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Domesticating the Exotic Species: International Biodiversity Law in Canada

Natasha Affolder*

While a significant body of international and regional agreements now addresses habitat preservation, wildlife protection, and biological diversity, these advances on the international level often fail to be effectively translated into domestic law. In this article, the author argues that international biodiversity law is being treated in Canada as “exotic”. It is peppered into parties’ submissions without a principled explanation of its role in Canadian law, receives little consideration from the courts, and must ultimately rely on non-legal means of enforcement.

The author examines jurisprudence dealing with four major biodiversity treaties. She notes that the judicial treatment of these conventions ranges from silence, to declarations of inapplicability, to limited usage in statutory interpretation. This impoverished view of international biodiversity law in Canadian courtrooms is contrasted with the richer understanding of the relevance of this body of law demonstrated by its usage in environmental advocacy campaigns.

The author focuses on two case studies: the 1992-2002 campaign for federal endangered species legislation, and the ongoing Cheviot mine campaign. In these campaigns, compliance with international biodiversity law is pursued through various shaming strategies. The author concludes that both the judiciary and environmental advocacy groups have an important role to play in identifying where Canada fails to give domestic effect to the obligations it assumes under ratified biodiversity treaties, and in addressing this failure.

Même si un nombre important de traités régionaux et internationaux ont pour objet la préservation de l’habitat, la protection de la nature et de la diversité biologique, ces avancées à l’échelle internationale ne sont pas effectivement retranscrites dans le droit domestique. Dans cet article l’auteur soutient que le droit international sur la biodiversité est considéré comme «exotique» au Canada. Ce droit est parsemé dans les soumissions des parties sans qu’aucune explication de principe ne soit donnée quant à son rôle dans le droit canadien. Les tribunaux portent par conséquent peu d’attention à ce droit, ce dernier ne dépendant ultimement que de mesures non légales pour son exécution.

L’auteur examine la jurisprudence liée à quatre traités majeurs sur la biodiversité et remarque que le traitement judiciaire accordé à ces conventions varie du silence, à l’usage limité de l’interprétation statutaire, à des déclarations d’inapplicabilité. Cette approche réductrice des tribunaux canadiens à l’égard du droit international sur la biodiversité est contrastée par une compréhension plus profonde de la pertinence de ce droit par les milieux environnementaux, ce qui ressort clairement de l’utilisation qui en est faite dans les campagnes de lutte pour la défense de l’environnement.

L’auteur se penche ensuite sur deux études de cas : la campagne fédérale de 1992-2002 sur la loi sur les espèces en voie de disparition et la campagne Cheviot sur les mines. Dans ces campagnes, le respect du droit international sur la biodiversité est obtenu par différentes stratégies instrumentalisant le sentiment de honte. L’auteur conclut que le milieu judiciaire et les groupes de lutte pour la défense de l’environnement ont un double rôle à jouer pour déterminer pourquoi le Canada ne parvient pas à se conformer à l’échelon domestique aux obligations qu’il a contracté en ratifiant les différents traités sur la biodiversité et comment remédier à cette situation au niveau national.

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Introduction

International biodiversity law is easily viewed in Canada as an exotic species of law: not only does it advance the protection of endangered species such as the hairy-eared dwarf lemur in Madagascar, the maned three-toed sloth in Brazil, and the sandbar shark in Equatorial Guinea, but treaty negotiations occur in Ramsar and Rio. But the consequence of treating this branch of law as “exotic” is perilous. It allows international biodiversity law to be regarded in Canada as something other than law, something “to be avoided if at all possible,”¹ something to be peppered into submissions and judgments without a principled explanation of its role in Canadian law. Indicted as being “interesting” rather than binding law in Canada,² international biodiversity law receives only limited consideration in recent Canadian judgments.

The lack of engagement with international biodiversity law in Canadian judicial decisions contrasts with the proliferation of international biodiversity treaties. While a significant body of international and regional agreements now addresses habitat preservation, wildlife protection, and biological diversity, these advances on the international level often fail to be effectively translated into national law. Where international biodiversity norms fail to be implemented in Canadian law through statutes or incorporated as customary international law, internationally-minded lawyers optimistically look to domestic courts as the vehicles through which international treaty and customary norms may enter the Canadian legal system.³

This article suggests that, in the case of international biodiversity law, such optimism may be misplaced. An analysis of Canadian judicial decisions between 1990-2005 reveals an extremely limited role of the courts in internalizing international biodiversity law norms. Analysis of these judicial decisions also reveals

¹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994) at 206. Higgins describes the treatment of international law by judges and counsel in some courts of the United Kingdom as “some exotic branch of the law, to be avoided if at all possible, and to be looked upon as if it is unreal, of no practical application in the real world” (*ibid.*).

² See e.g. *MacMillan Bloedel v. Simpson*, [1993] B.C.J. No. 3143 (S.C.) (QL) [*MacMillan Bloedel* (S.C.)] leave to appeal refused, [1994] B.C.J. No. 3349 (C.A.) (QL) [*Macmillan Bloedel* (C.A.)]. The trial court said: “In these circumstances, there is no point in dealing with the extensive submissions of the applicants, *interesting* as they were ... [T]he argument relating to international agreements and resolutions, these not being expressed in Canadian law, are not relevant to this inquiry” (*Macmillan Bloedel* (S.C.), *ibid.* at para. 7 [emphasis added]). See also *Repap New Brunswick, Woodlands Division v. Pictou*, [1996] N.B.J. No. 495 (Q.B. (T.D.)) (QL) [*Repap*], where the court said “There is no question that there are matters of great concern at issue. There is no question that maybe they should be addressed in other forums” (*Repap, ibid.* at para. 12).

³ See Anne-Marie Slaughter, “Judicial Globalization” (2000) 40 Va. J. Int’l L. 1103:

National courts are the vehicles through which international treaties and customary law that have not been independently incorporated into domestic statutes enter domestic legal systems (*ibid.* at 1103).

that the majority of arguments involving international biodiversity law before Canadian courts originate in the submissions of environmental advocacy groups. Given the limited role of courts in giving effect to international biodiversity norms in domestic litigation, environmental advocacy groups attempt to foster compliance with these norms through wider campaign strategies.

In elucidating the role of Canadian environmental advocacy groups in fostering compliance with international biodiversity law, I explore how these advocacy groups use international law both inside and outside the courtroom. The first section of this article discusses the use of international biodiversity law in domestic litigation and disaggregates judicial responses to these arguments. This analysis reveals an impoverished view of international biodiversity law in Canadian courtrooms. A richer understanding of the relevance of international law is gained by examining this litigation in the context of environmental advocacy campaigns. In these campaigns, Canada's failure to give effect to its international law obligations is articulated in a manner that uses shame to foster compliance. Canada's reputation both as a law-abiding member of the international community and as an environmental leader is attacked. The second section of this article examines the use of international biodiversity law in advocacy campaigns. In these campaigns, international law arguments are deployed in shaming strategies that include media and public relations campaigns, transnational litigation, and market-based campaigns. This analysis reveals that Canadian advocates and the judiciary have a greater role to play in engaging with international biodiversity law sources in a principled manner, ensuring that Canada lives up to its international law commitments.

I. International Biodiversity Law in the Courtroom

A. *The Application of International Law in Canadian Courts*

Understanding the potential role for international biodiversity law in Canadian courtrooms demands an appreciation of how public international law is applied in Canadian courts. This area is not uncontested and remains ripe with nuance and uncertainty, much of which is usefully explored in detail elsewhere.⁴ A few central

⁴ For a "primer" on the application of international law in Canadian courts, see Jutta Brunnée & Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can. Y.B. Int'l Law 3 at 9; Gibran Van Ert, *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2002); Mark Freeman & Gibran Van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) c. 8. Examples of the growing body of academic commentary on the role of international law in Canadian courts include Anne Warner La Forest, "Domestic Application of International Law in *Charter* Cases: Are We There Yet?" (2004) 37 U.B.C. L. Rev. 157; Stephen J. Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001) 80 Can. Bar Rev. 534; Karen Knop, "Here and There: International Law in Domestic Courts" (2000) 32 N.Y.U.J. Int'l L. & Pol. 501; Stéphane Beaulac, "National Application of International Law: The Statutory Interpretation Perspective" (2003) 41 Can. Y.B. Int'l Law 225. In the

tenets of reception law require elucidation to appreciate the case discussions below. First, with respect to treaties, international treaties must be implemented in Canadian domestic law to be binding.⁵ Further, the federal nature of the Canadian state requires that treaties that concern matters of provincial jurisdiction may only be implemented by provincial legislatures.⁶ As treaties may be implemented in multiple ways, questions arise as to what counts as transformation.⁷ Moreover, what is the status of a treaty that has been signed and ratified by Canada but not implemented by domestic statute? How does it differ from the status of a treaty that has not been ratified by Canada?

The Supreme Court has taken some steps in addressing these questions in recent cases outside the international environmental law context. Following this jurisprudence, a role for ratified (but not implemented) treaties exists where “the values reflected in the international convention may help inform the interpretation of the domestic statute.”⁸ This role is not uncontested.⁹ Central to the approach of Canadian courts to international law sources is the presumption of legislative conformity with international law. This presumption demands that judges interpret statutes in a manner consistent with international laws that are binding on Canada. The presumption was recently articulated by Justices Iacobucci and Major in *Ordon Estate v. Grail*:

Although international law is not binding upon Parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada’s obligations under international instruments and as a member of the international community. In choosing among possible interpretations of a statute, the court should avoid interpretations that would put Canada in breach of such obligations ...¹⁰

With respect to custom, Canadian courts largely appear to have accepted the view that customary international law automatically forms part of the law of Canada

environmental law area, see Jutta Brunnée, “A Long and Winding Road: Bringing International Environmental Law into Canadian Courts” in Michael Anderson & Paolo Galizzi, eds., *International Environmental Law in National Courts* (London: British Institute of International and Comparative Law, 2002) 45.

⁵ For a recent enunciation of this requirement see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker* cited to S.C.R.]. L’Heureux-Dubé J. makes this point at para. 69 and Iacobucci J. at para. 79.

⁶ *Reference Re Weekly Rest in Industrial Undertakings Act*, [1937] 1 D.L.R. 673, [1937] 1 W.W.R. 299 (P.C.) [*Labour Conventions* cited to D.L.R.].

⁷ This uncertainty leads courts (and commentators) to disagree as to whether certain treaties or specific treaty obligations are implemented or not. The view of the Supreme Court in *Baker*, *supra* note 5, that the *Convention on the Rights of the Child* is not implemented in Canada is contested. For a discussion of what counts as treaty transformation, see Brunnée & Toope, *supra* note 4 at 22.

⁸ Hon. Claire L’Heureux-Dubé, “From Many Different Stones: A House of Justice” (2003) 41 *Alta. L. Rev.* 659 at 664. See also *Baker*, *ibid.* at para. 70.

⁹ See *Baker*, *ibid.* at paras. 79-80, Iacobucci J.

¹⁰ *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 137, 166 D.L.R. (4th) 193.

without the need for an explicit act of transformation.¹¹ This was the position of the Ontario Court of Appeal in the recent case of *Bouzari v. Iran*.¹²

These tenets of reception law frame a discussion of the limited role of international biodiversity law in Canadian courts. They also highlight the challenges for both counsel and judges in precisely clarifying the significance of an international source in Canadian law. Many treaties in the biodiversity field are not implemented by easily identifiable legislation. The absence of a *Biodiversity Convention Act* does not mean that the provisions of the *Biodiversity Convention*¹³ have not been at least partially implemented in Canadian law. Explicit implementation is not always necessary as treaty obligations can be implemented through other means, such as conformity with prior legislation.¹⁴ Further, not all treaty provisions require implementation by statute as some operate purely at the international level (for example, provisions respecting the operation of international environmental institutions). The vital question is a results-based one. Canada, as a contracting party, has certain obligations under the *Biodiversity Convention*. Has Canada given effect to these obligations in Canadian law?

B. Methodology—Case Selection Criteria

Effective implementation of an international treaty offers one explanation of why a treaty might not receive judicial mention. If the *Migratory Birds Convention Act*,¹⁵ for example, so effectively conveys the meaning, purpose, and content of the *Migratory Birds Convention*¹⁶ into Canadian law, little recourse would be needed to the treaty itself. One might suggest, optimistically, that the sparsity of references to international treaties in Canadian judicial decisions evidences the fact that Canada is doing such an excellent job of fully implementing its international biodiversity obligations that there is little need for Canadian judges to consider these obligations.

¹¹ I qualify this statement, as the lack of clear affirmation of this approach by the Supreme Court of Canada leaves room for doubt in the wake of *dicta* suggesting that customary law, like treaty law, requires explicit transformation. For a discussion of the conflicting authorities on this point see Toope, *supra* note 4 at 537-39; Van Ert, *supra* note 4 at 149.

¹² (2004), 71 O.R. (3d) 675 at para. 65, 243 D.L.R. (4th) 406 (C.A.). See also *Re Regina and Palacios* (1984), 45 O.R. (2d) 269, 7 D.L.R. (4th) 112 (C.A.).

¹³ *Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 79, Can. T.S. 1993 No. 24, 31 I.L.M. 818 [*Biodiversity Convention*].

¹⁴ Irit Weiser suggests that human rights treaties are often ratified on the basis that no new legislation is required. See Irit Weiser, "Effect in Domestic Law of International Human Rights Treaties Ratified Without Implementing Legislation" in Canadian Council on International Law, *The Impact of International Law on the Practice of Law in Canada: Proceedings of the 27th Annual Conference of the Canadian Council on International Law, Ottawa, October 15-17, 1998* (The Hague: Kluwer Law International, 1999) at 132.

¹⁵ S.C. 1994, c. 22.

¹⁶ *Convention Between the United States and Great Britain for the Protection of Migratory Birds*, 16 August 1916, 39 U.S. Stat. 1702, T.I.A.S. No. 628 [*Migratory Birds Convention*].

Canada's record of implementing its biodiversity treaty obligations is not this rigorous, however, and the limited judicial discussion of these treaties is not likely a result of watertight treaty implementation.¹⁷ The issue of treaty implementation informs the methodology of this research as it suggests that the quantity of judicial comment on a treaty is not necessarily significant. What matters is the quality of the engagement with an international source. This study thus offers a qualitative assessment of the judicial decisions between 1990 and 2005¹⁸ where judicial mention is made of one of four major biodiversity treaties: the *Biodiversity Convention*,¹⁹ the *Ramsar Convention*,²⁰ the *World Heritage Convention*,²¹ and the *Migratory Birds Convention*.²²

While Canada has ratified other biodiversity treaties, I have excluded from consideration here those treaties that only receive judicial mention in the context of an analysis of their implementing legislation, where there is no independent engagement with the international source. For example, this study does not consider the *Agreement on the Conservation of Polar Bears*,²³ because the sole relevant case that mentions it is *R. v. Martin*,²⁴ where the court accepted that the Agreement was implemented pursuant to a general implementing power in the *Export and Import Permits Act*.²⁵ The court made no independent consideration of the Agreement.

Similarly, although seven Canadian cases since 1990 mention the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*,²⁶ none address the Convention itself. Rather, the Convention is only peripherally mentioned in the context of discussion of its implementing legislation, both the *Wild Animal and Plant*

¹⁷ See e.g. the discussion of the decade-long battle to give effect to Canada's legal obligation to introduce federal endangered species law, at text accompanying notes 101-22 below.

¹⁸ This analysis is based on the author's review of the record from cases known to the author and Quicklaw searches. It is current to 15 May 2005. The searches include the Quicklaw electronic databases covering federal and provincial judgments (CJ) as well as electronic databases of environmental appeal board decisions in Ontario, British Columbia, Alberta, and Quebec (OEAB, BCEA, AEAB, and ENVQ).

¹⁹ *Supra* note 13.

²⁰ *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, 2 February 1971, 996 U.N.T.S. 245, Can. T.S. 1981 No. 9 [*Ramsar Convention*].

²¹ *Convention for the Protection of the World Cultural and Natural Heritage*, 23 November 1972, 1037 U.N.T.S. 151, 27 U.S.T. 37 [*World Heritage Convention*].

²² *Supra* note 16.

²³ 15 November 1973, Can. T.S. 1976 No. 24.

²⁴ (1994), 72 O.A.C. 316.

²⁵ R.S.C. 1970, c. E-17.

²⁶ 3 March 1973, Can. T.S. 1975 No. 32, 8249 T.I.A.S. 1087.

Protection and Regulation of International and Interprovincial Trade Act,²⁷ and the *Export and Import Permits Act*.²⁸

I also do not consider those cases where one of the four treaties that form the subject of this inquiry is mentioned only to note the source of the domestic law obligation and there is no independent discussion of the treaty. This eliminates from consideration many of the cases where the *Migratory Birds Convention Act* is applied (including a number of aboriginal hunting cases) as there is no distinct consideration of the international treaty regime.

I justify these exclusions on the grounds that the goal of this research is not to measure how often the names of treaties are invoked by the courts, but the extent to which the courts are willing to discuss (even if only to reject) the use of an international instrument. With these limitations in place, a search of the case law yields nineteen references to the *Biodiversity Convention*, the *Ramsar Convention*, the *World Heritage Convention*, or the *Migratory Birds Convention*. What is significant about this result is not this number, but the limited and often superficial nature of the engagement with international law in these cases.

C. The Cases

The earlier doctrinal discussion of the relationship between international and Canadian law identifies some of the ambiguities, conflicts, and novel areas currently explored by Canadian courts and commentators. It does little to prepare one for the murkiness surrounding the treatment of international biodiversity law in these cases, and the absence of rigorous discussion of how international biodiversity treaties are applied in Canadian law. Of the six cases where judicial mention is made of the *Biodiversity Convention*, for example, not a single case deals with the legal status in Canada of this international treaty. Is the *Biodiversity Convention* implemented in Canadian law? Has it only partially been implemented? To what degree does it require implementation in Canadian law? Should domestic laws be interpreted to conform as far as possible with Canada's commitments under the *Biodiversity Convention* based on the presumption of conformity, even if it has not been wholly implemented? A rigorous engagement with these questions eludes these cases.

Attempting to disaggregate this body of nineteen cases, I divide them into four categories of judicial response: judicial silence; explicit rejection of international law as it is not implemented in Canadian law; judicial uncertainty; and acceptance of international law as a useful source in interpreting domestic legislation. Common to each of these categories are examples of significant judicial unease with international

²⁷ S.C. 1992, c. 52. See *R. v. Deslisle* (2003), 181 B.C.A.C. 55, 2003 BCCA 196; *R. v. Kwok Shing Enterprises Ltd.* (2001), 41 C.E.L.R. (N.S.) 288, 2001 BCPC 305.

²⁸ *Supra* note 25. See *Re African Lion Safari & Game Farm Ltd. v. Kerrio* (1987), 59 O.R. (2d) 65, 37 D.L.R. (4th) 80 (C.A.); *Lechner Estate v. Canada (M.N.R.)*, [1992] 2 C.T.C. 2615, 46 D.T.C. 2285 (T.C.C.).

law sources and a reticence to apply international law as anything other than an interpretive aid for domestic statutes.

1. Judicial Silence

International biodiversity law arguments are frequently met by judicial silence. Judges may not address these arguments at all or they may expressly acknowledge that international law arguments will not be considered. Often, this refusal to consider international law is not explained.

A recent example of this lack of engagement with international biodiversity law is the 2005 decision of the Federal Court in *Pembina Institute for Appropriate Development v. Canada (Minister of Fisheries and Oceans)*.²⁹ This case is one of several challenging the regulatory approvals granted to Cardinal River Coals Ltd. for an open pit coal mine project within a few kilometres of Jasper National Park. The Pembina Institute, along with other regional, provincial, and national conservation groups represented by the Sierra Legal Defence Fund (together, the “Conservation Groups”), sought an order to quash the project authorization and to compel the Department of Fisheries and Oceans to prepare an environmental assessment of project modifications. In their submissions, the Conservation Groups argued that the Federal Government’s 2004 authorization of the first part of the mine should be quashed because of the mine’s potential to destroy sensitive migratory bird habitat in violation of the *Migratory Birds Convention Act*. Their argument advanced a purposive interpretation of the *Migratory Birds Convention Act* reflective of Canada’s commitments under the *Migratory Birds Convention* to not only protect species, but also the “lands and waters on which they depend.”³⁰

The Conservation Groups argued that the *Migratory Birds Convention Act* should be interpreted in a manner consistent with Canada’s international obligations, and an interpretation that fulfills Canada’s treaty commitments should be preferred over one that does not.³¹ In support of this argument, they referred to Canada’s obligation under article 8 of the *Biodiversity Convention* to “[p]romote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings”³² and, to “[p]romote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas.”³³ The Conservation Groups interpreted subsection 35(1) of the *Migratory Birds Regulations*³⁴ as prohibiting the deposit of a substance harmful to

²⁹ (2005), 16 C.E.L.R. (3d), 2005 FC 1123 [*Pembina Institute*].

³⁰ *Ibid.* (Memorandum of Argument of the Applicants at para. 106 [*Pembina Institute* (MAA)]).

³¹ *Pembina Institute* (MAA), *ibid.* at paras. 112-13. For support on this point, the applicants referred to 114957 *Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town of)*, [2001] 2 S.C.R. 241 at paras. 30-31, 200 D.L.R. (4th) 419, 2001 SCC 40, L’Heureux-Dubé J. [*Spraytech* cited to S.C.R.].

³² *Biodiversity Convention*, *supra* note 13, art. 8(d).

³³ *Ibid.*, art. 8(e).

³⁴ C.R.C., c. 1035.

migratory birds in any waters of areas frequented by migratory birds or the authorization of such a deposit.³⁵ They argued that their interpretation of the provision is preferable in light of Canada's obligations under the *Biodiversity Convention*. In rejecting the Conservation Groups' applications, the Federal Court was entirely silent on these points of international law and the presumption of legislative conformity.³⁶

In *Repap*,³⁷ the validity of an injunction preventing certain defendants from blockading a roadway and impeding REPAP's logging operations was challenged. In their arguments requesting a rescission of the injunction, a group of the defendants, the Friends of Christmas Mountain, argued that the injunction against them should be rescinded, as there were inaccuracies in the affidavit on the basis of which it was granted and as:

there has been disregard of the Convention on Biological Diversity concluded in June of 1992 at Rio de Janeiro between Canada and many other countries. As a result ... there is a significant breach of international law being committed in the operations that are being carried on and therefore the court should not grant injunctive relief.³⁸

Although not directly articulated in the case, the legal test for rescinding an injunction demands the court to look anew at the evidence provided in support of the injunctive order and to determine whether the test for an interlocutory injunction is satisfied.³⁹ The test involves the tripartite considerations of "a serious question to be tried," the suffering by the applicant of "irreparable injury," and finally a consideration of the "balance of convenience."⁴⁰ The Friends of Christmas Mountain argued that in weighing the "balance of convenience", the judiciary should not favour an approach that shows disregard for international law.

The court rejected this argument without discussion and rejected the application to rescind the injunction. In the words of Justice Riordon, "[t]here is no question that there are matters of great concern at issue. There is no question that maybe they should be addressed in other forums."⁴¹ Even putting aside the strange juxtaposition of "no question" and "maybe" in this statement, this case is unsatisfactory in its lack of precision on the international law points. What section of the *Biodiversity Convention* was claimed to be violated? Was this section implemented in Canadian

³⁵ *Pembina Institute (MAA)*, *supra* note 30 at paras. 106-109.

³⁶ *Pembina Institute*, *supra* note 29.

³⁷ *Supra* note 2.

³⁸ *Ibid.* at para. 9.

³⁹ *Yaghi v. WMS Gaming Inc.* (2003), 18 Alta. L.R. (4th) 280 at para. 23, [2004] 2 W.W.R. 657, 2003 ABQB 680.

⁴⁰ *American Cyanamid v. Ethicon Ltd.*, [1975] A.C. 396 at 399-402 (H.L.); *RJR-MacDonald v. Canada (A.G.)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

⁴¹ *Repap*, *supra* note 2 at para. 12.

law? The *Biodiversity Convention* was ratified by Canada in 1992, and at the time of the *Repap* litigation was at least partially implemented in Canada.⁴²

*Wellington Centre and Malpeque Bay Concerned Citizens Committee Inc. v. Prince Edward Island (Minister of Environmental Resources)*⁴³ offers another example of a case where an international treaty was invoked in argument, yet its relevance rejected without explanation. The case involves an application for judicial review of a decision approving a new waste management facility by a group of citizens living near the proposed site. The citizens' group argued that the environmental assessment and Minister's report approving the disputed site were both insufficient, one of the deficiencies being a failure to mention the *Ramsar Convention*. Specifically, the applicant (Wellington Centre and Malpeque Bay Concerned Citizens Committee Inc.) asserted that the Minister's approval was without jurisdiction as it was based on an environmental impact assessment "invalidated by arbitrary prior constraints and exclusions."⁴⁴ One such exclusion was the failure to mention the significance of the *Ramsar Convention*.⁴⁵ In dismissing the application, Justice Jenkins of the Prince Edward Island Supreme Court held that the Minister's decision was not patently unreasonable, that appropriate considerations were addressed, and that "[t]he consultant and the Minister had no duty to make special mention regarding the Ramsar Convention."⁴⁶

This statement was not explained further. As in the case of *Repap*, a treaty was invoked with no precise reference to which section of the treaty was of concern, and whether the relevant section has been implemented in Canadian law. Whether the *Ramsar Convention* is incorporated in Canadian law was not explored in this case.⁴⁷

2. International Law Is Not Applicable As It Is Not Implemented in Canadian Law

Moving beyond those judgments where the rejection of international law sources goes unexplained, the cases in this section reveal a greater clarity in rejecting international treaty obligations on the basis that these obligations are not transformed into Canadian law. In *MacMillan Bloedel*,⁴⁸ Justice Drake of the British Columbia

⁴² This implementation was not by statute, but through a range of non-statutory instruments including the "Canadian Biodiversity Strategy" (1995), online: Environment Canada: Canadian Biodiversity Information Network <<http://www.cbin.ec.gc.ca/cbs>>.

⁴³ (1996), 148 Nfld. & P.E.I.R. 41, 22 C.E.L.R. (N.S.) 252 (P.E.I. S.C. (T.D.)) [*Wellington Centre* cited to Nfld. & P.E.I.R.].

⁴⁴ *Ibid.* at para. 43.

⁴⁵ *Supra* note 20.

⁴⁶ *Ibid.* at para. 46.

⁴⁷ For a discussion of the passive incorporation of the *Ramsar Convention* in Canadian law, see Elizabeth Brandon, "Does International Law Mean Anything in Canadian Courts?" (2001) 11 J. Env'tl. L. & Prac. 399 at 418-19.

⁴⁸ *MacMillan Bloedel* (S.C.), *supra* note 2.

Supreme Court heard an application to rescind an injunction prohibiting the defendants from interfering with MacMillan Bloedel's logging operations in Clayoquot Sound. The test for rescinding an injunction was not considered by the court here, as the motion was rejected on jurisdictional grounds. In the short oral dismissal of the motion, Justice Drake addressed the defendants' arguments "relating to international agreements and resolutions."⁴⁹ He dismissed these arguments, observing:

In these circumstances, there is no point in dealing with the extensive submissions of the applicants, interesting as they were. However, I will simply say, as far as their merits are concerned, that the argument relating to international agreements and resolutions, these not being expressed in Canadian law, are not relevant to this inquiry.⁵⁰

This sweeping rejection of the international law arguments of the defendants, based on the classic incantation that treaties must be implemented by statute to alter domestic law, is made absent any detailed discussion of the international agreements at issue. In appealing this decision, the applicants asserted that "Mr. Justice Drake erred in his assessment of international law ..."⁵¹ in his reliance on the *Labour Conventions* case⁵² to find the international treaties inapplicable. Ms. Russow (unrepresented by counsel in these arguments) attempted to distinguish the *Labour Conventions* case, arguing that the provincial court has an obligation not to defeat a ratified treaty. She argued that by granting and extending the injunction, the court violated this obligation by contributing to non-compliance with Canada's obligations under the *Biodiversity Convention*.

The British Columbia Court of Appeal rejected Russow's argument and held that British Columbia courts have no jurisdiction to apply international law. Justice Carrothers' judgment is revealing in a number of respects. He states:

*I have not been shown and I have been quite unable to discern or identify any pertinent or applicable principle of international law, whether developed by custom and usage, treaty or convention, or legislative or judicial determination, which falls within the judicial capacity and function of the courts of this province.*⁵³

This statement is clearly an invitation for advocates to argue points of international law with greater clarity and precision. Justice Carrothers documented his consideration of the applicant's "extensive submissions which she herself called 'a

⁴⁹ *Ibid.* at para. 7.

⁵⁰ *Ibid.*

⁵¹ *MacMillan Bloedel (C.A.)*, *supra* note 2 at para. 6.

⁵² *Supra* note 6.

⁵³ *MacMillan Bloedel (C.A.)*, *supra* note 2 at para. 7 [emphasis added].

lecture’ rather than an argument”⁵⁴ as well as the “assemblage of material contained in the applicants’ leave book, which cannot be summarized.”⁵⁵

*Kohl v. Canada (Minister of Agriculture)*⁵⁶ is a case where the *Biodiversity Convention* appears to have been included in the argument as a last resort. In this case, a breeder argued that an order to destroy a Highland bull contravened Canada’s international obligations under the *Biodiversity Convention* with respect to preservation and conservation of rare genetic resources.⁵⁷ The respondent countered with the argument that the applicant did not have standing to represent the interest of the Highland breed and that the *Biodiversity Convention* only came into force on 22 December 1993, after the date of the decision to destroy the cattle.⁵⁸

Rather than accept or reject these arguments as to the legal effect of the *Biodiversity Convention* in Canada, the Federal Court stated: “The legislature has specifically provided for the protection of the health of animals and, in that context, this portion of the applicant’s argument is not convincing.”⁵⁹ This precluded any further discussion of the *Biodiversity Convention* and whether it is incorporated in Canadian law.

3. Judicial Uncertainty

Judicial discomfort in defining the precise legal status of an international law source is not limited to treaties that Canada has ratified, such as the *Biodiversity Convention*. This unease can also be seen in cases where the principles argued may amount to customary international law. In the wake of Justice L’Heureux-Dubé’s decision in *Spraytech*,⁶⁰ Canadian environmental groups are repeatedly calling on the courts to apply the principle of precaution as customary international law binding on Canada.

In *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District)*,⁶¹ an environmental group sought to quash a determination by Cindy Stern, the District Manager of the Ministry of Forests, under

⁵⁴ *Ibid.* at para. 6.

⁵⁵ *Ibid.* at para. 7.

⁵⁶ (1994), 81 F.T.R. 35, 28 Admin. L.R. (2d) 38 (T.D.) [*Kohl* cited to F.T.R.], rev’d on other grounds (1995), 99 F.T.R. 319, 185 N.R. 149 (C.A.).

⁵⁷ *Ibid.* at para. 99.

⁵⁸ *Ibid.* at para. 100.

⁵⁹ *Ibid.* at para. 101.

⁶⁰ *Spraytech*, *supra* note 31. The decision quotes authorities stating that there may be sufficient state practice “to allow a good argument that the precautionary principle is a principle of customary international law ...” (*ibid.* at para. 32).

⁶¹ (2002), 50 C.E.L.R. (N.S.) 56, 45 Admin. L.R. (3d) 161, 2002 BCSC 1260 [*WCWC* (S.C.) cited to C.E.L.R.], aff’d (2003), 15 B.C.L.R. (4th) 229, 1 C.E.L.R. (3d) 185, 2003 BCCA 403 [*WCWC* (C.A.) cited to B.C.L.R.].

subsection 41(1) of the *Forest Practices Code of British Columbia Act*,⁶² approving timber harvesting of a block of forest that was home to the Northern spotted owl, a species at risk of extinction. In its submissions, the Western Canada Wilderness Committee (“WCWC”) argued that subsection 41(1) of the *Code* should be interpreted in a manner consistent with international law, specifically the precautionary principle and Canada’s obligations under the *Biodiversity Convention*.⁶³ It submitted that Ms. Stern’s failure to interpret subsection 41(1) of the *Code* in a manner consistent with these international obligations was “an error of statutory interpretation.”⁶⁴ Justice Shabbits, the trial judge, found no such error.

WCWC appealed the decision. The British Columbia Court of Appeal considered whether Ms. Stern’s decision was patently unreasonable for failing to give effect to the precautionary principle, rendering the decision of the chambers judge incorrect. Justice Prowse, writing for the appeal court, rejected WCWC’s argument that a standard of review of correctness applied since the question was one of statutory interpretation. Instead, she found the “critical question” in the case to be “whether the substance of her [Ms. Stern’s] decision was patently unreasonable.”⁶⁵ Justice Prowse observed that “[w]hile the applicability of the precautionary principle was raised before Ms. Stern, she does not state whether she took it into account in reaching her decision. The chambers judge was of the view that she did not and that her failure to do so did not constitute error.”⁶⁶

Justice Prowse noted that the precautionary principle “was not incorporated in the *Code*.”⁶⁷ She observed that “Ms. Stern did not specifically refer to the precautionary principle in her analysis,” that she “may not have given full effect to the precautionary principle,” but that “her decision reflects a degree of caution akin to that reflected in the precautionary principle.”⁶⁸

This decision is capable of several contradictory interpretations and leaves many questions unanswered. What is the significance of the fact that Ms. Stern’s decision exhibited a degree of caution “akin to the precautionary principle”? Did Ms. Stern have a legal obligation to interpret the relevant legislation in a manner consistent with precautionary principle? Is this a suggestion that the precautionary principle has some legal status under Canadian law? Or is this statement simply a way of explaining the absence of a more thorough engagement with the meaning of the precautionary principle in Canadian and international law?

⁶² R.S.B.C. 1996, c. 159 [*Code*].

⁶³ WCWC (S.C.), *supra* note 61 at para. 70.

⁶⁴ *Ibid.* at para. 71.

⁶⁵ WCWC (C.A.), *ibid.* at para. 33.

⁶⁶ *Ibid.* at para. 74.

⁶⁷ *Ibid.* at para. 80.

⁶⁸ *Ibid.* at paras. 79-80.

4. International Law As An Interpretive Aid in Statutory Interpretation

Courts appeal to international biodiversity law as an aid in domestic statutory interpretation in different ways. First, a number of Canadian cases reveal that the courts are willing to consider substantive provisions of an international treaty in the interpretation of its enabling domestic statutes. A second, more expansive, use of international law sources is emerging in biodiversity cases following the approach of the Supreme Court in *Baker and Spraytech*, where international law sources are seen as useful interpretive aids outside the limited context of enabling legislation.

In a number of biodiversity cases, judges use the *Migratory Birds Convention* with admirable clarity to interpret the *Migratory Birds Convention Act*. In *Animal Alliance of Canada v. Canada (A.G.)*,⁶⁹ Justice Gibson considered both the *Convention* and the *Act* in an application for judicial review of the *Regulations Amending the Migratory Birds Regulations*.⁷⁰ The regulations create a special hunting season, during which hunters can kill overabundant species of snow geese and species not easily distinguishable from snow geese, including Ross geese. The applicants (a coalition of the Animal Alliance of Canada, the Animal Protection Institute, the Canadian Environmental Defence Fund, the Dene Nation, and Zoocheck Canada Inc.) argued that the *Regulations* violate the *Migratory Birds Convention* and are thus *ultra vires* the implementing legislation, the stated purpose of which is to “implement the Convention.”⁷¹ This argument was successful before the Federal Court, and the *Regulations* were found to be *ultra vires* insofar as they authorize the killing of Ross geese and other species not easily distinguishable from snow geese. In arriving at this determination, Justice Gibson discussed the relevant principles of statutory interpretation with clarity and precision. He considered the substantive language of the *Convention* in detail, noting the authority of courts to “look at the international convention underlying implementing legislation to assist interpretation, even in the absence of ambiguity on the face of the legislation.”⁷² In interpreting Canadian statutes such as the *Migratory Birds Convention Act*, he acknowledged the presumption of conformity with international law.⁷³

Justice Gibson’s decision in *Animal Alliance* stands as a rare example of a considered and clear use of international law sources in statutory interpretation. A much more limited role for the *Convention* arises in *R. v. Blackbird*.⁷⁴ This case concerned the relationship between a local band bylaw governing migratory bird hunting on a reserve and the *Migratory Birds Convention Act*. *Blackbird*, who had been charged with fifty-three counts of illegal hunting practices contrary to the *Act*,

⁶⁹ [1999] 4 F.C. 72, 168 F.T.R. 114 (T.D.) [*Animal Alliance* cited to F.C.].

⁷⁰ S.O.R./99-147 [*Regulations*].

⁷¹ *Animal Alliance*, *supra* note 69 at para. 32.

⁷² Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 397.

⁷³ *Animal Alliance*, *supra* note 69 at para. 34.

⁷⁴ (2005), 74 O.R. (3d) 241, 248 D.L.R. (4th) 201 (C.A.).

argued that the local bylaw ousts the jurisdiction of the *Act*, as the bylaw constitutes a “complete code” regulating the hunt of migratory birds on the reserve. In rejecting this submission, Justice Laskin observed that the two regimes are overlapping, but not conflicting. Dual compliance is possible and the appellant could be charged under either regime. He found it particularly “significant” in arriving at this finding that the regulatory regime underlying the *Act* is

... derived from a Convention and a Protocol, [and] was designed to redress a serious environmental concern in North America. I do not think that a local by-law could oust this international regime unless, at a minimum, the by-law contained clear language expressing this ouster ...⁷⁵

It is difficult to ascertain here what particular legal “significance”, if any, attaches to the fact that the statute in question implements an international obligation, as a bylaw will be displaced by a statute regardless of whether it is implementing legislation or not.

A further example of reliance on the *Migratory Birds Convention* is Justice Campbell’s 1999 decision in *Alberta Wilderness Association v. Cardinal River Coals Ltd.*,⁷⁶ an early decision in the litigation around the Cheviot Coal Mine. In this case, Justice Campbell used the preamble to the Convention to justify a broad interpretation of the words “any other substance” in the impugned statute: the *Migratory Birds Convention Act*. The case involved a challenge to a decision by the federal Minister of the Environment and the Alberta Energy and Utilities Board authorizing the construction of the mine. Based on a reading of the purpose of the *Act* and the Convention, Justice Campbell found “a clear intention expressed to provide wide protection to migratory birds.”⁷⁷ He therefore concluded that a “similarly wide interpretation” should be given to the phrase “any substance” under the *Act* and that “any substance, including oil and oil wastes, is capable of being prohibited if it is ‘harmful’.”⁷⁸

D. The Practice of Environmental Appeal Boards

Despite the absence of clear authority for the proposition that environmental appeal boards can take official notice of international law, the practice of environmental appeal boards is beginning to reflect some willingness to engage with international law sources in interpreting Canadian law.⁷⁹ Two cases of the British

⁷⁵ *Ibid.* at para. 22.

⁷⁶ *Alberta Wilderness Association v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425, 165 F.T.R. 1 (T.D.) [*AWA v. Cardinal River Coals* cited to F.C.].

⁷⁷ *Ibid.* at para.103.

⁷⁸ *Ibid.* at para.103 [emphasis in original].

⁷⁹ For a discussion of the doctrine of official notice as it applies to administrative tribunals see Brown and Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback, 2004) at 10:8000. Van Ert, *supra* note 4 at 37-39, discusses the practice of Canadian

Columbia Environmental Appeal Board reflect this practice. *Resident Advisory Board v. British Columbia (Ministry of Environment, Lands and Parks)*⁸⁰ is a 1998 decision of the British Columbia Environmental Appeal Board in which both parties argued the relevance of substantive provisions of the *Biodiversity Convention*. The appellants attempted to appeal a pesticide use permit issued to the Canadian Food Inspection Agency (“CFIA”) that authorized the use of a particular pesticide to eradicate gypsy moth populations. In support of their arguments, they submitted that the spray program contravened the *Biodiversity Convention* because it failed to respect a precautionary approach and because an environmental assessment had not been conducted, as required by article 14 of the *Biodiversity Convention* for projects likely to have an adverse impact on biological diversity.

The appellants also argued that the precautionary principle applies in Canada as customary international law and “at the very least, the precautionary principle would require CFIA and the respondent to show that they carefully assessed the risks to health and biodiversity and chose the least destructive alternative measure to deal with the risk.”⁸¹ One of the appellants specifically referred the panel to article 14 of the *Biodiversity Convention*, which provides “that the contracting parties, as far as possible and as appropriate, shall introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity.”⁸²

The response of the CFIA was to refer the panel to article 8(h) of the Convention, stating the obligation of contracting parties to prevent the introduction of alien species and to “control or eradicate those alien species which threaten ecosystems, habitats or species.”⁸³ The panel neither addressed the question of the legal status of the *Biodiversity Convention* in Canada nor offered an analysis of the substantive arguments made by the parties concerning the *Biodiversity Convention*. Without saying that it has an obligation to do so, the panel attempted to adopt an approach consistent with the *Biodiversity Convention*. The panel stated that its “very task” under domestic law is analogous to that demanded by the Convention, namely “determining whether there is an unreasonable adverse impact in issuing a permit.”⁸⁴ The panel found that “the *Convention* provides general principles that the contracting parties should adhere to in the conservation and sustainable use of biological

tribunals (although not specifically referencing environmental appeal boards) taking “judicial notice” of international law.

⁸⁰ [1998] B.C.E.A. No. 19 (QL) [*Resident Advisory Board*]. The appellants included the Resident Advisory Board, Sierra Club-Victoria Group, the Ecological Health Alliance, the B.C. Branch of the Allergy and Environmental Health Association, Stop Overhead Spraying, the Unitarian Church of Victoria, and Fernwood Community Association.

⁸¹ *Ibid.* at para. 52.

⁸² *Supra* note 13, art. 14.

⁸³ *Ibid.*, art. 8(h).

⁸⁴ *Resident Advisory Board*, *supra* note 80 at para. 54.

diversity ...”⁸⁵ The panel did not address the argument that the precautionary principle is to be applied as it reflects customary international law.

The decision in *Resident Advisory Board* is applied and further explained in a second case before the British Columbia Environmental Appeal Board challenging the validity of a pesticide permit to eradicate gypsy moths. In *Fitzmaurice v. British Columbia (Ministry of Environment, Lands & Parks)*,⁸⁶ the environmental health organization appellants argued that the permit itself (and the spraying program it authorized) failed to comply with the precautionary approach of the *Biodiversity Convention*. This argument is different from that in *Resident Advisory Board*, where it was argued that the problem was the process by which the permit was issued. In response, the panel stated that it agreed with and adopted

the reasoning of the Board in the 1998 Resident Advisory Board decision that the Convention provides general principles for the conservation and sustainable use of biological diversity, and that weighing of risks and benefits is the very kind of analysis contemplated by the Convention, and undertaken in determining whether there is an unreasonable adverse impact in issuing a permit.⁸⁷

The panel noted that it had very little evidence properly before it to undertake this task of weighing risks and benefits, and based on the limited evidence available arrived at the following “equation”: “Likely non-permanent significant decrease in non-target Lepidoptera versus threat of trade restrictions on some forest products and nursery stock, and subsequent economic harm.”⁸⁸ The panel found that there was evidence that the use of the pesticide authorized by the permit would have an adverse effect on the environment, but to conclude that this adverse effect is “unreasonable”, it must find that the “intended benefit of the proposed spray program [would] outweigh the adverse effect *in the proposed spray site*.”⁸⁹ Noting the constraints of this possible analysis, the panel concluded that “the adverse effect is not unreasonable in the circumstances of this permit, given the limited evidence before it, and confined as it is by legislation and case law to site specific considerations.”⁹⁰ The panel acknowledged that this leads to less than satisfactory results and urged the permit holder to “seriously reconsider the requirement for ‘eradication,’ and contemplate an approach to the gypsy moth that uses alternative methods for control.”⁹¹

⁸⁵ *Ibid.*

⁸⁶ [2000] B.C.E.A. No. 22 at para. 48 (QL) [*Fitzmaurice*].

⁸⁷ *Ibid.* at para. 49. The appellants included representatives of the Ecological Health Alliance, the Sierra Club (Victoria Group), Stop Overhead Spraying Coalition, Green Party of Canada, Society Targeting Overuse of Pesticides, Society Promoting Environmental Conservation, and various individuals.

⁸⁸ *Ibid.* at para. 50. Lepidoptera is defined as “a large order of insects comprised of butterflies, moths and skippers that as adults have four broad wings and that as larvae are caterpillars” (*ibid.* at n. 1).

⁸⁹ *Ibid.* at para. 41 [emphasis added].

⁹⁰ *Ibid.* at para. 51.

⁹¹ *Ibid.* at para. 52.

In these two cases, the British Columbia Environmental Appeal Board advanced an approach consistent with the general principles of the *Biodiversity Convention*. This approach is articulated without any doctrinal discussion of the legal status of this treaty in Canada, nor any discussion of the common law presumption of legislative conformity with international law obligations. Environmental appeal boards are tasked with interpreting and applying Canadian law, including statutes that include principles of international law origin, such as precaution and sustainable development.⁹² Even absent explicit articulation of their authority to do so, these tribunals consider submissions founded in international law, take official notice of international law, and are likely to continue doing so.

E. The Role of Environmental Advocacy Groups in Arguing International Law

The above disaggregation of judicial decisions reveals a limited engagement of Canadian courts with international biodiversity law. How do international biodiversity law arguments reach the court in the cases where they feature? More often than not, international biodiversity law reaches a Canadian court because it is argued by an environmental advocacy group, acting either as a plaintiff, defendant, or intervenor. In well over fifty per cent of the cases where these international treaties are cited, their mention can be traced back to the argument of an environmental advocacy group.

Of the six cases that explicitly refer to the *Migratory Birds Convention*, three involve environmental advocacy groups: in two cases the advocacy groups were plaintiffs advancing international law arguments,⁹³ and in the third, the group was an intervenor.⁹⁴ Of the six cases to specifically address the *Biodiversity Convention*, four involve environmental advocacy groups, three as plaintiffs,⁹⁵ and one as a defendant.⁹⁶ In each instance, arguments based on the *Biodiversity Convention* originated in the submissions of these environmental group litigants. Two cases explicitly refer to the *Ramsar Convention*. In one of these cases, consideration of the *Ramsar Convention* was argued by the citizen's group plaintiff.⁹⁷ In the second case,

⁹² See *e.g.* *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (ss. 2 and 40 refer to sustainable development). The Alberta Environmental Appeal Board has considered international law sources in defining sustainable development and the precautionary principle. See *Re Mountain View Regional Water Services Commission*, [2004] A.E.A.B.D. No. 9 at para. 195 (QL) (referring to the *Bruntland Report*); *Re Imperial Oil Ltd.*, [2002] A.E.A.B.D. No. 48 at para. 142 (QL) (referring to the *Bergen Ministerial Declaration on Sustainable Development*).

⁹³ *Animal Alliance*, *supra* note 69; *AWA v. Cardinal River Coals*, *supra* note 76.

⁹⁴ *Hamilton-Wentworth (Regional Municipality of) v. Canada (Minister of the Environment)* (2001), 204 F.T.R. 161, 2001 FCT 381, *aff'd* (2001), 213 F.T.R. 57, 284 N.R. 248, 2001 FCA 347.

⁹⁵ *Resident Advisory Board*, *supra* note 80; *WCWC (S.C.)*, *supra* note 60; *Fitzmaurice*, *supra* note 86.

⁹⁶ *Repap*, *supra* note 2.

⁹⁷ *Wellington Centre*, *supra* note 43.

the initial mention of the *Ramsar Convention* is found in a report of the town's department of planning services, a department lobbied by numerous conservation groups including one of the respondents in this case, the Boundary Bay Conservation Committee.⁹⁸ Of the five cases to specifically address World Heritage status under the *World Heritage Convention*, one case was brought by the Bow Valley Naturalists Society,⁹⁹ and another two by the Canadian Parks and Wilderness Society.¹⁰⁰ In each of these cases, World Heritage status was raised in argument by the environmental group litigants.

The significant role of environmental advocacy groups in bringing international law sources to the attention of Canadian courts is not restricted to biodiversity treaties. It exists across the field of international environmental law. In four of the six recent cases where the Supreme Court of Canada has addressed international environmental law sources, the international law arguments were brought to the Court's attention by environmental group intervenors.¹⁰¹ A recent study documents the Supreme Court's reliance on authorities cited by public interest intervenors in its environmental law jurisprudence.¹⁰² The significant role of environmental advocacy groups in bringing international law arguments to the attention of Canadian courts may be unique to the environmental law area. In other fields where courts have cited international law with a greater frequency, such as in human rights law, Canadian judges and counsel may be more familiar with the relevant international law, especially the major international human rights treaties.

Despite their significant role in domestic environmental litigation, little academic analysis of Canadian environmental advocacy groups exists.¹⁰³ The few Canadian

⁹⁸ *Jones v. Delta (District)* (1992), 92 D.L.R. (4th) 714, 69 B.C.L.R. (2d) 239 (C.A.), leave to appeal to S.C.C. refused, [1993] 2 S.C.R. viii.

⁹⁹ *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)* (1999), 175 F.T.R. 122, 32 C.E.L.R. (N.S.) 84 (T.D.), aff'd [2001] 2 F.C. 461, 266 N.R. 169 (C.A.).

¹⁰⁰ *Canadian Parks and Wilderness Society v. Banff National Park (Superintendent)* (1996), 202 N.R. 132, 20 C.E.L.R. (N.S.) 171 (F.C.A.), leave to appeal to S.C.C. refused, [1997] 1 S.C.R. vi; *Canadian Parks and Wilderness Society v. Canada (Minister of Heritage)*, [2003] 4 F.C. 672, 1 Admin. L.R. (4th) 103, 2003 FCA 197.

¹⁰¹ Jerry V. DeMarco & Michelle L. Campbell, "The Supreme Court of Canada's Progressive Use of International Environmental Law and Policy in Interpreting Domestic Legislation" (2004) 13 Review of European Community and International Environmental Law 320 at 330. The six Supreme Court cases examined by the authors are *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 49 D.L.R. (4th) 161; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, 125 D.L.R. (4th) 385; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, 151 D.L.R. (4th) 32; *Spraytech*, *supra* note 31; *Imperial Oil Ltd v. Quebec (A.G.) ex rel. Minister of the Environment*, [2003] 2 S.C.R. 624, 231 D.L.R. (4th) 577, 2003 SCC 58.

¹⁰² Jerry V. DeMarco, "Assessing the Impact of Public Interest Interventions on the Environmental Law Jurisprudence of the Supreme Court of Canada: A Quantitative and Qualitative Analysis" 30 Sup. Ct. L. Rev. 299.

¹⁰³ For a rare discussion of the impact of Canadian environmental groups on Canadian litigation see Stewart A.G. Elgie, "Environmental Groups and the Courts: 1970-1992" in Geoffrey Thompson,

studies that examine the role of domestic environmental groups in Canadian processes appear primarily in management literature, focusing on multi-stakeholder initiatives and corporate-NGO relations.¹⁰⁴ Details of their constituencies, membership, sources of support, and international law expertise are all largely unknown. In the United States, theoretical interest in civil society has translated into early attempts to analyze and catalogue environmental advocacy groups. Business school cases on environmental groups are emerging,¹⁰⁵ critical analysis of their strategic campaigns beginning,¹⁰⁶ and attempts to create taxonomies by which to classify non-profits are materializing.¹⁰⁷ Where the international-local nexus is examined, however, it is the role of local and national non-profit groups in contributing to global legal processes that attracts attention.¹⁰⁸ In contrast, this article examines the process by which these international legal agreements are internalized in Canada.

One of the challenges of analyzing the work of Canadian environmental advocacy groups is the erroneous assumption of these groups' homogeneity.

Moira L. McConnell & Lynne B. Huestis, eds., *Environmental Law and Business in Canada* (Aurora, Ont.: Canada Law Book Inc., 1993) 185. For other analysis of Canadian environmental groups, see Jeremy Wilson, "Green Lobbies: Pressure Groups and Environmental Policy" in Robert Boardman, ed., *Canadian Environmental Policy: Ecosystems, Politics, and Process* (Toronto: Oxford University Press, 1992) 109; Jerry V. DeMarco & Anne C. Bell, "The Role of Non-Government Organizations in Biodiversity Conservation" in Stephen Bocking, ed., *Biodiversity in Canada: Ecology, Ideas, and Action* (Peterborough, Ont.: Broadview Press, 2000) 347; Alison Van Rooy, "The Frontiers of Influence: NGO Lobbying at the 1974 World Food Conference, The 1992 Earth Summit and Beyond" (1997) 25 *World Development* 93; Andrew Fenton Cooper & J.-Stefan Fritz, "Bringing the NGOs in: UNCED and Canada's International Environmental Policy" (1992) 47 *Int'l J.* 796.

¹⁰⁴ Sanjay Sharma & Irene Henriques, "Stakeholder Influences on Sustainability Practices in the Canadian Forest Products Industry" (2005) 26 *Strategic Management Journal* 159; Mae Burrows, "Allied Forces: Unions and Environmentalists Can Work Together for Jobs and Ecological Sustainability" (1998) 24:4 *Alt. J.* 18; Frances Westley & Harrie Vredenburg, "Strategic Bridging: The Collaboration Between Environmentalists and Business in the Marketing of Green Products" (1991) 27 *Journal of Applied Behavioral Science* 65; Patrick C. Fafard, "Groups, Governments and the Environment: Some Evidence from the Harmonization Initiative" in Patrick C. Fafard & Kathryn Harrison, eds., *Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada* (Kingston, Ont.: Institute of Intergovernmental Affairs: Saskatchewan Institute of Public Policy, 2000) 81.

¹⁰⁵ See e.g. Forest Reinhardt, "Environmental Defense" (2003), online: Harvard Business School Press <<http://harvardbusinessonline.hbsp.harvard.edu>>; Benjamin C. Esty & Aldo Sesia Jr., "International Rivers Network and the Bujagali Dam Project (A)" (2004), online: Harvard Business School Press <<http://harvardbusinessonline.hbsp.harvard.edu>>.

¹⁰⁶ Debora L. Spar & Lane T. La Mure, "The Power of Activism: Assessing the Impact of NGOs on Global Business" (2003) 45:3 *California Management Review* 78.

¹⁰⁷ See e.g. P.J. Simmons, "Learning to Live with NGOs" (1998) 112 *Foreign Policy* 82 at 85.

¹⁰⁸ See Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, N.Y.: Cornell University Press, 1998). See also Bas Arts, *The Political Influence of Global NGOs: Case Studies on the Climate and Biodiversity Conventions* (The Netherlands: International Books, 1998); Rupert Taylor, ed., *Creating a Better World: Interpreting Global Civil Society* (Bloomfield, Conn.: Kumarian Press, Inc., 2004).

Significant differences exist between environmental advocacy groups in terms of purpose, principal activities, acceptable means of financial support, and willingness to form alliances. Significant conflict can also exist within and between these groups, and treating such organizations, and the coalitions that emerge between them, as sites of uncontested opinion oversimplifies the challenges these campaigns face. Differences of opinion thus emerge both within and between advocacy groups over the importance to attach to international law arguments in specific campaigns or litigation.

Several public interest organizations now exist in Canada that specialize in legal issues including litigation, law reform, and legal advice. These organizations, which include the Sierra Legal Defence Fund and the Canadian Environmental Law Association, appear frequently in the cases that are the subject of this study. The regular and consistent involvement of these groups allows them to build a fluency in arguing international biodiversity sources unmatched by other counsel. In this way, a handful of international environmental law experts within the Canadian public interest environmental community are able to have a considerable impact on the international law arguments heard by Canadian courts. West Coast Environmental Law, another law-focused public interest organization, has produced an accessible guide explaining international environmental law treaties to non-experts.¹⁰⁹ This publication evidences another powerful way in which environmental groups contribute to the wider understanding of international biodiversity law in Canada.

A significant aspect of the work of several Canadian environmental groups is that they are active both internationally and domestically. The transnational process of forging connections between the international and local spheres is a unique contribution of environmental advocacy groups to effective biodiversity protection, but again, little analysis of this work exists. The day-to-day use of international law arguments by environmental groups in domestic litigation or campaign strategies, in Canada or elsewhere, has yet to be examined by scholars.¹¹⁰ Canadian environmental groups are active in transnational public litigation and inform international trade dispute resolution through the submission of amicus curiae briefs.¹¹¹ In recent years, Canadian environmental groups have participated in international treaty negotiations as members of official Canadian delegations. The nature of the relationship between

¹⁰⁹ Linda Nowlan & Chris Rolfe, *Kyoto, POPs and Straddling Stocks: Understanding Environmental Treaties* (Vancouver: West Coast Environmental Law, 2003).

¹¹⁰ One book-length study of the techniques used by environmental NGOs to protect biodiversity makes no mention at all of using international law in domestic courts as a possible strategy. See Michael M. Gunter, Jr., *Building the Next Ark: How NGOs Work to Protect Biodiversity* (Hanover, N.H.: Dartmouth College Press, 2004).

¹¹¹ See International Institute for Sustainable Development, Amicus Curiae Submissions, "In the Arbitration Under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules Between Methanex Corporation and United States of America" (9 March 2004), online: International Institute for Sustainable Development <<http://www.iisd.org/publications>>.

this participation and the domestic litigation employed to enforce these treaties remains to be elucidated.

A critical challenge arising from a reliance on environmental advocacy groups to bring forward international law arguments is the limited support these groups receive for this work. Fundraising for international law issues proves challenging for law-focused public interest environmental groups. These groups also suffer from the absence of a Canadian institution dedicated to promoting international environmental law domestically. Such institutions exist in the United States¹¹² and Britain¹¹³ and can provide crucial support for domestic efforts to give effect to international environmental law.

II. International Law Arguments Outside the Courtroom

International law arguments are employed by environmental advocacy groups in campaign strategies extending beyond the courtroom. In the wider campaigns that surround the litigation explored in the first section of this article, Canada's reputation as both a law-abiding nation and as an international leader in issues of environmental protection is attacked. Unhampered by the doctrinal restrictions on how international law is received by Canadian courts, environmental advocacy groups use international law arguments as a tool in these campaigns. International law is strategically used to shame Canada, through media and public opinion campaigns, transnational litigation, and market tools. Analysis of how these strategies are used in two campaigns, the campaign for endangered species legislation in Canada and the campaign against the Cheviot Mine, reveals how environmental advocacy groups attempt to foster compliance with Canada's international legal obligations through the deployment of shame.

Shame can be a potent tool in fostering compliance with international law. A growing body of international legal theory attempts to elucidate the role of reputational concerns in explaining why nations comply with international law even absent enforcement mechanisms.¹¹⁴ The following analysis of the use of shame in campaign strategies acknowledges the value of reputation in advocacy campaigns. International theorists such as Andrew Guzman focus on the external audiences affected by a country's reputation:

¹¹² Centre for International Environmental Law (CIEL) in Washington, D.C.

¹¹³ Foundation for International Environmental Law and Development (FIELD) in London, U.K.

¹¹⁴ See Andrew T. Guzman, "A Compliance-Based Theory of International Law" (2002) 90 Cal. L. Rev. 1825; George W. Downs & Michael A. Jones, "Reputation, Compliance, and International Law" (2002) 31 J. Legal Stud. 95. See also Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995) at 27; Harold Hongju Koh, "Why Do Nations Obey International Law?" (1997) 106 Yale L.J. 2599.

Because a country's reputation has value and provides that country with benefits, a country will hesitate before compromising that reputation. A country that develops a reputation for compliance with international obligations signals to other countries that it is cooperative. This allows the state to enjoy long-term relationships with other cooperative states, provides a greater ability to make binding promises, and reduces the perceived need for monitoring and verification. On the other hand, failure to live up to one's commitments harms one's reputation and makes future commitments less credible. As a result, potential partners are less willing to offer concessions in exchange for a promised course of action.¹¹⁵

The environmental advocacy campaigns discussed below also reveal how domestic audiences are targeted in reputational attacks on Canada. Underlying these approaches are assumptions that Canada is concerned about its reputation, and that Canadians care whether Canada is perceived to be violating international law.

A. The Campaign for Federal Endangered Species Legislation (1992-2002)

The call for strong federal endangered species legislation emerged prior to the 1992 UNCED Conference in Rio de Janeiro and continued beyond the eventual 2002 enactment of the *Species at Risk Act*.¹¹⁶ A focus on the campaign between the years 1992 and 2002 allows a detailed look at the argument advanced by environmental groups that Canada had an international legal obligation to enact federal endangered species legislation based on its Rio commitments. Specifically, once Canada ratified the 1992 *Biodiversity Convention*, Canadian environmental groups narrowed in on the obligation of contracting parties under article 8(k) to pass endangered species legislation. This international legal obligation occupied a central place in the environmental advocacy groups' domestic campaign, and these groups never allowed the international legal sources of Canada's responsibility to protect endangered species to move off the agenda.

The influence of Canadian environmental groups in the political struggle to enact federal endangered species legislation waxed and waned over the course of the decade.¹¹⁷ One factor contributing to the strength of the environmentalist voice was the ability of a number of considerably diverse environmental groups to unite and form the Canadian Endangered Species Coalition ("the Coalition"). The Coalition was directed by six of the major environmental groups and supported by a hundred more.

¹¹⁵ Guzman, *ibid.* at 1849-50 [footnotes omitted].

¹¹⁶ S.C. 2002, c. 29.

¹¹⁷ For a discussion of the politics surrounding this legislation, see William Amos, Kathryn Harrison & George Hoberg, "In Search of a Minimum Winning Coalition: The Politics of Species-at-Risk Legislation in Canada" in Karen Beazley & Robert Boardman, eds., *Politics of the Wild: Canada and Endangered Species* (Don Mills, Ont.: Oxford University Press, 2001) 137 at 145.

The strategies adopted by the Coalition were wide-ranging—from litigation, to media campaigns, to public pressure techniques, to international appeals, to consumer boycotts, to government lobbying. International law occupied a prominent place in the campaign, although its centrality differed between the litigation and non-litigation elements of the campaign. In the court cases, international law arguments played a peripheral role, and were ultimately unsuccessful.¹¹⁸ In the public, media, and government lobbying campaigns, however, international law and Canada's violation of its international obligations were central and immovable aspects of the campaign.

1. Public Opinion and the Media

International law arguments played a central role in efforts to shame Canada into introducing federal endangered species legislation. Coalition campaign materials routinely focused on the discrepancy between Canada's place as the first industrialized country to sign and ratify the *Biodiversity Convention* and Canada's reluctance to implement its treaty obligations in Canadian law. Specific references to Canada's failure to enact federal legislation to protect species at risk despite an obligation under the *Biodiversity Convention* to do so appeared in headlines, as well as in the opening sentences of reports, campaign materials, and submissions to Senate committees.¹¹⁹ Headlines and environmental group-sponsored ads emotively presented Canada's failure to give effect to the *Biodiversity Convention* as a deception or a lie: "Canada Lies, Endangered Species Die."¹²⁰

Canada's internationalist reputation was repeatedly the target of attack. Sierra Legal Defence Fund criticized Canada's reputation as a world leader in biodiversity as false through a newspaper ad in the *International Herald Tribune* emblazoned with the headline: "Think Canada is naturally a world leader in wildlife protection? Think again. For 10 years the Canadian Government has failed to honour its 1992 Biodiversity Convention promise to enact effective endangered species legislation."¹²¹ An article by David Suzuki emphasized the same message:

¹¹⁸ See e.g. *WCWC (S.C.)*, *supra* note 61; *WCWC (C.A.)*, *ibid.* WCWC was unsuccessful in an application for judicial review of a determination made under the *Forest Practices Code of British Columbia Act* (*supra* note 62) approving timber harvesting in a block of forest home to a species of owl, the Northern spotted owl, at risk of extinction.

¹¹⁹ See e.g. Gwen Barlee, "Presentation to the Senate Standing Committee on Energy, the Environment and Natural Resources on Bill C-5, the Species at Risk Act" (21 November 2002), online: Western Canada Wilderness Committee: <<http://www.wildernesscommittee.org/campaigns/species/sara/>>; Greenpeace Canada, "Wipeout: the Liberal Government's Plan for Canada's Endangered Species" (September 2001), online: Greenpeace <<http://www.greenpeace.org/raw/content/usa/press/reports/wipeout-the-liberal-governmen.pdf>>.

¹²⁰ Greenpeace Canada, Press Release, "Canada Lies, Endangered Species Die" (8 November 2001), online: Greenpeace Canada, <<http://action.web.ca/home/gpc/alerts.shtml>>.

¹²¹ See Sierra Legal Defence Fund, Media Release, "Canada Guilty of Decade of Inaction After Being First Industrialized Nation to Ratify Global Conservation Pact" (10 April 2002), online: Sierra Legal Defence Fund <http://www.sierralegal.org/m_archive/2002/pr02_04_10.html>.

Internationally, Canada still has something of a Boy Scout reputation when it comes to the environment ... But our reputation far exceeds our track record and it has begun to fray, badly. ... Canada's lack of federal legislation protecting endangered species ... should be a national embarrassment.¹²²

These two excerpts from the *Globe and Mail* and *International Herald Tribune* reveal how both domestic and international audiences were targeted in these reputational attacks on Canada. Exploiting the fact that Canadians hate to be seen as less environmentally conscious than their neighbours to the South, campaigners routinely contrasted Canada's lack of federal legislation with the *Endangered Species Act*¹²³ in the United States. As one Greenpeace campaigner commented, "If I were an endangered species I'd rather be living in the U.S."¹²⁴

The Coalition also introduced a report card that measured the federal government and each province against the international commitment to introduce endangered species legislation. The "D" grade that the federal government received in 1997 for failing to pass Bill C-65, the *Endangered Species Act*,¹²⁵ was widely reported in Canadian newspapers.¹²⁶ Such use of the Canadian media was essential to the campaign as the public was largely unaware of the absence of federal legislation. One Pollara poll commissioned by the International Fund for Animal Welfare in May 1999 found that sixty-six per cent of respondents thought the federal government already had a law to protect endangered species, and another twenty-one per cent did not know whether such a law existed.¹²⁷

Media and public awareness campaigns extended beyond Canada's borders to put international shame on Canada. At a meeting in Guadalajara, Mexico, in 2000 where conservation organizations from across North America gathered to discuss endangered species protection in the three countries, the Canadian director of Defenders of Wildlife characterized Canada's situation as "an international embarrassment." On the subject of wildlife protection, he further lamented, "we were once world leaders in environmental protection but now we trail far behind the United States and Mexico ..."¹²⁸

Reports documenting Canada's failure to uphold its obligations under the *Biodiversity Convention* also circulated at the Ancient Forest Summit meeting of 180

¹²² David Suzuki, "Our Environmental Shame" *The Globe and Mail* (22 March 2001) A17.

¹²³ *Endangered Species Act of 1973*, 16 U.S.C. §§1531-1544 (2000).

¹²⁴ Tzeborah Berman, quoted in Malcolm Curtis, "Endangered Species Law Toothless" [*Victoria Times-Colonist*] (13 December 1995) 1.

¹²⁵ Bill C-65, *Canada Endangered Species Protection Act*, 2d Sess., 35th Parl., 1997.

¹²⁶ Allan Thompson, "Ottawa Called Flop at Saving Species" *The Toronto Star* (30 September 1997) A6.

¹²⁷ The results of this 1999 poll are quoted in Amos, Harrison & Hoberg, *supra* note 117 at 145.

¹²⁸ Defenders of Wildlife, Press Release, "Canada's Endangered Species at Risk" (23 March 2000), online: Defenders of Wildlife <www.defenders.org/newsroom>.

countries in the Hague in April 2002.¹²⁹ The campaign did not stop at shaming techniques. The environmental groups leading the campaign made formal appeals to bodies outside Canada to attempt to force Canada's hand through international pressure.

2. Transnational Litigation and Foreign Appeals

a. North American Agreement on Environmental Cooperation

Canadian environmental advocacy groups are among the most committed users of the citizen enforcement process under articles 14 and 15 of the *North American Agreement on Environmental Cooperation*,¹³⁰ so it is not surprising that this process was used in the campaign to secure endangered species legislation. The *Biodiversity* submission is a claim brought by the Animal Alliance of Canada, Greenpeace Canada, and the Council of Canadians.¹³¹ The threshold requirement for claims under the citizen enforcement process is a failure to enforce domestic law. Shame was thus cast on Canada by the very suggestion that it was unwilling to enforce its environmental law. The applicants faced an uphill challenge in proving that Canada's failure to enact endangered species legislation was a breach of domestic law. The Commission for Economic Cooperation Secretariat ("the Secretariat") had faced the question of defining domestic law in a number of previous submissions brought by Canadian environmental groups, each time rejecting international law arguments as outside the scope of its jurisdiction.

In *AAA Packaging*,¹³² the Secretariat refused to request a response from Canada on the basis that the international obligation in question, namely the prohibition on exporting pesticides and toxic substances under article 2(3) of *NAAEC*, had not been imported into Canadian domestic law. The *B.C. Logging* submission¹³³ involved a challenge brought by Canadian environmental groups including the David Suzuki Foundation, Greenpeace Canada, the Sierra Club, and the B.C. Northwest Ecosystem Alliance. These groups argued that the Canadian government's practice of staying private prosecutions against logging companies brought under the *Fisheries Act*¹³⁴ is a violation of the obligation under article 6 of *NAAEC* to ensure access to judicial proceedings. The Secretariat dismissed this portion of the submission request on the

¹²⁹ See Sierra Legal Defence Fund, "The Lost Decade: Canada's Conservation Track Record Since Signing the 1992 Rio Convention on Biological Diversity" (10 April 2002), online: Sierra Legal Defence Fund <<http://www.sierralegal.org/reports2002.html>>.

¹³⁰ 12 and 14 September 1993, 32 I.L.M. 1480 [*NAAEC*].

¹³¹ *Biodiversity* (21 July 1997), SEM-97-005, (Citizen Submission) [Biodiversity Submission], online: North American Commission for Environmental Cooperation <<http://www.cec.org/citizen/index.cfm>> [CEC].

¹³² *AAA Packaging* (12 April 2001), SEM-01-002 (Citizen Submission), online: CEC, *ibid*.

¹³³ *BC Logging* (15 March 2000), SEM-00-004 (Citizen Submission), online: CEC, *ibid*.

¹³⁴ R.S.C. 1985, c. F-14.

basis that *NAEEC* is not part of Canada's domestic law. *The Great Lakes* submission¹³⁵ involved a group of eight Canadian and American NGOs alleging that the United States was failing to enforce its domestic law and two binational agreements, the *Great Lakes Water Quality Agreement*¹³⁶ and the *Agreement Concerning the Transboundary Movement of Hazardous Wastes*.¹³⁷ The Secretariat rejected the argument that these binational agreements represent "law of the nation" as they are not incorporated into the domestic law of the United States.

Attempting to steer around this discouraging body of jurisprudence, the environmental group applicants in the Biodiversity Submission argued that Canada's failure to enact endangered species legislation violated its obligation under the *Biodiversity Convention* to "[d]evelop or maintain the necessary legislation and/or other regulatory provisions for the protection of threatened species and populations."¹³⁸ In an attempt to satisfy the requirement that there be a breach of Canadian domestic law, the groups focused not on the breach of the *Biodiversity Convention* itself, but the breach of the instrument of ratification. According to this argument, the instrument of ratification binds Canada under domestic law to uphold treaty obligations. The Secretariat did not accept this distinction and responded that the purpose and effect of the instrument of ratification is to confirm Canada's international commitments regarding the Convention. It does not import those obligations into domestic law. While the argument was unsuccessful in this case, the Secretariat left open the possibility of success in future cases with the statement that "[i]n making this determination, [it] does not wish to exclude the possibility that future submissions may raise issues in respect of a Party's international obligations that would meet the criteria of Article 14(1)."¹³⁹

b. Appeals Under the Pelly Amendment

In 1999, a coalition of environmental groups led by the American environmental group Earthjustice sent a detailed letter to the Secretary of the Interior in the United States requesting certification of Canada pursuant to the *Pelly Amendment to the Fisherman's Protective Act of 1967*¹⁴⁰ for its failure to adopt endangered species legislation.¹⁴¹ The letter recommended a prohibition on the importation of Canadian

¹³⁵ *Great Lakes* (28 May 1998), SEM-98-003 (Citizen Submission), online: CEC, *supra* note 131.

¹³⁶ 15 April 1972, Can. T.S. 1972 No. 12, 7312 T.I.A.S. 301.

¹³⁷ 28 October 1986, Can. T.S. 1986 No. 39, 11099 T.I.A.S.

¹³⁸ *Biodiversity Convention*, *supra* note 13 at art. 8(k).

¹³⁹ Biodiversity Submission, *supra* note 131.

¹⁴⁰ *Fishermen's Protective Act (Pelly Amendment)* 22 U.S.C. §1978 (2000).

¹⁴¹ Earthjustice, "Petition for Certification of Canada Pursuant to 22 U.S.C. § 1978 for Failing to Adopt Endangered Species Legislation" (22 March 1999), online: Earthjustice <http://www.earthjustice.org/regional/international/trade_documents/Canada%20ESA.pdf>. The Pelly Amendment authorizes the President to prohibit the importation of products from countries that allow fishing operations that diminish the effectiveness of an international fishery conservation program or from countries that engage in trade or taking that diminishes the effectiveness of an international program

products into the United States until Canada passed a federal law to protect endangered species and their habitats. The letter stated that Canada was violating its commitment under the *Biodiversity Convention* and called on the United States government to pressure Canada into enacting legislation. The letter was intended as an international appeal for action, but was also aimed at shaming Canada. It was reported in a front page story in *The Globe and Mail*:

U.S. environmentalists will ask their government tomorrow to enact trade sanctions against Canada because of Ottawa's failure to pass endangered-species legislation ...

At the very least, the legal petition will embarrass Canada, once seen as an international leader on environmental issues, but now increasingly viewed as a laggard.¹⁴²

Appeals under the Pelly Amendment also focused more specifically on the protection of individual endangered species. Following an unsuccessful attempt to secure protection for the spotted owl through litigation in Canadian courts, environmental groups turned to the Pelly certification process to request a US ban on the importation of British Columbia wood products originating from critical spotted owl habitats. This request was a response to the failure of the environmental groups to secure adequate protection for the species through litigation in Canadian courts. In their appeal to the United States, the environmental groups cited Canada's failure to enforce its obligations under the *Biodiversity Convention*. They specifically referred to the British Columbia Supreme Court's decision in *WCWC*¹⁴³ as "absolute authority for the proposition that laws do not exist in Canada which protect the species from extirpation caused by logging in its habitat."¹⁴⁴

3. Market Pressure

Trade sanctions and consumer boycotts both feature as market tools adopted by Canadian environmental groups in campaigns to protect endangered species. In the case of campaigns to protect British Columbia rainforests in 1995, the Friends of Clayoquot Sound petitioned American publishers to ban British Columbia's paper supplies.¹⁴⁵ The Western Canada Wilderness Committee used radio advertisements advising consumers to only buy lumber from secondgrowth trees in order to save the

for endangered or threatened species. For a more detailed analysis of the Pelly Amendment, see Steve Charnovitz, "Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices" (1994) 9 Am. U.J. Int'l L. & Pol'y 751.

¹⁴² Anne McIlroy, "Animal Activists Push U.S. to Punish Canada: Trade Sanctions Sought Over Endangered Species" *The Globe and Mail* (17 March 1999) A1.

¹⁴³ *WCWC* (S.C.), *supra* note 61.

¹⁴⁴ Canada Wilderness Committee & The Northwest Ecosystem Alliance, "Petition for Certification of Canada, Pursuant to the Pelly Amendment" (24 October 2002), online: Western Canada Wilderness Committee <<http://media.wildernesscommittee.org/news>>.

¹⁴⁵ "A Yellow Environmental Campaign: U.S. Publishers Refuse to Boycott B.C.'s Paper Suppliers" *Western Report* 10:44 (20 November 1995) 16.

habitat of Canada's endangered species.¹⁴⁶ These strategies used both the market and the power of shame to put pressure on British Columbia and Canada. They reflect the complex, multi-faceted agenda of many environmental groups who are able to utilize a variety of economic tools in their campaigns alongside more classic strategies of litigation, media campaigns, and government lobbying.

B. The Cheviot Mine Campaign

The campaign mounted against the proposed development of an open pit coal mine a few kilometres from Jasper National Park differs from the campaign for federal endangered species legislation in a number of respects, including the involvement of a private-sector project developer. This means that the relative importance of government lobbying, transnational and domestic litigation, and public awareness strategies differs between these two campaigns. As private companies were involved in the project, conservation groups attempted to stigmatize the companies involved as well as shaming the Canadian and Alberta governments for the approval of the project.

The project's history has been turbulent since the decision of the federal government to approve it in 1997. A long series of court battles surrounded the project from 1997 to 2005, initiated by a coalition of local and national environmental groups actively campaigning to stop the mine's development, including the Pembina Institute for Appropriate Development, the Sierra Club, Nature Canada, Jasper Environmental Association, and the Alberta Wilderness Association (the "Conservation Groups"). The project was briefly abandoned in 2000, yet re-emerged in a revised form.

International law has featured in the campaign both in litigation and in the wider strategies that the Conservation Groups have adopted to shame the Canadian and Alberta governments and the companies involved. Cardinal River Coals Ltd. ("CRC"), which owns the mine, put forward a project design for environmental assessment by a joint Alberta-federal process initially in 1996. In 1997, the joint review panel issued its report and recommendations, recommending that the Minister of Fisheries and Oceans approve the project by providing CRC with the necessary regulatory approvals under the *Fisheries Act*. In October 1997, the Conservation Groups filed an application for judicial review of the joint review panel's report, which was dismissed.¹⁴⁷ On appeal, the Appeal Division of the Federal Court set aside that ruling and ordered that the proceeding be referred back to the Trial Division for hearing on the merits.¹⁴⁸ The new hearing of the case was joined with a hearing of an

¹⁴⁶ See Western Canada Wilderness Committee, News Release, "Wilderness Committee's Newest Radio Ad" (9 December 2004), online: Western Canada Wilderness Committee <<http://media.wildernesscommittee.org/news>>.

¹⁴⁷ *Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans)* (1998), 152 F.T.R. 49 (T.D), rev'd (1998), [1999] 1 F.C. 483, 238 N.R. 88 (C.A.) [*AWA v. Canada (C.A.)*].

¹⁴⁸ *AWA v. Canada (C.A.)*, *ibid.*

application filed by the Conservation Groups for judicial review of the Minister's first project authorization pursuant to subsection 35(2) of the *Fisheries Act*.¹⁴⁹

In this case, Justice Campbell found that the joint federal-provincial environmental review did not comply with the *Canadian Environmental Assessment Act*.¹⁵⁰ He struck down the federal authorization for the mine under the *Fisheries Act*, ruling that the Minister could not issue a *Fisheries Act* approval that contravened the *Migratory Birds Convention Act Regulations*.

Justice Campbell determined that the permanent dumping of millions of tonnes of waste rock on migratory bird habitat does fall under the *Migratory Birds Convention Act*, based on a broad reading of the phrase “any other substance harmful to migratory birds”.¹⁵¹ He considered the broad purposive language in the *Migratory Birds Convention Act* as justification for giving a broad interpretation to language in the *Migratory Birds Convention Act*.

In 2000, CRC presented new proposals for the mine, which were approved by the joint review panel and accepted by the federal government. CRC modified its design again in 2002 and moved ahead with a revised project involving new undertakings and works not previously examined through the prior assessment process. The Conservation Groups, represented by Sierra Legal Defence Fund, filed two new challenges to the federal environmental assessment and authorization of the project in November 2004, which were heard by the Federal Court in Edmonton in June 2005. The Conservation Groups called for an environmental assessment of the project modifications and a determination that the federal government's 2004 authorization of the first part of the mine be quashed because of the mine's potential to destroy sensitive migratory bird habitat in violation of the *Migratory Birds Convention Act*. In their submissions, the groups advanced the argument that subsection 35(1) of the *Migratory Bird Regulations* and the *Migratory Birds Convention Act* generally should be interpreted in a manner consistent with Canada's international obligations and that an interpretation that fulfills Canada's treaty commitments should be preferred over one that does not.¹⁵² None of these international instruments and arguments were discussed by the Federal Court in its rejection of the Conservation Groups' applications.¹⁵³

In the wake of the dismissal of their applications for judicial review, the Conservation Groups issued a media release on 30 September 2005 announcing their decision “to shift their campaign focus from the federal courts to the regulatory and enforcement agencies overseeing the mine, the federal and provincial endangered

¹⁴⁹ *AWA v. Cardinal River Coals*, *supra* note 76.

¹⁵⁰ S.C. 1992, c. 37.

¹⁵¹ *Migratory Birds Regulations*, *supra* note 34, s. 35(1).

¹⁵² See text accompanying notes 29-36 below for a discussion of this case.

¹⁵³ *Pembina Institute*, *supra* note 29.

species provisions and the mine's parent companies."¹⁵⁴ In the words of Dianne Pachal of the Sierra Club of Canada:

Even though the approval was issued despite unresolved concerns of federal government officials, the glaringly obvious environmental harm from Cheviot likely wouldn't be rectified by pursuing it further through the courts ... Our interest in seeing that the project doesn't go past the first phase that's been approved, about one-fifth of the mine, wouldn't be addressed by the Courts.¹⁵⁵

1. Public Opinion and the Media

Shaming continues to be an important weapon in the battle against the proposed mine. The Conservation Groups target tourists entering Jasper National Park, presenting them with brochures outlining the threats the mine poses to the park.¹⁵⁶ They argue that the Alberta government's approval of the mine amounts to a breach of Canada's obligations under the *Biodiversity Convention* and the *World Heritage Convention*, as Jasper National Park is a World Heritage Site.¹⁵⁷ These groups also capitalize on the support of the scientific community in making their arguments based on international biodiversity law.¹⁵⁸

The Sierra Club's 1997 Rio Report Card gave the Alberta government an "F" in biodiversity for considering approval of the mine in close proximity to a World Heritage Site, noting that its development would place Canada in "clear violation" of the *Biodiversity Convention*. This grade was downgraded to an "F-" in the following year's Rio Report.¹⁵⁹ The Sierra Club also drew public attention to testimony by Parks

¹⁵⁴ Sierra Legal Defence Fund, Media Release, "Conservation Groups Shift Focus in Tackling Mine Next-Door to Jasper National Park" (30 September 2005), online: Sierra Legal Defence Fund <www.sierralegal.org/news.html>.

¹⁵⁵ *Ibid.*

¹⁵⁶ Ashley Geddes, "Coalition to Lobby Tourists in Battle Against Coalmine" *Edmonton Journal* (5 July 1997) A8.

¹⁵⁷ See Dennis Hryciuk, "Mine Foes Vow to Fight Back; Environmentalists Eye International Focus to Protest Cheviot" *Edmonton Journal* (19 June 1997) B5; Ed Struzik, "Sierra Club Opposes Cheviot Mine Project" *Edmonton Journal* (10 September 1997) B5 [Struzik, "Sierra Club"]; Alberta Wilderness Association, Press Release, "Stop the Cheviot Mine! Legal Action Launched Over Proposed Cheviot Mine" (December 1997), online: Environmental Research and Studies Centre <<http://www.ualberta.ca/ERSC/cheviot/protectstudy.htm>>.

¹⁵⁸ A letter by a group of respected Canadian scientists, quoted in a press release of the Alberta Wilderness Association, refers to the fact that the protection of the Cheviot area falls directly under Canada's commitment to the *Network of Protected Areas* and the *Canadian Biodiversity Strategy*, *supra* note 42, which emerged as part of the *Biodiversity Convention*. See Alberta Wilderness Association Press Release, "Scientists Call for Protection Instead of Mine" (April 1998), online: Environmental Research and Studies Centre <www.ualberta.ca/ERSC/cheviot/protectstudy.htm>.

¹⁵⁹ See Sierra Club of Canada, "Rio Report Card" (1998), online: Sierra Club of Canada Rio Report <<http://www.sierraclub.ca/national/rio>>.

Canada before the Cheviot review panel, stating the mine could jeopardize Canada's ability to meet its international obligations under the *World Heritage Convention*.¹⁶⁰

The shaming strategy is closely linked to the World Heritage status of the national park. The *World Heritage Convention* states that each participating member country has an affirmative duty to protect World Heritage Sites within its jurisdiction.¹⁶¹ If a site is considered endangered by the World Heritage Committee, it may be included on the List of World Heritage Sites in Danger. Prompt listing of sites in danger ensures international attention for the sites, and embarrasses the governments unable (or unwilling) to protect their world heritage. Danger listing of Jasper National Park as a result of an approval of the Cheviot Mine would be a “‘black eye’ for Canada’s image abroad.”¹⁶² As in other environmental shaming campaigns, Canada’s international reputation as a world leader has also been invoked in the efforts to stop the Cheviot mine. Sam Gunsch, a director with the Canadian Parks and Wilderness Society, has observed, “[t]he prime minister has portrayed his government as a leader in environmental issues. Now the eyes of the world are on him.”¹⁶³

2. Appeal to the World Heritage Committee

The fact that Jasper National Park is a UNESCO World Heritage Site allows the network of conservation groups to raise what might otherwise have been a purely local land use issue to the international stage, placing additional international pressure on both the Canadian and Alberta governments involved in the mine approval process.

In March 1998, the director of the UNESCO World Heritage Committee requested that Canada’s ambassador to UNESCO arrange for Canada to consult with Alberta about reconsidering its Cheviot Mine approval. In the request, the UNESCO director noted the challenges by the environmental groups in court.¹⁶⁴ Political responses to this “international pressure” varied from reassurance on the federal level that Ottawa is taking the UNESCO request seriously¹⁶⁵ to outrage on the provincial level, expressed by Alberta Environment Minister Ty Lund in the media: “It really bothers me when people from some other part of the world start telling the people of Alberta how to operate in the province of Alberta.”¹⁶⁶

¹⁶⁰ See “Making Mountain Park a Reality”, online: Sierra Club of Canada <<http://fanweb.ca/cheviot>>.

¹⁶¹ *Supra* note 21, art. IV.

¹⁶² Ed Struzik, “UN Agency Asks Ottawa to Revoke OK for Cheviot” *Edmonton Journal* (19 March 1998) A1 [Struzik, “UN Agency”].

¹⁶³ Struzik, “Sierra Club”, *supra* note 157.

¹⁶⁴ Struzik, “UN Agency”, *supra* note 162.

¹⁶⁵ See Ed Struzik, “Feds to Co-operate with UN Request for Data on Project” *Edmonton Journal* (20 March 1998) A6.

¹⁶⁶ See Les Sillars, “This Land is Their Land: UNESCO Asks Ottawa to Revoke Approval of Alberta’s Cheviot Mine” *British Columbia Report* 9:31 (6 April 1998) 22.

3. Market Pressure

It is difficult to isolate the influence of Jasper National Park's World Heritage Site designation on the development of the Cheviot mine project. On 24 October 2000, the President and CEO of Luscar (one of the co-owners of Cardinal River Coals Ltd.) was quoted in the media as saying that the environmental approval process for the mine played a role in the company's decision to abandon the project, as concerns were raised that the mine would threaten wildlife in a World Heritage Site.¹⁶⁷ When pressed on the issue the next day at a press conference, however, he admitted that the environmental approval process was not the reason for indefinitely postponing the mine.¹⁶⁸ This contradiction suggests that in crafting their initial explanation of the project postponement to the media, the project sponsors were aware of the importance of appearing to be influenced by the World Heritage Site designation of the park.

Recognizing the influence of the market, environmental groups targeted the money behind Cheviot when plans for a revised Cheviot mine materialized. In March 2004, environmental groups sent letters to the mining companies responsible for the project, detailing the history of opposition to the mine and Canada's international obligation to protect Jasper as a World Heritage Site. The campaign also targets Ontario teachers, as the Ontario Teachers Pension Plan has a significant financial stake in the mine.

Conclusion

Environmental advocacy groups have a role to play both in identifying where Canada fails to give domestic effect to the obligations it assumes under ratified biodiversity treaties, and in addressing this failure. This article shows that despite the limited role of Canadian courts in giving effect to international biodiversity law, an important role exists for environmental advocacy groups both within and beyond the courtroom in fostering compliance with Canada's international legal commitments. Further and more profound engagement with international law sources by the Canadian judiciary can be encouraged by the clear and principled articulation of the relevance of international law in arguments before the courts.

At the same time, developments in international legal theory reveal the role of reputation in explaining why nations comply with international law. Strategies focusing on shaming Canada, challenging its reputation before both international and domestic audiences, are important components of campaigns highlighting Canada's failure to live up to its international law obligations. Opportunities for further engagement with international biodiversity law are not lacking. The challenge lies in promoting greater engagement with international biodiversity law sources on the part

¹⁶⁷ "Mining: Coal Project Postponed Indefinitely" [*Victoria Times-Colonist* (25 October 2000) D2.

¹⁶⁸ Alberta Wilderness Association *et al.*, News Release, "Indefinite Postponement of Cheviot Mine" (25 October 2000), online: Alberta Wilderness Association <<http://www.albertawilderness.ca/News/News2000.htm>>.

of both counsel and the judiciary in Canada.¹⁶⁹ This engagement will foster familiarity with international biodiversity law, making this body of law not less “interesting”, but perhaps less “exotic”.

¹⁶⁹ One step in this direction comes in the form of the new curriculum at UBC Faculty of Law where Transnational Law is a mandatory course for all first year students.