

## ENVIRONMENTAL COURTS COULD ADDRESS THREE SERIOUS FLAWS IN LAW IN CANADA

Joan Russow PhD

This resolution is extremely important for Canada vis a vis international instruments which have been ignored in courts. Hopefully, this recommendation will address these issues.

### 1. PROVISION IN THE CANADIAN CONSTITUTION VIS A VIS INTERNATIONAL LAW

All that is required for signing, ratifying or acceding to an international instrument is the consent of the Prime Minister and cabinet; there is, however, no requirement to take the instruments to parliament so that the necessary legislation can be enacted. This practice is contrary to what Canada submitted to the United Nations in 1982

In 1982, Canada received an international communique requesting information on Parliament and the Treaty-making power"]

Canada responded;

Canada will not normally become a party to an international agreement which requires implementing legislation until the necessary legislation has been enacted and if there is [ a discrepancy the implementing legislation will be enacted cite references, including 1982 document circulated by External Affairs "Canadian Reply to Questionnaire on Parliaments and the Treaty-making power"

This assertion is, however, substantially altered by two significant further statements:

Canada will not normally become a party to an international agreement which requires implementing legislation until the necessary legislation has been enacted [ cite references, including 1982 document circulated by external affairs Canadian Reply to Questionnaire on Parliaments and the Treaty-making power]

The full context of this statement comes from the 1982 "Canadian Reply to Questionnaire on Parliaments and the Treaty-making Power" (PTMP). It is an external Affairs communiqué which was put together in 1982 to assist external affairs to explain the division of powers and constitutional conventions in Canada vis a vis International obligation

Many international agreements require legislation to make them effective in Canadian domestic law. The legislation may be either federal or provincial or a combination of both in fields of shared jurisdiction. Canada will not normally become a party to an international agreement which requires implementing legislation until the necessary legislation has been enacted.

This raises a subsequent issue for the court to consider: Can Canada be internationally liable under a legally binding treaty but not held to be legally binding to fulfill the obligations under the treaty by the courts of Canada?

In signing the Biodiversity Convention was Canada required to ensure that the implementing legislation both federally and provincially was already in place prior to signing, not only federally but also provincially

In the PTMP, the following references are made to international law and federal and provincial legislation

If the existing laws of Canada (including Provincial and Federal Statutes, as well as the general rules of common law and the civil code of the Province of Quebec) do not confer upon the Government of Canada the capacity to discharge the obligations it proposes to undertake in a treaty, then it will be necessary for the appropriate legislative body, federal or provincial, to enact legislation to enable Canada to discharge its treaty obligations.

When environmental agreements such as UNFCCC and CBD have been used in court to address the destruction of old growth forest, the judge has responded; all

the international law referred to is not judicable in British Columbia because no statutory law has been enacted.

## 2.OBTAINING OF STANDING

In disputes between environmentalist and resource development, it is difficult to get standing

Often the only way to get standing is to be arrested. I was able to go into court to try to set aside an injunction because I was joined by a protester who had been arrested. I continued to seek leave to appeal, by myself, the decision against us. The lawyer for the company said that I was not in court with clean hands because I was arrested. When I told the court that I had not been arrested, the next time the lawyer declared that I should not have standing.

There have been interesting precedents recently in New Zealand where even a river was given standing

## 3. MISUSE OF INJUNCTIONS

In Canada, injunctions have been used not to prevent environmental harm, but to prevent those who strive to prevent environmental harm from preventing harm. Often in Canada, an injunction is issued against citizens and they have been arrested when they are asking for Canada to implement international obligations such as those in UNFCCC, CBD and UNCLOS and commitments under UNDRIP

treaties must be complied with is universally recognized (*pacta sunt servanda*). Under the Vienna Convention on the Law of treaties

Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained, Preamble)

Noting that the principles of free consent and of good faith and the *pacta sunt servanda* (treaties shall be complied with rule are universally recognized), Preamble)

Article 2 reads

ratification', 'acceptance', 'approval' and 'accession' mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty (Vienna convention on the law of treaties).

In 1991, BC Judge Norris stated;

**1. An injunction is an equitable remedy**

An injunction is an equitable remedy. The exercise of the equitable jurisdiction is not to be restricted by the straitjacket of rigid rules but is to be based on broad principles of justice and convenience, equity regarding the substance and not merely the facade or the shadow. It moves with time and circumstances.

The law of equity has developed over centuries to provide equitable doctrines and equitable maxims. May 1, 2008

1. Is the "legally binding" Biodiversity Convention binding on Canada if no legislation has been specifically enacted or it has not been expressed in Canadian law

Judge Drake ruled in reference to the September 15 chambers application that "the argument relating to international agreements and resolutions, these not being expressed in Canadian law, are not relevant to this inquiry