoil, outer space and, according to a majority of states, the Antarctic. The atmosphere is also sometimes considered to be part of the global commons. This apparently straightforward international legal order worked satisfactorily as an organising structure until technological developments permeated national boundaries. This structure does not, however, coexist comfortably with an environmental order that consists of a biosphere of interdependent ecosystems, which do not respect artificial national territorial boundaries. Many natural resources and their environmental components are ecologically shared. The use by one state of natural resources within its territory will invariably have consequences for the use of natural resources and their environmental components in another state. This is evident where a river runs through two or more countries, or where living resources migrate between two or more sovereign territories. Even apparently innocent activities in one country, such as the release of greenhouse gases or (possibly) genetically modified organisms, can

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have significant effects upon the environment of other states or in areas beyond national jurisdiction. Ecological interdependence poses a fundamental challenge for international law, and explains why international cooperation and the development of international environmental standards are indispensable: the challenge for international law in the world of sovereign states remains to reconcile the fundamental independence of each state with the inherent and fundamental interdependence of the environment.

PHILIPPE SANDS & JACQUELINE PEEL, "HISTORY"
in *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2018) ch 2 [footnotes omitted]

International environmental law has evolved over four distinct periods, reflecting developments in scientific knowledge, the application of new technologies and an understanding of their impacts, changes in political consciousness and the changing structure of the international legal order and institutions.

A first period began with bilateral fisheries treaties in the nineteenth century, and concluded with the creation of the new international organisations in 1945. During this period, peoples and nations began to understand that the process of industrialisation and development required limitations on the exploitation of certain natural resources (flora and fauna) and the adoption of appropriate legal instruments. The second period commenced with the creation of the UN and culminated with the UN Conference on the Human Environment, held in Stockholm in June 1972. Over this period, a range of international organisations with competence in environmental matters was created, and legal instruments were adopted, at both the regional and the global levels, which addressed particular sources of pollution and the conservation of general and particular environmental resources, such as oil pollution, nuclear testing, wetlands, the marine environment and its living resources, the quality of freshwaters and the dumping of waste at sea. The third period ran from the 1972 Stockholm Conference and concluded with the UN Conference on Environment and Development (UNCED) in June 1992. During this period, the UN tried to put in place a system for coordinating responses to international environmental issues, regional and global conventions were adopted, and for the first time the production, consumption and international trade in certain products were banned at the global level. The fourth period was set in motion by UNCED, and may be characterised as a period of integration: when environmental concerns should, as a matter of international law and policy, be integrated into all activities and into the broader development agenda concerned with poverty eradication and improving human health. This has also been the period in which increased attention has been paid to compliance with international environmental obligations, with the result that there is now a well-developed body of international jurisprudence.

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UNCED

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UNCED was held in Rio de Janeiro, Brazil, on 3-14 June 1992, and was attended by 176 states, more than fifty intergovernmental organisations, and several thousand corporations and non-governmental organisations. …

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UNCED's contribution to international law includes the Commission on Sustainable Development … , the endorsement of a new topic area known as the "international law of sustainable development" … , a number of the Rio Declaration Principles [*Rio Declaration on Environment and Development*, UNGA, UN Doc No A/CONF.151/26/Rev.1 (Vol 1), annex I (1992)], and the framework established by Agenda 21 [United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3-14 June 1992]. At the time of UNCED, it was suggested that its endorsement of sustainable development might undermine "the autonomy of environmental law as a body of rules and standards designed to restrain and prevent the environmentally destructive effects of certain kinds of economic activity," and there might be some reason to fear that the Rio Conference constituted "the beginning of the decline of international environmental law as an autonomous branch of international law." This has not occurred; international environmental law has continued to develop and expand since 1992. Nonetheless, UNCED's concern with the balance between environmental protection and economic development has necessitated a reorientation of international environmental regulation [so that environmental concerns would be] integrated into economic and development activities. The challenge for international environmental law has been to facilitate this interlinkage without environmental protection objectives being overwhelmed by the more powerful rules of international economic cooperation.

THE RIO DECLARATION

The Rio Declaration represented a series of compromises between developed and developing countries and a balance between the objectives of environmental protection and economic development. … The Declaration comprises twenty-seven Principles, which set out the basis upon which states and people are to cooperate and further develop "international law in the field of sustainable development" (Principle 27). Although it is non-binding, some provisions reflect rules of customary law, others reflect emerging rules, and yet others provide guidance as to future legal developments. A number of the principles—for example, in relation to precaution—have been frequently referred to by national and international courts. …

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The heart of the Rio Declaration is in Principles 3 and 4, which should be read together to understand the political context and the trade-off they represent. Both Principles were initially controversial. Principle 3 provides that "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." It represents something of a victory for developing countries and the Group of 77, being the first time that the "right to development" was affirmed in an international instrument adopted by consensus. In return for Principle 3, the developed countries extracted Principle 4, which provides that "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." This reflects a commitment to moving environmental considerations and objectives from the periphery of international relations to its economic core. …

The Rio Declaration recognised a new principle of "common but differentiated responsibility." Principle 7 notes the different contributions of countries to regional and global environmental degradation, and provides that:

> [i]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable

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development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

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Principle 11 … commits all states to enact "effective environmental legislation," although the standards, objectives and priorities "should reflect the environmental and developmental context to which they apply." Principle 11 also recognises that standards applied by some countries "may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."

The Rio Declaration developed general principles of the international law of sustainable development. The "precautionary approach" is endorsed by Principle 15, and the "polluter pays" principle is implicitly recognised in Principle 16. The Rio Declaration took several steps beyond the Stockholm Declaration by supporting the development of "procedural" techniques for implementing international standards (including access to information and public participation), the use of environmental impact assessments, and enhanced notification, information exchange and consultation.

CARL BRUCH ET AL, ENVIRONMENTAL RULE OF LAW: FIRST GLOBAL REPORT

(Nairobi: United Nations Environment Programme, 2019), online (pdf): <https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf> [footnotes omitted]

1.4 EVOLUTION OF ENVIRONMENTAL RULE OF LAW

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While some countries adopted environmental laws in the 1970s and 1980s, most adopted their framework environmental laws starting in the 1990s, following the Rio Earth Summit. The 1990s also saw a rapid growth of environmental ministries and agencies. From 1972 to 1992, nations entered into more than 1,100 environmental agreements and other legal instruments. International and bilateral donors and partners focused money and energy in building human and institutional capacity.

By the time the 2002 World Summit on Sustainable Development was held, many countries' wherewithal for making new international commitments at global summits was exhausted. There was a sense among many that the Summit should focus on implementation of existing commitments, rather than on generating yet more commitments that countries may have difficulty implementing. This led to a focus at the Summit on voluntary public–private partnerships, which were viewed as not providing a substitute for effective environmental rule of law.

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By the 2012 UN Conference on Sustainable Development (also known as "Rio+20"), there was substantial focus on environmental governance. *The Future We Want*, the outcome document from Rio+20, emphasized the importance of strong institutions, access to justice and information, and the political will to implement and enforce environmental law. It also expanded and refined a number of the public–private partnerships and other initiatives initiated at the World Summit on Sustainable Development. …

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The first United Nations Environment Assembly in 2014 adopted resolution 1/13, which calls upon countries "to work for the strengthening of environmental rule of law at the international, regional and national levels." And in 2016, the First World Environmental Law Congress, cosponsored by the International Union for Conservation of Nature and UN Environment, adopted the "IUCN World Declaration on the Environmental Rule of Law," which outlines 13 principles to serve as the foundation for developing and implementing solutions for ecologically sustainable development. It declares that "environmental rule of law should thus serve as the legal foundation for promoting environmental ethics and achieving environmental justice, global ecological integrity, and a sustainable future for all, including for future generations, at local, national, sub-national, regional, and international levels."

In 2015, the global community of nations recognized the importance of environmental rule of law to sustainable development. Sustainable Development Goal 16 emphasizes that environmental rule of law creates peaceful and inclusive societies premised upon access to justice and accountable and inclusive institutions. As such, Goal 16 cuts across all the other Sustainable Development Goals.

QUESTIONS

1. Identify and list environmental problems affecting Canada that can be addressed only by international cooperation and environmental challenges that Canada can regulate unilaterally using domestic law.
2. In your opinion, why it did take so long for the international community to create an international body of norms to protect the environment?
3. Should international environmental law treat all countries as equally responsible for global environmental problems such as climate change?
4. Do we need more environmental treaties to improve environmental protection?

III. IEL AND CANADA

The evolution of Canada's legal framework to protect the environment, addressed in the other chapters of this book, has been closely intertwined with the evolution of IEL. Canada's territory includes one quarter of the Earth's wetlands and boreal forests, the longest coastline on the planet, and 20 percent of the world's freshwater. As in other developed countries, social pressure from environmental organizations and social movements have consistently pushed concerns with environmental protection to the forefront of Canada's political agenda since the 1970s, with mixed results depending on the circumstances.

As a middle power, Canada relies heavily on international cooperation and the international rule of law to preserve its peace and security and to protect its values and interests, including those related to the national and international environment. Canada has been deeply engaged with IEL since its inception, being a party to a substantial number of important environmental agreements. Moreover, Canada has played an influential role in the development of key aspects of IEL. It was a Canadian diplomat, Maurice Strong, who served as secretary-general of both the 1972 Stockholm Conference on the Human Environment and the 1992 UN Conference on Environment and Development. Strong also served as the first head of UNEP, from 1972 to 1976. Canada has also played a leadership role in the negotiation of some of the key environmental law agreements, like the *Stockholm Convention on Persistent Organic Pollutants*, 22 May 2001, 2256 UNTS 119 (entered into force 17 May 2014).

As of April 2019, Canada is party to 115 international environmental agreements or legal instruments. (See "Canada Treaty Series" (last modified 3 March 2014), online: *Global Affair*

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Canada <https://www.treaty-accord.gc.ca/cts-rtc.aspx?lang=eng>.) This includes 54 multilateral agreements (for example, the 1992 *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994); the 2015 *Paris Agreement*; the 1992 *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993); and the 1989 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 22 March 1989, 1673 UNTS 57); 23 Canada–US environmental agreements (for example, the 1909 *Boundary Waters Treaty* and the 1991 *Agreement between the Government of Canada and the Government of the United States on Air Quality*, 13 March 1991, Can TS 1991, No 3 (entered into force 13 March 1991)); 28 cooperative bilateral agreements with various other countries (for example, the 2011 *Canada–Australia Cooperative Arrangement on Industrial Chemicals* and the 2017 *Canada–China Memorandum of Understanding Concerning Environmental Cooperation*); and various multilateral voluntary instruments (for example, the 1996 *Arctic Council* and the 2004 *Global Methane Initiative*) (see Environment and Climate Change Canada, "Participation in International Environmental Agreements and Instruments" for *Compendium of Canada's Engagement in International Environmental Agreements and Instruments*, 8th ed (2018), online: *Government of Canada* <https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/participation-international-environmental-agreements.html>).

This close engagement with IEL has affected Canada's environmental law in important ways. Canada's international commitments have often prompted the direct creation—or reform—of environmental laws and policies at the domestic level. Canadian legislators have incorporated some of the prominent legal principles of IEL—for example, sustainable development, precautionary principle, and polluter pays—into Canadian environmental law and policy regimes. Canadian courts have either applied customary IEL in concrete cases or indirectly applied IEL norms and principles that have been expressly incorporated into Canadian legislation. Finally, Canadian courts have used IEL to interpret national and sub-national environmental law provisions.

The following excerpt, from a paper by Charles-Emmanuel Côté, discusses the various ways in which IEL is applied to Canadian environmental law. The excerpt is followed by two concrete examples of the application of IEL in the areas of marine pollution and persistent organic pollutants to illustrate how IEL objectives and norms have been incorporated into Canadian statutory law (see Section III.A of this chapter).

CHARLES-EMMANUEL CÔTÉ, "APPLYING INTERNATIONAL LAW TO CANADIAN ENVIRONMENTAL LAW"

(Paper delivered at a Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage, University of Calgary, 23-24 March 2012) [footnotes omitted]

INTRODUCTION

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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. …

On the other hand, Canada's international obligations flow from treaties entered into with other sovereign states or IO's [intergovernmental organizations]. … For Canada to be bound by a treaty, it must have specifically consented to it. According

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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 of 1867* [(UK), 30 & 31 Vict, c 3], 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

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CUSTOMARY INTERNATIONAL LAW AS A SOURCE OF POSITIVE LAW

In the judicial ruling *R. v. Hape* [2007 SCC 26, [2007] 2 SCR 292] 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. 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.

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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 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. In its famous *Decision on the Conventions of the International Labour Organization* [*Canada (Attorney General) v Ontario (Attorney General)*, [1937] AC 326, 1937 CanLII 362], 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. 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.

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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 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. …

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IMPLEMENTATION ACT WITHOUT ANNEXATION OF THE TEXT OF A TREATY

The most common hypothesis is that of a treaty which 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.

[Later case law on domestic application of international law in Canada includes *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62; and *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856.]

A. EXAMPLES OF THE INCORPORATION OF IEL INTO CANADIAN STATUTORY LAW

1. Marine Pollution

The 1973 *International Convention for the Prevention of Pollution from Ships*, 2 November 1973, *as Modified by the Protocol of 1978 Relating Thereto*, 17 February 1978, 1340 UNTS 62 (entered into force 2 October 1983) (MARPOL 73/78) is the main legal instrument for the prevention of marine pollution from ships—both accidental pollution and that from routine operations. MARPOL 73/78 combines the original 1973 Convention and the 1978 Protocol. Six MARPOL annexes serve to incorporate protocols covering a wide range of potential marine pollution sources, ranging from ship-generated fuel oil residues, sewage, and air pollution (including greenhouse gases) to cargo residues such as ballast water oil, wash-water chemicals, and dry cargo residue.

Most aspects of the MARPOL Convention have been incorporated into Canadian law through the *Canada Shipping Act, 2001*, SC 2001, c 26. The following excerpts illustrate how the objectives of the Act expressly include meeting international obligations and how the texts of the various protocols are included in Schedules that are part of the domestic statute. Finally, the excerpts of the *Canada Shipping Act, 2001* show how a national statute can set explicit conditions of application for certain international agreements.

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CANADA SHIPPING ACT, 2001
SC 2001, c 26

Objectives of Act

6. The objectives of this Act are to

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(c) protect the marine environment from damage due to navigation and shipping activities;

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(g) ensure that Canada can meet its international obligations under bilateral and multilateral agreements with respect to navigation and shipping … .

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Schedule 1

29(1) Schedule 1 lists the international conventions, protocols and resolutions that Canada has signed that relate to matters that are within the scope of this Act and that the Minister of Transport has determined should be brought into force, in whole or in part, in Canada by regulation.

Schedule 2

(2) Schedule 2 lists the international conventions, protocols and resolutions that Canada has signed that relate to matters that are within the scope of this Act and that the Minister of Fisheries and Oceans has determined should be brought into force, in whole or in part, in Canada by regulation.

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Salvage Convention

142(1) Subject to the reservations that Canada made … , the International Convention on Salvage, 1989, signed at London on April 28, 1989 … , is approved and declared to have the force of law in Canada.

Inconsistent laws

(2) In the event of an inconsistency between the Convention and this Act or the regulations, the Convention prevails to the extent of the inconsistency.

2. Persistent Organic Pollutants

The *Stockholm Convention on Persistent Organic Pollutants* (POPs) is a legally binding multilateral treaty with the objective to control the global production and use of chemicals that remain intact in the environment for long periods, become widely distributed geographically, accumulate in the fatty tissue of humans and wildlife, and have harmful impacts on human health or on the environment. The Stockholm Convention was adopted in May 2001 and entered into force in May 2004. Because POPs migrate long distances and tend to accumulate in northern climates, the uncontrolled global production and use of these chemicals places Canada—particularly the inhabitants of Canada's North—at greater risk of exposure to POPs. Canada signed and ratified the Stockholm Convention in May 2001.

There is no single legislative act implementing the Stockholm Convention in Canada. The production, the use, and the release of POPs in the country are managed through an overlapping legal and policy framework that involves both federal and provincial/territorial regulations and agencies. At the federal level, key policies and legislation used to comply with the Convention's obligations include the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 [CEPA] (which is the cornerstone of the federal regime of chemicals regulation); the *Pest Control Products Act*, SC 2002, c 28; and the Toxic Substances Management Policy (which

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controls the production and use of POPs and other chemical substances in food, drugs, pesticides, and other products). The federal government has included POPs in the list of chemicals under the Chemicals Management Plan, which assesses and takes action on chemicals that are found to be harmful.

QUESTIONS

1. Explain when Canadian courts can, and when they cannot, directly apply international environmental law.
2. Identify and list any Canadian environmental regulation, besides the ones cited in this chapter, that has been adopted to give effect to international commitments.

IV. PRINCIPLES OF IEL IN CANADA

Many of the general principles of IEL that developed since the 1992 *Rio Declaration on Environment and Development*—for example, sustainable development, public participation, and access to information—have been either expressly or implicitly incorporated into Canadian statutory law. Chapter 4 of this book addresses the implementation of the IEL principle of sustainable development in Canada in detail. This section includes examples of how the precautionary principle has been incorporated into the *Impact Assessment Act*, SC 2019, c 28, s 1 [IAA] and CEPA, and how the "polluter pays" principle has been incorporated into the *Canadian Energy Regulator Act*, SC 2019, c 28, s 10. This section also illustrates the way Canadian courts have navigated the intersection between IEL and domestic environmental law in the context of disputes related to the scope and application of principles of IEL. In *Morton v Canada (Fisheries and Oceans)*, 2019 FC 143, the court has clearly referenced the precautionary principle as an emerging principle of IEL and as part of a related treaty of which Canada was a part. The court has, however, used the precautionary principle as a tool to help interpret domestic statutory law, not to grant direct rights and obligations. In *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 SCR 624 and *Midwest Properties Ltd v Thordarson*, 2015 ONCA 819, 128 OR (3d) 81, Canadian courts held that the "polluter pays" principle has become deeply entrenched in Canadian environmental law, making no references to specific treaties.

A. EXAMPLES OF THE INCORPORATION OF IEL PRINCIPLES INTO CANADIAN STATUTORY LAW

1. Precautionary Principle

Principle 15 of the 1992 Rio Declaration arguably contains the most accepted expression of the precautionary principle, stating: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." In Canada, legislators have expressly incorporated this principle into various environmental statutes, including the *Federal Sustainable Development Act*, SC 2008, c 33; and the *Fisheries Act*, RSC 1985, c F-14 (last amended August 28, 2019). IAA and CEPA, for example, have incorporated this principle as follows.

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IMPACT ASSESSMENT ACT

SC 2012, c 28, s 1 [emphasis added]

Purposes

6(1) The purposes of this Act are

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(d) to ensure that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, *are considered in a careful and precautionary manner to avoid adverse effects within federal jurisdiction and adverse direct or incidental effects;*

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(l) to ensure that projects, as defined in section 81, that are to be carried out on federal lands, or those that are outside Canada and that are to be carried out or financially supported by a federal authority, *are considered in a careful and precautionary manner to avoid significant adverse environmental effects;*

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Mandate

(2) The Government of Canada, the Minister, the Agency and federal authorities, in the administration of this Act, must exercise their powers in a manner that fosters sustainability, respects the Government's commitments with respect to the rights of the Indigenous peoples of Canada *and applies the precautionary principle*.

CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999

SC 1999, c 33, preamble, ss 2, 6, 76.1 [emphasis added]

Whereas the Government of Canada is *committed to implementing the precautionary principle* that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation … .

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Duties of the Government of Canada

2(1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada and subject to subsection (1.1),

(a) exercise its powers in a manner that protects the environment and human health, *applies the precautionary principle* that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation, and promotes and reinforces enforceable pollution prevention approaches … .

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National Advisory Committee

6(1) For the purpose of enabling national action to be carried out and taking cooperative action in matters affecting the environment and for the purpose of avoiding duplication in regulatory activity among governments, the Minister shall establish a National Advisory Committee … .

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Precautionary principle

(1.1) In giving its advice and recommendations, the Committee *shall use the precautionary principle*.

• • •

Weight of evidence and precautionary principle

76.1 When the Ministers are conducting and interpreting the results of

(a) a screening assessment under section 74,

(b) a review of a decision of another jurisdiction under subsection 75(3) that, in their opinion, is based on scientific considerations and is relevant to Canada, or

(c) an assessment whether a substance specified on the Priority Substances List is toxic or capable of becoming toxic,

the Ministers shall apply a weight of evidence approach and the precautionary principle.

2. Polluter Pays

Principle 16 of the 1992 Rio Declaration reads: "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment." Many Canadian environmental laws have expressly or implicitly incorporated the "polluter pays" principle, as illustrated by these excerpts from CEPA and the *Canadian Energy Regulator Act*.

CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999

SC 1999, c 33, preamble, s 287 [emphasis added]

Whereas the Government of Canada *recognizes the responsibility of users and producers in relation to toxic substances and pollutants and wastes, and has adopted the "polluter pays" principle* … .

• • •

Fundamental purpose of sentencing

287. The fundamental purpose of sentencing for offences under this Act is to contribute, in light of the significant and many threats to the environment and to human health and to the importance of a healthy environment to the well-being of Canadians, to respect for the law protecting the environment and human health through the imposition of just sanctions that have as their objectives

(a) to deter the offender and any other person from committing offences under this Act;

(b) to denounce unlawful conduct that damages or creates a risk of damage to the environment or harms or creates a risk of harm to human health; and

(c) *to reinforce the "polluter pays" principle by ensuring that offenders are held responsible for effective clean-up and environmental restoration*.

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CANADIAN ENERGY REGULATOR ACT
SC 2019, c 28, s 10

POLLUTER PAYS PRINCIPLE

Purpose
136 The purpose of sections 137 to 142 [liability regime] is to reinforce the "polluter pays" principle by, among other things, imposing financial requirements on any company that is authorized under this Act to construct or operate a pipeline.

LIABILITY

Recovery of loss, damage, costs, expenses
137(1) If an unintended or uncontrolled release from a pipeline of oil, gas or any other commodity occurs, all persons to whose fault or negligence the release is attributable or who are by law responsible for others to whose fault or negligence the release is attributable are jointly and severally, or solidarily, liable for

(a) all actual loss or damage incurred by any person as a result of the release or as a result of any action or measure taken in relation to the release;

(b) the costs and expenses reasonably incurred by Her Majesty in right of Canada or a province, any Indigenous governing body or any other person in taking any action or measure in relation to the release; and

(c) all loss of non-use value relating to a public resource that is affected by the release or by any action or measure taken in relation to the release.

Contribution based on degree of fault
(2) The persons who are at fault or negligent or who are by law responsible for persons who are at fault or negligent are liable to make contributions to each other or to indemnify each other in the degree to which they are respectively at fault or negligent.

Vicarious liability
(3) The company that is authorized under this Act to construct or operate the pipeline from which the release occurred is jointly and severally, or solidarily, liable with any contractor — to whose fault or negligence the release is attributable — that performs work for the company for the actual loss or damage, the costs and expenses and the loss of non-use value, described in paragraphs (1)(a) to (c).

Absolute liability
(4) If an unintended or uncontrolled release of oil, gas or any other commodity from a pipeline occurs, the company that is authorized under this Act to construct or operate that pipeline is liable, without proof of fault or negligence, up to the applicable limit of liability that is set out in subsection (5) for the actual loss or damage, the costs and expenses and the loss of non-use value, described in paragraphs (1)(a) to (c).

B. IEL PRINCIPLES IN CANADIAN COURTS

1. Morton v Canada (Fisheries and Oceans) and the Precautionary Principle

Piscine Orthoreovirus (PRV) is a highly infectious virus that affects salmon known to be present in Norway, the United Kingdom, Ireland, Chile, the United States, and Canada. Heart and Skeletal Muscle Inflammation (HSMI) is an infectious disease that is currently among the top four

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diseases affecting salmon in Norway. A 2017 Norwegian study identified PRV as the cause of HSMI in Atlantic salmon. However, a 2016 study in Canada has concluded that while infectious, the PRV strain found in British Columbia has not been shown to cause disease or mortality.

The established policy of the Department of Fisheries and Oceans (DFO) was not to test for the presence of PRV or HSMI prior to issuing licences authorizing operators to transfer smolts (juvenile salmon) from inland hatcheries to ocean-based fish farms. (See DFO policies at Fisheries and Oceans Canada, "Fisheries Policies and Frameworks" (last modified 27 May 2019), online: *Government of Canada* <https://www.dfo-mpo.gc.ca/reports-rapports/regs/policies-politiques-eng.htm>.) Section 56 of the *Fishery (General) Regulations*, SOR/93-53 (FGRs) provides the minister of fisheries and oceans with the discretion to authorize such transfers. However, s 56(b) requires the minister to deny a transfer licence if fish have a disease or disease agent that "may be harmful to the protection and conservation of fish." DFO policy allowed operators themselves to determine that if the stock showed no signs of clinical disease requiring treatment, they could grant the licence without governmental testing.

Alexandra Morton challenged this policy in *Morton v Canada (Fisheries and Oceans)*, 2015 FC 575 (*Morton 2015*), arguing that it puts wild Pacific salmon at risk. The Federal Court held that s 56(b) of the FGRs requires the minister to take an approach consistent with the precautionary principle when considering transfer licences, and that the DFO policy constituted an impermissible delegation of the minister's regulatory authority to fish farm operators. Following the Federal Court's decision, DFO eliminated the licence condition held to be illegal, and adopted a new PRV policy that included a novel legal interpretation of the phrase "the protection and conservation of fish" in s 56(b). This interpretation allowed the transfer of any smolts that have a disease or disease agent unless they harm genetic diversity, species, or conservation units of fish "such that [they] cannot sustain biodiversity and the continuance of evolutionary and natural production processes."

'Namgis First Nation, alongside biologist Alexandra Morton, challenged this new iteration of the PRV policy, because it continued to put wild Pacific salmon at risk, as it continued to circumvent testing. 'Namgis additionally challenged a decision by DFO to issue a specific licence pursuant to the policy, authorizing a particular transfer of smolts to restock a fish farm situated in its territorial waters. While considering whether decisions under the PRV policy were reasonable, the court examined the following question: Did the minister derogate from the precautionary principle (when interpreting s 56 of the FGRs to design the PRV policy)? In finding that the minister's interpretation of s 56 is unreasonable because it derogates from the precautionary principle, the Federal Court referenced *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241 and *Castonguay Blasting Ltd v Ontario (Environment)*, 2013 SCC 52 (in which the Supreme Court of Canada declared the precautionary principle as an emerging principle of IEL) as well as the Canadian commitment to a precautionary approach to fisheries under the United Nations *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 4 August 1995, 2167 UNTS 88 (entered into force 11 December 2001). The court decision, however, was explicit in that the precautionary principle did not directly create or provide substantive rights.

MORTON V CANADA (FISHERIES AND OCEANS)

2019 FC 143

[1] The *Fishery (General) Regulations*, SOR/93-53 ("FGRs"), made pursuant to the *Fisheries Act*, RSC 1985, [c F-14] ("*Fisheries Act*" or "Act"), form part of Canada's fisheries management regime. The FGRs require the Minister of Fisheries ("Minister") to issue a licence before live fish can be transferred into any fish habitat or fish rearing

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facility. The Minister may only issue such a licence if the conditions set out in s 56 of the FGRs are met. ...

• • •

[17] Pursuant to s 56, the Minister may issue a licence if three specified conditions are met:

> 56 The Minister may issue a licence if
> (a) the release or transfer of the fish would be in keeping with the proper management and control of fisheries;
> (b) the fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish; and
> (c) the release or transfer of the fish will not have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks.

• • •

[39] ... Justice Rennie [in *Morton 2015*] found that s 56(b), properly construed, embodied the precautionary principle:

> [97] In my view, subsection 56(b) of the *FGRs*, properly construed, embodies the precautionary principle. First, subsection 56(b) prohibits the Minister from issuing a transfer licence if disease or disease agents are present that "may be harmful to the protection and conservation of fish." The phrase "may be harmful" does not require scientific certainty, and indeed does not require that harm even be the likely consequence of the transfer. Similarly, the scope of "any disease or disease agent" in subsection 56(b) should not be interpreted as requiring a unanimous scientific consensus that a disease agent (e.g., PRV) is the cause of the disease (e.g., HSMI).
>
> [98] The consequence of interpreting subsection 56(b) consistently with the precautionary principle is that the licence conditions must also reflect the precautionary principle. As the licence conditions cannot derogate from or be inconsistent with subsection 56(b), they therefore cannot derogate from the precautionary principle. As noted earlier, the Minister did not attempt to justify that licence condition 3.1(b)(iv) was consistent with the precautionary principle, but confined his argument in this respect to licence conditions 3.1(b)(i), (ii) and (iii).
>
> [99] In my view, the Minister's argument cannot stand. For the reasons given, conditions 3.1(b)(ii) and (iv) are inconsistent with section 56(b) and thus with the precautionary principle. The conditions dilute the requirements of subsection 56(b), a regulation designed to anticipate and prevent harm even in the absence of scientific certainty that such harm will in fact occur.

• • •

iv) Did the Minister derogate from the precautionary principle?

• • •

[155] [Cermaq Canada Inc] takes the position that the Minister's interpretation of harm with respect to s 56 is consistent with the precautionary principle as the focus of the principle is on serious or irreversible damage and that Justice Rennie's discussion of the principle is *obiter*. Further, DFO's approach to the PRV Policy in its regular review and assessment of developing science regarding PRV and HSMI takes an "adaptive management" approach which has developed in conjunction with the precautionary principle (*Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302 at para 32), and the Delegate states in her decision that DFO will continue to actively monitor this area, and as new information becomes available, consider whether changes will be required. Further, s 56 itself is

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reflective of the precautionary principle as it prohibits a transfer where a threat exists to the protection and conservation of fish, the principle does not provide additional substantive rights to limit the Minister's discretion. In any event, the Minister considered the risk of PRV and determined that it was not a risk to the protection and conservation of fish, therefore, the precautionary principle is not engaged and whether scientific certainty on that issue exists is irrelevant.

A) ANALYSIS

[156] In my view, Cermaq's position, that Justice Rennie's findings concerning s 56 and the precautionary principle are *obiter*, is of no merit. Justice Rennie devoted an entire section of his decision to considering the meaning of the precautionary principle. In that regard he referenced *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 ("*Spraytech*") and *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52 at para 20, in which the Supreme Court referred to the principle as an emerging principle of international law, which informed the scope and application of the legislative provision in question. Justice Rennie stated as follows:

> [43] The precautionary [principle] recognizes, that as a matter of sound public policy the lack of complete scientific certainty should not be used as a basis for avoiding or postponing measures to protect the environment, as there are inherent limits in being able to predict environmental harm. Moving from the realm public policy [*sic*] to the law, the precautionary principle is at a minimum, an established aspect of statutory interpretation, and arguably, has crystallized into a norm of customary international law and substantive domestic law: *Spraytech* at paras 30-31. However, except as discussed in Part VII, the legal contours of the principle need not be determined here, as this decision does not rest or depend on the application of the principle.

• • •

[158] It is clear that Justice Rennie's findings are not *obiter*, but represent another basis upon which he found the impugned licence conditions to be invalid.

[159] I am also of the view that Justice Rennie's reasons serve to inform my analysis of the reasonableness of the PRV Policy in the sense that, as s 56 embodies the precautionary principle, the Minister's Interpretation of s 56 must also be informed by that principle. This, in turn, informs the PRV Policy, which applies the Interpretation, and any decisions made pursuant to s 56 and the Policy.

[160] In any event, the Minister acknowledges that it is intended that the precautionary principle will inform all aspects of fish management including the PRV Policy. For example, the Wild Salmon Policy references Article 6.2 of the 1995 *United Nations Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Migratory Fish Stocks* whereby participating states will be more cautious when information is uncertain, unreliable or inadequate, and that the absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures. The Wild Salmon Policy states that the precautionary approach identifies important considerations for management: acknowledgment of uncertainty in information and future impacts and the need for decision-making in the absence of full information. It implies a reversal of the burden of proof and the need for longer term outlooks in the conservative of resources. And,

> The application of precaution in the WSP will follow the guidance provided to Federal Departments by the Privy Council Office publication entitled "*A Framework*

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for the Application of Precaution in Science-based Decision Making About Risk" (Canada, Privy Council Office 2003). That Framework includes five principles of precaution:

- The application of the precautionary approach is a legitimate and distinctive decision-making approach within a risk management framework.
- Decisions should be guided by society's chosen level of risk.
- Application of the precautionary approach should be based on sound scientific information.
- Mechanisms for re-evaluation and transparency should exist.
- A high degree of transparency, clear accountability, and meaningful public involvement are appropriate.

• • •

[163] That said, the precautionary principle does not serve to create or to provide Ms. Morton or 'Namgis with substantive rights, such as requiring the Minister to test or gather information on the presence of PRV or HSMI in salmon before a transfer.

[164] And while paragraphs 97 to 99 of *Morton 2015* establish that the phrase "may be harmful" does not require scientific certainty or that harm will even be the likely consequence of the transfer, in my view, not requiring scientific certainty does not equate to total absence of uncertainty as 'Namgis submits. Within the confines laid out by s 56(b), the Minister or his delegate maintain the flexibility to assess the risk of harm including by weighing DFO's scientific advice, other and contrary scientific reports, and factual considerations in order to determine the allowable level of scientific uncertainty in a given situation. The Court must defer to that conclusion as long as "the decision was made in accordance with the governing legislation and that it is a reasonable decision in light of the evidence and information which was before the decision-maker" (*Mountain Parks Watershed Assn v Chateau Lake Louise Corp.*, 2004 FC 1222 at para 17).

[165] The difficulty that the Minister faces in this matter is that his interpretation of the phrase "the protection and conservation of fish" contained in s 56(b) of the FGRs, [*sic*] ascribes a level of harm that fails to embody and is inconsistent with the precautionary principle. In the result, decisions made under s 56 that apply the [*sic*] PRV Policy, which adopts that Interpretation, are also made in derogation of the precautionary principle.

• • •

[168] … I do not understand the precautionary principle to mean that the risk of any level of potential harm is acceptable until it reaches the level of serious or irreversible harm, such as extirpation. Rather, its focus is to exercise more caution when information is uncertain and, where appropriate, to ensure that steps are taken to prevent irreversible harm, even when the potential risk of causing that harm is uncertain.

[169] As stated in "Science and the Precautionary Principle in International Courts and Tribunals":

> While preventive action involves intervention prior to the occurrence in relation to known risks, precaution involves a preparedness by public authorities to intervene in advance in relation to potential, uncertain or hypothetical threats. If the risk is sufficiently serious in character, precaution may posit intervention even where a risk is simply suspected, conjectured or feared.

• • •

[214] Further, given the high degree of scientific uncertainty surrounding PRV and HSMI, the rapidly evolving science, the outstanding DFO comprehensive risk

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assessment, and the known decline in wild salmon numbers, the Delegate's failure to address wild Pacific salmon health and status in making the PRV Policy Decision also fails to embody the precautionary principle.

• • •

[317] In any event, I have found above that the Minister's Interpretation of s 56 of the FGRs is unreasonable. This is because it permits transfers of fish carrying a disease agent or of fish that are diseased to a level or threshold of harm to wild Pacific salmon at the conservation unit or species level, it fails to embody and is inconsistent with the precautionary principle, and it fails to take into consideration the health of wild Pacific salmon. As a result of that finding, the PRV Policy Decision will be quashed.

2. "Polluter Pays" Principle: Imperial Oil and Midwest

Persistent problems with ground oil contamination in a residential complex built on land near the city of Levis led homeowners to file suit against the Quebec government for inadequate supervision of land remediation. The Quebec government had granted a licence for the residential building project on land that had previously served as storage for oil tanks belonging to Imperial Oil Limited and on which oil had leaked onto the ground. In 1998, the Quebec ministry of the environment issued Imperial Oil a cleanup order to decontaminate the soil. Imperial Oil asked a provincial administrative tribunal to quash the order, arguing that it had been motivated by the provincial government's desire to reduce its civil liability. After the administrative tribunal had rejected the appeal, a Quebec Superior Court judge ruled in favour of Imperial Oil, but the decision was later overturned by the Quebec Court of Appeal. The Supreme Court relied on the "polluter pays" principle to reject Imperial Oil's appeal against the Court of Appeal decision. The majority relied on the principle in its decision that those who had given cause to the contamination should be the ones responsible for remedying it, emphasizing, however, that this IEL principle is now "firmly entrenched in environmental law in Canada."

IMPERIAL OIL LTD V QUEBEC (MINISTER OF THE ENVIRONMENT)

2003 SCC 58, [2003] 2 SCR 624

LEBEL J:

I. INTRODUCTION

1 This environmental law case arises out of the application of the polluter-pay statutory principle that has now been incorporated into the environmental legislation of Quebec. When contamination caused problems at a site that had been operated by the appellant, Imperial Oil Limited ("Imperial"), Quebec's Minister of the Environment (the "Minister") ordered Imperial to prepare at its own expense a site characterization study which would also include appropriate decontamination measures and submit it to the Ministère. Imperial challenged that order before the Administrative Tribunal of Québec ("ATQ"), without success. The Superior Court allowed Imperial's application for judicial review because the Tribunal had committed what were, in the Court's opinion, unreasonable errors in interpreting the relevant legislation. In addition, the Court held that a situation of conflict of interest in which the Minister found himself at the time the order was issued would have

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invalidated the order in any event. Because the Minister had been involved in supervising earlier decontamination work at the site and a number of purchasers of parts of the site had brought action against the Minister in civil liability, he did not have the appearance of impartiality required by the rules of procedural fairness applicable to his decision. The Quebec Court of Appeal set that judgment aside. In the opinion of that Court, the nature of the duties imposed on the Minister created a state of necessity which justified a situation that would otherwise have breached the principle of impartial administrative decision-making. The appeal decision also held that the ATQ had not unreasonably interpreted the *Environment Quality Act*, R.S.Q., c. Q-2 ("*EQA*").

2 … For reasons differing in part from those of the Court of Appeal, I would dismiss this appeal. The Minister had the authority to issue the kind of order at stake in the present case under the *EQA*. Accordingly, by reason of the nature of the duties assigned to the Minister by the *EQA*, he did not violate any of the rules of procedural fairness that applied to the execution of his power to issue orders. The concept of impartiality was raised, interpreted and applied incorrectly in this case.

• • •

V. ANALYSIS

• • •

23 Section 31.42 *EQA*, which was enacted in 1990 (S.Q. 1990, c. 26, s. 4), applies what is called the polluter-pay principle, which has now been incorporated into Quebec's environmental legislation. In fact, that principle has become firmly entrenched in environmental law in Canada. It is found in almost all federal and provincial environmental legislation, as may be seen: *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33; *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12, ss. 6, 7; *Fisheries Act*, R.S.C. 1985, c. F-14, s. 42; *Waste Management Act*, R.S.B.C. 1996, c. 482, ss. 26.5(1), 27(1), 27.1, 28.2, 28.5; *Environment Management Act*, R.S.B.C. 1996, c. 118, s. 6(3); *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ss. 2(i), 112, 113(1), 114(1), 116; *Environmental Management and Protection Act, 2002*, S.S. 2002, c. E-10.21, ss. 7, 9, 12, 14, 15, 46; *Contaminated Sites Remediation Act*, S.M. 1996, c. 40, ss. 1(1)(c)(i), 9(1), 15(1), 17(1), 21(a); *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 7, 8, 43, 93, 97, 99, 150, 190(1); *Pesticides Act*, R.S.O. 1990, c. P.11, ss. 29, 30; *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, ss. 16.1, 32, 84, 91; *Crown Forest Sustainability Act, 1994*, S.O. 1994, c. 25, s. 56(1); *Environment Act*, S.N.S. 1994-95, c. 1, ss. 2(c), 69, 71, 78(2), 88, 89, 90; *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, ss. 8(1), 9, 28, 29, Part XIII; *Environmental Protection Act*, R.S.P.E.I. 1988, c. E-9, ss. 7, 7.1, 21; *Environmental Protection Act*, R.S.N.W.T. 1988, c. E-7, ss. 4(2), 5.1, 6, 7, 16. (See R. Daigneault, "La portée de la nouvelle loi dite 'du pollueur-payeur'" (1991), 36 *McGill L.J.* 1027.) That principle is also recognized at the international level. One of the best examples of that recognition is found in the sixteenth principle of *Rio Declaration on Environment and Development*, UN Doc. A/Conf. 151/5/Rev. 1 (1992).

24 To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes 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.

25 … The Act authorizes the Minister to issue an order when he believes on reasonable grounds that a contaminant harmful to the environment is present in a place

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and may cause harm to human beings or the ecosystem. The order may be made against whoever is responsible for the contamination, including anyone whose activity occurred before the coming into force of the Act in 1990. As discretionary and broad as the power to make orders appears to be, nonetheless important procedural requirements circumscribe it. We must now examine them.

John Thordarson and his company, Thorco Contracting, stored waste petroleum hydrocarbons (PHC) on their property inappropriately, in breach of the approvals and compliance orders issued by the Ministry of the Environment and Climate Change (MOE). Contaminated groundwater with significant concentrations of PHC resulting from this illegal storage migrated from the defendants' land onto adjoining property belonging to the plaintiff, Midwest Properties. Midwest launched a claim against Thorco Contracting and Thordarson based on three causes of action: (1) s 99 of the *Environmental Protection Act*, RSO 1990, c E.19 [*EPA*]; (2) nuisance; and (3) negligence. The plaintiff was successful on all three actions at the Ontario Court of Appeal and was awarded full remediation costs based on the "polluter pays" principle, in addition to punitive damages. The Supreme Court denied leave to appeal the decision.

MIDWEST PROPERTIES LTD V THORDARSON

2015 ONCA 819, 128 OR (3d) 81

[6] In my view, the trial judge erred in her interpretation and application of the private right of action contained in s. 99(2) of the *EPA*. This private right of action was enacted over 35 years ago and is designed to overcome the inherent limitations in the common law in order to provide an effective process for restitution to parties whose property has been contaminated. The trial judge's interpretation of the section is inconsistent with the plain language and context of this provision; it undermines the legislative objective of establishing a distinct ground of liability for polluters. This is remedial legislation that should be construed purposively. It is important that courts not thwart the will of the Legislature by imposing additional requirements for compensation that are not contained in the statute.

• • •

[49] In my view, the trial judge's interpretation undermines the legislative objective of establishing a separate, distinct ground of liability for polluters. It permits a polluter to avoid its no-fault obligation to pay damages solely on the basis that a remediation order is extant. The purposes of the *EPA* would be frustrated if a defendant could use an MOE order as a shield. Such an interpretation would also discourage civil proceedings, and may even discourage MOE officials from issuing remediation orders for fear of blocking a civil suit.

• • •

[68] This approach to damages reflects the "polluter pays" principle, which provides that whenever possible, the party that causes pollution should pay for remediation, compensation, and prevention: see Pardy [Bruce Pardy, *Environmental Law: A Guide to Concepts* (Markham, Ont: Butterworths, 1996)], at p. 187. As the Supreme Court has noted, the polluter pays principle "has become firmly entrenched in environmental law in Canada": *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, at para. 23. In imposing strict liability on polluters by focusing on only the issues of who owns and controls the pollutant, Part X of the *EPA*, which includes s. 99(2), is effectively a statutory codification of this principle.

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QUESTIONS

1. Identify other principles of international environmental law in Canadian court decisions.
2. How have these courts engaged with these principles?

V. CASE STUDY: INTERNATIONAL CLIMATE REGIME AND CANADIAN CLIMATE LAW AND POLICY

Climate change, caused by greenhouse gas (GHG) emissions from everyday human activities (heating, transportation, industrial production, energy generation, food production, etc.) is a global problem *par excellence*. Because all states are responsible for climate change, and all states are affected by it, unilateral action by one state or action by a group of states is insufficient. An international response is inescapable. The international community has reached broad political consensus that climate change needs to be addressed, although there have been disputes over how urgent the problem is, what the remedies should be, and which countries should bear what burdens and what costs of climate action. Since 1992, states have been negotiating international responses to climate change under the *United Nations Framework Convention on Climate Change* (UNFCCC). In 2015, they signed the *Paris Agreement* to strengthen the global response to the threat of climate change by keeping the global temperature rise well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase even further to 1.5°C, increase efforts to adapt to the impacts of climate change, and steer global financial flows toward a climate-friendly economy. Canada is a party to both the UNFCCC and the *Paris Agreement*.

The Canadian domestic legal framework to address climate change, discussed in Chapter 6 of this book, has been heavily influenced by international climate change law, especially at the federal level. Jurisdiction to regulate climate change in Canada, like other environmental issues, is shared between the different levels of government, although it is fair to say that many of the human activities that produce GHG emissions are under provincial jurisdiction. One significant challenge for Canada has been to coordinate provincial and federal regulation on climate. The *Pan-Canadian Framework on Clean Growth and Climate Change: Canada's Plan to Address Climate Change and Grow the Economy* (Gatineau, Qc: Environment and Climate Change Canada, 2016), online: *Government of Canada* <https://www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework/climate-change-plan.html> is presented as a collective plan uniting the federal government, the provinces, and the territories (and engaging Indigenous peoples) to support Canada's efforts to implement its *Paris Agreement* commitment to reduce GHG emissions by 30 percent below 2005 emission levels by 2030. One of the cornerstones of the *Pan-Canadian Framework* is pricing GHG emissions across the country to steer behaviour toward a cleaner economy.

The *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [GGPPA], entered into force on June 21, 2018, establishing a federal GHG emissions pricing scheme that ensures the existence of carbon pricing throughout Canada. GGPPA allows provinces to establish their own carbon pricing schemes, provided they meet specified minimum federal benchmarks. If these minimum benchmarks are not met, a federal pricing regime (the federal backstop) will apply. Despite having broad support from most provinces and territories when it was agreed to in 2016 (Saskatchewan and Manitoba being the exceptions), by 2019, the GGPPA was facing resistance from several provinces, including from new conservative provincial governments in the two provinces with the largest shares of GHG emissions in Canada: Ontario and Alberta.

Four provinces have presented legal challenges against the GGPPA. In 2018, the government of Saskatchewan presented a reference case to the province's Court of Appeal to determine whether the GGPPA is "unconstitutional, in whole or in part." In August 2018, the government of Ontario filed a reference case questioning the constitutionality of the GGPPA

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to the Court of Appeal for Ontario. In April 2019, the Manitoba government applied for judicial review of GGPPA before the Federal Court of Canada, arguing that the federal carbon tax does not fall under Parliament's jurisdiction. In June 2019, the government of Alberta filed a reference question before the Alberta Court of Appeal on the constitutionality of the GGPPA. The Alberta case was heard in December 2019.

Thus far, provincial courts in two jurisdictions have confirmed the constitutionality of the GGPPA. In 2019, in a 3-2 decision (*Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40), the Saskatchewan Court of Appeal upheld the constitutionality of the GGPPA on the basis that the legislation falls within the scope of the federal government's "Peace, Order and Good Government" (POGG) jurisdictional authority. On May 31, the Saskatchewan government filed its appeal to the Supreme Court of Canada. In a 4-1 decision, the Court of Appeal for Ontario (in *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544) ruled that federal Parliament has the power to enact a minimum national price on GHG emissions under the *Constitution Act, 1867*, based on the national concern branch of POGG. The Ontario government filed its appeal to the Supreme Court of Canada in August 2019.

The excerpt of the Ontario Court of Appeal decision below shows how, in deciding whether or not the federal Parliament has the power to enact GGPPA, the court referred to the international nature of the climate challenge (1) to discuss the context of the federal legislation, (2) to interpret the pith and substance of GGPPA, and (3) to analyze whether GGPPA met the three elements of POGG.

REFERENCE RE GREENHOUSE GAS POLLUTION PRICING ACT
2019 ONCA 544

II. BACKGROUND

GREENHOUSE GAS EMISSIONS AND CLIMATE CHANGE

[6] Climate change was described in the *Paris Agreement* of 2015 as "an urgent and potentially irreversible threat to human societies and the planet." It added that this "requires the widest possible cooperation by all countries, and their participation in an effective and appropriate international response."

[7] There is no dispute that global climate change is taking place and that human activities are the primary cause. ...

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INTERNATIONAL COMMITMENTS TO MITIGATING CLIMATE CHANGE

[22] In 1992, growing international concern regarding the potential impacts of climate change led to the "Rio Earth Summit" and adoption of the *United Nations Framework Convention on Climate Change* (the "*UNFCCC*"). The objective of the *UNFCCC* is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." Canada ratified the *UNFCCC* in December 1992, and it came into force on March 21, 1994. The *UNFCCC* has been ratified by 196 other countries.

[23] In December 1997, the parties to the *UNFCCC* adopted the *Kyoto Protocol* [*Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005)], which established GHG emissions reduction commitments for developed country parties. Canada ratified the *Kyoto Protocol* on December 17, 2002 and committed to reducing its GHG emissions for the years 2008-2012 to an average of six percent below 1990 levels. Canada did not fulfill its commitment, and ultimately withdrew from the *Kyoto Protocol* in December 2012.

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[24] In December 2009, most of the parties to the *UNFCCC* adopted the *Copenhagen Accord* [Decision 2/CP.15 in UNFCCC, *Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009, Addendum, Part Two: Action taken by the Conference of the Parties at its fifteenth session*, UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010)]. The accord recognized that "climate change is one of the greatest challenges of our time." Parties to the accord recognized the need to hold global warming below 2 degrees Celsius above pre-industrial levels and to consider the need to limit it to 1.5 degrees. Under the accord, Canada committed to reducing its GHG emissions by 17 percent below 2005 levels by 2020. Canada is currently not on track to fulfill this commitment.

[25] In December 2015, the parties to the *UNFCCC* adopted the *Paris Agreement*. The Preamble to that agreement recognizes that climate change represents "an urgent and potentially irreversible threat to human societies and the planet." Parties to the agreement committed to holding global warming to "well below" 2 degrees Celsius above pre-industrial levels and to make efforts to limit it to 1.5 degrees above pre-industrial levels. Canada ratified the *Paris Agreement* on October 5, 2016 and committed to reducing its GHG emissions by 30 percent below 2005 levels by 2030. Canada's commitments under the *Paris Agreement* were part of the impetus for the *Act*.

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CANADIAN EFFORTS TO ADDRESS CLIMATE CHANGE

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[28] Shortly after announcing the *Pan-Canadian Approach* [*Pan-Canadian Approach to Pricing Carbon Pollution*], and after extensive discussions with the provinces, Canada ratified the *Paris Agreement*. Canada is required to report and account for progress towards achieving a "nationally determined contribution," which Canada stated at 30 percent below 2005 levels by 2030.

[29] On December 9, 2016, eight provinces, including Ontario, and the three territories adopted the *Pan-Canadian Framework on Clean Growth and Climate Change* (the "*Pan-Canadian Framework*"), which explicitly incorporated the Benchmark. …

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III. THE GREENHOUSE GAS POLLUTION PRICING ACT

[33] The *Act*'s long title is: "An Act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources and to make consequential amendments to other Acts." The Preamble of the *Act* includes, among other observations:

> [R]ecent anthropogenic emissions of greenhouse gases are at the highest level in history and present an unprecedented risk to the environment, including its biological diversity, to human health and safety and to economic prosperity.
>
> • • •
>
> [T]he United Nations, Parliament and the scientific community have identified climate change as an international concern which cannot be contained within geographic boundaries.
>
> • • •
>
> [A]s recognized in the Pan-Canadian Framework … climate change is a national problem that requires immediate action by all governments in Canada as well as by industry, non-governmental organizations and individual Canadians.

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[34] The *Act* puts a price on carbon pollution in order to reduce GHG emissions and to encourage innovation and the use of clean technologies. …

[35] The *Act* does not apply in all provinces. Rather, the *Act* and its regulations serve as the "backstop" contemplated by the *Pan-Canadian Framework* in those provinces that have not adopted sufficiently "stringent" carbon pricing mechanisms. …

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V. ANALYSIS

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CHARACTERIZATION—THE "PITH AND SUBSTANCE" OF THE ACT

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[70] This step of the analysis requires an examination of the purpose and effects of the law to identify its "main thrust": *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 63. The purpose of a law is determined by examining both intrinsic evidence, such as the preamble of the law, and extrinsic evidence, such as the circumstances in which the law was enacted: *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 36. The effects of the law include both its legal effects and the practical consequences of the law's application: *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at paras. 18, 24.

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[73] Not surprisingly, the parties characterize the pith and substance of the *Act* in different ways. Ontario puts it broadly: "a comprehensive regulatory scheme for the reduction of greenhouse gas emissions from all sources in Canada." Canada describes it more narrowly, as the "cumulative dimensions of GHG emissions." During oral argument, Canada indicated that it would, if necessary, accept some of the characterizations proposed by the interveners, such as Canada's Ecofiscal Commission, which defined the matter as "the control of extra-provincial and international pollution caused by GHG emissions."

[74] Neither Ontario's nor Canada's proposed characterization is persuasive. Ontario's description is too broad and is designed to support its submission that the law effectively gives Canada sweeping authority to legislate in relation to "local" provincial matters, thereby excluding any provincial jurisdiction in relation to GHGs. Canada's definition is too vague and confusing, since GHGs are inherently cumulative and the "cumulative dimensions" are undefined.

[75] The Preamble to the *Act* provides insight into its purpose:

> Whereas there is broad scientific consensus that *anthropogenic greenhouse gas emissions contribute to global climate change*;
>
> • • •
>
> Whereas impacts of climate change, such as coastal erosion, thawing permafrost, increases in heat waves, droughts and flooding, and related risks to critical infrastructures and food security are already being felt throughout Canada and are impacting Canadians, in particular the Indigenous peoples of Canada, low-income citizens and northern, coastal and remote communities;
>
> Whereas Parliament recognizes that it is *the responsibility of the present generation to minimize impacts of climate change on future generations*;
>
> • • •

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> Whereas the Government of Canada is committed to achieving Canada's Nationally Determined Contribution – and increasing it over time – under the Paris Agreement by *taking comprehensive action to reduce emissions across all sectors of the economy, accelerate clean economic growth and build resilience to the impacts of climate change*;
>
> Whereas it is recognized in the Pan-Canadian Framework on Clean Growth and Climate Change that *climate change is a national problem that requires immediate action by all governments in Canada as well as by industry, non-governmental organizations and individual Canadians*;
>
> • • •
>
> Whereas some provinces are developing or have implemented greenhouse gas emissions pricing systems;
>
> Whereas *the absence of greenhouse gas emissions pricing in some provinces and a lack of stringency in some provincial greenhouse gas emissions pricing systems could contribute to significant deleterious effects on the environment*, including its biological diversity, on human health and safety and on economic prosperity;
>
> And whereas *it is necessary to create a federal greenhouse gas emissions pricing scheme to ensure that, taking provincial greenhouse gas emissions pricing systems into account, greenhouse gas emissions pricing applies broadly in Canada* … . [Emphasis added.]

[76] The purpose of the *Act*, as reflected in its Preamble and in Canada's international commitments and domestic initiatives, discussed earlier, is to reduce GHG emissions on a nation-wide basis. It does so by establishing national minimum prices for GHG emissions, through both the fuel charge and the OBPS [Output-Based Pricing System] excess emissions charge. Its effect is to put a price on carbon pollution, thereby limiting access to a scarce resource: the atmosphere's capacity to absorb GHGs. The pricing mechanisms also incentivize behavioural changes.

[77] The *Act*'s purpose and effects demonstrate that the pith and substance of the *Act* can be distilled as: "establishing minimum national standards to reduce greenhouse gas emissions." The means chosen by the *Act* is a minimum national standard of stringency for the pricing of GHG emissions.

CLASSIFICATION

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(ii) Singleness, Distinctiveness and Indivisibility

[110] The requirement of *Crown Zellerbach* [*R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 1988 CanLII 63] that a matter be single, distinct and indivisible is designed to limit the national concern branch to discrete matters with contained boundaries. It is aimed at preventing provincial jurisdiction from being overwhelmed with broad characterization of areas of national concern, such as "environmental protection," "inflation" or "preservation of national identity": see *Crown Zellerbach*, at pp. 452-453, per La Forest J., citing Gerald Le Dain, "Sir Lyman Duff and the Constitution" (1974) 12 Osgoode Hall L.J. 261, at p. 293; and Hogg, *Constitutional Law of Canada*, at para. 17.3(c).

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[116] The international and interprovincial impacts of GHG emissions inform not only the "national" nature of the concern, but the singleness, distinctiveness and indivisibility of the matter of establishing minimum national standards to reduce GHG emissions. Like the production, use and application of atomic energy, which was considered in *Ontario Hydro v. Ontario (Labour Relations Board)*, 1993 CanLII 72 (SCC), [1993] 3 S.C.R. 327, the matter of establishing minimum national standards to reduce GHG emissions is "predominantly extra-provincial and international in character and implications, and possesses sufficiently distinct and separate characteristics to make it subject to Parliament's residual power": *Ontario Hydro*, at p. 379. Moreover, like the strategic and security aspects of atomic energy, the connection between minimum national standards to reduce GHG emissions and global climate change "bespeak[s] its national character and uniqueness": *Ontario Hydro*, at p. 379.

QUESTIONS

1. How would the Ontario Court of Appeal have decided the jurisdictional reference questions if Canada had no international climate change obligations?
2. Can the federal government meet international climate commitments without the cooperation of provinces? How?

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