Morgan Blakley's outline for Environmental Law 329 text: ***Environmental Law: Cases and Materials*** by Tollefson and Doelle.
NB: Based entirely on text, did not go to class.

If you want this outline in openoffice format so you can edit it, email me at: plato@uvic.ca

Chapter 1: International Environmental Law

Introduction

- **Hard law**: Binding international law
- **Soft law**: Non-binding components of international law
- **Customary law**: Generally binding on all states
- **Treaties**: Only binding on states that ratify the treaty

Part 2: Relevance and Application of Intl law (IL) in the Domestic Env Law (EL) Context

- **Brandon, "Does IL Mean Anything in Canadian Courts?" 2001**
  - National courts have a role in interpreting domestic law in a manner consistent with intl obligations
  - Traditionally, Canada was dualist: IL not binding unless implemented domestically
  - *Suresh* 2002 suggests that direct transformation of IL into domestic law may be unnecessary. Arguable that *Suresh* has same effect for treaties
  - Must be careful about division of powers: Executive signs, but no implementation until legislature makes it law
  - Legislature is presumed not to legislate in violation of IL (such a violation must be explicit)
    - Unimplemented treatises also influence Cdn law
  - An implementing statute need not make mention of treaty it implements
  - Where statute contains limited reference to treaty it may be sufficient to deem it as implementing the treaty. *Crown Zellerback* SCC, court took Ocean Dumping Act as implementing intl obligation because of references to Convention in Act. No explicit implementation by parliament
  - General implementation power is evidence of intent to implement
  - Evidence of passive intent to implement:
    - 1) Treaty provisions
    - 2) Gov action to comply
    - 3) Gov expression of status of treaty
  - Positive implementation: If it is plain from context that statute is intended to implement a treaty, then there is no need for express implementation
  - Implementing policy to conform with treaty indicates intention to implement
  - Recent cases suggest courts will look to treaties (even unratified ones) were necessary for statutory interpretation
  - Focus of courts is now on whether the gov intended to implement instead of if actually implementation trough legislation has occurred
    - Method of implementation less important than intent to do so
- **Spray-tech v. Hudson (Ville) 2001 SCC**
  - Bylaw restricting use of pesticides. Cases uses a lot of international law in interpreting municipalities act
  - **Principle of subsidarity**: Law making and implementation best achieved at local level because

closest to citizens, most responsive to local needs
  - **Precautionary principle**: “Where there are threats of serious or irreversible damage, scientific uncertainty is not sufficient to justify postponing environmental protection.” There may be sufficient state practice to allow a good argument that the precautionary principle is a principle of customary IL.
- **Gosselin v. Quebec AG 2002 SCC**
  - Age issues with Quebec social assistance program. Court was split on relevance of International covenant which Canada had signed and ratified
  - Majority: If legislature intended to allow judicial review, it would have explicitly said so and drafted the clause specifically enough for review. EG the International Covenant on Economic, Social, and Cultural Rights says exactly what standard of life is necessary
  - Dissent: LHD. Agrees with dissent in QCA. The Quebec Charter clause closely resembles the covenant clause and is intended to reflect Canada's international commitments.
  - *The court was disagreeing over whether the Quebec Charter clause was intended to implement the Convention's specific human rights obligations.*
- **Canadian Foundation for Children v. Canada 2004 SCC**
  - Spanking case s.43 CC
  - Statutes should be construed to comply with international obligations
  - Court refers to intl Convention on Rights of Child and determines s.43 is consistent with intl obligations under the convention
  - *Unlike Gosselin, here the court was not arguing about whether the clause was meant to implement the treaty.*
- **R. v. Hape 2007 SCC**
  - Court approves **adoptionist approach**: The doctrine of adoption operates in Canada such that prohibitive rules of customary intl law should be incorporated into domestic law in the absence of conflicting legislation. The automatic adoption is jsutified on the basis that customary intl law is the law of nations unless sovereign exercise determines otherwise. Parliamentary sovereignty allows violation of customary IL, but it must be express

<u>Part 3:</u> Domestic application of the Precautionary Principle (PP): A Case Study
- The precautionary principle seems to boil down to 'better safe than sorry'
- There are more and less permissive versions. More permissive versions use negative language and not cost-effectiveness as a potential limit on principle. More vigorous version. Steps should be taken to mediate risks even where science is not fully established.
- PP can be analyzed on four dimensions: Threat, uncertainty, action, and command
  - Threat: nature of the immanent harm
  - Uncertainty: Lack of ken as to whether and how threat might materialize
  - Action: Cost-effective preventative measures. Triggered if threat and uncertainty thresholds are met
  - Command: Prescribes the legal status of action to be taken. EG: Shall or May do X
- Indian SC has accepted PP as customary IL in *Vellore Citizens Welfare Forum v. Union of India*
  - Significance of adoption tempered by fact that court held PP was already in part domestic indian law
- *Spraytech* decision is a good example of **indirect application of PP**
- In Australian case Leatch v. National Parks and Wildlife Service, court said PP is just common sense. Court then held PP is a relevant factor.
- PP can be explicitly or implicitly incorporated into domestic law. Use of PP in domestic statutes can

reassure courts that PP is a norm of domestic law

Part Four
World Trade Institutions

- **Louka 2006; *IL, Fairness, Effectiveness, and World Order***
  - General Agreement on Tariffs and Trade (GATT)
    - Legal agreement/quasi-legal institution to regulate intl trade and bring down trade barriers
  - World Trade Organization (WTO)
    - Manages a legal apparatus including GATT provisions and others
    - WTO intrudes on government policy decisions
  - **Treaties**
    - **GATT**
      - National treatment rule: Once goods imported, they must be treated equally to domestic goods
      - Most favoured nation rule: Member states of GATT must treat equally their trading partners
      - Article XX is most discussed. Allows exceptions to free trade for the protection of the environment and natural resources. (CB 36)
    - Under WTO: Sanitary and Phyosanitary Measures SPS: Allows member states to adopt sanitary laws for food safety, human, plant, and anmial health. Must be based on science, transparent, and non-arbitrary
    - TRIPS: Trade related Aspects of Intellectual Property Rights
      - Countries can recognize patents on most products and processes, protect plant varieties, etc.
  - **Dispute Settlement:**
    - WTO made DSU made DSB
      - DSB: Dispute Settlement Body: Purpose administer dispute settlement proceedings
        - It is political, not judicial.
        - It is mediation, if mediation fails, then countries can convene panel. Panel decision is binding if adopted by DBS (unlike GATT)
          - Adoption is deemed automatic within 60 days unless consensus in DSB formed against it. DSB has all members of WTO in it.....good luck with consensus.
          - Panel decision can be appealed on legal grounds, appeallate decision binding in same way as DSB decisions
    - **1998 Shrimp Turtle Case**
      - Extraterritorial application of usa endangered species legislation. Required turtle excluder devices where shrimp harvesting in endangered turtle areas. Appellate body ruled against usa. Rule was unbending and did not take into account different conditions in different areas. Also, failure to engage in diplomacy and unilateral action constituted basis of discriminatory behavior.
    - **2001 Shrimp Turtle Case**
      - usa entered into multilateral talks and allowed use of comparably effective measures. Malaysia did not agree, and usa banned malaysian imports of shrimp. Negotiation requires good faith, not agreement. Unilateral action allowed if good faith talks fail.
    - **Asbestos Case**
      - Under GATT, countries cannot discriminate like products. Canada argued against France

and Eu that they could not discriminiate against asbestos fibre products because health reasons was not a legitimate ground of distinction. Appellate decision said first criteria includes health risks.
        - Like products must meet four criteria:
            - 1) Properties, nature, and qualityy of products; 2) end uses of product; 3) consumer's tastes and habits; and 4) the tariff classification of the products.
- **Tollefson and Neilson 2009*; Investor Rights and Sustainable Development***
    - International investment agreements: IIAs
        - Tend to fetter the sovereignty of least developed countries
        - Foreign direct investment (FDI) has grown massively in last 20 years
            - Led to massive growth and complexity of intl investment governance regime
                - Bilateral investment treaties, NAFTA etc
    - Tension between investor rights and sustainable development
        - Government's have been sued for environmental protection measures
            - EG: Canada MMT fuel additives, federal ban on PCB exports
    - Investor Protection Architecture and Procedures
        - Neither under NAFTA or other IIAs is the conflict between investor rights and sustainable development directly addressed.
            - For the most part, investors get large amounts of rights, but the state gets few if any
            - Conferring upon investors a broad right to sue host states directly for damages in a legally binding int'l forum is a huge shift in int'l law.
        - Problem with most IIAs, adjudication is in a non-public forum
    - A frequent critique of IIAs is asymmetry between investor rights and and state's obligations. No obligations on investors.
    - Uncertainty:
        - 1) IIAs have tended to interpret more broadly investor rights, than other int'l legal bodies
        - 2) Lack of addressing balance between sustainable development and investor rights
        - 3) Arbitration process:
            - 3.1) These tribunals are poorly equipped and ill-disposed to address complex public issues
            - 3.2) Prevailing processes lack transparency in terms f access to documents, hearings, and public participation.

Chapter 2: Common Law

Introduction

- The common law is…

Part 1: Applying Traditional Tort Lan in Encironmental Cases

- **Negligence**: Has assumed a dominant role in litigation around environmental harm. To establish a claim P must prove: They were owed a duty, the D breached the standard of care, P suffered damage, and the damage was factually and legally caused by D.
- **Private Nuisance:** Alleges that the D unreasonably interfered with P's use and enjoyment of an interest in land, causing foreseeable harm to P. P must have sufficient interest in property to bring an action.
    - Factors affecting whether interference was unreasonable: damage to land, gravity and duration of interference, nature of the neighbourhood, utility of D's conduct, sensitivity of P

  - Pleaded in *Palmer* and *Cambridge Water*
- **Public Nuisance:** Arises from an infringement of public rights (as opposed to private rights)
  - Ambit of public rights discussed in part 5
  - Private citizens normally do not have standing here because Crown is supposed to be guardian of public rights. Private citizens need either consent of AG (in a relator action) or where as a result of the nuisance, they have suffered special damage that is distinct from that suffered by members of the general public.
- **Tort of Strict Liability (Rylands v. Fletcher tort)**: It is called strict because the D is liable whether or not s/he acted negligently. Limitation is that P must show D's activity constitutes unnatural use of the land.
- **Trespass to land**: Intentional and unjustified interference with another;s possession of land. No need for physical damage or knowledge of ownership. Direct entry is a key element.
  - Intersting issue is smells, vibrations, spraying, etc.
- **Trespass to the person**: Assault and battery. Rare in environmental context
- **Remedy**: The standard remedy is monetary compensation, designed to make the plaintiff whole. In many cases environmental harms are not assigned an adequate market value and the harm will go uncompensated. The polluter rarely pays.
  - **Main alternative:** Injunctive relief, usually interim injunctive relief pending final resolution of legal dispute; but can be permanent injuctive relief; or very rarely quia timet injunction (temporary or permanent): order seeking to prevent anticipated damage before it occurs
- **A key issue:** Cleaning up of historical contamination. Most provinces require current owner to remediate the cite. These laws only require elimination of risks to human health, they do not require restoration of environment.
  - Two very different approaches by the courts: *Tridan Developments Ltd. v. Shell Canada Products Ltd. 2002 OCA* contra *Cousins v. McColl-Fronenac Inc. 2007 NBCA*
  - See especially *BC v. Canadian Forest Products Led. 2004 SCC*
- **Palmer v. Nova Scotia Forest Industries 1983**
  - Want injunction to stop SCFI from spraying herbicide.
  - Fear of harm spray would cause to water and health (a farmer and an indian).
  - Private nuisance: Requires substantial interference with a person's enjoyment of property. There must also be proof of damage. Damage need not be pecuniary, but must be material or substantial
    - Risk of health clearly in this category if P can prove chemicals will travel onto land and create risk of health
  - Trespass to Land
    - No damage required, if chemicals on land, trespass established
  - Ryans v. Fletcher
    - P must prove likelihood of damage, its escape, and direct consequences
  - Quia Timet injucntion
    - P must show a strong case of probability that the apprehended mischief will in fact arise
      - Strong case of probability is the same as sufficient degree of probability
    - Not an impossible burden. Court can still consider balance of convenience and hardship
  - Regular injunction
    - Essential elements: irreperable harm, damages are not adequate. (Same in quia timet)
    - Discretionary remedy and sufficient grounds are necessary to warrant court's discretion
  - This seems like a colourable appeal from the decision of the regulatory agency, which should

not be allowed.
  - Weight of current scientific evidence does not support allegations of plaintiffs. Defendant entitled to costs.
- **Cambridge Water Co. v. Eastern Counties Leather Plc 1993 UKHL**
  - Is ECL liable in damages suffered by CWC from water contamination
  - Trail judge found that a reasonable supervisor would not foresee the small spillages prior to 1976 as an environmental hazard.
  - Under *Rylands v. Fletcher*, reasonable care is not a control mechanism and will not exonerate the D from liability. The **control mechanism is the principle of reasonable use**
  - Foreseeability is a requirement in both nuisances and negligence.
  - Knowledge, or at least foreseeability of the risk, is a prerequisite for the recovery of damages under RF; but RF is a principle of strict liability, meaning that the D may be held liable even if they exercised all due care to prevent the escape.
  - As with private nuisance, it is foreseeability of the type of harm.
  - It is more appropriate for strict liability in regard to high risk operations, to be imposed by parliament than by the courts.
  - **Protection and preservation of the environment is no perceived as crucialy important to the future of mankind.**
    - But this does not mean RF or other CL principles should be applied more strictly in respect of such pollution
    - Good legislation reduces need for judicial intervention
  - Nobody at ECL could have reasonably foreseen type of harm which occurred.
  - That ECL now knows of the pools of PCE, does not leave open the possibility that they will be required to clean them up. Nor can they be held liable under nuisance or RF in respect of continuing escape of PCE.
  - <u>Natural Use of Land</u>
    - Natural use no includes ordinary use.
      - Can include recreational uses and some industrial uses
    - Court refuses to redefine though because storage of chemicals in large quantities and their use in the manner employed by ECL is CLEARLY an unnatural use.
    - That PCE is common use in tanning industry is insufficient, nor is the fact that ECL is in a small industrial community.
  - ECL's use is non-natural, but from above they are not liable
- Special principles apply to the liability in negligence of public authorities. Courts in this setting distinguish between operational and policy decisions....Regulatory negligence stuff.

<u>Part 2: Undertanding the Limits of Traditional Torts</u>

- **Collins 2001; Material Contribution to Risk and Causation in Toxic Torts**
  - Causal indeterminacy: Arises randomly and signifies a chance that the defendant in fact harmed no-one
  - Causal uncertainty: results from the inherent nature of the substance and injuries at issue
  - Material contribution: all that D can prove is that P contributed to his/her risk of developing the type of injury which she ultimately sustained.
    - The but-for test often results in nothing result for the P
  - Toxic Torts: involve injuries caused by negligence or other legally culpable conduct of persons having control over toxic substances.

- Legal difficulties: Long latency periods, multiple potential causes, tracing causal chain is difficult if not impossible.
- **In toxic torts all evidence material to the issue of causation must be circumstantial because nobody can see the chemical doing its harm.** (From chemical leaving the factory to person ingesting it in their carrot soup, to the cancer that develops)
- Traditional test for causation
  - Legal causation AKA remoteness: Policy assessment of degree of proximity between factual causation and injury. (Is the degree of negligence disproportionate with the harm caused)
  - Factual causation: physical causal chain.
  - Traditionally: P must prove on BOP that but-for D's conduct, P would not have sustained the harm
    - Where P is harmed by multiple parties, material contribution test applies. Causation established if P can prove that D materially contributed
    - Causation need not be proved to a scientific level of certainty and may be inferred form very little affirmative evidence when the facts lie particularly in the ken of the D.
- General v. Specific Causation
  - General causation: That D's conduct was capable of causing the harm
  - Specific causation: That D's conduct did cause P's harm
  - Finding of specific entails general, but not vice versa. P must prove both
  - Since scientific certainty rarely achievable, P can rely on probabilistic evidence, usually epodemiological evidence in toxic torts (study of distribution of disease)
    - Can implicate D without reaching 51%, then P gets nothing, despite proving material contribution

- Specific Causation: Indeterminate Ds, Indeterminate Ps, and Indeterminate Harm
  - <u>Indeterminate Defendants</u>
    - P might be able to prove harm resulted from one or more of a group of people, but cannot identify specific one who was cause-in-fact. Think the DES litigation, especially *Sindell*
    - *Sindell*: usa court adopted <u>market share liability</u> to permit recovery
  - <u>Indeterminate Plaintiff</u>
    - Where P suffers non-signature illness present in background population it can be difficult or impossible to prove the P would not have gotten ill but-for D's toxins.
  - <u>Indeterminate Harm and the Future Complainant</u>
    - Subset of indeterminate P. P might show that D has increased risk, but P has no signs of illness yet.
      - Who pays for medical monitoring, mental distress, and intangible losses resulting from such situations?
        - Good place for Gov taxes etc
  - **Snell v. Farrell SCC approach**
    - Atrophy of optic nerve following cataract surgery. Doctor negligent in continuing surgery after discovering bleed, but experts could not determine if negligence caused the atrophy
    - SCC held that burden shifting is almost always unjust, and traditional causation test can deal with most uncertainty issues.
    - Sopinka said burden and standard of proof are not immutable, and both are flexible if needed. **In circumstances where the facts lie particularly in the ken of the defendant, very little affirmative evidence will be required to justify an inference of causation in the absence of evidence to the contrary.**

- **Hollis v. Dow Corning Corp SCC**
  - A <u>significant gap in knowledge</u> between parties, can justify application of flexible prrof of causation and burden.
- Collins says the practical effect of *Snell* is to permit a finding of causation based on proof of material contribution to risk
- <u>Alternative Approaches and Risk-Based Liability</u>
  - Five options: material contribution (already law in Canada); altering burden of proof; concerted action theory; market share liability; redefinition of injury to include risk creation
    - These seem unified in their imposition of liability on the basis of causation of risk rather than injury
  - Reversing the onus:
    - **UK *McGhee***: Dermatitis from brick dust. Where D has breached standard, and injury of type occurs, loss should be borne by D unless D proves other cause
      - *UK abandoned this approach I think*
  - Liability for risk
    - usa ***Collins v. Eli Lilly and Co***: Radical version of risk liabilty. Allowed P to sue any on eof group of DES manufacturers and collect 100% of damages on proof of "possible causation". Court based imposition of de facto joint liability on the fact that "each defendant contributed to the risk to the public, and consequently to the risk of injury to the individual plaintiffs".
    - usa ***Martin v. Abbot Labs***: DES again, allowed P to recover from one of a groupd of manufacturers, but manufacturer could limit liability to its market share.
    - usa ***Hymowitx v. Eli Lilly and Co***: Allowed P to recover even though D proved drug taken by P not theirs. Court stated "Liability is based on overall risk, not on single cause; therefore no exclusion for risk creator just because single causation not proved
      - **Court did not treat proof of risk as proxy for proof of injury. Rather it effectively created a tort of creation of risk and imposed full liability for P's damages.**
    - Another version: Discount liability to the extent harm was likely caused by other factors
      - **Risk as injury thesis**: Proposed as uified approach to the three indeterminacies (D,P and Harm) (**aka proportional recovery**)
- Risk based approach is necessary for toxic torts because factual causation is impossible to prove

<u>Part 3: Class Action Suits (CASs)and Environmental Tort Claims</u>

- CASs have not made much impact in protecting the environment in Canada
- Ontario Class Proceedings Act. Key provision is s.5(1) sets out requirements for certification of action. (page 77)
  - ***Hollick v. Metro Toronto***: Court refused to certify: No access to justice issue (Ps could use small claims etc), behavior modification not an issue (better ways to deter polluters), insufficient judicial economy (the common issues were negligible in relation to the individual matters)
  - ***Pearson v. Inco***: Nickel oxide pollution. Refused to certify for health-related damages. Such damages to individualistic and would dwarf common issues. Claim certified on basis of loss of property value though.
- Good and Bad News for Environmental Class Actions
  - Combined effects of *Hollick* and *Person* are damaging to class action environmental claims for health reasons.

- Judicial economy is a cornerstone of class action proceedings. Parliament is in a better position to deal with widespread environmental impacts.
  - Where judicial economy emerges as paramount, one should inquire into trade-offs in access to justice
- Potential Solutions
  - Section 6(1) of Ontario act says action cannot be barred because it requires individual assessment of damages.
  - ***Rumley v. BC*** court sanctioned systemic liability in order to certify a class whose claims in negligence against one institution sspanned 49 years. (Residential school for children with disabilities; sexual and physical assault). Although not an environmental CA, it shows court willing to use a flexible approach to CAs
- **Barrette v. St. Lawrence Cement Inc 2008 SCC**: Allowed residents of city to bring class action for neighbourhood disturbances related to operation of cement plant. Also distinguihsed *Hollick*, held that class members experienced similar injuries and trial judge has discretion to assess damage on an average basis to facilitate litigation.

Part 4: Tort Litigation Aimed at Detering Public Participation (SLAPPs)

- Strategic Litigation Against Public Participation (SLAPPs) characterize ostensibly legal activities as tortious; alleging defamation, breach of contract, conspiracy, interference with contract, etc
- BC had legislation but it was repealed when liberals took power
- Charter does not apply in private litigation *Dolphin Delivery ltd. v. RWDSU 1986 SCC*
- In Canada, SLAPPS have been quite prominent in the realm of environmental law and land use decision processes.
- SLAPPS threatens the essence of democracy, values of environmental law and policy, and citizens' rights to participate in decision making processes
- **Tollefson 1994; SLAPPs: Developing a Canadian Response**
  - SLAPP identification test. A SLAPP lawsuit must be:
    - 1) civil complaint or counterclaim for damages or injunctive relief;
    - 2) filed against a NGO or NG individual
    - 3) because of their communications to a government body, official, or the public;
    - 4) on an issue of public interest or concern
  - “Public interest” is too vague for some
    - Too precise for others: term implies that the D's motives are relevant in determining whether a lawsuit is a SLAPP. Suggests the defendant needs altruistic motives.
  - Anti-SLAPP law's biggest issue is how far a law should go to protect public participation in governance from litigation chill.
  - Why Winning Isn't Enough for the SLAPP Target
    - There is little civil procedure to ensure a speedy dismissal of a SLAPP. In most jurisdictions, unless D can show case to be frivolous or vexatious, court will allow the claim to proceed.
    - Civil rules are equally ineffective for deterring SLAPPs in the first place.
      - Usually the winning party recovers party to party costs, (works out to about one third o factual expenses incurred).
      - IN cases involving particularly egregious conduct, court can award “solicitor and client costs”. These come close to covering full costs of winning party.
  - ***Daishowa Inc. v. Friends of the Lubicon 1998 OGD***: Tried to get Daishowa to agree to not log un-treatied lands in Northern Alberta. Company sued, arguing conspiracy to injure business,

interference with contractual relations, inducement to breach contracts, defamation for use f word “genocide”. Court dismissed all by defamation, awarded Daishowa $1.00.

- ***Fraser v. Saanich 1999***:
  - Meritless claim against residents opposed to residential home rebuilding. Awarded special costs of $2,500.00 (It was a very brief case, with only 9 people involved.
- Effective SLAPP legislation requires three elements:
  - 1) Procedural reforms that expidite early identification and dismissal of SLAPP suits;
  - 2) measures to mitigate costs and burden of defending such suits; and
  - 3) provisions aimed at discouraging such suits
  - Trying to balance right of plaintiffs to have access to courts and defendant's right to be protected from legal intimidation in connection with democratic activitites

- **Proposed Quebec SLAPP Legislation**
  - Allows imposition of sanctions for abuse of procedure in first instance. (Page 84 – need to highlight key stuff still)

Part 5: Recognizing Common Law Public Rights in the Environmental Context

- ***British Columbia v. Canadian Forest Products Ltd. 2004 SCC (Canfor)***
  - Forest fire caused by company that did not properly monitor its brush piles
  - Damages sought: Expenditure for fire suppression and restoration of burn area; Loss of stumpage revenue; Loss of trees set aside for environmental purposes
  - Crown invokes its role as *parens patriae*
  - Some see injunction as only remedy available for AG protecting public interests; compensation is for private claims. This is too narrow a view of Crown's entitlement to compensation for environmental damages
  - Public rights in the environment is deeply rooted in the CL
  - No legal barrier to crown suing for compensation and injunctive relief on account of public nuisance, or negligence causing environmental damage, or torts such as trespass; but there are clearly novel and improtant policy questions raised by such actions.
    - **Police questions include**:
      - Crown's potential liability for inaction in the face of environmental threats
      - Existence of enforceable fiduciary duties owed to the public by the crown
      - Spectre of indeterminate liability to indeterminate amount of people for indeterminate amount of harm.
- **DeMarco et al 2005; Opening the Door...The Canfor decisions**
  - No legal barrier to crown suing for injunction and compensation. Three elements to the conclusion:
    - 1) AG representing the Crown is the proper party to sue to stop a public nuisance
    - 2) Court should take a broad view of what constitutes a public nuisance
    - 3) Injunction is not the only remedy (although it is the usual one)
  - Crown did not accept a public trust doctrine in the case, but left the door open for it to be argued.
  - Reliance on public trust doctrine cannot be absolute. A broader strategy is needed. **The essential goal would be to develop a flexible environmental cause of action that can be brought by public interest plaintiffs. It should capture the idea that the crown holds public lands and resources on behalf of present and future generations of Canadians and the Crown must therefore be held accountable for how it deals with those lands and resources,**

and the environment generally.

- The *Guerin* case is a landmark case in establishment of fiduciary law in the context of Crown-aboriginal relations. Recognition of public fiduciary obligations has the potential to expand the role of civil actions as a means of reviewing government actions.

- **Gage 2008; Asserting the Public's Environmental Rights**
  - If it can be argued that the public has legal rights regarding the environment, then the relationship between the public, the crown, and industry will be changed.
  - Nature of Public Environmental Rights
    - Public rights are legally enforceable rights held by the public at large.
    - In *Canfor* the SCC states that there are public environmental rights deeply rooted in the CL
      - EG: running water,r the air, the shore, the sea
    - Public rights can play an important role in environmental law:
      - 1) Counter to private rights that otherwise dominate legal analysis; they emphasize public access to resources that are often privatized
      - 2) Public rights reflect how the environmental community often talks about air, water, and land use issues
      - 3) Unlike Charter rights, public rights are not limited to claims involving human health; they apply to issues where the public has an historic use of, or interest in, environmental features.
  - What public environmental rights exist?
    - There is judicial and statutory authority supporting the existence of PERs
    - Right to use air, fish and continued existence of fish habitat; water for navigation; water for domestic purposes; etc
  - Public Rights and Conservation
    - Traditionally public rights have been understood in terms of the right to make use of land and resources. There is evidence of right to protection as opposed t just use.
      - 1) Canfor suggest as much. Canfor was held liable for the fire despite no suggestion that the public was likely to use the timber in question
      - 2) The public includes current and future generations
      - 3) Aboriginal cases have held conservation to be a valid legislative objective that can justify interference with aboriginal rights. Similarly aboriginal title emphasizes the need to manage the land in a manner that recognizes the communty's bond to the land.
  - Using public environmental rights: Standing in public nuisance claims:
    - Primary obstacle in asserting public rights through public nuisance has been the restrictive rules about standing.
      - In general only the AG can bring a claim
    - Exception: An individual who has suffered special harm
    - *Hickey v. Electric Reduction Co*: Fishermen did not have standing regarding an oil spill because they merely suffered more harm from the impact of the spill. The harm was not peculiar to them.
    - Challenging Hickey:
      - 1) It is a trial level decision and has rarely been applied
      - 2) It is likely the courts will abandon the current public interest standing requirements in public nuisance; the courts already apply a new standing test in administrative law and constitutional law.

- Interpreting Environmental Laws

The Public's environmental interests are protected by statute alone	The public has common law rights in respect of the environment
Government's job is to balance private rights and environmental interests; where there is a conflict, private rights should prevail because it is the earlier of the two	Government's job is to protect both public an private rights; where there is a conflict, the public rights should prevail because it is the earlier of the two
Until environmental legislation is enacted, the environment has no legal protection. Any new legislation is thus an interference with pre-existing private rights	Environmental legislation merely expands the CCL public nuisance rights. Private landowners are already forbidden from infringing public rights, so new legislation will not infringe private rights
Government has discretion to allow interference with environment. If it wants to fetter that discretion it would do so in clear language	If legislator intends to give government discretion to interfere with public rights, it must do so explicitly.
The government owes procedural fairness to people directly affected, but not to the public at large	Public rights are as significant to government decisions as private rights. The government must consult with the public and specific interests most directly affect by decisions

- Public trust doctrine:
  - Holds that there are some public rights so important that the Crown holds them in trust for the public.
  - Public rights do not depend on the existence of a trust for their legal effect. Nonetheless, the existence of such a trust could only strengthen the legal effect of such rights.

Chapter 3: Jurisdiction over the Environment

R. v. Fowler 1980 SCC:

- Deposited wood debris in stream
- Deposit of any waste was an offence, regardless of harm to fish habitat. Held ultra vires

R. v. Northwest Falling Contractors Ltd. 1980 SCC:

- Deposit of substance deleterious to fish habitat is vires

R. v. Crown Zellerbach 1988 SCC:

- Prosecution under Ocean Dumping Act. There was no clear connection between the charge provisions and fish or fish habitat, so Crown could not rely on s.91(12).
- **Marine Pollution was a matter of national concern. Had singleness, distinctiveness and indivisibility. Impact on provincial jurisdiction of recognizing new federal head of exclusive power justified in the circumstances.**
- LaForest dissent: Fear of assigning environment to federal government will pset the balance of powers.
- **National Concern Doctrine:**
  - 1) Separate form Emergency doctrine
  - 2) Applies to new matters and matters that although originally of a local or private nature in a province, have since become matters of national concern

- 3) **To qualify**:
  - **Must have singleness, distinctiveness and indivisibility that clearly distinguishes it from provincial matters. A scale of impact reconcilable with distribution of powers.**
- 4) On issue of singleness etc: it is relevant to consider twhat would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of intra-provincial aspects of the matter.
  - This is the **provincial inability test**.
- Application:
  - Distinction between salt and fresh water limits applicability of the act in so far as it impacts provincial jurisdiction.
  - …
- LaForest DISSENT:
  - The act tries to regulate an activity wholly within a province.
  - "the potential breadth of federal power to control pollution by use of its general power, is so great that without resort to the specific arguments made by the appellant, the constitutional challenge would be to limit its scope. "
  - The point is fear of erosion of division of powers through national concern over environment

Friends of Oldman River Society v. Canada 1992 SCC:b

- The minsiter of trasnport issued permit under NWPA without applying EARP. Minister of Fisheries refused to apply either the fisheries act or EARP process.
- "Protection of our environment has become one of the major challenges of our time..."
- the guideline orders requires any federal decision maker to screen any project that will have an environmental effect on any area of federal responsibility.
- Since the nature of the heads of power vary, so to do the environmental concerns that may be taken into account under a given head of power.
- The guideline orders has two fundamental aspects
  - 1) Deals with environmental impact assessments to facilitate decision making under federal heads of power.
    - Vires as it falls to matters under s.91
  - 2) The procedural elements that coordinate the process of assessment. Clearly vires either as an adjunct to thte specific s.91 powers or under POGG
- The guideline orders are in pith and substance nothing more than an instrument regulating the manner in which federal institutions must administer their duties. Any intrusion on provincial matters is merely incidental to the pith and substance of the legislation.

R. Hydro-Quebec 1997 SCC

- Accidental discharge of PCB waste into a Quebec river. Charged under CEPA.
- DISSENT:
  - Division of powers analysis is well established.
    - 1) Determine pith and substance
    - 2) See if the law can be assigned to a head of power
  - Respondent: True goal is regulation of the environment writ large
  - Appellant: Object of Part II of Act is regulation/control of pollution by toxic substances
  - Impugned provisions aimed at protecting environment and human health from any harmful substances.
  - <u>Can it be justified under Criminal Law Power s.91(27)</u>

- Criminal law must meet three requirements: Prohibitions, Penalties, Public Purpose.
- Criminal law definition should not be frozen in time nor confined to a fixed domain of activity (*RJR MacDonald*)
- Peace, order, security, health, morality: usual domains of criminal law (Margarine Reference)
- Colourable attempts at invasion will be declared ultra vires
- Legitimate **public purpose**:
  - Argues Act related to health.
  - **Agrees with majority that protection of environment is a legitimate criminal public purpose, analogous to the Margarine Reference list. BUT the structure of Part II is not intended to prohibit toxic pollution, it is directed merely to regulating the pollution.**
- Prohibition backed by penalty
  - Whether act is prohibitive or regulatory is often more art than science.
  - Simple inclusion of prohibitions and penalties does not make Act criminal law
  - The more elaborate the regulatory scheme, the more likely it will be characterized as regulation by the court.
  - In part II, the word prohibition only appears once in the act, and it coupled with the discretionary "may"; the minister may prohibit.
- POGG: Does not have singleness, distinctiveness, and indivisibility. No need to examine rest of test.
- T&C: Not a chance

- MAJORITY:
  - **it is incumbent on the courts to secure the basic balance between the two levels of government envisioned by the Constitution. However, in doing so, they must be mindful that the Constitution must be interpreted in a manner that is fully responsive to emerging realities and to the nature of the subject matter sought to be regulated.**
  - To assess Constitutional validity, look at division of powers and see if the provisions falls within one of them. If ti does, it is valid.
  - Pith and substance: dominant purpose or true charater
  - A discrete area of environmental legislation can fall within the NCD if it meets the Crown Zellerbach criteria.
  - **The general thrust f Oldman River is that the constitution should be interpreted to afford both levels of government ample means of protecting the environment while maintaining the general structure of the Constitution.**
  - Criminal law power is plenary and only requires Prohibition back by penalty (also needs public purpose though)
    - The only limitation is that the power cannot be employed colourably
  - Protection of environment is clearly within Margarine criteria; it is a public purpose of superordinate importance.
    - In line with international organisms
  - Purpose of criminal law is to underline and protect fundamental values. S
  - Use of criminal law power does not prohibit province from regulating environment either independently or to supplement federal action.
  - The respondent focuses too narrowly on one part of the act. **Broad wording is unavoidable in environmental protection legislation**.

- The act has prohibition backed by penalty, underlined by a valid criminal purpose. It is valid criminal legislation

Chapter 4: Environmental Regulation

Part 2: Environmental Standard-Setting and Forms of Standard

Environmental Standard Setting

- Standard setting is usually a four stage chronological process:
  - 1) Setting an objective
  - 2) Developing criteria
  - 3) Establishing an ambient quality standard
  - 4) Defining an individualized operational standard.
    - Issue a license with specific compliance obligations
- Under command and control, the license or permit supplies the command. Control refers to monitoring and enforcement
- **Tollefson 2008; Setting the Standard**
  - **Standard Setting Processes**
    - 1) All standard setting should in theory start from a clear definition of the overarching outcomes that the regime seeks to achieve. Usually framed in broad categorical terms (EG: secure safe drinking water; protect biodiversity). Where standards take the form of hard law, the articulation of the threshold objecives usually occurs be means of legally enforceable regulations (and sometimes in legislation)
    - 2) Then, identify the criteria by which to gauge whether the objective(s) are being met. Typically a daunting scientific task.
      - Range and interaction of threats and systems is complex, inevitable knowledge gaps in the dose-to-response relationship and as such a pragmatic approach is often taken, dealing with the greatest/most obvious concerns
    - 3) Then form ambient quality standards. Has technical and political dimensions
      - Taking data generated by criteria-identification process and evaluate it to see how best to achieve objectives. Must take into acount cost-benifits, risk-acceptability, etc.
      - Ambient standard usually thought of in terms of environment's carrying capacity.
    - 4) Move from statement of desired outcomes to creating standards that define the permissible behavior of the individual party the standard is purporting to regulate.
      - Again scientific and political
    - For air and water permits, Canada tends to express discharge standards in terms of an upper limit for mass of specific substance that can be discharged in a given period of time. The usa uses technology based permits as a general rule.
  - **Forms of Standard**
    - Three main forms of standards to influence behavior
    - 1) **Performance based standards**: Specific and measurable indicator of a desired objective, leaving broad discretion as to how to achieve the result to the regulated party
    - 2) **Technology based standards**: Silent about outcome, but specify a particular technological requirement or mode of operation thought to be optimal for achieving the standard.
    - 3) **Management based standards**: Eschew specification of both outcomes and means, opting to promote achievement of objectives by obligating parties to undertake specific management-planning activities.
    - Each standard intervenes at a different stage of production.

- Planning stage: Management based; Acting stage: tech based; Outputs: performance based
- Prescriptive debate: argument as to whether performance and management based approaches are superior because they are less prescriptive than technology standards.
  - Tollefson points out that this is almost a false argument: Technology standards clearly prescribe production methods, but do no tprescribe management planning and outcomes or outputs. Similarly, prescriptiveness of management standards can vary widely from simply requirign an environmental management system, to highly detailed measures requiring government sign-off. Performance standards also vary: Specificity of standard can vary, usually depends on whether standard is qualitative or quantitative. Qualitative: Thou shalt maintain slope stability and prevent soil erosion. Quantitative: No falling on slopes greater than 35 degrees.
- Autonomy v. certainty:
  - Are performance standards superior in terms of certainty? Qualitative standards rate much higher in terms of private autonomy. But autonomy impinges on certainty of achieving objective. The more generic the qualitative standard, the higher the risk the objective will b ecomprimised.
- Measure, evaluate, verify performance
  - Theoretically best quantitative measure would offer direct measurements of an ambient environmental value
- Choosing optimal form of standard
  - Context dependent

Part 4: Overview of Canadian Regulatory Models

Fisheries Act:

- Two key sections relevant to environmental protection are its habitat protection and pollution prevention sections 35(1) and 36 repsectively.
- **s.35(1) HADD Habitat protection**
  - HADD Harmful Alteration, disruption, or destruction of sigh habitat
  - Written out at page 208
  - It is a performance standard: Aims to prevent impact pf parties on the environment byfocusing on the results of their activities. It does not tell firms how to achieve compliance.
  - Effort by environmental groups to invoke s.35(1) to exercise control over DFO decisions has been generally unsuccessful.
    - **Ecological Action Centre Society v. Canada**
      - Sought JR of Variation order allowing drag fishing. Society claimed it was contrary to law bc it allowed HADD and exceeded director's jurisdiction for the same reason.
      - Act confers absolute discretion on minister in matters of issuing license
      - s.35 does not impose blanket prohibition on HADD. HADD allowed if authorized.
- **s.36 Pollution Prevention**
  - Critics says it is overbroad because it creates zero tolerance for marine pollution even where the deleterious substance that has been discharged caused no actual harm to the environment.
  - s.36(3) written out at page 211
  - “Deleterious Substance” defined in subsection 34(1) and written out page 211
  - A performance based standard
  - s.36(5) enumerates scope and includes certain exceptions (some substances, sites, works, and undertakings)

- If an activity falls outside the exceptions is is by default included.
- Both BCCA and OCA agree that “any water” under 34(1) is a zero tolerance standard. It is not a reference to the water into which the discharge actually occurs, but literally any water.
- **R. v. MacMillan Bloedel 1979 BCCA**
  - Once determined that bunker C oil is deleterious and it has been deposited, the offence is complete; there is no need to determine whether the water itself was rendered deleterious
  - Had parliament intended to require the water to be rendered deleterious, they would have said so
- **R. v. Kingston (City) 2004 OCA**
  - Landfill leaking into Cataraqui river.
  - 34(1)(a) no stipulation in paragraph a that the substance must be proved to be deleterious to the receiving water. The language is clear; the substance is deleterious if, when added to water, it degrades or alters the quality of the water to which it has been added.

Richler 2005; Kingston and the Criminalization of Harmless Pollution

- Argues that s.36(3) is overbroad and therefore contrary to s.7 of the Charter. Invokes BR Motor Vehicle Reference 1985. Risks criminalizing conduct that is not harmful. A law that is broader than necessary to accomplish its purpose violates the PFJ because an individual's rights are limited for no reason.
  - Says s.36(3) does not look at real world effects, and that is why it is overbroad (as compared to s.35(1) that is not overbroad according to *R. v. Levesque* OSC).
- Argues that proving deleteriousness should be onerous because the Act imposes criminal or quasi-criminal sanctions.
- No value in deterring harmless pollution....*Oxymoron and stupid*

<u>The Canadian Environmental Protection Act</u>

- Often considered cornerstone of federal environmental law
- **A Key feature:** its focus on classification, identification, and regulation of chemicals in use or proposed for use in Canada
- CEPA has 12 parts. Key parts include:
  - Part 3: Provisions relating to public participation
  - Part 4: Pollution prevention
  - Part 5: Toxic substance control
  - Part 6: Biotechnology
  - Part 7: Pollution control
  - Part 8: Emergency orders and measures
  - Part 10: Enforcement
- Public participation plays a key role in CEPA. Various provisions to keep public informed.
- **Action forcing provisions**: Allows members of public to trigger investigation into violations of CEPA, and in limited circumstances, commence their own environmental protection where the minister has failed to conduct or report on an investigation.
- **Action for damages**: There is a provision that allows members of the public to commence an action for damages resulting from losses arising from violations of CEPA.
  - No such action has been brought to date
- In many ways heart of CEPA is Part 5: control of toxic substances.
  - **Part five has two step procedure for regulating toxic sunstances.**
    - **1) Assessment of the risks associated with the substance. If deemed toxic, then**
    - **2) Consider how identified risks can be: managed, reduced, or eliminated through**

regulation, alternative measures or both.

- All substances used or proposed for use in Canada must initially be listed on either the Domestic Substances or non-domestic substances lists. Non-domestic substances
  - Domestic includes about 23,000 chemicals in use in Canada when CEPA enacted
  - Substances on non-D list are prohibited from import or manufacture in Canada until approved under CEPA

- PCB exports banned under 35(1) but NAFTA 11 claim made and S.D. Myers paid 6 million dollars.

~~Gaines 2006; Environmental Policy Implications of Investor-State Arbitration under NAFTA Chapter 11~~

- ~~The PCB export ban was politically motivated, not environmentally motivated.~~
- ~~Canadian Swan Hill facility polluted air and water, nothing edible within 30 km.~~
- ~~Canada's strongest policy argument was Basel Convention self-sufficiency principle: Canada had obligation to ensure adequate domestic disposal facility.~~
- ~~Not an expropriation under NAFTA 1110. Expropriation connotes a taking of private property and transfer to government. Regulatory action does not generally amount to expropriation.~~

~~Notes~~

- ~~NAFTA PCB decision underscores the threat of such agreements to national sovereignty~~
- ~~Baptist-bootlegger theory: Lobbying works best when two very different groups support it (for very different reasons)~~
  - ~~PCB export ban: Canada hid political motivation behind environmental concerns~~
- ~~MMT fuel additive: Canada settled before NAFTA occurred for 20 million and recanted that MMT was environmentally harmful, and lifted MMT ban.~~

Chapter 5 Compliance and Enforcement

Part 1: Regulatory Compliance and Enforcement Strategies

Castrilli 1999; Canadian Policy.....”

- Compliance: The state of conformity with the law
- Enforcement: Activities that compel offenders to comply with the law
- **Overview of Federal and Provincial Compliance Measurement**
  - Federal legislation (CEPA and the FA) enforces environmental standards primarily through command and control: statutory prohibitions and regulations. Violations are prosecuted virtually the same as criminal code offences. Expensive, time consuming.
  - Provincial legislation tends to be more multifaceted and include: prosecutions, administrative orders, ticketing for minor offences, cancellation of permits, administrative monetary penalties
- **Correlating Compliance and enforcement outcomes with environmental results**
  - Canada's capacity to measure the relation between compliance and enforcement and the state of the environment is rudimentary.
  - Regulations and their provisions do not necessarily consider all aspect s of environmental protection
- **Conclusions:** Canada should establish performance objectives and measures for enforcement and compliance as they relate to environmental protection

Vigod 2007; Smarter Regulation: The Case for Enforcement and Transparency

- Nothing worth reading

Part 3: Issues in Environmental Law Enforcement

- **Levis (City) v. Tetrault; Levis (City) v. Quebec Inc 2006 SCC**
  - Regulatory offences: Incidental sanctions whose purpose is to enforce the performance of various duties, thereby safeguarding the general welfare of society.
    - The are not criminal offences because they do not require fault. (they are not subject to the presumption of full mens rea)
  - Absolute liability offences still exist, but they are an exception and require clear expression of legislative intent.
    - Guilt follows from commission of the act.
  - Penal liability for absolute liability offences would violate PFJs where a conviction would expose the accused to imprisonment.
- **R. v. United Keno Hill Mines Ltd. 1980 YJ**
  - Keno pled guilty to depositing waste into the Yukon river (PRE CHARTER)
  - Sentencing corporations is different than sentencing people
  - Special considerations:
    - **In Environmental cases, the court should vary the severity of the sentence in accord with the nature of the environment affected and the extent of the damage**
      - **Considerations**: Special nature of area, extent of harm, peripheral impacts, prospects and costs of remediation, duration of damage, potential damages had actions persisted. Environment's resilience and capacity to repair itself are crucial considerations
  - Coroporate Offenders:
    - Size, wealth, nature of corporation all matter.
  - <u>Sentencing corporations:</u>
    - <u>Criminality of conduct</u>: Severity should be directly linked to degree of criminality inherent in corporation's conduct.
    - <u>Extent of attempt to comply</u>: Less severe if corporation diligently tried to comply. Government inaction or tacit allowance of non-compliance mitigate against harsh penalty
    - <u>Remorse</u>: Talk is cheap, courts want to see action. Speed and efficacy of rectification. Voluntary reporting to authorities. Personal appearance of corporate execs in court.
    - <u>Size of corporation:</u> Bigger, wealthier corporations deserve bigger fines
      - Cannot avoid large fines by establishing a network of smaller corporations
    - <u>Profits realized by offence</u>: In the absence of conclusive evidence from the corporation, the court can rely on any reasonable estimate the Crown submits.
      - Generally resitution is better means of attacking illegal gains than a fine.
        - Restitution can embrace: Loss to corporate competitors, damage to public an dprivate property, the cost of prosecution.
      - Restitution better to compensate victims, fines better for sanctioning criminal conduct
    - <u>Criminal Record</u>: Recidivism suggests profit more important than compliance.
      - Where corporation is not directly involved with the public, fines should be severe because stigma is not as effective.
    - <u>Sentencing Tools</u>
      - Fines alone will not form law abiding corporate behavior.
      - Greater spectrum of sentencing options is required to ensure effective deterrence and prevent illegal economic advantages from accruing to corporations willing to break the law and swallow harsh fines as an operational cost.
      - Fines inadequate: Cost of doing business, leave upper eschalons of corporation unscathed.

- Should place onus on corporate heads to prove existence of working system of control and supervision...

Director and Officer Liability

- **R. v. Bata Industries Ltd. 1992 Ont.**
  - Chemical barrels in various states of decay.
  - Must look at evidence of individual's authority and control.
    - Hierarchy, shares, role, etc
  - Must also look at evidence of responsibility undertaken for waste disposal practices; both undertaken and neglected and undertaken and achieved.
  - **These factors boil down to corporate and social responsibility.**
  - Court discusses role of three director like people.

Wood 2008; Six Principles for Smart Regulation

- Administrative penalties: allow government to issue relatively modest fines for minor environmental violations without incurring costs of prosecution.
- Seem to provide effective deterence
- Concerns: Absolute liability, double jeopardy, lack of judicial scrutiny, high administrative discretion. Trivializes serous problems.
- Conisderations of AMPs:
  - Certainty of punishment most important in promoting compliance
  - Need to ensure that for serious offences, criminal prosecution remains prefered means of enforcement. Stigma of criminal courts necessary for true crimes...*bs*
  - Charter considerations.

Part 5: Citizen Enforcement

- Promote more competition in law enforcement. Protect against political forces.
- Indemnification of costs for successful citizen crucial
- In BC and Alberta, private prosecutions are always stayed by the AG

Tollefson 2004; Towards a Costs Jurisprudence in Public Interest Litigation

- Private AG has emerged to ensure compliance with federal law (in usa).
- In usa, where private AG is successful, they are paid litigation fees and reasonable attourney costs.
  - Where attourney did it pro bono, courts have held that they should be compensated at the rate their service would have been billed in a private firm.
- One-way costs rules: Allows enforcement by ensuring costs if private group wins, but no risk of costs if they loose.
- In Canada, private prosecutors must establish guilt BARD, in usa, citizen suits are governed by proof on BOP
  - Makes sense (usa). BOP v. BARD is more consistent with resources of parties.

Ferfuson 2004; Challenging the Intervention and Stay of an Environmental Private Prosecution

- Roles of Pps:
  - Cure to working entente between industry and government
  - Important safeguard against corruption in Crown prosecution decisions
  - Avoids laws becoming paper tigars because of government non-enforcement
  - Reassures complying groups that their competitors will not benefit by non-compliance
  - Provides an important civil liberty
- AG intervention is important:
  - Stops malicious prosecutions by individuals

- Given time and expenses required to privately prosecute, private malice not very liekly.
- **Kostuch v. Alberta 1995 ACA**
  - One of the Oldman river private prosecutions
    - First 7 were either stayed by the AG or disposed of by the courts
  - High deference to Alberta AG and government
  - Appeal of stay of proceedings
  - Charter s.7
    - Private interests are not matters for criminal prosecution. The fundamental consideration in any decision regarding prosecutions is the public interest.
    - AG is a meber of the executive and answers to the legislature and the public
  - Extent of Power of review
    - Assuming court can review prosecutorial discretion, it could only do so if there was **flagarant impropriety.** Unreasonableness is not the standard.
      - The judiciary and the executive DO NOT MIX
  - **Flagarant Impropriety:** can only be established by proof of misconduct bordering on corruption, violation of the law, or bias.

Chapter 6 JR of Environmental Decisions

Part 1: Administrative Law and JR

- Admin law: defining and governing the relationship between citizens and the state. It is intimately connected with the rule of law
- **Rule of Law:** The notion that the state derives its power to make decisions that affect individual rights through law. As such, it is legally accountable for the exercise of that power.
- All decision makers must comply with legally mandated procedures when exercising statutory power. Also governed by the common law principles of procedural fairness
  - What **procedural fairness** requires in any case depends on three main factors:
    - 1) Nature of the decision
    - 2) Relationship between the decision maker and the affected party
    - 3) the effect of the decision on the rights of the party in question
- **Judicial Review**
  - Ultimate responsibility for supervising administrative decisions lies with the superior courts.
  - There are levels of deference. A privative clause indicates legislative intent for high deference
  - Court's role is to review the legality of administrative decisions, not its merits.
  - **Common grounds** for JR:
    - Substantive ultra vires (decision maker acting beyond scope of statute)
    - Failure to take account of a relevant consideration
    - Unlawful fettering of discretionaryReal or apprehended bias
    - Exercising statutory discretion for an improper or discriminatory purpose or in bad faith
    - Breach of procedural fairness
    - In limited circumstances, errors of law and/or fact
  - **Main remedies**:
    - Certiorari: Order quashing administrative action
    - Mandamus: Order requiring authority to act
    - Prohibition: Order prohibiting authority from acting
    - Declaratory relief: Order seeking judicial declaration of existing rights, duties, or powers

- * Important and closely related is interim injunctive relief. It has been difficult for interest groups to get this relief in Canada, even where irreparable harm to the environment is likely.

- **New Brunsqick v. Dunsmuir 2008 SCC**
  - By virtue o the rule of law: All exercise of public authority must find their source in law. All decision making powers have legal limits, derived form the enabling statute, the common or civil law, or the constitution.
  - JR must balance rule of law and legislative supremacy.
    - **In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent**
  - The legislative branch cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the Constitution. Even a privative clause is limited.
  - There are two standards of review: Correctness and Reasonableness simpliciter
  - **Reasonableness:** Deferential standard
    - On this standard court inquires into the qualities that make a decision reasonable, referring to both the process of articulating the reasons and the outcome.
      - Concerned mostly with the existence of justification, transparency, and intelligibility within the decision making process.
      - Also concerned with whether the decision falls with a range of possible, acceptable outcomes which are defensible in respect of the facts and law
    - **Deference:** Determined by reference to the particular expertise and experiences of the courts and the decision makers, and to the different roles of the court and administrative bodies in the Canadian constitutional system.
  - **Correctness**:
    - This standard is applied in respect of jurisdictional and some other questions of law
    - Promotes just decisions and avoids inconsistent an unauthorized application of the law.
    - **When applying the correctness standard, the court will show no deference to the decision maker;s reasoning process; it will undertake its own analysis of the question. The court will determine if it agrees with the determination of the decision maker, if it doesn't, it will substitute its decision and provide the correct answer.**
  - **Jurisdiction**: Narrow concept, and only asks whether the tribunal had the authority to make the decision
  - Where the question at issue is one of general law “that is bothe of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise” the standard is correctness.
  - **Judicial Review Process:**
    - 1) Determine if the jurisprudence has already determined satisfactorily, the degree fo deference. If not, then:
    - 2) courts must analyze the factors making it possible to identify the proper standard of review
      - this analysis is contextual and depends on application of a number of factors including:
        - 1) Presence of privative clause
        - 2) Purpose of the tribunal, determined by interpreting enabling statute
        - 3) Nature of the question at issue
        - 4) The expertise of the tribunal
        - Not always necessary to consider all the factors

Part 2: Standard of Review in the Environmental Law Context

- **Weir v. BC EAB 2003 BCSC**: Pure question of law, then apply correctness standard
  - Pushpanathan factors: Privative clause, tribunal expertise, Purpose of statute and provision, and nature of the question: fact, law, or mixed.
- *Algonquin*: Question of jurisdiction, then apply correctness standard\
- *CPAWS*: Exercise of ministerial discretion, suggests high degree of deference
- Prarie Acid Rain (AKA *TrueNorth*): Where statute grants broad dicretion, high degree of deference.
- **Algonwuin Wildlands Leaugue v. Ontario 1998 ODC**
  - Minister approcel forest plans before Forest management manual complete. The Enabling statute required minister to comply with the manual. Decision ultra vires
- **CPAWS 2003 FC**
  - Exercise of discretion involved polycentric mandate, weighing competing interest. Broad responsibility on minister. Decision fact oriented. Road decision not patently unreasonable.
- **TrueNorth 2006 FCA**
  - Interpretation of a statute (CEAA in this case) the standard is correctness. No privative clause, no particular expertise, and interpretation issues are legal.
- **Green 2002; Discretion, JR, and the CEAA**
  - CEAA is vague about balance of economic and natural interest. Gives responsible authority near complete discretion.

Part 3: Grounds for Judicial Review

- Reliance on irrelevant considerations:
  - **Wimpey Western Ltd. v. Alberta 1983 ACA**
    - That an Act does not place limitations on Director's discretion, does not mean their discretion is unfettered.
    - **Test is whether the consideration in question falls within the intent and purpose of the Act**
  - **Imperial Oil Ltd. v. British Columbia 2002 BCTC**
    - BC would not issue permit until civil claims settled with landowners
    - Mandamus appropriate where irrelevant consideration is the only reason for failing to issue the permit.
    - Preclusion from delegation: The permit would only be issued when Salmo and owners said they had an acceptable agreement with Imperial. This effectively delegated decision to Salmo and was improper.
- Discrimination:
- ***Moresby Exploreres v. Canada 2007 FCA***
  - Dispute about management of Gwaii Haanas National Reserve. Haida/non-Haida tour operators get different allowable user limts. Calls the plan administrative discrimination.
  - **In the context of legislation conferring broad discretionary regulation making power on the Governor in Council, discrimination (in the administrative law sense) is permitted unless it is expressly prohibited**
  - *What is "administrative discrimination"?*
  - Discrimination on the basis of race is contrary to public policy where it simply reinforces stereotyeps, amelioration discrimination is allowed.
- Procedural Fairness:
  - Dunsmuir: A fair procedure is said to be the handmaiden of justice....Rule of law...blahblahblah

- ***Le Chameau Explorations Ltd. v. Nova Scotia 2007***
  - Shipwreck explorers denied permit because UK said they claimed wreck.
  - Existence of a Duty of Procedural Fairness
    - A general CL principle that a duty of procedural fairness lies on every public authority making a decision which is not of a legislative nature and which affects the rights, privileges, or interests on an individual
  - Scope and Conduct of Duty
    - Depends on context of the statute and rights affected. Underlying all the factors is that the purpose of the participatory rights contained in the duty of procedural fairness is: 1) to ensure that administrative decisions are made using a fair and open procedure appropriate to: 2.a) the decision being made and 2.b) its statutory, institutional, and social context, 3.a) with an opportunity for those affect to put forward their views and evidence fully, and 3.b) have them considered by the decision maker
    - Nature of the decision, process followed in making it. The more the process provides for judicial type decision making, the more likely trial model procedural protections will be required
    - The nature of the statutory scheme and the terms of the statute: Greater procedural protections required where there is no right of appeal, or when the decision is determinative of an issue.
    - Legitimate expectations of the person challenging the decision: Part of the doctrine of fairness and natural justice; it does not create substantive rights.
    - Must account for and respect, choice of procedure made by the agency itself: Particularly where the statute leaves it to the agency to choose its own procedures, or when the agency has expertise in determining the appropriate procedures.
  - Certiorari appropriate here. Applicant denied right to make submissions.
- Failure to give reasons:
  - Rarely invoked and very rarely successful. Quasi-judicial bodies have duty to provide reasons. Cabinet etc, never have to give reasons.
- ***Pembina Institute for Appropriate Development v. Canada 2008 FC***
  - Kearl tar sands project. P submits Panel failed to provide cogent rationale for its conclusions
  - Panel must explain in a general way why the potential environmental impacts, either with or without mitigation measures, would be insignificant. Panel is not required to give in-depth explanation of the scientific data it relies on.
  - Panel has expertise, and any conclusions drawn from data gets high deference. But deference to expertise is only triggered when those conclusions are articulated.

Part 4 Public Interest Standing

- **Anand 1982; Financing Public Participation in Environmental Decision Making**
  - Public intervention softens the two-sidedness of agency-interest relations and curbs agency capture.
  - **Agency Capture by regulated interests because**:
    - 1) Limited resources are allocated to administrative agencies in dealing with a hige mass of activity
    - 2) Dependence of agency on regulated interests for political support. Independent tribunals cannot depend on government protection in face of vocal opposition
    - 3) The public interest mandate is not a unitary thing.
  - Public participation benefits investigation and adjudication in four main ways:

- 1) Provides decision makers with greater range of ideas and information
  - Provides a different viewpoint on the matter
- 2) Enhances public acceptance of judicial and administrative decisions
- 3) Can promote autonomy of agency, by giving broader perspective and alternative bases of political support
- 4) Presentation of alternative views forces decision makers to be more thorough in their analyses and more clear in their reasons.

- **Public Interest Standing (PIS)**
  - **Test for PIS:**
    - 1) Is there a justiciable issue?
    - 2) Does the applicant have a genuine interest in the issue to be tried?
    - 3) Is there another reasonable and effective manner for the case to be brought forward?
  - **Shiell v. Canada (Atomic Energy Control Board) 1995 FC**
    - Corporate respondent operated uranium mine and mill. Shiell lived in province several hundred km away
    - No personal interest in the proceedings.
      - Decision will not affect her any more than anyone else in general public
    - It is essential to balance access to courts and scarce judicial resources
    - *Case is probably the higher end of refusal to grant standing. More liberal cases exist*
  - **Algonquin Wildlands League v. Ontario ODC**
    - Non-profit public interest environmental group with history of responsible involvement in forest and land use planing in the area. It is a justiciable issue, and there is no other reasonable or effective manner to bring the issue to the court. Standing granted
  - **Minningwatch Canada. v. Canada (DFO) 2007 FC**
    - Affirms PIS test
    - Also considers purpose of CEAA: **Fundamental purpose of the CEAA is to ensure that projects requiring an EA are considered in a careful and precautionary manner before federal authorities take action in connection with them**
    - MWC contesting that the impugned decision represent a a departure from a positive duty to consult the public. To this effect, the issue of public participation is of import, not just to this case, but to future projects across Canada.
  - **s.21 CEAA** makes public consultation mandatory when conducting an EA by means of a comprehensive study
  - By the time the Ras changed track, and chose to proceed by screening, the documentation shows that public consultations were already underway.
  - Standing and serious and justiciable issue are closely connected and often merge.
  - MWC also has genuine interest.
    - **Genuine interest criteria:** applicant seeking PIS must demonstrate a longstanding reputation and it must do significant work on the subject-matter of the challenge, and its interests must be greater than that possessed by a member of the general public.
  - Lack of participation in an assessment does not preclude getting standing.
  - Factor 3 of test: Public interest standing can be denied if another group will be more directly affected. Rationale: those most directly affected by decision are often in best position to bring to the court the information necessary for an appropriate resolution of the issue.
  - Geographic proximity is not a bar to assessing PIS

Part 5: Interim Injunctive Relief

- **Tollefson 2002; Advancing an Agenda**
  - RJR MacDonald **test for interim injunctive relief** (IIR): 1) Is there a serious issue to be tried? 2) Would the applicant suffer irreparable harm if the injunction were refused? And 3) does the balance of convenience between the parties justify the relief sought?
    - Also, courts require indemnification for damages in event claim is ultimately dismissed.
- *****What about using indemnification for costs in SLAPP cases? Require company to provide security?*****
  - *Wilderness Society v. Banff* court held that irreparable harm would not result from clear-cutting 300 year old tress in national park
  - Irreparable refers to the nature of the harm, not its magnitude
  - usa courts almost always consider harm to environment as irreparable.
- **Algonquin Wildlands v. Ontario 1996**
  - Stage 1: Low threshold. Unless case on the merits is frivolous or vexatious, or pure question of law, then go to stage 2
  - Stage 2: Irreparable harm
    - It will be rare that a public interest group making such an application will suffer irreparable harm. It would be illogical to grant standing, then deny at this stage. Move to stage three.
  - Stage 3: Balance of convenience
    - Some irreparable harm to natural growth and wildlife in area.
    - Crown hampered in pursuing its policy of use of Crown lands. Crown revenue at least deferred, loss of employment will ripple through community.
  - No injunction should be granted
- **Imperial Oil Resources Ventures Ltd. v. Canada (MFO) 2008 FC**
  - Kearl oil sands poject (KOS)
  - DFO delivered letter to Imperial stating that in their opinion the Authorization had be rendered a nullity as a result of the earlier judicial decision. Imperial filed judicial review.
  - Serious issue to be tried. Should be heard in court.
  - Not convinced that applicant will suffer irreparable harm is the stay is not granted. Imperial argued that work stoppage would create domino effect on 2012 timeline. But estimates for work were crude, and besides, if Imperial started work then lost in court, even more money would be wasted.

Part 6 Costs in JR Proceedings

- **Tollefson 2009; Costs in Public Interest Litigation**
  - Spectre of adverse costs looms large for public interest litigants
  - Traditionally costs follow the event. Three rationales: compensation, deterrence, and spoils
  - Courts have broad discretion for costs awards
  - **Two-way costs regimes**: Award can go either way. Litigant can receive or be liable for costs depending on which party prevailed on the merits
  - **No-way costs regime:** Party bears its own costs regardless (usa approach)
  - **One-way costs regime:** Where party granted public interest standing, they are entitled to full indemnification, and are shielded form adverse costs
  - *Okanagan Indian Band 2003 SCC* Court can order governemnt to pay an impecunious litigant's costs. (rarely done)
  - England: Protective Costs Orders

- Predictability of costs for public interest litigants is an important goal for future law reform.
- Canadian costs awards are rife with uncertainty and inconsistency
- Ex-post facto awards: Court well poised to assess whether ordinary rules should apply. But leaves uncertain costs awards until the end.
- *Okanagan:* must be mindful of desirability of promoting access to justice and public benefits of this type of litigation
- ***Incredible Electronics***:
  - Two test for determining whether a case falls within public interest litigation
    - 1) **Public Importance Test:**
      - Focuses on the nature and significance of the issue(s) in question.
      - The party must be a partisan " in a manner of significance not only to the parties, but also to the broader community."
    - 2) **Public Interest Litigant Eligibility Test:**
      - Is the litigant properly characterized as a public or private interest litigant.
      - *Odhavji Estate*: SCC demarcates two types of PILs:
        - 1) Those that have no direct, pecuniary, or other material interest in the proceedings
        - 2) Those litigants that possess a private or pecuniary interest that is modest in comparison to the costs of mounting the proceeding
  - Debate about whether party's financial status should bear on costs issue
    If test is met, then government and public agencies should not get costs. Third party private interests is a different story.
    - Corporations enjoy broad state-confered privileges like free(ish) mineral extraction rights etc. They are not just like a private citizen
- greater predictability in costs would reduce deterrence because of uncertainty about costs.
- Anticipatory costs are most advanced in England under Protective Costs Orders (PCOs), (but still fairly new): First argued at appeal level in 2005 in ***Corner House***.
  - **PCO criteria**:
    - 1) The issue is of general public importance
    - 2) the public interest requires that those issues be resolved
    - 3) the claimant has no private interest in the outcome of the case
    - 4) having regard to the financial resources of the parties, the amount of costs likely to be incurred, is it fair and just to make the order; and
    - 5) if the order is not made, ,the claimant will probably discontinue the proceedings and will be acting reasonably in doing so
- **Okanagan Order criteria:**
  - 1) The applicant genuinely cannot afford to pay for the litigation and there is no realistic option for bringing the issue to trial
  - 2) that its claim is prima facie meritorious; and
  - 3) that the issue raised by the case is of public importance and not resolved in previous cases.
- In *Little Sisters II* court emphasizes exceptional nature of alternative costs awards and Okanagan Orders.

Chapter 7: Federal Environmental Assessment

- Canadian Environmental Assessment Act (CEAA) came into force in 1995
- Characteristics of a sound EA process include:
  - A strong legislative foundation: Ensures clarity, certainty, fairness, and consistency.
  - Adaptable procedures: Balance adaptability for a diversity of projects and activities without sacrificing certainty and openness
  - Public involvement: Access and influence.
- What activities should be included? Assessment of projects, activities, policies, plans, programs, etc
- **CEAA overview:**
  - Is set out in legislation (unlike EARP Guidelines Order). Less susceptible to government interference, but less easily amended
  - Law Lists regulations: List all regulatory decisions that trigger an EA under CEAA
  - **Preamble** sets out key objectives:
    - Sustainable development, conserve and enhance environment, promote sustainable development that conserves an enhances the environment, integrate environmental factors into planning and decision making, facilitate public participation and provide access to information, exercise leadership in anticipating and preventing environmental harm
  - **s.4(1) Purposes**
    - Ensure projects are considered in a careful and precautionary manner
    - prevent significant adverse impacts
    - promote sustainable developments
    - Eliminate unnecessary duplication in EAs
    - Promote coordination and cooperation with provincial governments
    - Promote communication and cooperation with Aboriginal Peoples
    - Prevent significant adverse effects outside the jurisdiction
    - Ensure meaningful public participation
  - **Application of CEAA**
    - Determined by complex combination of definitions and project lists
      - Dominant reason was constitutional considerations
      - A list would likely exclude unanticipated and new projects
      - Ensure a consistent application of the process
    - Definition of “Project” is crucial. Defined in **s.2**
      - Two parts: one for undertakings relating to a physical work and one for physical activities not in relation to a work
      - Undertakings related to a physical work are considered projects unless they are in the exclusion list
      - Physical activities are excluded unless they fall under the inclusion list.
      - Not all projects are assessed: national security reasons, emergencies, or due to minimal federal involvement
  - **s.5** identifies federal decisions that trigger an assessment.
  - s. 46 to 48 are alternative triggers to s.5 (the transboundary provisions)
- **Scoping Basics**
  - Determining the scope of the activity to be assessed and the scope of the assessment to be carried out
  - Pre-condition to scoping: Determine there is a project as defined under s.2 and for which a

federal authority is exercising a duty, power, or function included in s.5

- **Decisions on scope are critical to the EA process. They determine how the process is defined for the purposes of the assessment, what issues can be raised, and what impacts will be considered**
  - Subject to much CEAA litigation
- Key issue is interpretation of s.15(3) on the scope of the project, cumulative effects, consideration of alternatives, and the role of the public
- For possible types of EA:
  - Screening, comprehensive study, review panel, mediation
  - Over 99% undergo a screening
  - Minister can upgrade from screening to a panel review at any time before during or after screening
- **Key screening** steps: (Page 321)
    - Public notice of commencement
    - determination of scope of project and assessment
    - Screening report
    - Final project decision
  - Transparency and public engagement are limited in screenings.
  - A fundamental question is whether the project is likely to cause significant adverse environmental effects.
- **Comprehensive studies**: (321)
  - 5-10 a year
  - RAs retain much control over the processes and final project decision.
  - **Key mandatory steps**:
    - Notice of commencement
    - Mandatory public engagement at scoping stage, during preparation of the EA report. And before the project decision.
    - Final track decision. Early on project is formally decided to either go through comprehensive study or through panel review
      - Public must be given opportunity to comment, decision is final
  - Coordinated by the CEA Agency. Power limited to process, cannot decide substantive issues
- **Panel Reviews:**
  - 1-5 a year
  - Key differences between panel review and comprehensive study:
    - Process is taken out of the hands of RAs and placed in hands of independent panel members
    - Panel reviews have always, as a matter of practice, invluded public hearings (less clear with studies)
    - Panel reviews involve an enhanced role for the minister of the environment, most notably with respect to scoping
    - The final project decision is subject to Cabinet approval
  - On a project is determined to go by panel, the minister determines the scope of the project, the scope of the assessment, sets the terms of reference, and appoints panel members
  - **s.34 key responsibilities of the panel**
    - Ensure required information is obtained and made available to the public
    - Hold hearings in a manner that offers the public an opportunity to participate

        - Prepare a report that includes conclusions, recommendations and a summary of comments received
        - Submit the report to the Minister and the RA
    - Panel can summon any person as a witness
    - Determination that a project can proceed may be made either on the basis that the project is not likely to cause significant adverse environmental effects or that significant effects are justified in the circumstances
    - Public participation creates transparency. Intervenor funding can be made available
- **Mediation**:
    - All parties must agree
    - Decision taken out of hands of government, parties, intervenors
    - Responsibility fo scoping rests with minister, as does appointing mediator
    - RA retains control over substantive outcome in the orm of the final project decision.

Part 2: The Evolution of Scoping under CEA

- Scoping is critical and has been manipulated by RAs to protect projects from meaningful public participation
- Key litigation issue has been exercise of discretion by RA and minister of the environment in determining the **scope of the project under s.15** and the **scope of the assessment under s.16**
    - Courts apply high degree of deference when reviewing scoping decisions
- **Alberta Wilderness Assn. v. Cardinal Coals Ltd 1999 (Cheviot)**
    - Open pit coal mine proposal near eastern boundary of Jasper National Park
    - Main argument was that joint panel failed to comply with obligations under s.16 (scope of assessment) and with the joint panel agreement.
    - **Overview of duties under CEAA** (page 327)
        - Information gathering: s.34(a). Foster public participation s. 34(b)
        - Considerations: Conduct EA including assessment of: all related operations and undertakings s.15; cumulative effects and their significance ss. 16(a) and (b); mitigation measures 16(1)(d); need for and alternatives to the project 16(1)(e); alternative means of carrying out the project and environmental effects of the alternatives 16(12)(b); capacity of affected renewable resources to be sustained 16(2)(d)
        - Report: rationale, conclusions, recommendations, summary of public comments 34(c)
        - Decisions: the RA must respond to project with approval of governor in council 37(1)(a). Then, RA may take course of action under 37(1), if significant adverse environmental impacts, then approval can be given if justified in the circumstances 37(1)(a)
    - Failure to comply with a requirement of s.16 can be an error of law. Care must be taken to characterize failure as failure to comply with law, rather than as merely an attack on the quality of the evidence and the correctness of the decision.
    - "**Significance**": under 16(1)(b) is subjective determination and does not involve interpretation leading to a possible error of law
    - "**alternative measures**": under 16(2) are circumscribed by the scope of the assessment
    - "Mitigation measures" and "environmental effects" are properly considered together
    - **s.16(1) and (2)** page 329
    - **s.34(a)** page 330
    - **s.35** powers to compel production of evidence (page 330)
        - Here held that joint panel had ample powers to compel

- The panel must substantiate its recommendations made for CEAA. Also s. 35
- Joint review panel breached its duty to obtain all available information. IT failed to compel production of information it should have compelled.
- **s.16(2)** page 334
  - Failed to consider adequately the alternatives.

- **Friend of the West Country Assn. v. Canada (MFO) 1999 (Sunpine)**
  - JR of interpretation of CEAA is on standard of correctness
  - **s.15 and 16** page 336
  - **Independent utility test**: Does the work have utility independent of other projects? Are the bridges independently useful without the mainline road?
  - This is NOT an acceptable test in Canada
  - Once scoped under 15(1), s.15(3) did not require that the EA include construction, modification, ….or other undertakings outside the scope of the project
  - **s.16(1) and 16(3)**
    - s.16(1) is mandatory and requires consideration of factors set out in 16(1)(a) to (e). However, the scope of the factors to be considered are to be determined by the RA pursuant to 16(3). This scoping is discretionary and involves two steps.
      - 1) RA must consider each factor listed in (a) through (e) (because the use of the word “shall”) to the project being assessed.
        - s.16(1)(a) includes cumulative effects. The RA must consider environmental effects that are likely to result from the projects scoped under 15(1), in addition to projects or activities that will be carried out.
      - 2) Involves exercise of discretion granted by 16(3) to determine the scope of this part of the 16(1)(a) cumulative effects factor. **By necessary implication, a decision as to the cumulative effects that are to be considered, requires a determination of which other projects or activities are to be taken into account**. Therefore, it is within the minister's discretion to decide what other projects to include and which to exclude for the purposes of s.16(1)(a) cumulative effects.
    - **When s.16(3) is taken into account, it is plain that while it is mandatory in the sense that it requires a scoping of certain factors in s.16(1), that scoping is left to the discretion of the RA. The scoping of other projects under ss.16(3) and 16(1)(a) places no mandatory duty in that regard on the RA.**
      - *WTF does all this mean? It seems to mean that under s.16(1)(a) the RA must consider cumulative effects. However, when coupled with 16(3), the RA can decide what other effects to include in the cumulative effects assessment. This seems right to me.*

- **s. 15(1), 15(3) 16(1) and 16(3)**
  - One the bridge projects were scoped under 15(1), there was no obligation to include the Mainline road or Sunpine logging operations by reason of 15(3).
    - *This seems like bullshit to me. There was no appeal on the trial judge's finding of no error here. This could be important, bc the appellate court does not therefore decide the issue.*
  - In declining to consider matters outside the scope of the projects and outside federal jurisdiction, the Coast Guard misinterpreted 16(1)(a) and 16(3). It construed the boundaries of the exercise of its discretion too narrowly.
  - Nothing in s.16(1)(a) or 16(3) limits the assessment to sources within federal jurisdiction. Once engaged, the federal RA is to exercise its cumulative effects discretion unrestrained by its perception of constitutional jurisdiction.
  - **Provided the RA does not decline to exercise its discretion by misinterpreting paragraphs**

16(1)(a) and 16(3), it is open to the RA to include or exclude other projects.

- The Coast Guard erred in declining to exercise its discretion regarding cumulative effects by excluding considerations from other projects because they were outside the scoped projects or were outside federal jurisdiction.

- **Prairie Acid Rain Coalition v. Canada (MFO) 2006 FCA (TrueNorth)**
  - Critical decision with respect to JR of project scoping decisions under s.15 of CEAA
  - Oil sands development required the destruction of Fort Creek. DFO scoped the project as the watercourse destruction, did not include the oil sands development.
  - In Sunpine, it was held that JR of interpretation of CEAA by coast guard is on standard of correctness. No difference here. No privative clause. CEAA statute of general application. Administered by broad range of federal authorities. No particular expertise of DFO in interpreting CEAA. Interpretive issues are legal.
    - But exercise of discretion by an RA will normally be reviewed on a more deferential standard
      - *So where the question is interpreting the act, standard of correctness, but when the question is RA discretion, deference is reasonableness*.
      - So long as RA takes into account relevant considerations and does not take into account irrelevant considerations, the court will not re-weigh decision.
  - **Power of DFO under s.15(1)**
    - Argument one: DFO required to scope project based on s.2 definition
      - "Project" defined in s.2
      - s.15(1) allows the RA to determine the scope of the project, regardless of the definition of project in s.2
      - s.5(1)(d) "in whole or in part" refers to the project as scoped by the RA. 5.1.d merely recognizes that a project as scoped by the RA my have multiple parts.
    - Argument two: The power of RA to impose mitigating measures under provisions such as s.20(2) or 37(2) would be rendered superfluous if scope of project does not include the entire physical work
      - This argument is based on reading provisions in isolation. These provision are predicated on the scoping of a project under 15(1)
    - Argument three: based on the *Comprehensive Study List Regulations*
      - Purpose: When a listed project is scoped under 15(1), a comprehensive study, rather than a screening, is required. It does require the RA to scope the work as a project simply because it falls under the list.
      - Nor do Regs purport to sweep provincial jurisdiction into federal jurisdiction. (Oil sands development are clearly provincial
    - Argument four:
      - Policy argument that many sections will wither away from disuse and management of federal aspects will default to provinces.
      - This is okay because **12(4) and (5)** of CEAA recognize that an EA can be carried out under provincial jurisdiction, and the federal RA may cooperate with the province.
    - Argument five: Environmental concerns should be assessed "unconfined by any parsing of the natural world into provincial and federal pieces". Here the appellants are addressing the scope of assessment under 16, not the scope of the project under 15.
      - **The consideration of cumulative effects enables the Rat o consider environmental effects emanating from sources outside federal jurisdiction. This involves scope of assessment, not scope of project.**

- The independent utility test has no application here, same as in *Sunpine*.
- Argument six: Narrow scoping of project would preclude application of ss. 46 and 48 (effects on transboundary and indian interest in land respectively).
  - Again, appellant is attacking assessment under s.16, not scope of project under s.15
  - It is not necessary to rescope the project, the effects can be assessed under the assessment
- No improper delegation: Oil sands provincial

- **Minningwatch Canada v. Canada (MFO) 2007**
  - First case involving post-2003 version of CEAA. Based on size and nature of the proposed mine, the RA looked like it had to go through a comprehensive study. The RA re-scoped the project as the tailing pond only and commenced the screening without public input into scoping decision.
  - Issue: Right of RA to make course of action decision under 20(1)(a).
  - Applicant seeks 6 things (see page 351)
  - The text of s.15 remains the same
  - **The decision to suddenly retrack the Project, appears to have been based on inexistent "new" fisheries data. This contrasts sharply with decision to conduct a comprehensive study**
    - **Really at issue is whether the RA can legally refuse to conduct a comprehensive study on the grounds that the project as scoped does nt include a mine or milling facility.**
  - Overall, ss. 2,5,13,14,15,16,18, and the new s.21 and considerign the purpose fo CEAA and the intent of parliament, support the applicants principle proposition that where a project is described in the CLS, the RA MUST ensure public consultation with respect to the proposed scope of the project for the purposes of the EA, the factors proposed to be considered in its assessment, the proposed scope of those factors,...
  - Under s. 59(d), Parliament wholly reserved to Cabinet the discretion to decide what projects to describe in the CSL. **It must be assumed that this was not meant to be the project "As scoped" by the RA, otherwise the exercise of Cabinet's plenary discretion would be futile and useless.**
  - Once a project is included in the CLS (subject to the Minister capacity to suppress a project from the CSL under s.58(1)(i))**s.21.1** grants the minister of the environment the discretion to either continue the comprehensive study or upgrade it to a panel or mediation. The minister cannot downgrade it.
    - Nothing in the CEAA allows the minister to downgrade a comprehensive study to a screening. Likewise, there is no such power for an RA
  - Distinguished from TrueNorth:
    - TrueNorth was a s.15 case. This is a breach of s.21.1 public consultation requirements
    - TrueNorth was always intended to be a screening. It must be applied cautiously and only to the extent that the facts are directly on point with the facts of this case.
      - *Seems like the court is trying to distinguish TrueNorth to its facts.*
    - There was no explosives factory or magazine in TrueNorth
    - This goes beyond HADD, and includes depositing deleterious substances into a TIA
  - The vast majority of TrueNorth is about s.15, so of little help here
  - TrueNorth did not consider in detail s.21 and the old s.21 did not refer to the "proposed project"
  - Differences between new and old s.21 (Page 355)
    - Basically new version makes public consultation mandatory before scoping decision is made, and once project is set out in CSL, it must undergo a comprehensive study.

- In sidestepping the requirements under s.21 under the guise of re-scoping, the RA committed a reviewable error.
- Considering the very unusual circumstances of the case, judicial intervention is necessary.

Part 3: Challenges Ahead:

- The Scoping challenge:
  - House of Commons Committee recommended that national environmental priorities and international commitments be incorporated into the EA process
  - Another committee recommended a more formal scoping process, the establishment of clear criteria, and the Agency should play a more central role in the scoping process.
  - Related issues that keep coming up in the literature:
    - 1) Who should make the scoping decision?
    - 2) The process for making the scoping decision and the appropriate role of interested parties
    - 3) The substance of scoping decisions and the level of substantive guidance or criteria
- The Role of the Public:
  - The public is recognized in the preamble and the purpose section as a valuable contributor to the process. But actual engagement is discretionary for most Eas carried out under CEAA
  - Benefits of meaningful public participation: (Big list page 360)
    - Local and traditional ken
    - Enhanced legitimacy
    - Alternative perspectives...
  - Barriers to participation include:
  - Lack of capacity (Time and resources)
  - Lack of confidence in ability to influence the outcome of the EA process
  - Only in screenings is public participation completely discretionary
  - **s.18(3)** sets out in detail what is required once public participation is deemed important.
  - Panel reviews always involve hearings for the public and are independent of the Ras

Chapter 8: Parks And Protected Areas

Part 2: Conflicting Mandates? Use, protection, and Ecological Integrity in National Parks

- The CNPA incorporated that “ecological integrity is the first priority in all aspects of parks management”.
- **S,2(1)** definition of ecological integrity
- **s.4** dedication clause: “benefit, education, and enjoyment...and unimpaired for future generations”
- **CPAWS v. Canada 2003 FCA**
  - Wood Buffalo Park, Minister approved 118km road.
  - **s.8(1)** Minister responsible for administration, management, and control of parks
  - **s.8(2)** Ecological integrity is the first priority
  - Standard of Review is patent unreasonableness: polycentric mandate, conflicting interests, public interest.
  - Political accountability is adequate here:
    - Parliament cares about the parks
    - Minister is responsible to the public and engages competing interests
    - The decision was transparent
  - Minister does not expressly mention “ecological intergrity”; this is not necessary.

- **Fluker 2003; Maintaining Ecological Integrity as our First Priority**
  - The CPAWS decisions treat 8(2) as just another factor
  - trial division treated human concerns as distinct from ecological integrity
  - Ecological integrity includes human activity: socio-ecological relationship
  - The conflicting mandate between s.8(2) and s.4(1) creates problems for minister and courts in attempting to balance human and natural interests.

Part 4: Emering Issues in Parks and Protected Areas

- Two main themes: Potential for citizens to secure greater protection for protected areas using the public trust doctrine. Potential options for law reform
- **Public Trust Doctrine**
  - Public trust doctrine is CL principle, vesting trust-like duties in the Crown to protect public resources for the benefit of the public at large.
  - Powerful tool in usa
  - The public trust doctrine can be argued to exist under CEAA dedication clause
  - **Sierra Club v. Department of the Interior 1974 usa**
    - National Park System Act says: provide for the enjoyment of the park in such a manner and by such means as will leave them unimpaired for future generation
    - This, the purpose of the act, and his general trust obligations impose duty to protect
    - *In essence creating a statutory public trust doctrine*
  - **Green v. Ontario 1972**
    - Similar dedication clause to NASP and CNPA. P arguing breach of statutory trust.
    - There can be no trust unless the subject matter of the trust is certain. The RA can increase, decrease, or even close down provinicial parks under s.3(2)
  - Although in Canfor, Binnie rejects the usa public trust jurisprudence. He does say the Crown can sue for compensation and injunctive relief for damage to public lands, but he stops short of recognizing a standalone Crown right to sue on the public trust. HE leaves open the Crown's potential liability for inactivity in the face of threats to the environment
    - The door is open to renew a public trust caselaw in Canada, buts it likelihood of success and parameters are very unclear.

Chapter 9: Species Protection

Part 2: Federal Endangered Species Legislation in Canada and the usa

- Most SAR legislation addresses four key issues:
  - 1) Threshold issue: Species listing
  - 2) What measures are needed to protect and restore species
    - 2.1) Designation of critical habitat
    - 2.2) Develop and Implement a recovery plan
  - 3) Offence to harm species provisions
  - 4) Compensation to land owners and resource tenure holders affected by implementation
- Species listing under SARA
  - **Smallwood 2003; A guide to Canada's SARA**
    - Listing is the prerequisite to protection under SARA
      - Two parts to the listing process
        - 1) The scientific listing process: national list of species at risk prepared by COSEWIC: committee on the status of wild life in canada.

        - 2) Political listing process: Political consideration. Cabinet has nine months to take action contrary to the listing. This reverse onus thus holds that if cabinet does not act, a species listed by cosewic is put on the SARA list. (**s.27**)
    - **The Legal list:**
        - List of Wildlife Species at Risk: contained in Schedule 1
        - Unless listed, a species receives no protection under SARA
        - After cosewic assessment received, parliament has nine months to act. It can: (**s.27**)
            - 1) Accept the assessment and add the species;
            - 2) decide not to add the species; or
            - 3) refer the matter back to cosewic for further information and consideration
        - **Four different listing categories (SARA s.2):**
            - Exterpated: species no longer exists in the wild in canada, but exists in the wild elsewhere
            - Endangered: facing imminent extirpation or extinction
            - Threatened: species likely to become endangered if nothing is done to reverse the factors causing the decline
            - Species of special concern: Species may become threatened or endangered because of biological characteristics and identified threats
            - Listing affects level of protection
        - Basic prohibition:
            - s.32 prohibits killing, harassing, capturing, or taking a listed species; also prohibits trading and possession of any part of a listed species
            - s.33 prohibits damaging or destroying a listed species' residence.
            - Does not apply to species of special concern
            - Both sets of prohibitions limited to federal jurisdiction: Federal lands, aquatic species, and migratory birds (*anything else?*)
        - Critical Habitat protection:
            - s. 58 prohibits destruction of critical habitat within federal jurisdiction.
            - Applies to endangered and listed species. Only applies to extirpated species if reintroduction plan through recovery plan created.
        - Recovery Process:
            - Must be prepared for all extirpated, endangered, and threatened species.
            - Species of special concern get less prescriptive protection
        - RIAS page 429 (Assess costs-benefits of recovering species...)
- ESA
    - Discretion to not list in ESA much narrower than in Canadian SARA
    - **Northern Spotted Owl et al. v. Hodel 1988**
        - Argued that failure to list was arbitrary, capricious, or contrary to law
        - Agency cannot reject unrebutted scientific evidence without reasonable alternative.
- Critical Habitat Designation and Recovery Strategies
    - Implementation record in canada and the usa has been poor
    - Under ESA critical habitat must be designated concurrently with listing of species unless either:
        - 1) It is not determinable; or
        - 2) not prudent (in that it could actually lead to adverse impacts on the species)
        - In contrast to the species listing, the habitat listing can take socio-economic factors into account

- Also obliged to implement recovery plans for the conservation and survival
- Far more discretion under SARA
  - No necessary linkage between species listing and habitat protection
  - Habitat protection dependent on highly discretionary recovery plan strategy and action plan
  - "Critical habitat" defined s.2: It does not exist and is not protected unless it is identified in the recovery strategy or action plan
    - **Recovery plan:** Sets out scientific framework within which recovery is to be implemented. Strictly scientific
    - **Action plan:** Specific implementation to be taken under the recovery plan. Can take into account socio-economic factors
- Critical Habitat Protection and Species Recovery under SARA (432)
  - On listing, species recovery plan must be posted within on year
  - 68 of 218 recovery plans that are due have been completed
  - Many of the completed plans inadequate
  - Critical habitat only identified for 16 of the 228 species
  - After recovery plan complete, action plan implementation
    - No time requirements and can take into account socio-economic factors
  - Failure to identify critical habitat probably because of fear of adverse impacts on private landowners.
    - In BC, the government has specifically instructed scientists to NOT identify critical habitat
- **Mittelstaedt 2008; A Sweeping Strategy to save tiny fish: To Rescue BC's Nooksack dace**
  - Feds don't want to identify critical habitat because it could infringe on property rights or province, private citizens, and on commercial interests
- Prohibitions on Harming Species
  - Takings prohibitions **s.32**, residence protection s.33
  - Only applies within designated areas of federal jurisdiction. (Federal lands, aquatic species, and migratory birds under the MBCA)
  - **Smallwood 2003; A Guide to Canada's SARA**
    - **s.32** Prohibits harm to species and possession or trading bits of the species
    - **s.33** prohibits damage to the residences
    - **s.58** primary section under SARA for protection of critical habitat
    - Critical habitat: "..." page 440
    - Unlike basic prohibitions, critical habitat protection does not automatically apply on listing
    - **s.57** purpose section for **s.58**:
      - Within six months after critical habitat identified under a recovery or action plan, that habitat is protected by:
        - 1) Provisions under SARA including conservation agreements under s.11
        - 2) Provisions under other federal legislation
        - 3) critical habitat under s.58 (CH under federal jurisdiction
    - **The Safety Net Provision: S.61** CH protection can extend to areas within provincial jurisdiction but only when the governor in council, on the recommendation of the minister of the environment, makes an order to that effect.
      - The minister of the E, *must* make the recommendation if, after consulting with the province, the minister is of the opinion that:
        - There are no provisions under SARA that protect the particular CH, including s.11
        - There are no provisions under any other federal legislation that protects the

particular CH; **and**
        - **The laws of the province do not effectively protect the CH**
    - Lasts five years s.61(2)
- Compensation Issues under SARA
    - SARA basic prohibitions apply to private lands only for aquatic species and migratory birds; the Act otherwise is limited to federal lands
    - Historically, it is unprecedented for Canada to provide compensation for anything short of actual expropriation.
    - **s. 64** compensation. Discretionary "may provide compensation for impacts arising out of specific provisions of SARA including:
        - s.58 CH prohibition
        - s.60 discretionary prohibition on federal lands of provincially listed species
        - s.61 safety net; or
        - Under an emergency order that is necessary for the survival or recovery of the species
    - **Notes:**
        - Definition of "extraordinary impacts:
            - Rounthwaite argues against market value decrease formula for determining if impact meets threshold. Argues principled approach, start with jurisprudence on de facto expropriations. Consider the following factors:
                - 1) Degree of harm current or proposed use of the land pose to the critical habitat
                - 2) Ease that harm to the CH can be avoided by owner and with help from government
                - 3) Social utility of current or proposed land use
                - 4) Extent that regulatory restrictions take away incidents of ownership
                - 5) Equitable principles: Is land owner seeking compensation in good faith and with clean hands?
                - Argues that if on this consideration, the impact is extraordinary, then landowner should get full compensation
            - Alberta Environmental Law Centre argues against a statutory entitlement to compensation
                - 1) Such a model will enforce view of landowners' right to destroy critical habitat unless compensated
                - 2) Encourage destruction of CH because the owner will have to show intent to develop
                    - Will promote development on land that otherwise not occur
                - 3) Set back and burden the excellent work of conservation groups

Part 3: Federalism and Biodicersity

- **Tarlock 1995; Biodiversity Federalism**
    - Risk reduction is more accepted in Western tradition. But we have no reliable way to measure risks before they actualize. Seeks to prevent or redress human harm
    - Biodiversity protection conflates human-nature dichotomy
        - Antithetical to capitalist notions like development and exploitation
    - Chief threat to biodiversity is habitat loss. Protection of environment as opposed to regulation of industry is where biodiversity protection focuses.
    - Federalism models frustrate this form of biodiversity protection for three reasons:
        - 1) Federalism premised on the search for the optimum exclusive regulatory balance.

(*Watertight compartments: but these have been abandoned by the SCC*)
    - 2) In contrast to air and water quality, there is no universal standard that can be applied to biodiversity.
    - 3) Division of powers prevents federal government from forcefully protecting biodiversity
  - Local resistance can thwart national biodiversity protection ideals
  - Reasons federalism does not mesh with biodiversity protection
    - 1) Political boundaries do not mesh with ecosystem boundaries
    - 2) Multiple agencies have different mandates
    - 3) Property rights are difficult to reconcile with habitat protection

Chapter 10: Climate Change

Part 1: The Emergence of Climate Change as a Policy Priority

- The Need for Action (Page 465)
  - Climate is warming almost certainly caused by humans, especially fossil fuel burning
  - Broad consensus that tempurate needs to be stabilized and not exceed 2 degrees over pre-industrial levels. This requires a 60-80% reduction in GHG
- Canadian Policy Options and Obstacle
  - Need to emphasize global climate action
- **Hsu 2008; Regulating GHGs in Canada: Constitutional and Policy Dimensions**
  - Alberta emits over 1/3 of Canada's GHGs and doesn't give a shit.

Part 2: Climate Change, Intl Law, and Domestic Implementation

- **Doelle 2007; Global Carbon Trading...** (Page 468)
  - Kyoto mechanisms consist of:
    - Emissions trading (ET)
      - Essentially cap and trade
    - Clean Development Mechanism (CDMs)
      - Credits for emissions reductions below business as usual baseline in developing countries; no obligations for developing nations to reduce emissions
    - Joint Implementation: Hybrid between ET and CDM
  - Emissions Trading under Kyoto:
    - Emissions reduction targets for developed countries are the baseline
    - Targets implemented through allowed amounts units (AAUs)
    - More or less unrestricted trading of AAU's, credits from CDM and JI projects
    - Limited banking allowed to stop a collapse of carbon price. Collapse likely because collapse of USSR economies and usa not involved
  - CDM
    - Two objectives:
      - 1) Release valve for developed nations is carbon is too expensive
      - 2) Provide developing nations, development assistance through technology transfer and economic activity
    - Encourages investment in mitigation measures in developing nations
  - JI
    - Directed mainly at economies in transition
    - Two tracks:

        - 1) One resembles ET
        - 2) Other resembles CDM
        - Purpose is to allow developing countries who cannot meet monitoring criteria to still be eligible for CDM
            - Track one, requires host country to monitor
            - Track two: Where host country has not met monitoring criteria and is therefore treated like a developing country
    - Choice of Carbon Credit for Kyoto Compliance in Canada
        - Not much here (page 470)
    - Use of Kyoto Mechanisms Domestically
        - 1) Full integration of domestic emissions reduction and international carbon credits would provide domestic entities full access to Kyoto credits to meet its domestic obligations
            - There would be no control of meeting domestic targets by either reductions or purchase.
        - 2) Fully Domestic Eliminate carbon trading for government and industries
        - 3) Partial use EG restrict access to the federal government
- **Friends of the Earth v. Canada (Governor in Council) 2008 FC**
    - Trying to force government to comply with Kyoto Protocol Implementation ACT (KPIA)
    - KPIA forces the minister of the environment and the GIC to do various things
        - Table action plan to meet Kyoto protocols
        - Amend or repeal environmental legislation to comply with Kyoto (tied to other sections)
    - Minister's initial Climate Change Plan, at least acknowledges some duties imposed by KPIA but suggests they are discretionary.
        - The plan says the government has no plan to meet Kyoto
    - Implementation of Kyoto would DESTROY THE UNIVERSE!!!!! and the government does not consider it a viable option; such action would outweigh the benefits of meeting Kyoto
    - It is clear and uncontradicted that at the point of FOTE's second and third applications, the GIC had not carried out any regulatory actions as contemplated by s.7 and s.8 of KPIA
    - Justiciability
        - Even largely political questions can be JRed if it “possesses a sufficient legal component to warrant a decision by a court”
        - A guiding principle of justiciability is that all branches of government must be sensitive to the separation of function between the courts and the legislatures.
        - s.5 of KPIA minister's duty to prepare an annual Climate Change Plan.
        - s.7 and 9 require GIC to meet Kyoto obligations. s.8 requires pre-publication of any regulations made pursuant to s.7 and requires efficacy statements to be included.
        - The justiciability s.7 and 9 is dependent on the authority of the court to order the GIC to make, amend, or repeal the environmental regulations referred to in s.7
        - section 5 through 10.1 listed on page 479
    - **Section 5**
        - Words like “equitable distribution” and “just transition” are policy laden and not proper for JR. Cannot read s.5 in peacemeal bits, it must be read as a whole.
        - Failure of minister to prepare a Climate change plan is justiciable, but an evaluation of the contents of the plan is not.
        - Word “shall” almost always means an imperative. The word “ensure” does not
        - “to ensure Canada meets its Kyoto obligations” does not create justiciable issues.
    - **Section 7**

        - Without clear statutory language the court has no role to play in requiring legislation to be implemented.
        - Further, the court cannot create a meaningful remedy, and it cannot dictate what the GIC would have to do.
        - Undeniable that any attempt by the court to dictate the contents of the regulatory arrangements would be inappropriate.
        - Outside the constitutional context, it is unlikely the court has any role to play in controlling or dictating the conduct of other branches of government
        - Since s.7 creates no mandatory duty, neither do s.8 or 9
    - **Parliamentary Accountability**
        - Although not always the case, the complex and broad requirements for parliamentary accountability and public notification in the Act, displaces the enforcement role of the courts.
        - The Act ensures compliance through parliamentary, public,and scientific discourse.
        - The Act must, in consideration of the interpretation of the Act's language and the review mechanisms, be interpreted as excluding judicial review.
        - Practical significance of political accountability, especially in a minority government should nto be underestimated.
    - Court has nor ole to play in reviewing the reasonableness of the government's response to Kyoto within the four corner of KPIA
- <u>Current Canadian Governmental Regulatory Initiatives and Alternatives</u>
- **Hsu 2008; Regulating GHGs in Canada: Constitutional and Policy Dimensions**
    - GHG regulation possibilities
        - Command and control: BAT or quantity limits etc
    - Cap-and-trade
        - Issue allowances which can be bough/sold/traded
        - Idea that allowances will flow to their highest and best uses
    - Intensity based emissions trading
        - Reduce emission intensity instead of absolute emissions
        - The more productive you are, the more credits you get
    - Taxation
        - Carbon taxes levied at some sales point for carbons intended for combustion
    - **Federal Attempts at GHG Regulation**
        - nothing worth reading (page 489)

<u>Part 4: Constitutional Issues in Climate Change Regulation</u>

- **Hsu 2008; Regulating GHGs in Canada: Constitutional and Policy Dimensions**
    - There are validity issues under s.91 and 92 in regulating GHG emissions
        - 1) The SCC holds that environmental protection powers does not reside exclusively with either level of government
        - 2) The SCC has been willing to permit Parliament to regulate certain kinds of pollution under POGG and criminal law power
            - Crown Z and Hydro-Quebec
        - 3) Jurisdiction to enact legislation to comply with international treaty obligations rests with the respective legislatures, not with the executive
    - **Provincial Jurisdiction**

- Carbon Tax: Taxation power under s.92(2)
  - Direct taxation to raise revenue for provincial purposes.
    - Province thus must:
      - a) Impose a tax
      - b) the tax must be imposed directly
      - c) be imposed within the province
      - d) and, for the purpose of raising revenue
    - (a) through (c) are easily met. (d) is not facially feasible given the carbon tax that is in place is supposed to be Carbon neutral
      - *Hsu offers no even half decent argument why the legislation would be upheld. It seems to me to be the case that all tax in the province is ultimately revenue neutral. IN one way or another the tax is spent back into the community. The issue seems to be whether alternative tax breaks are somehow different from other provincial spendings*
- Cap/Trade and Intensity based Regimes (501+)
  - If limited to businesses qua business under s.92(5), (10), (13), and 92A, then likely to be held valid.
  - Many industries fall under provincial jurisdiction and this jurisdiction has been interpreted broadly by the courts
  - If province tried to regulate a federal industry like aeronautics, the court would likely look to the **necessary incidental doctrine**.
    - 1) TO what extent does the impugned part of the statute encroach on federal jurisdiction when viewed in isolation?
    - 2) Is the rest of the statute valid?
    - 3) Given the answer to (1) is the section sufficiently integrated into the whole to profit from its validity?
  - The cap/trade regime with Manitoba, BC and several usa states will likely be held valid if challenged because it does not seekt o regulate interprovincial/international trade. It merely allows undertakings governed by the statute to take part in the scheme
- Command and Control
  - Same considerations as Cap/Trade

- **Federal Jurisdiction**
  - Carbon Tax
    - Very broad taxation powers under 91(3). Very easy for feds to pass a carbon tax
  - Cap/Trade and Intensity based Regimes
    - Federal industries: aeronautics, nuclear power, international/provincial truck and bus lines. Would pass similar to provincial analysis
    - More interesting is regulation like that proposed by the conservatives in 2007 that seeks to embrace provincial industries such as oil and gas.
      - Likely would have to be justified under 91(27) criminal law; or POGG
    - **Criminal Law Power**
      - Highly regulatory nature of CT makes it hard to understand as being criminal law
      - Hydro-Quebec decision is why Hsu considers this a possibility
        - Upheld toxic substance provisions of CEPA under 91(27) Despite highly regulatory framework of CEPA
      - Unlike toxic substances, emissions do not have the same kind of direct health

effects.
    - CT permits buying and selling of what it is trying to prohibit
        - Does not exactly prohibit activity. IT really just regulates it.
        - If upheld under (27), there would be little left for anything to fall within (27). Just penalty and public purpose
    - **National Concern POGG**
        - Hsu thinks federal government unlikely to be able to uphold general regulation of industry to combat global warming.
        - Can argue extraprovincial nature of the issue and following up on treaty obligations
            - Challenger would argue the extraprovincial harms are very indirect and of little overall significance. Also, treaty implementation is not up to the executive or federal parliament. It is up to the jurisdictional power holder.
        - Court could easily find the matter lacked singleness....
        - Scale of impact on provincial powers would likely be large
    - **National Emergency Doctrine**
        - The jursiprudence the feds would rely on:
            - 1) Feds can rely on emergency to respond to existing emergencies and to prevent emergencies
            - 2) Emergencies can include economic ones like mass inflation
            - 3) Court should be loathe to second guess parliament that an emergency exists
                - Only needs a rational basis
            - 4) Only sustains legislation for temporary period of time
            - 5) Legislation needs to indicate emergency or “serious national concern,” etc
            - 6) Unlike National Concern, national emergency does not preclude provincial legislation dealing with the same emergency.
        - It is far more likely that the courts will uphold a CT regime than an Intensity regime under this power. Intensity regimes allow increases in GHGs and would thus go completely against the 'emergency'.
        - Would get strong opposition from the provinces
- <u>Command and Control Regime</u>
    - Same considerations as a CT regime
    - Better chance at being upheld as criminal law (27) than CT and Intensity regimes

<u>Part 5: The CL and Liability for Climate Change Impacts</u>

- **Curran 2007; Climate Change Backgrounder Uvic ELC**
    - Four categories of tort action for government failure to deal with climate change (CC)
        - 1) Actions against public agencies for acts/omissions contributing to CC
        - 2) Actions against public agencies to require consideration of CC impacts in decision making
        - 3) Civil suits against private entitites that emit GHGs (mostly nuisance, some negligence)
        - 4) Actions against public agencies regulating GHGs by regulated parties.
    - **Primary Challenge facing a civil suit in Canada that seeks to impose tort liability for harms caused by climate change**
        - <u>Duty of Care:</u>
            - <u>Tort</u>
                - Foreseeability of type of harm

        - Arguably, there is a duty to foresee potential harm to everyone in the world. As knowledge expands, so to does foreseeability
        - Courts will likely decline liability where the specter of indeterminacy looms large
    - Public Nuisance
        - Remedies to plaintiffs who receive special damage (as compared to teh damage every member of the public suffers)
        - Courts balance: Utility of Ds conduct etc. See tort section way way way above.
            - Courts in Canada impose this strictly. EG fishermen could not claim special damages for oil spill. They just suffered more of the same damage. *This implies a requirement that the special damage be different in quality and quantity*
        - Also, Ds can use defence of statutory authority
    - Private Nuisance
        - Requires unreasonable interference with property. Courts look at nature, severity, foreseeability, and reasonableness of impugned interference
        - GHG emissions are considered a reasonable part of contemporary business. The question then becomes when do emissions become unreasonable
- Causation
    - In Canada material contribution test is the only alternative to but-for test.=
        - Courts have offered little guidance as to what constitutes material contribution
    - But-for test applies in all but the most exceptional cases (SCC said that a few times)
    - usa has market share liability alternative
- Remedies:
    - In usa, held liable for market share in appropriate cases. In BC jont and severally liable for 100% of liability, \
- Discussion
    - Good luck succeeding though. Especially in Canada

Part 6: Climate Change and Environmental Assessment

- Early efforts to deal with CC in EAs were unsuccessful. The tide has shifted a bit.
- The Federal Court in Pembina Institute 2008 told the panel to explain its results that the Kearl Oil sands project would not cause significant adverse environmental impacts
- **Hsu 2008; Regulating GHGs in Canada: Constitutional and Policy Dimensions**
    - using CEAA to require the federal government to consider GHG implications of new projects.
    - Well, the feds can consider GHG impacts, it is unlikely they can be forced to consider them
    - **CEAA**
        - GHG effects have been considered intermittently in EAs under CEAA
        - CEAA as it stands is not very good for forcing GHG analysis in EAs. The solution requires legislative change, but the political situation is unlikely to produce those.