

## Sustainable Drafting



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### Introduction

There is no shortage of reminders that human activity has a profound impact on our planet and its intricate web of natural systems. Undersea wells spewing oil into the sea and melting polar ice are only some of the more vivid illustrations of this impact, which increasingly gives us pause to consider where our human project is heading, how long it will last and what our children's children will inherit when their turn comes to live their lives.

The purpose of this article is to look at these fundamental questions in terms of the role of legislative counsel. This may come as a surprise to many, particularly to those of us whose work is focused on meeting short deadlines and tending to the details of legislation. The too often frantic nature of our work leaves us little time, much less the inclination, to think about these questions. But we should. In fact, we need to.

This article is also written on the occasion of honouring one of the most rigorous and tireless modern contributors to legislative drafting: Duncan Berry. Dr Berry has spent most of his professional life pushing the bounds of legislative drafting, most notably in his doctoral work on improving the readability of legislative texts, reminding us of one of the most fundamental aims of drafting: to communicate the law so that it can operate effectively to shape social behaviour. This article aspires to provide another equally important reminder to legislative counsel about the nature of their work in building a sustainable world.

### Sustainable Development

Throughout human history, and indeed the history of most every species, the fundamental goal of living has been to foster the regeneration of life. There have, of course, been exceptions like the Shaker movement in the United States in the late 19th century, but they are just that: obscure exceptions eclipsed by a far more widespread impulse to continue human life and society in this world as opposed to the next. Today, as we grasp the effect of human activity, this impulse is expressed in terms of sustainable development, which the 1987 World Commission on Environment and Development (Brundtland Commission) defined in 1987 as

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“development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.

Although the concept of sustainable development initially focused on the sustainability of the natural environment, it has since expanded to encompass social and economic sustainability, most notably in the *Johannesburg Plan of Implementation*, arising from the 2002 World Summit on Sustainable Development, which conceived sustainable development as comprising three interdependent and mutually reinforcing pillars: “economic development, social development, and environmental protection.” This broader focus of sustainable development recognizes that environmental sustainability not only supports the other two pillars, but that it also cannot be achieved without paying attention to the other two. Indeed, it may be more accurate to describe this conception of sustainable development as the sustainability of all three dimensions.

This broader approach often evokes apprehension amongst those who work in the social or economic spheres. They see it as an attempt to subordinate all disciplines and, in a government context, all policy to environmental imperatives. And indeed, there are those who argue that this is as it should be. Thus, Klaus Bosselman argues that sustainable development is doomed to fail if it is nothing more than a balancing of social, economic and environmental concerns. He argues for the principle of sustainability as something distinct from sustainable development that can provide “guiding ideals for the design of public policy” and give direction to sustainable development.<sup>2</sup> He also argues that:

it is crucial to realize the ecological core of the concept [of sustainability]. Not realizing it means the social, economic and environmental interests have nowhere to go. There is only ecological sustainable development or no sustainable development at all. To perceive environmental, economic and social as equally important components of sustainable development is arguably the greatest misconception of sustainable development and the greatest obstacle to achieving social and economic justice.<sup>3</sup>

Sustainable development has also moved beyond the conceptual realm of principle to find a place in a multitude of international agreements<sup>4</sup> and countless pieces of domestic legislation.<sup>5</sup> Although most implementing legislation is focused on activities that have a significant impact on the environment, there are also examples of more broadly applicable legislation. In Canada, the federal Parliament and three provinces have enacted statutes recognizing that sustainable development or environmental sustainability should orient all government action.<sup>6</sup> For example, section 5 of the *Federal Sustainable Development Act* says that:

The Government of Canada accepts the basic principle that sustainable development is based on an ecologically efficient use of natural, social and economic resources and acknowledges the need to integrate environmental, economic and social factors in the making of all decisions by government.

The breadth with which sustainable development is being applied to government action through international agreements and domestic legislation, suggests that sustainability should also be recognized as a fundamental legal principle, taking its place alongside the rule of law, human rights and natural justice. Bosselman has

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<sup>2</sup> K. Bosselman, *The Principle of Sustainability*, Ashgate Publishing Ltd., Hampshire (UK), 2008 at 62-63.

<sup>3</sup> Bosselman, *ibid.* at 23.

<sup>4</sup> See, for example, the preamble to the Marrakesh Agreement establishing the World Trade Organization ([http://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm)). See generally *An introduction to trade and environment in the WTO*: [http://www.wto.org/english/tratop\\_e/envir\\_e/envt\\_intro\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/envt_intro_e.htm).

<sup>5</sup> See, for example, the *Resource Management Act*, 1991, No. 69, s. 5 (NZ) and the *Environment Act*, SNS 1994-95, c. 1. S. 2 (Nova Scotia).

<sup>6</sup> *Federal Sustainable Development Act*, SC 2008, c. 33; *Sustainable Development Act*, C.C.S.M. c. S270 (Manitoba); *Sustainable Development Act*, R.S.Q. c. D-8.1.1 (Quebec); *Environmental Bill of Rights*, SC 1993, c. 28, s. 2 (Ontario).

argued that it too should orient the legal system through which government action is realized.<sup>7</sup> If the rule of law, human rights and natural justice are cornerstones of the legal system, then why not sustainability, which itself embraces the others as principles that support sustainable societies and economies?

But this leads to a further question: is the legal content of sustainability nothing more than our principles of justice or does it add something else to orient government action? The answer can be found in first recognizing that principles of justice have traditionally concentrated on mediating relationships between individuals and social groups. Even when these principles have been applied in relation to the environment, their purpose has been to achieve a just division of environmental resources among people. What sustainability adds is the recognition that the environment does not merely provide the substance of rights that may be held by people, but that the environment itself demands legal protection because its survival is a precondition for the existence of all else.<sup>8</sup>

### **Role of Legislative Counsel**

What then is the role of legislative counsel in relation to sustainable development? Do we simply assume that it is reflected in the drafting instructions we receive, that it is someone else's job to make sure legislative policy is consonant with sustainable development? I do not think so. Sustainable development, like the fundamental legal principles of the rule of law, human rights and natural justice, is everybody's business, and particularly that of legislative counsel. There are three dimensions to the role of legislative counsel in relation to sustainable development.

The first relates to the drafting of legislation like that mentioned above<sup>9</sup> that is particularly intended to advance sustainable development. To draft it well, legislative counsel should have a good understanding of sustainable development and the way the principles it incorporates are expressed.

The second dimension involves ensuring that the legislation they draft is consonant with principles of sustainable development that have been incorporated into laws enacted to advance them. For example, many international trade agreements acknowledge sustainable development in provisions that allow protective measures to be adopted that might otherwise be considered barriers to trade. Chapter 20 of the General Agreement of Trade and Tariffs (GATT) allows protective measures in the following terms:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...

(b) necessary to protect human, animal or plant life or health;...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. ...

An understanding of general concepts related to sustainable development ("the protection of human, animal or plant life or health"; "the conservation of exhaustible natural resources") is thus needed to assess the scope for enacting the protective measures. Assessing the need for such protective measures is similar to that of

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<sup>7</sup> Bosselman, above n. 2 at 43ff.

<sup>8</sup> Bosselman, above n. 2 at 79ff.

<sup>9</sup> Above, notes 5 and 6.

assessing whether a restriction on a human right is justifiable within the terms of a constitution that guarantees such rights.<sup>10</sup>

The third dimension has to do with legislative counsel's role in influencing policy development. This role encompasses advice on the consonance of legislative measures with legal principles that do not necessarily have binding legal force on legislators. Before the advent of entrenched constitutional rights and freedoms, principles of justice and due process were subject to the policy choices of legislators. But the role of legislative counsel has traditionally been to inform these policy choices and to argue in favour of legal principles that support sustainable societies, notably those related to the rule of law, and to remind legislators of the interpretive presumptions that protect individual rights.

One rule of law principle that is particularly close to the role of legislative counsel is that the law should be intelligible and accessible to those who are bound by it. Legislative counsel have been responsible for making the statute book more usable since the middle of the 19th century and in many jurisdictions around the world they have more recently led the charge in the many remarkable advances that have been made to improve the general readability of legislation.

The role of legislative counsel also at times strays beyond the legal world to address the workability of legislation. Legislative counsel are to a large extent the repositories of legislative experience gleaned not only from their own efforts, but also from working with a wide variety of instructing officials who have brought their own experience and wisdom to the drafting table. In this context, the principle of sustainability brings a long-term perspective to practical drafting matters, urging solutions that will not simply solve some current political issue, but which will stand up over time, as Janet Erasmus has reminded us.<sup>11</sup> This objective of durable laws has many dimensions ranging from the adaptability of legislation to circumstances that may change over time to its intelligibility as language itself evolves.

A comparable policy role has more recently developed in the corporate world with the concept of corporate social responsibility. It suggests that corporations should have broader objectives than simply maximizing profit for their shareholders and it has been recognized both internationally and in domestic law. For example, the *OECD Guidelines for Multinational Enterprises*<sup>12</sup> provide recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide voluntary principles and standards for responsible business conduct in various areas, including: disclosure; employment; human rights; environment; combating bribery; consumer interests; science and technology; competition; and taxation.

If legislative counsel are called upon to discharge both legal and policy functions that have traditionally encompassed the advancement of legal principles like those related to the rule of law and the practical workability of legislation, is it not perhaps time to consider expanding this role to encompass the principles of sustainable development? Indeed, just such a proposal is currently before the Canadian Parliament. Bill C-469 would amend existing provisions relating to the examination of bills and regulations for conformity with fundamental rights.<sup>13</sup>

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<sup>10</sup> For example, article 15 of the European Convention on Human Rights allows derogations in time of war or public emergency while section 1 of the Canadian Charter of Rights and Freedoms allows "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

<sup>11</sup> Janet Erasmus, "Keepers of the Statute Book: Lessons from the Time-Space Continuum", *The Loophole*, 2010, Issue No. 1 at 7.

<sup>12</sup> [http://www.oecd.org/document/28/0,3343,en\\_2649\\_34889\\_2397532\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.html)

<sup>13</sup> See Bill C-469 (40th Parliament, 3rd Session), s. 28:

28. Paragraph 1(a) of the *Canadian Bill of Rights* is replaced by the following:

(a) the right of the individual to life, liberty, security of the person, including the right to a healthy and ecologically balanced environment, and enjoyment of property, and the right not to be deprived thereof except by due process of law;

## Principles of Sustainable Development

But what, exactly, are the principles of sustainable development and how are they relevant to drafting legislation? Some guidance on this is to be found in the International Law Association's New Delhi Declaration of Principles of International Law Relating to Sustainable Development.<sup>14</sup> This declaration sets out the following principles:

1. Duty of states to ensure the sustainable use of resources.
2. The principle of equity and the eradication of poverty.
3. The principle of common but differentiated responsibilities.
4. The principle of the precautionary approach to human health, natural resources and ecosystems.
5. The principle of public participation and access to information and justice.
6. The principle of good governance.
7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

Each of these principles is explained in some detail in the declaration. And, although they have not all been accepted as principles or rules of international law,<sup>15</sup> they provide a good indication of which principles are developing. In the remainder of this article, I will outline three of the more well-developed of these principles.

### Precautionary Principle

The precautionary principle, or approach as it is called in the Delhi Declaration, is intended to inform decision-making about measures to prevent harm, notably harm to the environment or to human health and safety. It is particularly applied in making decisions that depend on matters of science. It recognizes that the absence of full scientific certainty is not to be used as a reason to postpone decisions when faced with the threat of serious or irreversible harm.

The principle is formulated in Principle 15 of the Rio Declaration on Environment and Development:

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.<sup>16</sup>

This principle has since been both incorporated into legislation<sup>17</sup> and recognized in court decisions.<sup>18</sup>

### Polluter-pay Principle

The polluter-pay principle is an element of the third of the Delhi principles (common but differentiated responsibilities). It assigns polluters, particularly those in the private sector, the responsibility for remedying

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<sup>14</sup> Resolution 3/2002.

<sup>15</sup> Bosselman above n. 2 at 58.

<sup>16</sup> <http://www.unep.org/Documents/Multilingual/Default.asp?documentid=78&articleid=1163>

<sup>17</sup> See, for example Federal Sustainable Development Act, SC 2008, c. 33, s. 2; Canadian Environmental Protection Act, 1999, preamble and ss. 2.1, 6.1 and 76.1; Environmental Protection and Enhancement Act, RSA 2000, c. E-12, s. 2(c) (Alberta) and the Environment Act, SNS 1994-95, c. 1, S. 2 (Nova Scotia).

<sup>18</sup> *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40 <http://scc.lexum.umontreal.ca/cgi-bin/print.pl?referer=http://csc.lexum.umontreal.ca/en/2001/2001scc40/2001scc40.html> Interpretation and application of *Town of Hudson By-law 270—Cities and Towns Act, R.S.Q., c. C-19, s. 410(1)*; bylaw limiting the use of pesticides accepted as “health” based, and application of the international law’s precautionary principle accepted as preventive action of the Town.

contamination they have caused or contributed to and imposes on them the direct and immediate costs of pollution. It is widely recognized in environmental protection legislation throughout Canada<sup>19</sup> and applied in court decisions.<sup>20</sup>

## Inter-generational Equity Principle

The Inter-generational Equity Principle is an element of the second Delhi principle relating to equity and the eradication of poverty. It is also embedded in the *Brundtland Report* (1987) definition of sustainable development and countless pieces of domestic legislation that adopt this definition.<sup>21</sup> It is elaborated as follows by Edith Brown Weiss:

The basic concept is that all generations are partners caring for and using the Earth. Every generation needs to pass the Earth and our natural and cultural resources on in at least as good condition as we received them. This leads to three principles of intergenerational equity: options, quality, and access. The first, comparable options, means conserving the diversity of the natural resource base so that future generations can use it to satisfy their own values. The second principle, comparable quality, means ensuring the quality of the environment on balance is comparable between generations. The third one, comparable access, means non-discriminatory access among generations to the Earth and its resources.<sup>22</sup>

The Inter-generational equity principle has also been discussed in decisions of the Supreme Court of Canada. In 114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*,<sup>23</sup> L'Heureux-Dubé, J. stated:

The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment. In the words of the Superior Court judge: "Twenty years ago, there was very little concern over the effect of chemicals such as pesticides on the population. Today, we are more conscious of what type of an environment we wish to live in, and what quality of life we wish to expose our children [to]" ((1993), 19 M.P.L.R. (2d) 224, at p. 230). This Court has recognized that "[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment ... environmental protection [has] emerged as a fundamental value in Canadian society": *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 55. See also *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 16-17.

Similarly, two years later in *Imperial Oil Ltd. v. Quebec*,<sup>24</sup> Judge Lebel, said:

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<sup>19</sup> See, for example, the *Canadian Environmental Protection Act, 1999*, s. 98 and the *Environment Act*, SNS 1994-95, c. 1, s. 2(c) (Nova Scotia); *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12, s. 2(i) (Alberta).

<sup>20</sup> *Imperial Oil Ltd. v. Quebec* (Supreme Court of Canada)

<http://scc.lexum.umontreal.ca/en/2003/2003scc58/2003scc58.html> . Interpretation of *Environment Quality Act*, R.S.Q., c. Q-2, s. 31.42; *British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board (Supreme Court of Canada))* <http://scc.lexum.umontreal.ca/en/2005/2005scc1/2005scc1.html> . Granting the right to appeal in a case dealing with the application of the B. C. *Environmental Management Act* (formerly *The Waste Management Act (British Columbia)*), in relation to the polluter liability in the case of amalgamated corporations.

<sup>21</sup> See, for example, the *Federal Sustainable Development Act*, SC 2008, c. 33, s. 2.

<sup>22</sup> E. Brown Weiss, "Climate Change, Inter-generational equity and International Law" (2008), 9 *Vermont Journal of Environmental Law* 615 at 616. See also *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, Tokyo, Japan: United Nations University; Dobbs Ferry, N.Y.: Transnational Publishers, 1989.

<sup>23</sup> [2001] 2 S.C.R. 241, 2001 SCC 40 at para 1 <http://scc.lexum.umontreal.ca/cgi-bin/print.pl?referer=http://csc.lexum.umontreal.ca/en/2001/2001scc40/2001scc40.html> .

<sup>24</sup> [2003] 2 S.C.R. 624, 2003 SCC 58 at para. 19 <http://scc.lexum.umontreal.ca/en/2003/2003scc58/2003scc58.html> .

The Québec legislation reflects the growing concern on the part of the legislatures and of society about the safeguarding of the environment. That concern does not reflect only the collective desire to protect it in the interests of the people who live and work in it, and exploit its resources, today. It may also be evidence of an emerging sense of intergenerational debt to humanity and to the world of tomorrow.

However, if the basic notion of equity to future generations is incontestable, the articulation of this equity is not nearly so obvious. Edith Brown Weiss outlines some of the issues as follows:

One criterion [of inter-generational equity] is to balance the needs of future generations with those of the present, neither licensing the present generation to consume without attention to the interests of future generations or requiring it to sacrifice unreasonably to meet indeterminate future needs. Since we cannot predict the values of future generations, we also have to provide them with the options and quality to satisfy their own values and needs. In addition, the principles need to be generally acceptable to the many different cultures in the world, and finally they have to be reasonably clear so that they can be implemented and applied.<sup>25</sup>

## Conclusion

In this article, I have attempted to provide a general framework for understanding how legislative drafting should find its place in perhaps the most fundamental of human projects: building and maintaining a sustainable world. Legislative counsel as much as anyone else in society must understand and bear in mind the links between sustainable development and their work. The 20th century has seen the rise of fundamental concepts like the rule of law and human rights. The 21st promises to build on this quest for social order and human dignity and to extend it to respect for the world at large.

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<sup>25</sup> Weiss, above n. 22 at 616-617.