1. Tort actions for environmental harms

a. *Overview* - tort law affords plaintiffs the means of seeking a remedy for environmental harms by relying on several different causes of action. These include negligence, nuisance, *Rylands v Fletcher* (strict liability), trespass, and battery. (see also: GHG tort actions)

b. Standing

i. *Overview* - generally, requires that the Plf. suffered direct harm as a result of the wrong alleged; however, there are exceptions to this general rule.

ii. Standing in public nuisance litigation

1. *General rule of standing* - Attorney General, representing the Crown, has been the appropriate party to sue for abatement of a public nuisance. {Canfor}

a. *Special harm exception to the rule of standing* - where an individual has suffered a harm which is different than harm suffered by public at large; not sufficient that it is "greater" harm, must be a harm *peculiar* to selves. {Hickey} Different both in kind and in degree. {Curran}

i. *Policy objectives* - impractical in environmental cases for members of the public to show sufficient special damages to serve the twin policy objectives of deterrence to wrongdoers and adequate compensation of their victims. {Gage}

ii. For instance, despite *Hickey,* individuals suffering direct financial loss as a result of interference with a public right generally found to suffer special harm. {Gage}

iii. For instance, Plf. must show special injury as a result of D.'s actions; may be particularly difficult in GHG tort actions, where damage very diffuse. {Curran}

iv. For instance, GHG damage suffered by Kivalina community not sufficiently different from that of public, despite enhanced relationship with that area. {Kivalina}

b. *Public trust exception* - also known as *parens patriae,* the trust relationship between public and government concerning environmental conservation may give rise to standing in public nuisance as well. {Gage}

2. *Implication of standing on remedy* - some regard the injunction as the "public remedy" obtained by the Attorney General, while damages are a "private remedy" available to those private citizens who have suffered a special injury as a result of the public nuisance. However, Crown's jurisdiction is not so limited, can sue for injunction and for damages. {Gage}

iii. Standing in public interest litigation

1. *General rule of standing* - only those who suffer as a direct result of environmental harm are able to gain standing, save for where the litigation is shown to be in the public interest:

a. *Justiciability* - is there a serious and justiciable issue to be tried? (see also, judicial review ->

justiciability)

i. For instance, as with injunctive relief, unless case is frivolous or vexatious, should proceed to next stage. Not a consideration of merits, but of justiciability. {Algonquin}

ii. For instance, the fact that redress for GHG could require judgments which would touch on economic, environmental, foreign policy, and national security interests raises a question as to justiciability. {Connecticut}

b. *Genuine interest* - does the applicant have a genuine, direct, personal interest in the subject matter? Is the applicant more or differently affected than the general public? {Shiell} Longstanding reputation involving significant work on the subject matter? Geography not determinative. {Miningwatch}

i. For instance, interest of a person several hundred miles away from mine, with no other stake, is not direct or personal. Prior involvement in other litigation in this domain, and bona fide concern also insufficient. {Shiell}

ii. For instance, history of responsible involvement in forest and land planning issues, include many members who live in the area or frequent it for pleasure or business, sufficient to meet genuine interest. {Algonquin}

c. *Preferred means* - is there another reasonable and effective manner for bringing the case forward? Is there evidence of other party with genuine interest reasonably expected to bring a challenge? {Miningwatch} Weighs between need for adversarial representation and judicial economy. {DTEastside}

i. For instance, where other members of the community do not oppose the action sought to be enjoined, this test may be met. {Algonquin}

ii. *Considerations* - not to be applied rigorously or independently, but rather purposively, flexibly, and cumulatively weighed to satisfy purposes underlying: {DTEastside}

1. *Public interest litigation* - does it raise issues of public importance that transcend immediate interests of litigants? {DTEastside}

2. *Comprehensive* - does it assesses the overall effect of this scheme on those most directly affected by it, so as to prevent a multiplicity of individual challenges? {DTEastside}

3. *Proximity* - risk of the rights of others with a more personal stake being adversely affected by badly advanced claim? {DTEastside}

4. *Parallel litigation* - existence of a civil case in another province is not necessarily a sufficient basis for denying standing. {DTEastside}

5. *Other plaintiffs* - existence of other potential plaintiffs, while relevant, should be considered in light of practical realities; {DTEastside}

a. For instance, no DES sex workers willing to bring suit. Further, while they were

willing to testify / swear affidavits, this is not the same thing as being willing to bring suit. {DTEastside}

2. *Tension in considering public standing applications* - it is essential that a balance be struck between ensuring access to justice and preserving judicial resources; disastrous if the Courts became overburdened as a result of marginal or redundant suits. {Can. Coun. of Churches}

3. *Implication of standing on remedy* - although s.18.1(1) of the *Federal Courts Act* limits injunctive relief to those "directly affected", this is not applicable to public interest litigants - may achieve relief despite lack of direct effect. {Miningwatch}

c. Classification of torts relevant to environmental actions

i. Strict liability

1. *Overview* - originated in *Rylands v. Fletcher.* Arises where the defendant brings a dangerous substance onto their land, which then escapes and causes injury to another. Said to be strict in that whether the defendant acted negligently is legally irrelevant. Plaintiff must show that the defendant's activity constituted a non-natural use of the land in question. {Palmer}

2. *Interest protected* - the right to shift the costs of a catastrophic event onto the party which invited that peril to materialize. {Palmer}

3. *Application*

a. *Danger* - the object brought onto the D.'s property must have been dangerous or likely to do mischief were it to escape. {Cambridge}

i. For instance, operating a nickel refinery in accordance with emissions regulations does not constitute an extra hazardous activity. {Inco}

b. *Foreseeability of type of injury* - the injury claimed in the action must have been caused by the escape of the dangerous object, and must have been a natural and anticipated consequence or the escape. Can be cumulative over time. {Cambridge}

i. For instance, when bringing PCE onto the land, leather tannery could not have foreseen that a water supply 170 miles away would be contaminated. {Cambridge}

ii. For instance, had Inco caused an unsafe deposition of nickel, this would have been a foreseeable consequence of its refinery operation. {Inco}

c. *Due diligence not a defence* - unlike negligence, but similar to private nuisance, the fact that the defendant has taken all reasonable care will not of itself exonerate from liability. {Cambridge}

i. For instance, compliance with environmental and zoning regulations would not have availed Inco, had its refinery been found dangerous. {Inco}

d. *Natural use defence* - exception for liability under *Rylands*, holds that if the activities of the D. constitute a natural use of the land that liability does not attach. However, this is limited in scope. {Cambridge}

i. For instance, use and storage of substantial quantities of hazardous chemicals not a natural use, despite whether it is common in industry. {Cambridge}

ii. For instance, Inco's nickel refinery was in a heavily industrialized area, did not create risks beyond those incidental to any industry. {Inco}

e. *General benefit of the community defence* - generally, refers to entities, usually governmental, acting under statutory authority and engaged in activities that benefit a significant segment of the community at large. Mere industrial benefit from operating a business not sufficient. {Inco}

ii. Trespass

1. *Overview* - intentional and unjustifiable interference with another's possession of land. There is no need for physical damage or knowledge of ownership, as trespass protects the right of possession.

2. *Interest protected* - the right of exclusive possession of land, and therefore only applicable to Plf. with a possessory interest in land. {Palmer}

3. *Application*

a. *Direct entry* - key element of trespass to land; as a result, trespass claims are often summarily dismissed, with focus then on strict liability and nuisance. Applicable as battery or assault where environmental harm leads to personal injury. {Palmer}

i. For instance, for pesticide contamination action to succeed, must prove whether substance will actually be deposited on Plf.'s lands. {Palmer}

b. *Damage not required* - as the possessory interest is what is protected, there is no need for any damage to occur; trespass is actionable *per se*. If damage to heatlh does occur, would also be actionable in battery. {Palmer}

iii. Toxic battery

1. *Overview* - where the D. did not adequately investigate own substance, exposure of the plaintiff (and others) to the substance in effect constitutes a form of involuntary experimentation, sufficient to create a claim in battery.

2. Interest protected - arises from trespass action, but instead of interest in land, protects interest in one's own body and well-being.

3. *Policy support* - if courts are willing to impose liability in battery, then the *Resurfice* tendency to reward intentional ignorance will be effectively counterbalanced. {Collins}

iv. Negligence

1. *Overview* - dominant in litigation around environmental harms. To establish such a claim a plaintiff must show that they were owed a duty of care, that the defendant breached the required standard of care, that they suffered damage, and that this damage was caused (factually and legally) by the defendant. {Palmer}

2. *Interest protected* - the right to be from foreseeable harm caused by one's neighbour.

3. *Development* - may be space in negligence for an action based on the failure of a D. to investigate or disseminate health information concerning toxic substance. Rather than penalizing Plf. for lack of information, punishes D. for exposing Plf. to substance with indeterminate effects. {Collins}

4. *Application*

    a. *Negligence* - rests on the duty of care: one must avoid those actions which lead to a foreseeable risk of harm to one's neighbour. {Curran}

        i. In GHG actions, therefore must determine at what point the harm from GHG emissions became foreseeable. Increasingly likely that GHG creates unreasonable risk. {Curran}

v. Private nuisance

1. *Overview* - D. unreasonably interfered with the plaintiff's use and enjoyment of an interest in land, causing *foreseeable harm* to the plaintiff. Private nuisance protects the quality of possession of land. {Palmer}

2. *Interest protected* - interest / quality of possession in land, therefore requires the plaintiff to have a sufficient property interest to be able to bring the claim. {Palmer}

3. *Application*

    a. *Interference harming to plaintiffs enjoyment of land*

        i. *Detrimental effect* - regardless of whether the damage is physical or non-physical, the Plf. must show that the interference, for instance, a contaminant in soil, actually had some harmful effect. {Inco}

            1. For instance, safe and harmless deposits of nickel constitute a *change*, but not *damage*. Therefore, not physical harm as contemplated. {Inco}

        ii. *Physical damage* - stronger form of nuisance claim, does not require weighing of competing factors - physical damage is always an unreasonable interference. Factors include: {Inco}

            1. *Readily ascertainable and material damage* - must be damage which has already occurred, and not merely potential damage which may occur. Must be observable. {Inco}

                a. For instance, phenoxy herbicides were only known to cause damage in massive quantities. However, court did not consider possibility of long-term cumulative effect or indeterminacy. {Palmer}

                b. For instance, if GHG emissions have caused erosion, loss of growth, etc., action may be sustainable. {Curran}

        iii. *Non-physical interference* - also called amenity nuisance, weaker form of the tort, involves weighing factors such as: {Inco}

1. *Nature of the neighbourhood;* (see natural use exception under strict liability for more information)

2. *Utility and reasonableness of the defendant's activities* - control mechanism in nuisance, akin to standard of care in negligence. Balances interests of two lawful landowners against one another. {Inco}

3. *Sensitivity of the plaintiff*.

b. *Gravity and duration of the interference* - needs to be substantial interference in order to ground nuisance claim, not trifling or *de minimus*. {Palmer}

1. For instance, chemical contamination interfering with the health of plaintiffs, as in use of pesticides, clearly falls within the purview of nuisance. {Palmer}

c. *Foreseeability of harm* - the impugned interference must be an objectively reasonable consequence of the actions which caused it. {Cambridge}

i. For instance, reasonable person would not have been able to foresee that spilling a small amount of PCE over many years would render a water supply 170 miles away "unwholesome". {Cambridge}

d. *Due diligence not a defence* - unlike negligence, but similar to strict liability, the fact that the defendant has taken all reasonable care will not of itself exonerate from liability. {Cambridge}

vi.Public nuisance

1. *Overview* - arises where there is an infringement of public as opposed to private rights. Includes rights to access and use public waterways and highways as well as certain other public amenities. Because the Crown is considered to be the guardian of public rights, private citizens do not ordinarily have standing to sue for public nuisance. {Demarco}

2. *No longer applicable in U.S.* - due to doctrine of displacement, common law tort of nuisance has been displaced through comprehensive legislation by Fed., thus occupying the field. Despite lack of remedy available still precludes action. {Kivalina}

3. Application

a. *Public environmental rights* - traditionally protect right to make use of resource (as per roots in public trust doctrine, see below). However, as per *Canfor*, which protected timber to which the public had no right of use, may be extended to a more general conservation right. {Gage}

i. *Broad definition of public* - public includes not just the user but also the community at large and even future generations. However, this is problematic for the tort action, as it raises the spectre of indeterminacy. Thus, standing is at issue. {Gage}

b. *Standing* - primary obstacle to asserting public rights through the tort of public nuisance has been the restrictive rules about who can bring such a claim (see standing, above). {Gage}

c. *Balancing* - not only must special injury be shown, as with private nuisance (above) must be weighed against reasonableness and utility of harmful activity. {Curran}

i. For instance, this may pose a barrier in environmental tort actions, where the economic nature of GHG activity very utile, broad; but only where there is no physical damage.

d. *Legislative assumption* - legislation regulates the use of public environmental rights, it is natural for the courts to assume that it is ensuring conservation of the public right. This is a valid legislative objective, as revealed in Aboriginal rights cases. {Gage}

e. *Policy objectives* - deterrence to wrongdoers and adequate compensation of their victims.

4. *Public trust doctrine*

a. *Overview* - roots found in Roman law, common resources held in trust by the state for the benefit and use of the general public. Environment thereby held for future generations; state has a fiduciary duty to deal with the trust property in a manner that reflects the interest of the public. {Preston}

b. *Application* - though not yet recognized in Canada, theoretically places restrictions on government. {Preston}

i. Property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public. {Preston}

ii. Secondly, the trust property may not be sold. {Preston}

iii. Thirdly, the property must be maintained for particular types of uses, such as navigation, recreation, or fishery. {Preston}

c. Importance of public trust - could potentially be the basis for an action concerning the omission of the Crown in protecting public lands - for instance, by failing to fulfill its trust relationship, protect public lands / environment (eg. failure to regulate - though see justiciability). {Canfor}

d. Causation in environmental torts

i. *Overview* - statutory environmental law operates on an innocent until proven guilty, generally BRD paradigm. Tort law has required proof on BOP, but even where possible to prove a breach, case may fall short on causation. {Collins}

ii. *Two stages in causation analysis*

1. *General causation* - the capacity of the substance to cause the illness in question. Is Bisphenol A a hormone disruptor? Specific causation becomes relevant only after an affirmative response is provided to the generic causation inquiry. {Collins} (see also: certification in class actions)

2. *Specific causation* - determine whether it actually did cause the illness in his or her specific case. At this stage, a plaintiff must adduce evidence of the nature, duration, and extent of his or her exposure to the substance in question. {Collins}

iii. *Canadian approaches to causation* – a sliding scale, from the most traditional to the

1. *But for causation* - the traditional approach. Plf. who cannot prove that, but for the D.'s breach that the harm would not have materialized, will not succeed. Due to diffuse and polycentric nature of environmental harm, this has caused many environmental tort actions to fail. {Collins}

    a. For instance, would bar redress in GHG cases, as it is no possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, group at any particular point in time. {Kivalina}

2. *Robust and pragmatic* – stems from *Snell*, held that the ostensible failure of the but-for approach was not inherent in the test itself but resulted from its "too rigid" application by courts. Where there is scientific uncertainty, where facts lie witth the D., an inference of causation may be drawn based on little affirmative evidence. May be abrogated by *Resurfice*. {Collins}

3. *Material contribution* – introduced to correct the failings of the *but for* test, applies where to deny liability through but for would offend notions of fairness and justice. Will improve toxic torts, as less than perfect causation will now support a claim. Plf. bears the burden to show that: {Resurfice}

    a. Impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. {Resurfice}

    b. Impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. {Resurfice}

        i. For instance, may be friendly to redress in GHG cases, as no possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, group at any particular point in time. {Kivalina}

    c. Clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury. {Resurfice}

    d. Plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. {Resurfice}

        i. For instance, dermatitis is what would be expected where risk is being covered for extended periods in brick dust. {McGhee}

iv. *Alternative approaches to causation*

1. *Sindell v. Abbott Laboratories test* - not applicable in Canada, stems from California; applies where a plaintiff has joined a "substantial percentage" of the market and where the product at issue is "fungible," making it difficult or impossible to identify its specific producer - liable to the extent of market share, absent exculpatory evidence. {Collins}

2. *Material contribution to injury* - as opposed to material contribution to risk (which is what is recognized in *Resurfice)*. Material contribution to injury addresses how far liability will extend in a group of two or more causal contributors. It does not address the scenario of intransigent scientific uncertainty obscuring the causal mechanism itself. Where the claim involves a poorly understood chemical, however, the MCI test is of little utility. {Collins}

a. For instance, each of three assailants who struck an otherwise healthy plaintiff on the head materially contributed to that person's brain injury, because we know that brain injury can be caused by blunt trauma to the head. {Collins}

3. *McGhee approach* - very similar to *Resurfice*, save that the burden of proof shifts to the D. in *McGhee* after breach and injury within area of risk are made out. {McGhee}

e. Remedies

i. *Damages* - standard remedy in tort law is monetary, designed to make the plaintiff "whole" - awards a successful plaintiff an amount of monetary damages that will restore him or her, as much as money can permit, to the position he or she would have been in had the tort not occurred. In many cases, that environmental harm that cannot be assigned a market value will go uncompensated.

1. *Several liability* – given the long latency involved in many toxic illnesses, there is a realistic chance that one or more negligent defendants will be insolvent by the time of trial. As a result, the imposition of several-only liability may frequently result in a plaintiff receiving no more than a partial recovery. {Collins}

ii. *Contaminated sites damages* - most provinces have laws that require the current owner of the site to undertake remediation. Such laws only require remediation that eliminates ongoing risks to human health and the environment, rather than restoring the environment to its original condition. Therefore, the common law is the only resort remaining to persons affected by such contamination.

iii. *Remedies in public nuisance litigation* - some regard the injunction as the "public remedy" obtained by the Attorney General, while damages are a "private remedy" available to those private citizens who have suffered a special injury as a result of the public nuisance. However, Crown's jurisdiction is not so limited, can sue for injunction and for damages. {Gage}

iv. *Injunctive relief* - can take the form of interim relief pending a final resolution of a legal dispute. It can also take the form of permanent injunctive relief as part of the final resolution of the dispute. A discretionary and unpredictable remedy.

1. *Interlocutory injunctions* - Plf. does not have to wait for anticipated damage to materialize, but, relying on *quia timet*, may apply for an injunction to prevent this occurrence. {Palmer} Failure to grant may render litigation moot. Public interest litigants are able to obtain such relief despite lack of "direct effect". {Algonquin}

a. However, moot cases may still be heard where considerations concerning adversarial context, judicial economy, and role of adjudicative branch suggest that this should be done. {Orcas}

2. *Obstacle via undertaking* - Courts often require applicant to undertake indemnity of the respondent for damages in the event that the claim is ultimately dismissed. This may run into millions, therefore precluding public interest litigants from proceeding. {Tollefson} However, recent jurisprudence suggests a shift away from undertaking requirement, as per *Friends of Stanley Park et al.* {StanleyPark}

3. *Application* – party seeking interlocutory injunction must show, on a strong case of probability, that: {Palmer}

a. *Serious issue to be tried* - are the matters justiciable? Is there a dispute between the parties which requires judicial resolution? (see also, judicial review -> justiciability)

i. For instance, unless case is frivolous or vexatious, should proceed to next stage. Not a consideration of merits, but of justiciability. {Algonquin}

b. *Irreparable harm absent injunction* - refers to the *nature* of harm - unable to be repaired - not *severity*. Therefore a permanent loss, one which could not be replaced in lifetime. {Tollefson} In private litigation, focuses on direct physical or economic injury. In public interest, focus is harm to environment.

i. For instance, as serious risk to health would constitute irreparable harm, damages not an adequate remedy - money cannot restore health. {Palmer}

ii. For instance, would be a rare case where public interest litigant would directly suffer irreparable harm; therefore, the proper consideration of "harm" in public interest litigation is at the balance of convenience stage. {Algonquin}

1. See also *Miningwatch* - although s.18.1(1) of the *Federal Courts Act* limits injunctive relief to those "directly affected", this is not applicable to public interest litigants - may achieve relief despite lack of direct effect. {Miningwatch}

iii. For instance, while in *Banff* Court held that logging of old growth trees taking hundreds of years to mature was not irreparable, jurisprudence now more forgiving. {Banff}

iv. For instance, a short-term delay in oil sands project does not necessarily lead to inevitable harm, as funds will be recouped. {Imperial}

c. *Balance of convenience* - question is whether Plf. would suffer greater harm absent injunction as D. would suffer present injunction. Should consider nature of the relief sought, nature of the legislation/authority under attack, and where the public interest lies. {Algonquin}

i. For instance, forest management legislation meant to balance economic development against environmental conservation and other interests. Therefore, difficult to interfere with decision making through injunction. {Algonquin}

ii. For instance, company relies on EA approval to embark on oil sands venture, despite outstanding legal challenges to that approval. Reliance in the face of uncertainty means that balance of convenience stands against the oil sands company. {Imperial}

f. Class actions

i. *Overview* - new phenomenon in Canada. Requires a representative of the class to obtain certification, a process which can cost up to $1m in legal and expert fees.

ii. *Purpose*

1. *Improvement of access to justice* - costs for individual environmental actions often exceed potential for recovery, particularly where damage is to property rather than to person (diminution of market value not lucrative). {Kneteman}

2. *Encouragement of behaviour modification* - can help to directly force corporate change through large damage awards, or stimulate the tightening of environmental regulations, thus indirectly causing change. {Kneteman}

3. *Serving judicial economy*- reduce the total amount of litigation arising out of a dispute; however, of course, if the litigation is not viable on an individual basis, then judicial economy is contradictorily served by denying certification. {Kneteman}

iii. Process

1. *Certification* - based on a determination that proceeding by way of class action to determine the *common issues* is the preferable procedure. Test is one of *predominance* - do individual *or* common issues predominate?

    a. *Range of focus* - predominance tests outside of Quebec prioritize concerns of *judicial economy*. In contrast, the Quebecois approach to preferability focuses on *access to justice*. {Kneteman}

        i. For instance, in *Alcan,* QCCA recognized that pollution rarely affects one individual or property; issues similar in each claim similar, but cost of individual litigation greater than modest recovery. {Kneteman}

    b. *General and specific causation* - predominance tests in English Canada rest heavily on whether the determination of general causation will significantly advance the action (see causation). {Kneteman}

2. *Costs in class actions* - under most regimes, the Plf. is immune from adverse costs findings, or will qualify to have adverse costs paid out by provincial funds (see adverse costs, below).

iv. *Issues*

1. *Yet to make substantial impact* - due to difficulty in certification and certain adverse outcomes, class actions have yet to make a substantial difference in environmental actions in terms of promoting access to justice (outside of Quebec). This is because courts focus on individual aspects of the problem, and the collective harm caused by widespread environmental effects is overlooked. {Kneteman}

2. *Quebecois approach* – Quebec has gained a reputation as Canada's "class action haven", particularly in the domain of environmental class actions. 2.5x as many as the rest of Canada combined, 68% certification rate.

    a. *Type of injury* - class actions that have been granted certification in English Canada have focused on property value diminution not personal injury. Courts in Quebec have been willing to certify environmental class actions that involved personal injuries. {Kneteman}

    b. *Right to appeal* – representative plaintiff in Quebec has the right to appeal a decision refusing certification, but a defendant has no right of appeal from a decision certifying a class action. {Kneteman}

    c. *Focus of certification* - Predominance tests outside of Quebec prioritize concerns of *judicial*

economy. In contrast, the Quebecois approach to preferability focuses on *access to justice*. {Kneteman}

d. *Judicial creativity* – certification of environmental class actions in Quebec is facilitated by the creativity of judges in establishing subgroups among class members. Also increases economy in assessing damages. {Kneteman}

g. Adverse costs

1. *Costs orders by type of action*

a. *Class action suits* – actual litigants (class, representative party) not subject to costs. While in BC, parties avoid adverse costs orders once certified, in Ontario these costs are borne by the Law Foundation of Ontario. {Inco}

i. *Discretion to reduce costs* - s. 31(1) of the *Class Proceedings Act* holds that the TJ has discretion to consider whether the proceeding was:

1. *A test case;*

2. *Raised novel law;*

a. For instance, *Inco* involved ancient causes of action (trespass, nuisance) applied to novel material (environment). {Inco}

b. For instance, *Inco* first to deal with physical environmental damage to large number of properties through industrial emissions. {Inco}

3. *In public interest.*

a. For instance, *Inco* involved environmental issues in the context of a class proceeding, therefore a compelling matter of public interest; combines A2J and environmental law in one proceeding. {Inco}

ii. *Guiding purpose of s. 31(1)* – Court must balance the chilling effect of large costs awards against the need to discourage frivolous and unnecessary litigation. {Inco}

1. For instance, in *Inco* the liability for costs was cut in half. {Inco}

b. Private prosecutions and citizen suits - where enforcement proceedings culminate in judgment for the plaintiff or through settlement, Courts may order that the defendants reimburse the citizen attorney general for the costs of litigation, such as reasonable attorney fees (eg. equivalent of private law billings if services were provided *pro bono*). {Tollefson}

c. Public interest litigants – may be liable for costs of agencies whose decisions were challenged as well as the costs of private parties that may have joined the litigation. However, growing judicial comfort with practice of ordering that prevailing public interest litigants be awarded "special" or "solicitor and client" costs, but excusing unsuccessful public interest litigants from adverse costs liability. {Tollefson}

2. Types of cost regime

a. *One-way costs* - also called *fee shifting*, refers to a one-way costs rule, in which the defendant must reimburse the costs of litigation to the plaintiff if the latter triumphs. However the plaintiff does not have to remit costs to the defendant if the latter succeeds in litigation. {Tollefson}

b. *No-way costs* - default position in U.S. civil litigation is a no-way rule, though certain fee-shifting legislation exists favouring litigation victors. {Tollefson}

c. *Two-way costs* - English rule, holds that either party may be liable for costs should they fail in the litigation. {Tollefson}

d. *Special costs orders* - now regularly sought by public interest litigants at or near the commencement of litigation. Degree of immunization against adverse costs liability. "Caps" at a predetermined amount what a litigant will recover (if successful) or for which they will be liable (if not). {Tollefson}

3. Special costs orders for public interest litigants

a. *Overview* - purpose is to avoid injustice, and ensure access to justice.the injustice at stake is not denial to the appellant of an anticipated remedy, nor denial to public of a desired outcome, but denial of an opportunity to have a vital private and/or public issue judged and resolved. {Little Sisters}

b. *Test for departure from normal costs order:*

i. *Public importance* - matters of public importance that transcend the immediate interests of the named parties, and which have not been previously resolved; {Victoria}

1. *Not merely public interest* - but something *more*; either in the nature of the case, or the identity/motivation of the plaintiff; weighed against any countervailing factors. {Tollefson}

ii. *Lack of interest* - no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically; {Victoria}

iii. *Balance of convenience* - party opposing has a superior capacity to bear the costs of the proceeding; {Victoria}

1. *Impecuniousity* - of the Plf. should not be a determinative factor, as this does not really relate to public interest (but only A2J). {Tollefson}

iv. *Lack of frivolity* - not abusive, vexatious or frivolous litigation. {Victoria}

c. *Test for advance costs order:*

i. *Would otherwise be abandoned* - party seeking costs cannot afford litigation, no other reasonable option exists for bringing litigation before the courts; {Okanagan}

1. For instance, in *Farlow*, it was not clear that the litigation would be abandoned if PCO were denied, and further, the issue at stake (death of child through negligence of hospital)

was not one of public interest. {Farlow}

2. For instance, Plf. must be impecunious or must have made some contribution to costs. Must have made attempts for private funding {Lockridge}

3. For instance, access to justice would appear to be satisfied where Plf. represented pro bono by ecojustice. {Lockridge}

ii. *Claim is prima facie meritorious* - that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means. {Okanagan}

1. For instance, certain cases may not be prima facie meritorious or frivolous; therefore, can be a neutral factor. {Lockridge}

iii. *Public importance* – issues transcend individual interests of the litigant, are of public importance, and have not been resolved in previous cases. {Okanagan}

h. General issues in environmental tort actions

i. *Foreseeability*

1. *Encourages and manufactures ignorance* - where a substance is too poorly understood to make any definitive conclusion about its characteristics, plaintiffs will fail to meet the *Resurfice* standard - because the harm will not be foreseeable. Thousands of chemicals for which material risk data is not available. As strict liability, nuisance, and negligence all require foreseeability of harm, this factor substantially weakens most toxic tort actions. {Collins}

a. Additionally, could hold emitters liable in negligence re: failure to investigate, or in battery for exposure to substance with indeterminate effects (see classification of tort actions). {Collins}

ii. *Judicial resources*

1. *Courts refer issues back to regulatory agencies* – despite that regulatory agencies are themselves too overwhelmed to deal with environmental issues (eg. safety testing for thousands of chemicals), court refers issues back to these agencies, themselves citing, as in *Palmer,* a lack of resources and expertise. {Palmer}

iii. Damage defraying function of tort law

1. *Cost should be borne by those creating risk* - as noted in *Cambridge*, social policy suggests that the cost of damage resulting from ultra-hazardous operations should be absorbed as part of the overheads of the relevant business. This accords with tort policy, which shifts costs to parties able to defray them (perhaps by raising prices). However, Courts leave this to the legislature. {Cambridge}

2. *Liability for historic pollution not recognized by statute or at common law* - as the harm was not foreseeable when the impugned actions occurred, it is not actionable. Further, as the actions ceased before the harm became foreseeable, there is no liability whatsoever. Therefore, those affected absorb the externality entirely. {Cambridge}

2. Division of powers in environmental law

a. *Overview* - environment is not an independent matter to be legislated upon, but rather a polycentric matter relevant to many heads and subject to concurrent jurisdiction. Conceivably, both the Fed and the PG may act with respect to the environment under any head of power. {Oldman} (see also: species at risk -> federalism, EA -> scoping, AGW -> federalism)

   i. *Leadership role* - while environmental law is not something which can be entirely Fed, nor can it be entirely under PG control; Fed expected to take leadership role, and to implement obligations imposed by international treaties. {Hydro}

   ii. *Sources of conflict* - jurisdictional conflict arises where one level of gov. encroaches on authority of another. This could lead to invalidity, inapplicability, concurrence, etc., depending on the nature of the conflict and the heads of power involved. {Oldman}

   iii. *Sources of validity* - if a provision dealing with the environment is aimed at promoting the dominant purpose of a valid statutory scheme, then the provision is valid. {Hydro}

   iv. *General approach to division of powers* - Constitution should be interpreted so as to ensure that both levels have sufficient power to protect the environment within their legislative ken. {Hydro}

      1. Constitutional doctrines such as paramountcy seem to preclude this. {SprayTech}

      2. Strong "legislative ken" approach seems to touch on interjurisdictional immunity, another relic ill suited to the living tree of the modern constitution. {Hydro}

   v. *Precautionary principle* - to achieve sustainable development, policies must anticipate, prevent, and attack the causes of environmental degradation. Included in virtually every governmental document and policy concerning environmental law. {SprayTech}

b. Pith and substance analysis

   i. *Overview* - test applied to determine the true nature of a law, by analyzing its dominant or most important characteristic. First stage in any constitutional challenge, as to have any validity, legislation must be grounded in at least one head of power. {Oldman}

      1. For instance, Guidelines Order of MoE requiring EA for Fed decisions is p&s related to Fed control of Fed institutions, and could only be exercised in relation to decision already within power of Fed. {Oldman}

   ii. *Interpretation not rigorous* - should not be approached with the same rigour as statutes dealing with less complex statutes where s. 7 vagueness is concerned. {Hydro}

c. Provincial jurisdiction over the environment

   i. *Overview* - mainly derived from the ownership and control of land.

      1. *Land ownership* - Public lands and the resources in those lands are vested primarily in the provincial Crown, therefore the provinces wield significant powers as landowner; excepting areas of Federal ownership (mainly in the territories).

2. *Heads of power* - s. 92(13), property and civil rights is the primary constitutional basis for the PG control over factors affecting the environment; also includes s. 92(16), matters of a local or private nature, s. 109 re: mines and minerals, s. 92A re: non-renewables, forests, electrical energy, etc.

    a. For instance, s. 92(13) is deemed to govern the dumping of innocuous (as opposed to harmful substances) in PG rivers, as per *Fowler*. {Fowler}

d. Municipal jurisdiction over the environment

i. *Overview* - power derived from the provinces, who are constitutionally empowered to delegate aspects of jurisdiction to municipal governments; often in the form of a *Municipal Government Act*.

1. *Areas related to environment* - include zoning, which allows for control of activities in areas, permits for development, noise, odour, waste, etc.

2. *Nature of delegation* - can be completely delegated, or partially legislated by the PG with the residual power concerning implementation left to the municipality.

3. *Subsidiarity doctrine* - services should be delivered by the party which is closest to the issue and therefore best situated to deal with it; principle is of minor importance, employed only in Spray-Tech.

4. *General welfare powers* – laws genuinely aimed at furthering health, safety, other goals, though this does not obviously confer an unlimited power; law must be scrutinized for true purpose - laws enacted under general welfare but truly serving an ulterior motive, regardless of mischievousness, are ultra vires. {SprayTech}

5. *Administrative discrimination* – discrimination is prohibited unless expressly allowed. {Moresby}

ii. *Determination of constitutionality*

1. *Scope of delegation* – municipality may exercise only powers (1) *expressly conferred* by statute, (2) necessarily or fairly *implied by express power*, or (3) *indispensable powers* essential to, and not merely convenient to their purposes. {SprayTech}

    a. For instance, includes general welfare powers, as legislature cannot possibly foresee all powers necessary to equip its creatures. {SprayTech}

2. *Broad application* - courts will not strike down municipal legislation unless there is clear demonstration that the law is UV. {SprayTech}

3. *Extraterritoriality* – laws can be struck down where it affects matters beyond the boundaries of the municipality without delivering any identifiable benefit to its inhabitants. {SprayTech}

4. *Implicit purpose* – under general welfare power, purpose need not be express; rather, can be read in from the nature of the legislation itself. {SprayTech}

    a. For instance, distinctions in law banning pesticides in certain areas, for certain uses clearly show that the purpose is to minimize health risks; falls under health provision in empowering legislation, ergo intra vires. {SprayTech}

5. *Administrative discrimination* – can only occur where enabling legislation specifically so provides, or where the discrimination is a necessary incident to exercising the power delegated by the province. {SprayTech}

    a. For instance, distinctions necessarily incident where they are required to maximize the health effects of law banning pesticides. {SprayTech}

e. Federal jurisdiction over the environment

i. *Overview* - mainly derived from specific heads of power, due to lack of land control.

1. *Conceptual powers* - criminal law (s. 91(27)), taxation (s. 91(3)), spending, trade and commerce (s. 91(2)), POGG. Associated with responses available to environmental issues.

    a. *Criminal law power* - able to implement prohibitions with stiff penalties to prevent harm to human health, etc. Limited to prohibition/penalty formula, suitable for command and control.

        i. *Prohibition backed by penalty* – cannot take the form of regulation, but rather must provide clear prohibition and penalty. {Hydro}

            1. Regulatory schemes can be identified through measures of discretionary authority, elaborateness. {Hydro}

        ii. *Must protect valid public purpose* - the prohibition must be aimed at the protection of a valid public purpose, such as health, safety, etc. {Hydro}

            1. The environment is a public purpose which Fed can legitimately safeguard through criminal legislation. {Hydro}

        iii. *Plenary yet limited* - does not grant full control to legislate in subject matter areas it touches on, but exclusive jurisdiction for discrete criminal prohibitions pertaining to those subjects. {Hydro}

            1. In other words, the prohibited action must be tailored to meet the specific circumstances which constitute the harm protected against. {Hydro}

        iv. *Not colourable* – only restriction on legislation under this power is that this head must not be invoked colourably to invade PG domain. {Hydro}

    b. *Spending power* - supplemental to the command and control approach under the criminal law power. Precise breadth is uncertain.

    c. *Taxation power* - supplemental to the command and control approach under the criminal law power. Can be non-targeted, in that it merely raises revenue to fund other approaches, or targeted, in that it would be aimed at reducing non-desirable activities.

    d. *Trade and commerce* - constrained by narrow interpretations, may not be able to significantly aid the effort to curb the effects of human activity on the environment.

e. *POGG* - residual power, re: matters not assigned under other heads of power. Can be novel matters, or extant matters which have increased in importance.

i. *National concern branch* - more relevant to environmental law. Following requirements for applicability: {Zellerbach}

1. *Permanence* - permanent issue; if temporary, then emergency branch is the more appropriate head of power.

2. *Novelty* - applies to matters which did not exist at the time of confederation, or which have in the interim increased in importance such that they are now matters of national concern. {Zellerbach}

3. *Distinct* - matter must have singleness, distinctiveness, and indivisibility that distinguishing from matters of PG concern; {Zellerbach}

4. *Plenary* - unlike emergency, confers plenary power. Therefore, for a matter to qualify must have ascertainable and reasonable limits re: encroachment on PG jurisdiction. {Zellerbach}

a. However, the plenary nature of this power has also been found inconsistent with need for concurrence in environmental jurisdiction. {Hydro}

5. *PG inability* - must consider PG inability, or, put another way, the effects on extra-provincial interests if one province fails to regulate effectively in this area. {Zellerbach}

2. *Functional powers* - sea coast and inland fisheries, navigation and shipping, Fed works/undertakings, canals, harbours, rivers, lake improvements most relevant to environment. Associated with the subject matter of environmental issues.

a. *Sea coast and inland fisheries* - s. 91(12), most obvious connection to the environment; not plenary, and PG has retained considerable jurisdiction over private fisheries and fish processing, under s. 92(13).

i. For instance, in *Fowler,* a provision of the *Fisheries Act* was found UV the Fed, as it precluded dumping of wood debris into a stream regardless of whether this harmed fish habitat; lack of nexus between the law and the head of power used to justify it undermined constitutionality. {Fowler}

b. *Navigation and shipping* - s. 91(10), each is a separate head of power; navigation covers all navigable watercourses, even those in PG or private hands. Not plenary, however, as PG retains jurisdiction in matters other than navigation. Shipping is limited to interprovincial/international.

c. *Federal agencies, works and undertakings* - s. 92(10), s. 91(29); Parliament has authority over certain undertakings dealing with communications, transportation, and can declare others as Federal if for advantage of multiple provinces.

i. For instance, the power of the Fed to legislate in relation to the operation of Fed institutions and agencies was used to justify *Guidelines Order* of MoE, requiring EA when certain decisions made. {Oldman}

f. *Resolution of environmental jurisdictional conflicts*

i. *Overview* –

1. *Legislative void does not cede jurisdiction* – the mere existence of provincial (or federal) legislation in a given field does not oust other jurisdictional prerogatives to regulate the subject matter. {Morton}

2. *Necessarily incidental* - legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional. {Morton}

3. *Interjurisdictional immunity* - certain areas where the Fed has a protective core content; impugned law is not held to be invalid, but simply inapplicable to the federal undertaking, person or thing, and is limited in application to matters within the jurisdiction of the Province by reading down the legislation. {Morton}

   a. *No longer in favour* - dominant tide of constitutional interpretation does not favour interjurisdictional immunity as a mode for interpreting and applying the constitution; inconsistent with living tree dicta. {Morton}

   b. Different from paramountcy, in that it does not require that the Fed have passed laws in the domain for the PG law to be invalid. {Morton}

4. *Subsidiarity* - does not apply to matters which have been delegated to the Federal government in the *Constitution Act*. {Morton}

   a. For instance, fisheries, as a national resource, require uniformity of the legislation which affects and protects that national resource. {Morton}

   b. For instance, mere ownership of lands underneath fish farms does not give PG right to encroach, nor does P&CR. {Morton}

5. *Federal paramountcy* - ensures that valid provincial legislation does not encroach too far into the federal sphere. It applies where there are two valid laws, one federal and one provincial, that are inconsistent with each other. Fed prevails over the PG law, which becomes inoperative and is held in abeyance unless and until Parliament repeals the federal law. {Morton}

   a. Does not apply where the jurisdiction in question is exclusively federal.{Morton}

   b. *Double aspect doctrine* - applicable where there are two facets to subject matter in question, one with local implications, the other with national implications. Consistent with concurrent legislation and the doctrine of subsidiarity. {Morton}

      i. For instance, unable to accept that PG matters of a local or private nature to encroach on matters concerning national resources set out for Fed management. {Morton}

      ii. For instance, PG permission yet required where Fed undertaking or industry requires use of subsoil belonging to the province. {Morton}

g. Aboriginality and the Constitution

i. *Overview* - enshrined in s. 35 of the Constitution Act, recognizes the existence of both rights by treaty and other rights. These rights are not absolutely held, subject to government infringement where the infringement:

1. *Minimal impairment* - action of the government must minimally impair the asserted right; and,

2. *Pressing and substantial purpose* - advances a legitimate, overarching governmental concern (for resource conservation, in the environmental context).

ii. *Aboriginal rights independent of treaty* - take two distinct forms, as set out by the Supreme Court of Canada:

1. *Aboriginal rights* - including practices, customs, or traditions integral to the distinctive culture of an aboriginal group, as per Van der Peet;

2. *Aboriginal title* - which encompasses the right to exclusive use and occupation of the land for a variety of purposes, as per *Delgamuukw*. Purpose does not have to be traditional, but rather only not incompatible with the connection with the land which underlies the right. Inalienable and communally held.

iii. *The duty to consult*

1. *Overview* - where undertaking an action which could affect an extant or potential Aboriginal right or title claim, the Federal government has a duty to first meaningfully consult with the Aboriginal group in question. {Tlingit}

a. *Impairment of right or title* - duty to consult is triggered by the possibility of an action undertaken which could impair Aboriginal right or title. {Tlingit}

i. For instance, EA performed on project which could affect Aboriginal land means that Aboriginal group should be involved in EA process. {Tlingit}

b. *Not a duty to agree* - duty to consult meaningfully and in good faith, though this is not commensurate with a duty to reach an agreement. Can lead to duty to accommodate, however. {Tlingit}

c. *Honour of the Crown* - duty not technical or narrow, but rather must be interpreted broad and purposively in light of relationship between Crown and Aboriginal people. {Tlingit}

d. *Balancing of interests* - concerns of Aboriginal groups must be balanced reasonably with the potential impact of the decision on those concerns, and with competing societal concerns. {Tlingit}

e. *Applies to extant and potential Aboriginal rights* - if aware of the pending claim or treaty negotiation, the Fed must consult, regardless of whether the right is merely a potentiality. Strength of potentiality determines scope of duty, however.{Tlingit}

i. For instance, if an Aboriginal group has made a claim of Aboriginal title which has yet to be heard by the courts, there is a duty to consult concerning the use or dispensation of that land

in the interim. {Tlingit}

h. Collaborative federalism in the environmental context

i. *Overview* - this is the dominant pattern of jurisdiction over environmental regulation, favoured in all policy fields.

ii. Circumstances in which cooperation is likely to occur:

1. *Control* - where this gives a government greater control over domestic policy than unilateralism; therefore, where there are interdependencies or externalities beyond government control, cooperation is necessary for effective policy. {MacKay}

2. *Cost* - where intergovernmental imposes political or other costs; therefore, it is in governmental best interest to induce cooperation. {MacKay}

iii. *Agreements under the collaborative model* - all emphasize delivery of protection by the party best situated to do so, almost always the PG (subsidiarity principle); generally, bar action by other levels of government absolutely.

1. *Equivalency agreements* - holds that PG laws apply if their standards are equivalent to those set by Fed legislation. {MacKay}

2. *Statement on Interjurisdictional Cooperation* - PG and Fed agreement which commits the governments to cooperate on environmental policy in order to avoid duplication and to harmonize standards. Led to establishment of the CCME.

3. *Environmental Management Framework Agreement* - tentative agreement which committed the PG to conclude sub-agreements in areas of environmental regulation that harmonize standards and reduce duplication; ultimately rejected. {MacKay}

4. *Canada-Wide Accord on Environmental Harmonization* - revitalization of the EMJA; calls for consensus based decisions driven by a commitment to high environmental protection standards, sustainable development. Produces non-binding commitments which are generally unenforceable. {MacKay}

5. *Canadian Council of Ministers of the Environment* - group formed out of SIJC. Government falling under standards must undergo six months of consultation; if these are fruitless, the offending party may withdraw. Therefore, not really legally enforceable. {MacKay}

iv. *Regionalization and experimentation* - diversity possible in PG policies means that legislation may be better able to satisfy diverse citizen preferences concerning the environment. Also allows for policies to be "tested" before they are adopted on a large scale.

1. *Quality undermined* - engenders a race to the bottom mentality, in which the Fed is rendered impotent; certain parties are incentivized by the private sector to become pollution havens, which leads others to follow suit, undermining the regime. {MacKay}

2. *Devolution of power* - the literature tends to criticize the collaborative model because it results in the devolution of legislative power to the provinces, which, through the race-to-the-bottom, lead to weak

environmental protection. This approach suggests that POGG should be used to take unilateral action. {MacKay}

i. Explanations for weak Federal role in environmental regulation

i. *Constitutional restraint* - following Zellerbach, POGG expanded to allow for greater involvement in environmental regulation; seen as the primary impetus for Fed involvement in environmental management. {MacKay}

1. *Canadian Environmental Protection Act* - consolidated other Fed environmental acts including *Clean Air Act*. {MacKay}

2. *Canadian Environment Assessment Act* - statutory obligation for Fed environmental impact assessments for development projects which fall under Fed purview due to funding, oversight, etc. {MacKay}

3. *Green Plan* - designed to promote and fund sustainable projects and programs across departments, coordinating with PG and private sector actors. {MacKay}

ii. *Provincial resistance* - however, in the years following the decision, the Fed was reluctant to use its newly granted powers; this is due to the possibility of conflict with PG interests. {MacKay}

1. *Mere excuse* - critics contend that the excuse of constitutional difficulties is just that, an excuse to cover up for basic unwillingness to take necessary action. {MacKay}

2. *PG protective* - however, there is no doubt that PG are highly protective of jurisdiction over natural resources. {MacKay}

3. *PG leader in environmental authority* - PG continues to exercise greater share of environmental authority; Fed involvement generally limited to matters with interprovincial or international implications; unwilling to press for greater role. {MacKay}

iii. *External pressures* - cannot completely understand Fed and PG respective roles in environmental regulation without considering electoral incentives to defend or extend environmental jurisdiction. Public concern is the impetus for involvement. {MacKay}

1. *Cost-benefit* - The costs of environmental protection are concentrated, while the benefits are diffuse; therefore, policy in this area is often seen as being saddled with an unacceptable political costs. {MacKay}

2. *Opponent funding* - Further, the opponents of environmental initiatives are generally better funded, informed, and organized than their proponents. {MacKay}

3. *Political climate* - As a result, the success of environmental initiatives is often dependent on the political climate; in the time following an environmental disaster, or when the economy is doing well, voters are more likely to sympathize with environmental concerns. {MacKay}

3. <u>Environmental regulation</u>

a. *Overview* - 70% of Canadians call pollution laws inadequate, stronger regulations to combat global warming

supported for various resource industries (though not forestry, manufacturing, or mining). {McAllister}

b. Development of environmental regulation to reflect uncertainty and other shortcomings

i. *Overview* - legislation concerning the environment has evolved over time, and greening reflects this process over three stages. Regulation is response to market and technical failures; assessments attempt to anticipate these failures and environmental problems they cause; negotiation and problem solving attempt to address these issues in highly sophisticated ways. {Emond}

ii. Shortcomings of symbolic/permissive/command and control regulation

1. *Overview* - focus on the obvious; smoke stacks, responses to major environmental disasters or revelations about consumption practices. Regulator and the regulated strike a symbiotic balance in which each contributes to the political well-being of the other. {Emond} Permits specific discharges within an acceptable limit, imposes penalties on those who exceed limit. Focuses on what we know, rather than what we do not know. {M'Gonigle}

2. *Failures*

a. *Uncertainty* – no longer acceptable due to explosive increase in variety of artificial substances in use; focus on observable cause and effect relationships means that there are effects which remain hidden, yet regulation proceeds on the assumption that these do not exist. {M'Gonigle}

b. *Assumption of assimilative capacity* - theory is that the environment has an enduring capacity to assimilate prescribed levels of pollutants without harm. May not be *any* assimilative capacity, also impossible to gauge assimilative capacity without knowing consequences of emitting chemical. {M'Gonigle}

c. *Assumption of scientific knowledge* - too many chemicals introduced every year, many or most escape regulation; assessment is expensive and time consuming. Priority based on (primarily acute) toxicity, persistence, and bioaccumulation. Chronic effects at sub-lethal levels are not a focus. {M'Gonigle}

d. *Assumption of effective regulation* - high level of funding, expertise, and enforcement facilities available. Lack of these resources commoditizes environment, with costs externalized to government and public. {M'Gonigle}

e. *Adversarial* – precludes opportunities for creative solutions and collaborative outcomes; industry can be an agent of change, rather than the culprit of environmental degradation. {Harrison}

f. *Reactive, rather than anticipatory* - the damage has been done by the time that it is realized that regulatory mechanisms are even necessary. {Emond}

g. *Legitimacy issues* - by excluding public from participation, the measures are viewed as mere symbolic reassurance; regulated industry makes small concessions in exchange for government approval. {Emond}

h. *Liability shift to regulator* - the regulator assumes liability by entering the field, as the regulated industry able to shift blame once standards are met. {Emond}

i. *Knowledge gap* - knowledge concerning the problem increases proportionally with the regulatory effort, thus requiring constant adjustment of standards; the alternative is immediate obsolescence. {Emond}

j. *Inefficient* - costly because it fails to account for the marginal cost of compliance among differently situated firms; it is too coarse grained to suit all actors, effectively. {Freeman}

k. *Stifling* - prevents innovation, as there is no incentive to perform beyond minimum. {Freeman}

iii. Shortcomings of preventative/precautionary command and control regulation

1. *Overview* - focuses on less obvious problems, such as the odourless, colourless, tasteless, and lethal substances known as exquisite toxics. Problem now framed as "environmental risk" exposed through epidemiological information, among other things. {Emond}

2. *Failures*

   a. *Adversarial* - precludes opportunities for creative solutions and collaborative outcomes; industry can be an agent of change, rather than the culprit of environmental degradation. {Harrison}

   b. *Cooperativeness* - having removed the vestiges of the relationship between regulator and regulated, there is no longer any incentive to work together. {Emond}

   c. *Adjudicative dependency* - adjudication used to fashion and implement policies, as well as to enforce policies. Therefore, diminishes role of innovative and collaborative solution. {Emond}

   d. *Resource consumption* - byproduct of adjudicative nature of this form of regulation, resources consumed mean that each side saves for "mega projects" thus leaving most problems to be dealt with through other means. {Emond}

   e. *Status quo* - built in bias for the status quo, by loading the approval process with hearing and assessment requirements. While this avoids innovations that are worse from the environment, this can also hold back innovations which are more environmentally sound. {Emond}

iv. Recommendations to improve environmental regulatory model

1. *Preventative design* - end of pipe solutions are not sufficient; smoke stacks were made to enhance air quality, a solution which contributed to acid rain. A holistic approach which accords with the precautionary principle is necessary; based on a presumption of harm. Permissiveness not viable in the face of uncertainties. {M'Gonigle} - however, Emond has pointed out shortcomings here as well (see above).

2. *Lowering standard of proof* - lowering the standard of proof by accepting uncertain scientific information as sufficient on BOP is a means which has been adopted by the American courts (and arguably Canada in *Snell*); however, following *Resurfice*, it is clear that this is not the way the wind is blowing in Canada. {M'Gonigle}

3. *Risk creation as causation* - by accepting creation of risk as evidence of causation, the Courts are able to assign liability in a manner which minimizes judicial subjectivity. This is a risk-benefit analysis: the

harm was created, and the costs of that risk to the Plf. outweigh the benefits to the D. However, risks and benefits may not be so amenable to quantification. {M'Gonigle}

4. *Establishing a legal right to environmental quality* - jurisdictions in the US have enacted legislation which enshrines a right to environmental quality; this includes a lowering of the standard of proof, and shifting the burden onto the defendant once a prima facie case has been established (eg. the Plf. shows that the actions are likely to harm the environment). The D. must then show that actions were reasonable. Not yet apparent in Canadian law. {M'Gonigle}

5. *Shifting burden of proof*

    a. *Alternate liability* - (eg. Cook v. Lewis) where, having proven negligence, but not which of multiple tortfeasors caused the harm, the burden shifts; the D.s must then absolve themselves on BOP or else be held liable. Limited application, since it requires proven and limited causes of harm, establishment of negligence, and of course, is a reactive solution in any case. {M'Gonigle}

    b. *Strict liability* - (eg. Rylands v. Fletcher) where, a person who has a harmful thing under their care or control is to be held strictly liable for the consequences should it escape; removes the need to prove negligence. The tort is made out once the harm and causation are proved, subject to a defence of due diligence. The difficulties in disproving a due diligence defence add cost and difficulty to trial process. {M'Gonigle}

6. *Shift to mutual problem solving / cooperative approach*

    a. *Overview* - there is great doubt as to the extent to which negotiation and compromise may be useful, particularly as environmental protection to some degree now reflects values and ethics; these are not subject to compromise. Therefore, a scheme of negotiation, presupposing compromise, is not compatible. {Emond} (see also, cooperative enforcement, below)

    b. *Implementation* - recognize the legitimacy of negotiation, mediation, and other new means of problem solving; establish a regime of rights and obligations concerning participation in the process; recognize the limits of cooperative problem solving. {Emond}

7. *Shift to market-based mechanisms*

    a. *Overview* - such as emissions trading schemes, thought to be more efficient than command and control approach. Based on the idea that firms able to reduce emissions at a lower cost will be encouraged to do so by being able to sell excess allocation to other firms. Economic efficiency produces greatest decrease at least cost. {Freeman} (see also: GHG -> mechanisms)

        i. *Political considerations* - allocations in market system are dominated by political considerations, as are other components of the system. {Freeman}

        ii. *Taxation* - market systems are difficult to tax, as the valuation of emission is difficult to determine. {Freeman}

        iii. *Hotspots* - trading may create hotspots of pollution, rather than diffusing effects over broad area, which would help reduce bioaccumulation. {Freeman}

        iv. *Monitoring* - require monitored indicator for the purposes of trading or taxing; this is not

always feasible. {Freeman}

v. Indicators of effective environmental regulation

1. *Compliance* - the state of conformity under the law is one measure which can be employed. Measured with relation to Fed regulations, and PG licencing/regulations. {Castrilli}

2. *Enforcement* - extent to which enforcement is being employed indicates extent to which emitters are complying with the law. Fed employs prosecutorial enforcement, PG employs administrative penalties, etc., more flex and less cost. {Castrilli}

3. *Shortcoming of regulatory indicators* - regulations are unable to take into account every aspect of regulated topics, do not regulate comprehensively, a perfect compliance rate with regulations does not equate to perfect protection. {Castrilli}

c. Environmental standard setting

i. Process for creating an environmental standard

1. *Setting objective* - broad categorical terms (eg. safe drinking water) set out either in law or code of practice, depending on proponent agency. Values carry additional objectives; for instance, to conserve value in question without unduly reducing supply of timber from BC forests, as per the *Forest and Range Practices Act*. {Tollefson}

2. *Developing criteria* - gauge whether the objective is currently being achieved or compromise. Due to complexity of dose-response relationship, a pragmatic approach is adopted, basing results on limited parameters of greatest concern. {Tollefson}

3. *Establishing ambient quality standard* - identification of how the objectives can best be achieved with view of costs, benefits, and risk acceptability; typically informal, policy-based. {Tollefson}

4. *Defining individualized operational standard* - moving from a statement of the desired ambient outcome to standards that define permissible behaviour of an individual party - eg. discharge standard for air pollution. Generally, limits for concentration released within a time period. In the US, they instead use discharge limits set with reference to best available technology standard. {Tollefson}

ii. Forms of environmental standard

1. *Performance based*

   a. *Overview* - specific, measurable indicator of a desired objective, leaving broad discretion with how it is achieved. Intervention at *output stage*. Work best where actual performance can be measured and verified. Preferential in circumstances where performance is measurable.

   b. *Measurement*

      i. *Direct measurement ideal* - best performance indicator is one which directly measures the ambient environmental value being protected. {Tollefson}

      ii. *Isolation of impact ideal* – while such values subject to a number of other influences, the

measure usually crafted to isolate impact of regulated activity; however, uncertainty cannot be eliminated. {Tollefson}

iii. *Measurement is costly* – if measurement responsibility remains with regulator, then there will be an increase in costs to the government in administrating the standard. {Tollefson}

c. *Autonomy*

i. *Protects autonomy, esp. where qualitative* - can preserve private autonomy, with autonomy increasing with congruency between the standard and the objective it protects. Further, qualitative measures more autonomic for private actors than quantitative measures, which can be proscriptive. {Tollefson}

ii. *Increased autonomy alienates public* - however, increased autonomy can alienate public participation and reduce transparency. {Tollefson}

2. *Technology based*

a. *Overview* - silent about desired outcomes; rather, specify a mode or technology which optimally promotes objective. Intervention at *action stage.* Proscriptive, but alleviate the regulator of having to spend resources on measurement or other initiatives. {Tollefson}

b. *Point of marginal utility* - required regulated facilities to install most stringent technology available, up to the point where the cost of doing so would cause a shut down. {Tollefson}

c. *Citizen suits* - provided for citizen suits, whereby private agents could challenge permit holders and the government with failed compliance and enforcement. {Tollefson}

d. *Measurement not required* - minimize monitoring and enforcement costs while increasing public participation in compliance efforts. {Tollefson}

e. *Stifles innovation* - to some degree, no incentive to innovate, as use of BAT sufficient to protect. {Tollefson}

3. *Management based*

a. *Overview* - eschew specification of outcome and means, instead promoting achievement of policy objectives by imposing management-planning activities. Intervention at *planning stage*. Preferred where the regulated community comprises heterogeneous enterprises facing heterogeneous conditions. {Tollefson}

d. Typology of policy implementation mechanisms

i. *Overview* - arranged from most to least coercive. Most government activities fall within regulation, exhortation, and inaction. {Harrison}

1. *Regulation* - legal requirements enforced through sanction; while this can involve cooperation (eg. involvement in development, or reduced monitoring of firms with certified systems), cooperation may undermine transparency. {Harrison}

2. *Government enterprise* - direct provision of services by government agencies; {Harrison}

3. *Expenditure*; {Harrison}

4. *Exhortation* - persuasion in a nominally voluntary manner. Where this amounts to a voluntary agreement, strong expectations of performance and a threat of regulation re: noncompliance. On the other hand, education and information merely attempt to influence behaviour. {Harrison}

    a. *Challenge agreements versus negotiated agreements* - challenge (public) agreements offer almost no change, though negotiated agreements against backdrop of regulation may have effect. {Gunningham}

5. *Inaction* - civil society is left to address environmental problems; may involve the threat of government intervention; similar to exhortation, but with a proponent other than the government. {Harrison}

    a. *Self-regulation* - fails to achieve compliance in absence of sanctions imposed by government. {Gunningham}

e. Fisheries Act

i. *Overview* - example of first-generation environmental protection legislation, with two key sections relevant to the environment - habitat protection under s. 35(1) and pollution prevention under s. 36 of the act.

ii. *Performance-based* - aims to regulate activities by focusing on the impact or outcome; firms are free to achieve compliance however they please, however.

iii. *Action forcing provisions* - has action forcing, in that members of the public may lay private informations against parties who have violated s. 35 or s. 36 prohibitions.

iv. *Broad discretion* - confers a broad power on MoFO to manage and regulate the fisheries, including absolute discretion with regard to issuing licenses. {EcologyAction}

v. Habitat protection, s. 35(1)

1. *Prohibition* - harmful alteration, disruption, or destruction of fish habitat (HADD); persons are prohibited from any work or undertaking which causes HADD.

2. *Exception* - under s. 35(2), HADD prohibition does not apply where a person is authorized by MoFO or regulations pursuant to the *Fisheries Act*.

3. *Work or undertaking* - words "work or undertaking" do not include fishing. If intended otherwise, definition should have been made clear, as was done elsewhere in the Act. {EcologyAction}

4. *Criticism*

    a. *Broad discretion* - the breadth of the discretion granted to the Minister under the *Act* to issue exceptions greatly weakens its force.

5. *Changes to s. 35 via Jobs, Growth and Longterm Prosperity Act (Bill C-38)*

    a. *Overview* - many activities previously scrutinized for their impact on fish habitat may now be ignored. Includes projects that result in the temporary removal of vegetation from spawning grounds and the disruption of gravel or sediment as a result of road construction, specifically designated projects or classes of project (eg. mining, hydroelectric), limits protection to fish of value to humans. {Hume}

        i. Issue with protecting only fish of value to humans overlooks the uncertainty concerning the role that species play in environment - may be critical to survival of fish which are of value, for instance.

    b. Changes in force

        i. *Environmental assessment* - previous to changes, provisions in the Fisheries Act triggered an environmental assessment. This is no longer the case. {Hume}

        ii. *Expanded exceptions under s. 35(2)* - Previously limited to (1) means or conditions authorized by the Minister, or (2) under regulation from the GIC. Now includes (1) prescribed works or activities, (2) works or activities carried on in or around prescribed water, (3) authorized by the Minister or (4) by a prescribed person or (5) by this Act. {Hume}

    c. *Changes not in force*

        i. *s. 35(1) protection contracted* - will be altered by s. 142(2) when this comes into force by order of the GIC. Only protects commercial, recreational, or Aboriginal fishery, fish which support such fisheries; only prohibits serious harm to fish, not to habitat. {Hume}

            1. *Current*: No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

            2. *Proposed*: No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery

vi.Pollution protection, s. 36

1. *Prohibition* - no deposits of deleterious substances of any type in waters frequented by fish, or in areas where the substance may enter such water.
    a. Purpose of the definition is to ensure that conduct which falls short of rendering the water deleterious is nevertheless prohibited. {MacMillan}

2. *Exception* - other than subject to authorization under s. 36(4), under undertakings or works or substances exempted under s. 36(5).

3. *Deleterious substance* - <u>any</u> substance, which, if added to <u>any</u> water, would degrade / alter quality so that it is deleterious or likely to be deleterious to fish, fish habitat, or use by man of fish, s. 34(1).

    a. For instance, Bunker C oil is a deleterious substance; therefore, a spill of such oil, even if

remediated before causing water to become deleterious, is prohibited under s. 36. {MacMillan}

b. For instance, ammonia is naturally occurring, necessary for life, but if added to any water, not just receiving water, would render it deleterious, therefore, prohibited. {Kingston}

c. Would not any substance cause water to become deleterious to fish at sufficiently high concentrations?

4. *Criticism*

a. *Overbreadth* - zero-tolerance regime which prosecutes polluters even where the deleterious substance has no actual harmful effects. Arises from *any water* re: deleterious substance: even if the substance has a deleterious effect when added to a thimble of water in a laboratory, but no effect in the wild, it is prosecutable.

i. For instance, *Richler* holds that benign pollution should not be prosecuted, that benign polluters are innocent, there there is no benefit in deterring harmless pollution; holds that there is a different between bioaccumulative toxics and other substances, eg. ammonia. {Richler}

f. Canadian Environmental Protection Act

i. *Overview* - second-generation environmental protection legislation, cornerstone of Fed environmental law and policy, focuses on classification, identification, and regulation of chemical substances.

ii. *Action forcing provisions* - allows for members of the public to trigger investigations into violations of the Act, and in some circumstances, to commence prosecution in their own right. Also allows members of the public to claim damages for CEPA violations.

iii. *Regulation of toxic substances, Part 5*

1. *Assessment of risks* - determination of whether a substance is toxic; if so, the Ministers of Health and Environment must pass regulations controlling its manufacture, use, import, and so on within two years.

2. *Assessment of management* - determination of means through which identified risks can be managed or eliminated, whether by regulation or otherwise.

3. *Substances Lists* - all substances used or proposed for use must be listed on either the Domestic or Non-Domestic Substances Lists. The former contains substances which were grandfathered for use pending assessment at the time of CEPA's enactment.

4. *Domestic substance list* - 23,000 chemicals grandfathered out of CEPA application pending assessment;.

5. *Criticism*

a. *Omissions* - fails to consider all substances (too many), made only slow progress through grandfathered DSL chemicals thus far.

b. *Focus* - assessment is expensive and time consuming. Priority based on (primarily acute) toxicity, persistence, and bioaccumulation. Chronic effects at sub-lethal levels are not a focus. {M'Gonigle}

4. <u>Enforcement of environmental regulation</u>

a. Overview - there are several means available for enforcing compliance with environmental regulation, and these apply whether the scheme is command and control, cap and trade, etc.

b. Citizen enforcement of environmental regulation

i. Overview - governments may not be able to enforce environmental regulations stringently due to budget constraints, political climate (eg. job protection), and legal considerations (difficulty in meeting burden of proof). As a result, public interest may be served where citizens are empowered to enforce environmental regulations on behalf of the regulator.

ii. Citizen suits v. private prosecutions - private prosecutors in Canada must establish guilt BRD where as citizen suits in the US are governed by a civil standard of proof. Also more daunting legally and scientifically.

iii. Not widely adopted in Canada - while private prosecutions are possible under the *Criminal Code*, citizen suits are not allowed under the *Species at Risk Act*, for instance. Laws allowing for commencement of investigation or claims for damages, such as those in CEPA are circumscribed (see also, species at risk -> *SARA*).

iv. Advantages of private prosecutions

1. *Precludes entente* - cures inaction which arises between overworked bureaucracy and the industries subject to their regulation. {Ferguson}

2. *Corruption safeguard* - provides important safety net against the potential for corruption in Crown prosecutorial services. {Ferguson}

3. *Avoids impotency* - ensures that laws are not rendered nugatory through government non-enforcement. {Ferguson}

4. *Reassurance to good actors* - demonstrates to voluntary good faith actors that their competitors will not benefit through non-compliance. {Ferguson}

5. *Democratic involvement* - gives substance to an important civil liberty in what is to be a participatory democracy. {Ferguson}

v. Costs awards - where enforcement proceedings culminate in judgment for the plaintiff or through settlement, Courts may order that the defendants reimburse the citizen attorney general for the costs of litigation, such as reasonable attorney fees (eg. equivalent of private law billings if services were provided *pro bono*). {Tollefson}

vi. Citizen enforcement and Canadian Environmental Bill of Rights - document drafted by environmental groups which would enhance the role of citizens in environmental law enforcement; has no teeth until enacted, however. Therefore, private prosecution remains the primary tool for citizen enforcement.

vii. Citizen enforcement and Ontario Environmental Bill of Rights - citizens granted standing to enforce environmental laws under two procedures. {Tollefson}

1. *Protection of public resource*s - under s. 84, citizens may commence actions to protect public resources in Ontario from harm caused by violation of environmental legislation; used twice in ten years. {Tollefson}

2. *Harm via public nuisance* - under s. 103, citizen can bring an action for damages under public nuisance where they have suffered individual harm as a result; six actions in ten years. {Tollefson}

viii. Government interference in citizen enforcement

1. *Overview* – in certain provinces, policies oblige the AG to assume conduct of all private prosecutions, which almost always lead to a Crown stay of charges. In certain provinces, the policy is to always stay, regardless of RPC. {Ferguson}

2. *Test for stay of charges* - may vary from province to province, but generally requires RPC (reasonable prospect of conviction) and public interest in prosecution. {Kostuch}

3. *Flagrant impropriety* – Court will only overturn prosecutorial discretion where there is flagrant impropriety, eg. unlawfulness, bias, corruption. Higher than reasonableness. {Kostuch}

    a. For instance, in *Kostuch* bias was avoided by referring the decision to intervene to experienced prosecutors in another province. {Kostuch}

4. *Legitimacy* - raises suspicions that partisan politics have interfered with the rule of law; suspicions which could be easily dispelled were the AG to provide reasons for staying prosecutions. {Ferguson}

    a. For instance, in *Kostuch* the reason for the stay, that there was a likely defence under the *Fisheries Act*, was not known until trial. {Kostuch}

5. *Zealousness v. leniency error* - public interest is only well served where there is a balance struck between using the system for malicious purposes, and avoiding under-enforcement. {Ferguson}

6. *Charter implications* - stay of a private prosecution does not generally violate the *Charter*, and even if it does, this would be justified under s. 1 due to the objectivity of Crown counsel - yet, seems contrary to free and democratic society to allow unreasonable stays of private prosecutions, without transparency, accountability, etc. {Ferguson}

    a. For instance, in *Kostuch* it was held that s. 7 does not include the unrestricted right of a private prosecutor to continue a prosecution in face of an intervention by the AG. {Kostuch}

c. Prosecutorial enforcement of environmental regulation

i. *Overview* - includes significant sanctions at both PG level (five years, fines into millions) and Fed (if proceeding by indictment). {Berger}

ii. *Symbolic* – Criminal charges carry stigma, such that it is a means for government to show that it is not shying away from its responsibilities in circumstances of a serious violation. {Berger}

iii. *Not temporally limited* - charges are not subject to the confining temporal limitation period of regulations (two years); there is no limitation period on indictable charges. {Berger}

iv. *Absolute liability* - while some argue that absolute liability is unjust, may be allowed on utilitarian grounds for minor penalties without stigma. {Berger}

1. For instance, *Levis (City)* found that these offences still exist, and are constitutional, but must be clearly identified through legislative intent. {Levis}

v. *Categorization of offence* - true crimes (BRD proof of actus reus and mens rea), strict liability (BRD proof of actus reus, subject to defence of due diligence), and absolute liability (BRD proof of actus reus only). {Berger}

d. Cooperative enforcement, optimization of enforcement

i. *Overview* - allows for mitigation of unfairness, reduction of friction between *regulator* and the regulated, reduces costs of the regulation process. {Zinn}

ii. *Categorization of actors* - holds that there are three types of regulated corporation, and the vast majority are *not* amoral actors: {Zinn}

1. *Amoral calculator* - agents that will choose to violate regulation wherever this poses a potential for economic benefit. {Zinn}

2. *Political citizen* - complies with rules viewed as legitimate, but not with those which are considered unreasonable. {Zinn}

3. *Incompetent* - ignorant of the rule, or otherwise incompetent to comply. {Zinn}

iii. *Optimization strategy for cooperative enforcement* - due to shortcomings (see below), advocates say that enforcement strategy should shift based on previous behaviour: {Zinn}

1. *Behaviour immediately preceding the current proceeding* - if the regulated firm cooperated in the "last round," the agency should cooperate; if the regulated firm defected in the "last round," the agency should adopt sanctions. {Zinn}

2. *Nature of firm* - determine whether firm is an amoral calculator, political citizen, or incompetent, where the latter two are dealt with under the auspices of cooperation, and the former under regulatory sanction. Severe penalties where violations are intentional or negligent. {Zinn}

3. *Publicization of enforcement* - Agency must develop reputation for cooperation, and do so by formalizing and disseminating enforcement strategy. {Zinn}

iv. *Shortcomings*

1. *Uncertain and insufficiently punitive* - cooperative enforcement is uncertain and insufficiently punitive, thereby failing to achieve compliance. Compliance only achieved where cost of noncompliance exceeds cost of compliance.{Zinn}

2. *Discourage good faith actors* - good faith actors become dejected or cynical where violators are not

sanctioned, thus encouraging noncompliance amongst all actors. {Zinn}

3. *Delegitimize process* - public enforcement and prosecution of environmental regulation is an expression of public disapprobation for violations; to negotiate enforcement behind closed doors is to take compliance out of this realm. {Zinn}

e. Liability of individuals in environmental offences by corporations

i. *Overview* - no longer requires directing mind - while previously, identification of a responsible individual of a corporation was necessary, now the collective acts of corporate agents are criminalized where it was directed or negligently supervised by one or more senior officers. {Berger}

ii. *Purpose* - environmental protection is too important to delegate entirely to the lower levels of a corporation; therefore, *Environmental Enforcement Act* allows for only a reasonable degree of delegation. {Bata}

iii. *Considerations* - involves both (1) authority in general, and (2) authority specific to the offence charged: {Bata}

1. *Position and relevant authority* - for instance, the position of the individual within the organization, as well as evidence of the individual's authority to control relevant behaviour. {Bata}

a. For instance, waste handling practices (eg. single control or co-managed), evidence of responsibility taken for waste management, whether undertaken or neglected, and affirmative steps taken. {Bata}

2. *De facto and de jure responsibility* - effectively looks at corporate and societal responsibility, which is undertaken by the job description or agreement. This standard encourages increased responsibility as an individual's stake in a corporation increases. {Bata}

3. *Increased power and benefit*- As power grows, the ability to control decisions relevant to the offence charged increases, and the potential for benefiting from less careful or responsible practices relating to the offence increases as well. {Bata}

f. Defence of due diligence in environmental offences

i. *Overview* - applies to corporate actors in environmental offences, but dependent on various considerations as set out by the SCC in *Sault Ste. Marie:*

1. *System initiation* - was a prevention system established by the board of directors relating to the substance of the offence charged, involving supervision or inspection? Was there improvement in business methods or exhortation by the individual of those controlled or influenced?

2. *System compliance* - Did each director ensure that corporate officers were instructed to set up a sufficient system, according with industry practice, to ensure compliance with environmental regulation? Did this involve officers reporting back periodically, and instruction to report noncompliance? {Bata}

3. *Reporting* - directors must review compliance reports, but may place reasonable reliance on such reports where prepared by informed parties. {Bata}

4. *Concerned parties* - directors must ensure that officers are responsive to concerns of government agencies, shareholders, members of the public, or other concerned parties. {Bata}

5. *Industry standards* - directors must be aware of the standards of the industry and other industries dealing with similar pollutants or risks. {Bata}

6. *Reaction to noncompliance* - directors must immediately and personally act where the system has failed, and this has come to their notice. {Bata}

    a. For instance, in *Bata*, Marchant did not exhort persons under control or influence to behave acceptably, or give instructions to remediate. {Bata}

g. Sentencing of environmental offenders

i. *Overview* – special considerations are invoked in circumstances where an offender is sentenced for having damaged environment - even where not criminal, but rather discharging in excess of water licence limits, for instance. {KenoHill}

ii. *Type of sentence*

1. *Administrative penalties* – introduced in the US to issue modest financial penalties for minor environmental violations; avoid the time and expense of full prosecution and trial. Credible deterrent effect, modest cost to the regulator. {Wood}

    a. *Possibly more punitive than prosecution alone* - regulated industries do not like administrative penalties, due to the issue of absolute liability, and the possibility for double jeopardy in certain jurisdictions. However, this may be indicative of their effectiveness. {Wood}

2. *Probation and other flexible options* - probation orders apply to corporations, allowing for periods of enhanced conditions placed upon the corporation to ensure compliance with the law, remediation, etc. {Berger}

3. *Fines as a penalty* – only one component of a sentencing arsenal; they are easily displaced and do not affect the source of illegal behaviour, however. The penalty must reach the directing mind. {KenoHill}

iii. *Considerations in sentencing*

1. *Spotlighting* – making an example of a company by a public regulator, either by recognizing conduct in excess of compliance, or by harshly bringing attention to those who fail to comply.

2. *Nature of the environment* - special care must be exercised in unique ecological areas, high-use recreational areas, or essential wildlife habitats; special condemnation will follow from damage to such areas. {KenoHill}

3. *Extent of injury* - penalties must reflect the degree of damage inflicted, and therefore must take into account to some degree the resiliency of the damaged environment as well. With irreparable or persistent damage come harsh penalties. {KenoHill}

4. *Offender characteristics* - the size, wealth, and nature of a corporation with a view to its operations and

power must be considered in crafting an appropriate penalty; notice may be taken of this. Must determine what amount will be an effective deterrent. {KenoHill}

5. *Criminality* - accidents, innocent mistakes, and unforeseeable events are less damnable than wilful or surreptitious violations. {KenoHill}

6. *Compliance attempts* - an actor which has shown diligence in attempts to comply should be treated less harshly; measured through duration of non-compliance, cost of compliance, whether the corporation has been candid concerning non-compliance, and extent of resources invested in compliance. {KenoHill}

7. *Remorse* - not necessarily verbal contrition, though perhaps where this is represented by actual corporate representatives in court; rather, speed in cleanup, voluntary reporting; perhaps a plea of guilty in circumstances where detection and conviction were not inevitable. {KenoHill}

8. *Profits realized* - ascertain whether any windfall has been illegally realized; this must be the minimum amount of any fine imposed. Difficult to determine, but absence contrary evidence the reasonable contentions of the Crown may be relied upon. {KenoHill}

9. *Criminal record* - recidivistic conduct raises assumption that corporation more worried about profit than compliance; further, corporations with little public image or contact should be severely punished. {KenoHill}

5. Judicial review of environmental decision making

a. *Overview* - while environmental regulation grants wide discretion to decision makers, the review of administrative decisions for procedural fairness and operation within the confines of statutory boundaries lies with the Courts.

b. *Central tension* - challenges decision makes to ensure action in compliance with the rule of law, and courts to balance their role as defenders of the rule of law with the need to show deference to democratic actors.

c. *Role of administrative law* - this is the form of law concerned with defining and governing the relationship between citizens and the state. All agents that derive power to act through statute; must exercise this power in accordance with tenets of administrative law. Includes Ministers, tribunals, etc.

d. Justiciability

i. *Overview* - requires an understanding that each branch of government must be sensitive to the balance of powers between the branches; this requires interpretation of sections to determine whether they were enacted with the intent that decisions should be subject to judicial scrutiny. {FOTE}

ii. *Application*

1. *Overview* - similar inquiry as to the determination as to standard of review; however, this is a threshold question - if the matter is not justiciable, then there is no rightful review

2. *Standards* - includes both institutional and constitutional standards - the question of both *adequacy* and *legitimacy* of applying judicial machinery to the proposed issue. {FOTE}

a. For instance, the language of a legislative provision may be mandatory or discretionary; an ongoing process of adjustment, as found in *KPIA* implies discretion. {FOTE}

3. *Policy considerations* - justiciability decreases as policy considerations increase. {FOTE}

    a. For instance, as s. 5 of the *KPIA* involves "just transition" for workers and "equitable distribution" of reduction levels among industries, policy-laden, weighs against justiciability. {FOTE}

    b. For instance, resolution of GHG lawsuits would require judgments to be made which could alter ability of the executive or legislative branches to respond to what is a political question. {Connecticut}

4. *Guiding criteria* - where there are no objective legal criteria to be applied and no facts to determine to guide judicial decisions, the matter is not justiciable. {FOTE}

5. *Dictation of contents* - determination of regulatory arrangements by the courts would be an inappropriate interference by the judiciary into the executive role. {FOTE}

    a. For instance, Court cannot tell the Court how to enact regulations so as to meet the obligations of Kyoto via the *KPIA*. {FOTE}

6. *Accountability* - where an Act contemplates Parliamentary and public accountability for achieving the purposes of the Act (eg. democratic accountability), this will often imply that justiciability is displaced. {FOTE}

iii. Types of decision

1. *Policies versus other decisions*

    a. *Overview* - Mere policies are not generally subject to review, and are afforded much deference. Exceptionally, policies may be reviewed: not for wisdom or soundness, but rather for legality. As illegality concerns validity, not application, may be challenged before applied - as soon as formulated. {Moresby}

2. *Delegation*

    a. *Overview* - delegated powers exercised by a subordinate authority (eg. parks superintendent, as opposed to the delegating minister) must be exercised strictly within mandate of empowering legislation, particularly where restricting employment. {Moresby}

3. *Discretion under CEAA*

    a. *Overview* - provides but vague guidance concerning the scope of the project to be considered, and the scope of the assessment to be undertaken; thus, discretion is nearly completely vested in decision makers. {Green}

    b. *Possibility of corruptive influence* - discretion under the CEAA is potentially dangerous, as there is a possibility that political or economic factors might unduly influence the decision making process. {Green}

c. *Recommendations*

i. *Legislative criteria* - for the CEAA regime to be meaningful and consistent, amendments creating specific criteria for exercise of discretion with a view to scoping of project and assessments it required. {Green}

ii. *Independent tribunal* - creation of an expert tribunal tasked with undertaking more detailed and substantive review of exercise of discretion under CEAA would be ideal. {Green}

e. Grounds for review

i. *Overview* - Applications for judicial review must specify grounds for relief, the action or decision to be scrutinized, the responsible decision make, and the form of remedy sought. All of the factors below are effectively different forms of *ultra vires* actions.

ii. *Ultra vires*

1. *Overview* - exercises of public authority must find source in law; decision making powers have legal limits shaped by statutory authority, constitution, *Charter*, and common law. Where rule of law is exceeded, subject to review. {Dunsmuir}

a. For instance, compliance with an enabling statute, such as whether a legislative condition precedent was met before making a decision, grounds for review. {Algonquin}

b. For instance, the use of discretion does not give carte blanche to ignore the text of the legislation; therefore, as *CAA* requires regulation of "any agent", the EPA must regulate GHG if these pose a threat to the public. {Massachusetts}

iii.*Irrelevant consideration*

1. *Overview* - decision making under statute requires consideration of all relevant factors, and further must not be tainted by consideration of any irrelevant factors. {TrueNorth} Test is whether the consideration in question is within the intent and purpose of the *Act*. {Wimpey}

a. For instance, even unfettered discretion, eg. where there are no legislatively required considerations, must consider all but only factors which are relevant to the objects of the act. {Wimpey}

b. For instance, policies concerning reducing proliferation of water treatment facilities are relevant to issuing permits for such facilities. {Wimpey}

c. For instance, as the settlement of civil claims are not within/unrelated to the ambit of the BC *Waste Management Act*, these are an irrelevant consideration in issuing a permit to remediate lands under the Act. {ImperialOil}

iv.*Failure to give reasons*

1. *Overview* - where an administrative decision maker fails to provide reasons, this may be a ground for judicial review. Rarely invoked, and rarely successful. Certain decision makers (eg. Ministers) are under no duty to provide reasons, for instance.

2. *Application*

a. *Objective basis for decision* – in circumstances where there are statutory reporting requirements, and the purpose of such reports is to serve as an objective rationale for the decision reached, reasons must be provided. {Pembina} Must provide justification, transparency and intelligibility. {Athabasca}

i. For instance, under SARA, failure to include basis for why the boreal caribou were not threatened in decision fails to meet standard. {Athabasca}

ii. For instance, under the CEAA, report meant to serve as basis for approving or disapproving project under review; therefore, failure to explain why GHG mitigated or insignificant is required to justify approval. {Pembina}

b. *Relation of reasons to statute* - the nature of the decision made should reconcile the available evidence with the intention of the act, the language of the provision, and the conclusion reached, such that a meaningful review may be conducted.

i. For instance, under SARA s. 80, Minister would have to explain why, in light of the evidence and the recovery plan for boreal caribou, an emergency order is not required. {Athabasca}

c. *No deference afforded absent articulation* - decisions made by experts who had ample material before them on substantive issues should be afforded deference; however, this is only triggered *where those conclusions are articulated.* Expertise commands deference only where the expert is coherent. {Pembina}

i. For instance, where reasons for GHG insignificance/mitigated are not articulated, no deference is due to the decision maker. {Pembina}

ii. As such, it could be said that this factor operates to determine the standard of review; where decisions are not articulated, the standard becomes one of correctness, and, as in *Pembina*, where evidence indicates that the decision is incorrect, it is one which should be overturned. {Pembina}

v. *Procedural fairness*

1. *Overview* - common law principles which govern decision making in addition to the statutory limits of discretion. Where procedural fairness not met, decisions will often be set aside. Purpose is to ensure that a fair and open procedure, appropriate to the decision being made, are in place. {Chameau}

2. *Application* - minimum requirements are (1) notice that an impending decision will be considered and rendered and (2) opportunity for affected parties to comment on decision and process. However, modified by following considerations: {Chameau}

a. *Judicial nature of proceedings* - more that the decision making process, decision itself, and determinations made en route resemble judicial decision making, the more the process will have to resemble a trial; increased fairness and procedural protections will be required, in other words. {Chameau}

b. *Finality of decision* - where no appeal process is available by statute, or where the decision is determinative with no further requests available, greater protections apply. {Chameau}

c. *Importance of decision* - the more important the decision is to the lives of the persons affected, the more stringent the procedural protections will be. {Chameau}

d. *Legitimate expectations* - the understanding of the person challenging the decision determines to some extent the scope of the duty of fairness. {Chameau}

e. *Procedural discretion* - should take into account the choices of procedure which are made by the agency itself, and the extent to which this is reflected by discretion in the enabling statute, and the agency's own expertise concerning fairness in the circumstances. {Chameau}

vi. *Administrative discrimination*

1. *Overview* – where broad regulation making power is bestowed on the GIC, administrative discrimination is permitted unless expressly prohibited. Situation is the opposite of that prevalent in municipal legislation, where discrimination is prohibited unless expressly allowed. {Moresby}

a. For instance, where regulation making power does not prohibit the making of distinctions by the GIC, and regulations do not prohibit subordinates from making distinctions, then this is allowable. {Moresby}

2. *Application*

a. *Public policy* – administrative discrimination deals with drawing distinctions, rather than with the basis on which such distinctions are drawn. Therefore, unless the distinction is contrary to public policy, the regulations would not prevent it from being drawn. {Moresby}

i. For instance, allocating proportion guide licences for park to Haida guides, despite under-subscription, not contrary to public policy. {Moresby}

b. *Ameliorative* – s. 15(1) jurisprudence reveals that while discrimination which furthers stereotyping is contrary to public policy, ameliorative discrimination is acceptable. {Moresby}

i. For instance, allocating proportion guide licences for park to Haida guides, despite under-subscription, ameliorative in nature. {Moresby}

f. Standard of review

i. *Overview* - the extent to which Courts will respect the discretion of government actors to make decisions, versus interfere with those decisions. Informed by legislative intent, *privative clauses*, etc. Courts will only defer *within* the statutory confines of the decision maker's authority; action in excess of authority is *ultra vires*, and must be remedied.

ii. *Purpose* - alleviates the central tension in judicial review, Courts determine the jurisdiction of decision makers, but legislative intent determines standard of review. Therefore, rule of law and legislative supremacy are both maintained. {Dunsmuir}

iii. *Privative clauses* - while privative clauses and legislative intent determine the standard of review, cannot

legislate out of the review process entirely through privative clause. {Dunsmuir}

iv. *Applicable standards of review*

1. *Reasonableness*

a. *Overview* - previously subdivided into unreasonableness and reasonableness *simpliciter*, this distinction was dropped in *Dunsmuir* due to confused and uneven application. {Dunsmuir}

b. *Application* - deferential standard premised on understanding that not all circumstances lead to a single reasonable conclusion; may be a range of reasonable conclusions possible. Decisions must fall within this range, must also be j*ustified,transparent, and intelligible*. {Dunsmuir}

i. For instance, government process for duty to consult does not have to be perfect. It merely has to be reasonable. {DeneTha}

2. *Correctness*

a. *Overview* - maintained in *true* jurisdictional (eg. where tribunal must decide the limits of its own jurisdiction with respect to a matter), constitutional, and some other questions of law (interpretation relating to jurisdiction). {Dunsmuir}

b. *Application* - no deference due to the decision maker; rather, the Court will undertake its own analysis. Only one viable outcome possible. {Dunsmuir}

v. *Process for determining which standard applies*

1. *Jurisprudence* - must first determine whether the standard of review has already been satisfactorily determined with regard to a particular category of question. {Dunsmuir}

2. *Functional* - where the above inquiry is fruitless, must proceed to analysis of factors, including presence or absence of privative clause, purpose of the statute (generally) and provision (specifically), expertise of the tribunal (relative to court). {Dunsmuir}

a. Fact, law, or mixed - strict fact indicates reasonableness, strict law indicates correctness, mixed indicates that different standards apply to different portions of the decision. Jurisdictional questions always correctness. {Weir}

i. For instance,, all government action, including interpretation of treaties and statutes, which has an impact upon aboriginal rights or constitutional issues invokes a correctness standard. {Athabasca}

ii. For instance, provisions which limit discretion invoke correctness - such as a condition precedent to consider the Management Planning Manual before approving management plans. {Algonquin}

*iii.*For instance, provisions concerning "satisfaction in own mind" are due significant deference. {Algonquin}

*iv.*For instance, the existence of the duty to consult is one of mixed law and fact. Legal portions of decision must be examined for correctness, while factual portions must be examined for

reasonableness. {DeneTha}

v. For instance, where factors are provided for consideration in exercise of discretion, it is for the Courts to decide whether they are exhaustive, or compulsory, or otherwise explicitly or impliedly restricted. {Wimpey}

vi. For instance, interpretation of the CEAA by the Government is reviewable on a standard of correctness. {TrueNorth}

b. Privative clauses - where there are privative clauses, these may state the nature of deference or review intended by the legislature. {Weir}

i. However, privative clauses are not determinative - even present such a clause, must consider other factors. {Orcas}

ii. For instance, where broad authority conferred, implies that agent is responsible to Parliament, not to Courts, except for where in excess of defensible reasonableness. {CanadianParks}

c. Statutory rights of appeal - statute may indicate a right of appeal, and further may indicate which court has jurisdiction to hear such an appeal. {Weir}

d. Expertise relative to Court – where decision maker has special expertise in making decision (never on questions of law - but certainly better situated to develop a strategy for fish habitat conservation), deference due. {Weir}

i. For instance, no tribunal or decision maker has expertise concerning interpretation of law relative to courts, nearly always correctness when jurisdictional or interpretive. {TrueNorth}

ii. For instance, decision makers may have expertise in the application and interpretation of home statute. {Athabasca}

iii. For instance, Ministers, not acting as adjudicators, have no implicit power to determine questions of law, due no deference concerning legal decisions. {Orcas}

e. Balancing of interests - where the statute includes multiple interests which must be balanced, more deference due to discretion inherent in balancing process. {Weir}

i. For instance, where authority is centred on polycentric issues, competing interests, this is a matter of discretion. {CanadianParks}

ii. For instance, s. 58 of SARA prohibits interference with critical habitat, no ambiguity; language precludes discretion concerning protection orders. {Orcas}

g. Remedies

i. *Overview* – include *certiorari* (quashing of administrative action), *mandamus* (requiring administrative action), prohibition (injunction), and declaratory relief. {Dunsmuir}

1. *Mandamus* – where the irrelevant consideration is the only reason for the failure to render the decision, mandamus is the appropriate remedy. {ImperialOil}

a. *Not applicable to discretion* – Mandamus cannot be used to compel the exercise of discretion in one manner or another; it commands a result, not the very result. {Athabasca}

i. For instance, cannot command the Minister to issue an s. 80 order protecting boreal caribou, but could have compelled minister to make s. 80 decision regardless of outcome. {Athabasca}

2. *Remission* – where the shortcoming in decision making arises from the failure to provide reasons, remission to the decision maker for articulation is the apt remedy. {Pembina}.

a. For instance, where the minister fails to provide adequate reasons for not issuing s. 80 order, correct response is to remit for articulation. {Athabasca}

6. <u>Public participation in environmental decision making</u>

a. *Overview* - due to legislative shortcomings, inertia, political climate, etc., for many reasons successful environmental decision making is dependent on public participation. This is reflected in public interest standing (see environmental tort -> standing, judicial review -> duty to consult / procedural fairness, environmental enforcement -> citizen prosecution).

i. Barriers to public participation

1. *Economic barriers* - economic barriers to participation in environmental decision making are well documented, particularly in litigation, and particularly for those vulnerable due to socioeconomic or other factors. {Anand}

a. For instance, consider possibility of adverse costs orders (see environmental torts -> adverse costs) or the requirement of an undertaking for damages when seeking interlocutory injunctive relief (see environmental torts -> remedies).

2. *Homogeneous interests* - unlike concentrated producer interests, environmental interests are not homogeneous; environmentalists are also consumers and producers of products, and therefore will see things differently based on these roles. {Anand}

3. *Free rider phenomenon* - rational and self-interested individuals will not act to achieve their common or group interests unless a group is small, or there is some special incentive at play. {Anand}

ii. Benefits of public participation

1. *Diversity* - provides decision makers with greater range of ideas and information on which to base their decisions; includes viewpoints that might not otherwise be available. {Anand}

2. *Acceptability* - increases public acceptance of decisions, increases legitimacy by ensuring that a number of important societal concerns are considered, if not reflected in the ultimate decision. This eases implementation of decisions. {Anand}

3. *Independence* - involvement of other parties may ease the extent to which regulators are reliant on regulated industries for support, whether informationally or politically. {Anand}

4. *Thoroughness* - presence of alternative viewpoints causes decision makers to be more thorough in considerations, as well as in articulating their decisions. {Anand}

iii.Agency capture

1. *Overview* - refers the advancement of commercial rather than public interests:

   a. *Resource scarcity* - limited resources allocated to administrative agencies in relation to those required to monitor and test their domains necessitates close cooperation between regulators and industries. Regulators come to be dependent on those industries for information. {Anand}

   b. *Political support* - regulators can become dependent on regulated industries for political support in order to protect them from legislative attack. {Anand}

   c. *Fragmented public interest* - the interest theoretically protected by the decision maker is not unitary, but rather diverse, comprising countervailing interests; therefore, cannot expected to become guardian with absolute success. {Anand}

7. *<u>Environmental assessment</u>*

a. *Overview* - a tool for environmental conservation which operates alongside environmental regulation. Assessment processes seek to anticipate, prevent or reduce environmental impacts of proposed new activities rather than try to manage the impacts of existing activities. (see also, climate change -> EA and GHG)

b. *Proponent versus agency driven models* - proponent model, party seeking approval must make a case to an independent decision maker. Agency model, the agency is the party which primarily takes on the information gathering role. Canada takes on more of an agency driven process.

c. *Focus of EA processes* - most EA in Canada is project-based; project is listed, identified through threshold test, or on the basis of a professional analysis. May be limited to private or public projects, small or large projects. Scope also important; biophysical, ethical, economic considerations considered?

d. Characteristics of a sound Environmental Assessment process

i. *Legislative foundation* - strong legislative foundation ensures clarity, certainty, fairness and consistency.

ii. *Flexibility* - procedures have to be able to adapt to the needs of a particular project or activity to be assessed.

iii.*Legitimacy* - must be fair, open, consistent, predictable, and engage the public. Must also be a strong link between EA and decision making.

e. Canada Environmental Assessment Act, 1995

i. *Overview* - first time that the EA process was formalized in legislation, and therefore less susceptible to interference versus previous EARP Guidelines Order. {Doelle}

ii. *Objectives* - sustainable development, environmental conservation; also careful and precautionary consideration, avoidance of adverse environmental effects. These suggest a sound EA process, as public engaged, linked to decision making, etc. {Doelle}

1. *Economy* - sensible that undertakings with potential adverse environmental effects be subject to only

one environmental assessment. The Governments of Canada and Alberta are parties to agreements that express this policy. {TrueNorth}

iii. *Triggering*

1. *Federal decisions concerning projects, s. 5* - Consists of exercise of *duties, powers, or functions* relating to an s. 2 project. {Doelle}

    a. For instance, certain actions by the Fed government, eg. deciding whether to approve alteration of fish habitat under s. 35 of the *Fisheries Act* will trigger an assessment.

2. *Project, s. 2* - undertakings related to a physical work and undertakings not related to a physical work are included. General approach used so as not to exclude unanticipated projects. {Doelle}

    a. Undertakings related to a physical work (eg. construction) were considered to be projects unless they were excluded through regulations.

    b. Activities not related to a physical work were only considered to be projects if they were listed for inclusion in regulation.

3. *Transboundary decisions, ss. 46 & 48* - also trigger s. 5. Tansboundary sections, EA could be initiated even where s. 5 decision is not invoked if there are extra-provincial or extra-territorial effects. {Doelle}

4. Issues with triggering

    a. *Proponent-driven, project-based* - goal is to determine whether there are significant adverse environmental effects, not whether the project fits into the GHG strategy of the PG or Fed; this might cause EA to miss cumulative effects. SAEE not well suited to GHG issues. {Hsu}

iv. *Scoping*

1. *Overview* - process of deciding what will be included in EA. Precondition is that there must have been a project (s. 2) under which a Fed authority is exercising a duty, power, or function (s. 5). Critically important, as the narrower the project is scoped, the narrower the impacts will be considered. {Doelle}

    a. *Scope can be part of a project* - the words "in whole or in part" recognize that assessment undertaken may relate only to a part of a project. {TrueNorth}

        i. For instance, while the project may have impacts not covered by Fed assessment, the scope of the assessment can be limited to parts of project relevant to Fed jurisdiction {TrueNorth}

    b. *Scoping is discretionary* - even where a project is listed for “comprehensive study” does not mean that the discretion of the Minister in scoping is fettered; empowered to scope under s. 15. {TrueNorth}

        i. For instance, to do otherwise has been held to deprive the scoping provisions of the *CEAA* of any meaning. {TrueNorth}

        ii. However, this refers to scoping of the project within the context of the assessment performed.

{Pembina}

1. For instance, joint panel review under the CEAA was insufficient because it did not adequately address GHG emissions in approving the project. {Pembina} (see climate change -> environmental assessment)

c. *Scope of assessment, not of project* - while the assessment may look at environmental effects caused by factors other the scoped project under s. 16, including factors beyond Fed jurisdiction, this is limited to cumulative effects. {TrueNorth}

i. For instance, the effect of destruction of a watercourse does not contribute meaningfully to AGW; thus, though entire project may contribute to global warming, the Fed component, as scoped to watercourse destruction, does not, and therefore passes assessment. {TrueNorth}

1. However, where scoped to include AGW effects, these must be considered - to do otherwise is an error in law. {Pembina} (see climate change -> environmental assessment)

ii. *Independent utility principle fails* - where weighing the adverse effects versus justifications, while the adverse effects do have to arise from the scoped project, the justifications do not have to directly arise from the scoped project. {TrueNorth}

1. Additionally, *CEAA* does not require that all projects witjh adverse environmental effects must have a measurable benefit. {TrueNorth}

v. Process options

1. *Overview* - four process options under the CEAA 1995. Assessments were carried out by way of a screening, a comprehensive study, a panel review, mediation, or some combination of these processes.

2. *Purpose* - to determine whether or not the project, as scoped, will have a significant adverse effect on the environment.

a. However, this may cause problems, as a project which does not itself cause an SAEE may do so in conjunction with other projects, though cumulative effects are a mandatory consideration under s. 16 of *CEAA*. {Hsu} (see climate change -> EA)

3. *Screenings* - viewed as form of self-assessment. 99% of projects triggering s. 2 / s. 5 underwent this level of assessment only. Can move to other forms at any time. Threshold level, used to streamline model. {Doelle}

a. *Focus* - fundamental question was whether the project is likely to cause significant adverse environmental effects.

b. *Process* - public notice given, project scoped, report prepared, and decision rendered.

c. *Public engagement* - involvement in scoping, report preparation and final decision is discretionary.

4. *Comprehensive studies* - viewed as form of self-assessment. Five to ten per year, constitutes a hybrid between a screening and a panel review. {Doelle}

a. *Focus* - final track decision, to determine which process is ultimately most appropriate to the project at hand (comp. study or review panel). Made at same time as scoping decision.

b. *Process* - public notice given, project scoped, track decision made, report prepared, and decision rendered. Ministerial authority involved at every stage.

c. *Public engagement* - mandatory public engagement at scoping, during the preparation of the environmental assessment report and before the project decision.

5. *Panel review* - one and five EAs per year. Process taken out of authorities' hands, placed with independent panel members. Panel has power to compel witnesses and documents. {Doelle}

   a. *Focus* - independence and transparency of government, environmental impact of project/decision. Ensure that information is obtained, made public, hearings held, report issued with conclusions.

   b. *Process* - enhanced role for Minister with a view to scoping, involved at all levels. Final decision subject to Cabinet approval. Public notice given, project scoped, report prepared, and decision rendered.

      i. *Joint panel* - allows for cooperation between Fed and PG decision makers or other jurisdictions (eg. WMB/FN).

   c. *Public engagement* - process always involved public hearings, though these were optional for comprehensive studies.

6. *Mediation* - available informally in most EA processes. Its function in those circumstances is to complement rather than replace the formal process. Rarely used. {Doelle}

   a. *Process* - taken out of the hands of responsible authorities and placed in the hands of someone independent.

f. Canada Environmental Assessment Act, 2012

i. *Implementation of changes* - Conservative government introduces changes in Budget Implementation Bill (2010) to streamline the EA process, add discretion to narrow the scope of the projects to be assessed and reduce the number of projects to be assessed under the Act.In comparison to the two months it took for CEAA 2012 to pass as part of the Budget Bill, it took years to consult on the concept and draft CEAA 1995. {Doelle}

ii. *Concentration of environmental decision making* - CEAA 1995 was designed around the basic idea that all federal decision makers should consider environmental implications of decisions. Under CEAA 2012, focus is on National Energy Board (NEB), the Canadian Nuclear Safety Commission (CNSC) and the Canadian Environmental Assessment Agency (CEA Agency). {Doelle}

   1. *No longer self assessment* - under 1995, decision makers asked to consider the implications of own decisions. Now, CEA will be responsible for vast majority of Fed decision makers, though NEB and CNSC will be exempt; these agencies will still perform self-assessment (though this was unsuccessful under previous act). {Doelle}

iii. *Triggering*

1. *Overview* - no longer a legal test for whether a project requires an assessment under the Act, but a definition of "designated project" which refers to listing regulations. Listing makes EA mandatory, save for NEB and CNSC projects (broad discretion for those agencies). {Doelle}

2. *Process* - starts with the registration of designated projects listed in a project list regulation. Whether an EA is required will then be decided by government officials based on information filed at registration. {Doelle}

    a. Ten days to decide whether additional information is needed.

    b. Notices will then be posted on public registries, twenty days allowed for public comments, decision on whether to assess rendered within 45 days.

3. *Ministerial discretion* - Minister can require an EA under s. 14(2) for projects not listed, for reasons of public concern / adverse environmental effects, but cannot be required to exercise this power. {Doelle}

4. *Transboundary project*s - interprovincial effects are irrelevant, unlike the 1995 Act; other transboundary projects do not require an EA, but rather only decision as to whether there will be significant adverse environmental effects, and whether these effects are justified in the circumstances. {Doelle}

5. *Exemptions* - infrastructure projects funded through the federal stimulus package are exempted from the federal EA process. Further, the Fed act will not apply where there is an equivalent PG process undertaken, thus undermining concurrent/harmonious jurisdiction (s. 37). {Doelle}

iv. *Scoping*

1. *Overview* - significantly narrowed, from generally inclusive, broad range of adverse environmental effects to focus on a few issues within the direct regulatory authority of the federal government. For instance, can be narrower than the project defined by the proponent. {Doelle}

v. Process options

1. *Overview* - screenings and comprehensive studies are combined into a one-size fits all EA process that is much narrower in scope; mediation is eliminated. Panel review remains. {Doelle}

2. *Environmental assessment* - the CEA decides whether EA or panel review required within 60 days of commencement decision (previously could do this at any time) - but cannot do so for NEB / CNSC projects. {Doelle}

    a. *Focus* - significantly narrowed.

    b. *Process* - proponent registers project, cannot implement until EA decisions made; CEA decides whether to assess, posts notice of commencement; responsible agency (CEA, NEB, CNSC) takes over; EA completed within one year (extensions available).

    c. *Public engagement* - fewer federal EAs mean fewer opportunities for members of the public to have input.

3. *Panel review* - little would gained through this process, as the scoping is so narrowed that either process is merely an information gathering exercise for Fed decision makers. {Doelle}

    a. *Focus* - only apply to CEA assessments, not permitted for NEB or CNSC assessments.

    b. *Process* - one person panels are now permitted (previous minimum was three persons). Minister may seek additional info from proponent after panel report to aid in final decision. Two year timeline.

    c. *Public engagement* - ability of Minister to seek additional information means that the public and panel are removed from the final decision making process.

8. <u>Protection of species at risk</u>

a. *Overview* -there have been five previous mass extinctions events; we are currently at the beginning of a sixth, caused by the destruction of species' habitats by humans. This is a troubling issue, as humanity's survival is dependent on the maintenance of global biodiversity. {Smallwood} (see also climate change -> species at risk).

b. *Forms of species at risk law* - legislation which designates large swaths of areas as "protected" (eg. *National Parks Act*), legislation which stipulates preventative measures relating to biodiversity (eg. *Forest and Range Practices Act*), and legislation which seeks to protect against further harm as well as to promote recovery for species at risk (eg. *SARA)*. {Smallwood}

c. *Convention on Biological Diversity* - convention in 1992, Canada first signatory, mandates enactment of legislation to protect biodiversity. Canada was also the first industrialized nation to ratify the convention, though this took nearly ten years to accomplish. {Smallwood}

d. Species at Risk Act

i. *Overview* - protects certain species within a very narrow interpretation of Federal jurisdiction, leaving the primary role for biodiversity protection to be played by PG and voluntary conservation initiatives. For instance, law applies only to Fed lands, aquatic species, and migratory birds. {Smallwood}

ii. *Purpose* - identification of species at risk; designation of critical habitat; implementation of recovery plans; pffences for "taking" species or destroying critical habitat; and, compensation for landowners affected (though this is not yet reflected in *SARA)*.

iii. *Guiding principle, s. 38* - the precautionary principle; all available measures should be taken to avoid negative outcomes anticipated by the *Act*, and action should not be delayed merely due to the lack of full evidence to support it. Full scientific certainty is not required before cost-effective measures can be undertaken. {Athabasca}

iv. Listing of species

1. *Overview* - once Fed cabinet has received a proposed addition from Committe on Status of Endangered Wildlife in Canada (COSEWIC), it has nine months for review. If no action is taken, the addition is approved. {Smallwood}

2. *Process*

a. *Listing recommendation* - COSEWIC must consider evidence concerning species, and make determination as to which s. 2 definition applies:

   i. *Extirpated* - species no longer exists in the wild in a given area, but exists elsewhere in the wild; must create recovery strategy (s. 39), prohibitions apply (ss. 32-33).

   ii. *Endangered* - species facing imminent extirpation or extinction; must create recovery strategy (s. 39), prohibitions apply (ss. 32-33).

   iii. *Threatened* - species likely to become endangered if no intervention or recovery is undertaken; or,

   iv. *Special concern* - species may become threatened or endangered due to identified threats and other biological characteristics.

b. *Consult competent ministers* - upon COSEWIC listing recommendation, the Minister of Environment must consult with competent ministers (Fisheries, Canadian Heritage), and wildlife management boards if the species is in an area under a land claims agreement. {Smallwood}

c. *Statutory action* - the Minister, following consultation, must decide whether to:

   i. s. 27(a) - accept the addition;

   ii. s. 27(b) - veto the addition; or,

   iii. s. 27(c) - refer the matter back to COSEWIC for further consideration.

   iv. s. 80 - list a species using emergency power.

d. *Provide reasons* - if the addition is vetoed or referred for further consideration, the Minister of the Environment must make a public statement in the registry setting out reasons for the decision. {Smallwood}

3. *Shortcomings*

a. *Referring out* - the Fed occasionally refers out the task of reviewing additions, with the result being introduction of socio-economic factors into what should be a scientific process. {Smallwood}

b. *Bias against northern species* - there appears to be a bias against northern species, caused in part by delays introduced by the Nunavut wildlife management board. {Smallwood}

c. *Regulatory impact analysis* - RIA performed after listing, cost-benefit analysis to Fed government actions; taken before recovery plan is made, therefore presenting skewed perspective on actual costs and benefits of listing a species (generally, underestimating the benefits). {Smallwood}

4. *Distinct from ESA*

a. *Hybrid listing approach* - compromise between a purely scientific and a purely political listing

process. Scientific body, COSEWIC, prepares a list of species at risk. Cabinet can object to ruling within 9 months, by veto or by asking COSEWIC to reconsider - negative option / reverse onus listing. {Smallwood}

b. *ESA allows for citizen suits re: listing* - under the ESA, the decision as to whether a species may be subject to scrutiny under a citizen suit.

i. For instance, failure to list Northern Spotted Owl, based on statements of expertise in the face of unrebutted expert opinions insufficient to preclude listing of the species. {NSOwl}

v. Basic prohibitions

1. *Application* - basic prohibitions apply only to extirpated, endangered, or threatened species. Species of special concern do not receive these protections. Limited to Federal lands, to aquatic species, and to migratory birds.

2. *Process*

a. *Take prohibition, s. 32* - prohibits killing, harming, harassing, capturing, taking, possessing, or trading a listed species or any part of a listed species. Does not include habitat modification.

b. *Residence destruction prohibition, s. 33* -prohibits damaging or destroying the "residence" of a listed species. Does *not* include habitat modification.

i. *Definition of residence* - dwelling place (such as a den, nest, or other similar area or place) that is occupied, or habitually occupied by members of the species during all or part of their life cycles; includes breeding, rearing, staging, wintering, feeding, hibernating. {Smallwood}

3. *Shortcomings*

a. *Residence* - mot a scientific concept, but rather an artificial tool which has the effect of minimizing the automatic effect of listing under SARA; fuller protection only becomes enabled once critical habitat is identified. {Smallwood}

b. *Limited protection* - where critical habitat not listed, residence destruction protection is minimal. If ecosystem no longer functioning or of high value, it may not be worth protecting - better to funnel efforts elsewhere. {0707814BC}

i. For instance, where pressures are so overwhelming that the species will not survive regardless of residence destruction, the law may not operate to protect an ecosystem (though this was under PG Act). {0707814BC}

4. *Distinct from ESA*

a. *Take includes habitat modification* – in the ESA, the definition of "take" includes all harm, and particularly habitat modification. Under SARA, this is not covered under taking, but rather specifically under the residence destruction prohibition.

i. For instance, in *Babbitt* it was ruled that congress had habitat modification specifically in mind when enacting the *ESA*. {Babbitt}

b. *Citizens critical* - the citizen suit provisions have ensured that the ESA has remained relevant through a number of different administrations and over a long period of time. Its success to this end and in successfully benefiting species at risk has shielded it from potential critics. SARA lacks such provisions.

vi. Critical habitat protection

1. Application

a. *Endangered and threatened* - critical habitat protection applies to endangered and threatened species. Species of special concern are not protected. Extirpated species are covered only if a recovery strategy has recommended the reintroduction of the species.

b. *Area* - critical habitat protection is limited to Federal lands, and to aquatic species and migratory birds, with rare exception (eg. the Nooksack Dace). {Mittelstaedt} Protection can extend to PG jurisdiction where the GIC makes a safety net order under s. 61. {Smallwood}

c. *Timing* - must be identified either in the recovery strategy or the action plan; therefore, protections do not apply until critical habitat is identified. {Smallwood}

d. *Purpose* - The intent of Fed in enacting SARA was to provide for compulsory, non-discretionary legal protection for critical habitat, within 180 days. Therefore, absent a legally enforceable provision to that end, the minister must make a protection order under ss. 58(1), 58(4) of SARA. {Orcas} {Smallwood}

2. Process

a. *Definition of critical habitat, s. 2* - under s. 2, that habitat which is necessary for the survival or recovery of a listed species, identified as such in a recovery strategy or action plan.

i. *More than geospatial area* - while critical habitat includes geospatial area identification, recognizes additionally that such areas are identifiable only because special features exist there upon which the species are specially dependent for survival or recovery. {Nooksack}

1. For instance, in *Orcas*, determined that acoustic degradation was a major feature/factor of critical habitat. {Orcas}

b. *Obligation to identify, s. 41(1)(c)* - the Fed must identify critical habitat to the extent possible, based on the best possible information, *when creating recovery strategies and action plans.* No discretion. {GSGrouse}

i. For instance, under s. 38, the lack of perfect scientific information is not sufficient to justify failure to identify any habitat where some habitat is identifiable. {GSGrouse}

ii. *Adequacy of information* - no requirement that the information meet Minister's standards for "adequacy" or peer review. Merely must be best information available, including scientific, community, and Aboriginal traditional knowledge. {Nooksack}

1. For instance, in *Greater Sage Grouse*, several essential habitats (all other than wintering) were identified both through features and geospatially; therefore, failure to delineate in recovery strategy indefensible. {GSGrouse}

c. *Prohibition order* - under s. 58, prohibits damage or destruction to critical habitat (within Fed jurisdiction.) This is effected by a protection order of the Minister, ss. 58(1),(4) or by other legislation, s. 58(5). Critical habitat must be protected by legally enforceable, non-discretionary provisions. {Orcas}

d. Protection by other regulation, s. 58(5) - not all protection of critical habitat needs to occur within the framework of SARA. The Act allows for protection under other Acts, but only where protection offered through other means is *equivalent* to that offered under a protection order - to do otherwise would be to dilute SARA{Orcas}

i. However, the fact that a currently non-discretionary provision may be modified to allow for discretion in future does not preclude its use under s. 58(5). {Orcas}

ii. For instance, the Minister may not refer to discretionary measures under the *Fisheries Act* as protection under s. 58(5). Protection under s. 58 is *mandatory.* {Orcas}

e. Permit to interfere, s. 74 – cannot allow for disturbance of critical habitat unless this is done in order to, under s. 74, allow for scientific research, to benefit the species, or the effect on the species is incidental. {Orcas}

f. *Safety net order, s. 61* - under s. 61, the MOE must recommend to the GIC that an emergency order be made to identify PG land as critical habitat where it would not otherwise be protected under SARA, other Fed legislation, or PG legislation. Such orders last for five years, are renewable, but must be repealed where no longer required. {Smallwood}

3. *Shortcomings*

a. *Compliance* - government appears reluctant to identify critical habitat, due to uncertainty with potential impacts on private landowners. This is mirrored in the US, where the inaction has led to a flood of litigation arising out of government inaction. {Hagen}

b. *Lack of guidance* - the issue may be that the legislation does not provide sufficient specificity in the identification process. {Hagen}

c. *Importance* - due to the importance of habitat protection in the protection of species at risk, designation of critical habitat should be the the default. Exceptions (eg. non-determinable/ imprudent under ESA). {Hagen}

4. *Distinct from ESA*

a. *Concurrence with listing* - under the ESA, critical habitat must be designated concurrently with the listing of a species unless it is either not determinable or not prudent (eg. listing would be harmful to the species' recovery). Under SARA, there is no necessity to identify critical habitat merely because a species is listed, Rather, this becomes necessary only at the recovery strategy and action plan stages.

i. While an additional twelve months may be had under the ESA, any further delay is only allowable where critical habitat not determinable. {NSOwl}

b. *Factors to be considered* - under the ESA, identification of critical habitat may take socio-economic factors into account. Under SARA, this depends on whether identification takes place at the recovery strategy (scientific) or action plan (holistic, including socio-economic) stage.

c. *Obligation* - under the ESA, critical habitat must be designated to the maximum extent prudent and determinable; and, where failure to do so would result in extinction, habitat must be designated as critical notwithstanding any other contravening factors.

d. *Areas* - ESA includes areas outside of the critical habitat region where these areas are essential to the conservation effort (eg. adjacent interdependent areas).

i. For instance, where benefit to conservation outweighs detriment to human activities; safety valve disregards this calculus where to do otherwise would lead to extinction. {NSOwl}

vii.Recovery strategies

1. Application – applies to endangered, extirpated and threatened species. Species of special concern are not covered (separate, less proscriptive process). Must be posted on the registry within one year of listing; or, if contained in Schedule 1 at time of enactment, before June 3rd, 2006.

2. *Process*

a. *Overview* - intended to be purely scientific in content and recommendation. Comes with obligation to identify critical habitat to the extent possible under s. 41(1)(c) (see above, critical habitat) {Nooksack}

b. Address threats – Under s. 41, content based on whether recovery of species is held to be feasible. Where feasible, strategy must address specific threats to the species, including loss of habitat. {Nooksack}

3. Issues

a. *Failure to act* - the government has repeatedly failed to live up to its responsibilities concerning recovery strategies, having completed these for only a fraction of the listed species despite the time limits imposed.

4. Distinct from ESA

a. *Concurrence with listing* - under the ESA, recovery must be designated concurrently with the listing of a species. Under SARA, must be designated within one year of listing.

viii.Action plans

1. *Application* - applies to endangered, extirpated and threatened species. Species of special concern are not covered (separate, less proscriptive process). No time period prescribed.

2. *Process*

a. Implementation - must specify measures which are to be taken to carry out the proposed recovery strategy; includes consultation, cooperation, etc.

b. Factors - a holistic approach, which includes consideration of all relevant factors, including socio-economic concerns.

c. *Compensation* – due to strong lobbies from rural and agriculturally dependent communities, SARA includes provisions which compensate landowners who are affected by its enactment. Under s. 64 of the Act, the government may, at its discretion, compensate for losses arising out of any "extraordinary impact" of SARA. However, currently without regulations, and therefore ambiguous.

ix.Emergency orders

1. *Overview* - under s. 80, GIC has discretion to issue emergency order where MoE has made a recommendation that a species faces an imminent risk to survival or recovery. {Athabasca}

2. Process

a. *Considerations* - whether, on the basis of the best information available, there is a threat to the survival or recovery of the species. Includes: {Athabasca}

i. *Decline* - sudden decline in population or habitat that requires immediate protective actions; {Athabasca}

ii. *Sudden danger* - strong indication of impending danger or harm, with inadequate mitigation measures in place; or, {Athabasca}

iii.*Regulatory gap* - identified in protection measures that will jeopardize survival or recovery, not otherwise able to be dealt with in a timely manner. {Athabasca}

iv.*Aboriginal issues* - decision of the MoE not to recommend an emergency order under s. 80 may be set aside merely on the basis that the minister did not give consideration to aboriginal interests, HoTC. {Athabasca}

x. Safety net orders

1. Overview - protection of critical habitat and species (including basic prohibitions) can extend to PG jurisdiction where the GIC makes a safety net order under s. 61. {Smallwood}

e. Ontario Endangered Species Act

i. *Listing*

1. *Overview* - science-based, mandatory listing process (unlike the hybrid process under SARA). Assessment performed by independent committee, COSSARO – the Committee on the Status of Species at Risk in Ontario.

2. *Interference* - PG's power is limited to referring a matter back to COSSARO for reconsideration, cannot veto.

3. Considerations - COSSARO assessments must be based on the best available scientific information; obtained from both community knowledge, and aboriginal traditional knowledge.

ii. *Recovery strategies*

1. *Overview* - strong provisions concerning mandatory recovery plans; must create such a plan for every endangered (within one year) and threatened (within two years) species, under s. 11. Deferrals are possible, but not greater than five years in any event.

iii. *Critical habitat*

1. *Overview* - mandatory critical habitat designations, within two years for endangered species and three years for threatened species, under s. 56.

f. Issues in biodiversity

i. *Importance of biodiversity*

1. *Undiscovered species* - considerable untapped potential for practical benefit in the thousands of plant and animal species which are not currently being used by human beings. In many cases, the species itself has not yet been discovered; it may be extinct before the species, or any practical benefit it may offer, are discoverable. {Kunich}

2. *Tangible synergistic benefits* - beyond immediate practical benefit (eg. food, medicine) untapped species may play a critical role in supporting ecosystems necessary to sustain other species upon which humans do directly rely. Or, species which do not play a critical role today may play one in the future, as the climate and ecosystem change. {Kunich} - similar to uncertainty, begs precaution.

ii. *Definitions*

1. *Linear feature disturbance* - issue concerning the disturbance of habitat by the imposition of a linear feature (such as a pipeline); predators gather on the edge of the disturbance and take advantage of the inability of migrating animals to avoid predation in the open. Troubling to species regardless of whether they are the target at the linear feature, because the easy source of food will allow the predator to proliferate and put pressure on species elsewhere.

   a. *Linear feature density* - requires consideration of the quality of the habitat aside from the linear feature disturbance.

   b. *Lambda* - measure of self-sustenance of a population; lambda of one means that the species is replacing its members year over year; lambda of less than one means that the population is shrinking; greater than one, the population is growing.

2. *Range* - the area in which the species has been known to move; must also determine where the core habitats are (eg. summer and winter habitat, which has not been completed for the Caribou along the Enbridge corridor).

g. Approaches to biodiversity in policy

i. *Risk-focused approaches* – difficult to implement, as there are no reliable means of measuring the magnitude of the relevant risks. {Tarlock}

ii. *Biodiversity-focused approaches* – difficult to implement, due to issues concerning the ethical dichotomy between human beings and nature. Objective is habitat conservation and restoration, rather than the regulation of industrial activities – focus is on locating hotspots and protecting them in their entirety. Likely most effective. {Tarlock}

iii. *Species-focused approaches* – generally, the approach of setting aside specific areas or specific resources for conservation may be inadequate to meet the overall goal of protecting biodiversity over the long term. {Doremus

1. *Land-ownership conflict* – focus on certain species tied to public lands, which we believe to be dedicated to public good; but, considerable reluctance to implement rules which determine the use to which private lands may be put. {Doremus}

2. *Charismatic species* – unfortunately, species-focused approach tends to offer protection only to those species that we find culturally or spiritually important; this falls short, as biodiversity cannot be protected unless the integrity of entire ecosystems is maintained. {Doremus}

3. *Categorization of species* – approach which focuses on indicator (canary-in-the-mine), keystone (critical), and umbrella (large range) species; claims that in so doing, integrity of ecosystems is maintained. Issue is that the categories are artificial, and therefore may be of limited use. May also be difficult or impossible to identify successfully which species are members of which categories. {Doremus}

h. Issues with federalism and biodiversity protection

i. *Overview* – by focusing on the optimum balance between Fed and PG involvement, the exploration of limits by each legislature can frustrate cooperation between the parties. The boundaries of the federalist system are not logically compatible with the boundaries of ecosystems.{Tarlock}

ii. *National Accord for the Protection of Species at Risk* – before SARA came into force, Fed and PG agreed to enhance respective efforts to protect biodiversity, including fifteen principles guiding government actions to this end. Unfortunately, PG have largely failed to fulfil these principles (few meeting even half of the criteria).

iii. *Shortcomings of concurrent jurisdiction*

1. *Intragovernmental conflict* – further, there may be conflict between different Fed (or PG) agencies within a government, which either delays or precludes action advancing biodiversity protection. {Tarlock}

2. *No national floors* – unlike other environmental issues, such as air quality, it is not possible to establish a national floor which the PG can then exceed with its own legislation; such uniform standards cannot be formulated in the biodiversity realm. {Tarlock}

3. *Outside traditional Fed jurisdiction* – the powers which must be exercised in order to protect biodiversity are found outside the core competencies associated with the Fed. Further, this may not merely be a lack of constitutional authority, but of agency competency (for example, inability to post recovery plans within imposed deadlines). {Tarlock}

iv. *Solution* - may be a patchwork of regulation implemented by PG and Fed, which both sets standards, regulates activities, etc. Many of these activities are already subject to regulation in some form or another. The trick, therefore, is to ensure that biodiversity is recognized in the existing regulatory schemes. {Doremus}

i. *Species at risk and climate change*

i. *Overview* - 20-30% of species are at increased risk due to the advent of AGW; reducing GHGs alone not sufficient, as raiase of 0.6~C inevitable. {Kostyack} Priority thus to contain GHG worldwide. Might as well close shop if the global community fails to contain GHG, as otherwise AGW will overwhelm initiatives at maintaining biodiversity. {Ruhl}

ii. *Legislative response* - radical changes to ESA not necessary, as it is neutral on the source of threats. Rather, merely reduces the acceptable margin of error. This reasoning also applies to *SARA*. {Kostyack}

iii. *Recommendations*

1. *Funding* - within any climate change legislation, provisions and funding related to biodiversity must be a consideration. Also achievable by granting C&T auction proceeds to conserve wildlife. {Kostyack}

2. *Affirmation* - must be reaffirmed that the ESA is the primary tool for protecting species, regardless of threat. {Kostyack}

3. *Adaptive management* - must be able to change approaches, respond to new information due to the rapidly changing environmental conditions. Includes research, funding, and planning based on projections. {Kostyack}

4. *Ecosystem-based approach* - listing and strategies should be approached on ecosystem, rather than species basis; means of addressing displacement of species, avoiding disassembly of ecological communities. {Kostyack}

5. *Reactivity* - Act should recognize that any non-trivial net increase of GHG is an activity which meets the threshold of harming listed species. {Kostyack}

6. *Cap* - national cap with aggressive annual reductions, and pursuit of equivalent actions on the international scale must be undertaken. {Kostyack}

7. *Aggressive identification* - ESA must be proactive and aggressive in monitoring and identifying species threatened by climate change, as early identification and intervention is crucial, allows for additional flexibility in responses. {Ruhl}

8. *GHG regulation* - ESA is not the apt agency to undertake GHG emission limiting; this would squander agency resources on a Sisyphean quest. Other legislation must contain GHG emissions. The proper place for s. 7 and s. 9 are to regulate activities unrelated to AGW which directly threaten ESA species. {Ruhl}

9. *Ensure maximum survival* - objective should be to get as many species with long-term survival prospects as possible through AGW. Recovery plans should identify intensity of assistance required, and be flexible and responsive. {Ruhl}

10. *Trade offs* - ensure that where mitigative measures harm other species, that decisions are made to promote long-term diversity; where a species is "doomed," measures to protect it which harm non-doomed species should be avoided, for instance. {Ruhl}

9. Climate change and environmental regulation

a. *Overview* - pits PG against Fed, economic activities of the provinces versus national and international obligations of the Fed. No longer makes sense for Canada to unilaterally and immediately cease the upward momentum of emissions re: Kyoto (which would require 25% per year as of 2008). Overly cynical treatment of the possibility of reducing GHG is counterproductive. Challenging, but not the political football it is made out to be. {Hsu}

b. Federalism and mechanisms for reducing GHG emissions

i. *Overview* - concurrence is guiding policy, courts have encouraged PG and Fed to legislate GHG within their own respective jurisdictions. SCC has allowed the Fed to regulate certain polluting activities under POGG or the criminal law power. However, has not recognized that implementation of international treaty obligations necessarily defeats PG jurisdiction. {Hsu} (see also environmental regulation -> recommendations to improve -> market mechanisms)

1. *Federal plans* - CPC plan aimed at 20% reduction below 2006 levels by 2020, 60% by 2050. Covers highest GHG industries (energy, cement, pulp and paper). Similar to Martin government's plan (Green Plan). {Hsu}

2. *PG plans* - AB has a lax, intensity-based plan which might allow for 72% increase by 2020. BC and QC have each implemented CT solutions at point of sale for fossil fuels. BC also introduced C&T bill, details to follow once Western Climate Initiative finalized. {Hsu}

3. *Definition of upstream* - meaning, rather than at point of distribution, imposed at the point of extraction, manufacture, or import. {Avi}

ii. Command and control

1. *Overview* - GHG could take traditional command and control form, either through results-oriented, strategic management, or BAT means. Effectively, set targets or means of emission and enforced through penalty. {Hsu}

2. *Jurisdiction*

a. *Fed jurisdiction to implement c&c* - same as C&T (see below). {Hsu}

b. *PG jurisdiction to implement c&c* - same as C&T (see below), would likely stand or fall on scoping re: Federal undertakings. {Hsu}

iii. Cap and trade

1. *Overview* - alternately, could use C&T programs, where hard cap for emissions instituted (across industry or territory, etc). Allowances are issued to emitters. These can be traded, so that emissions are concentrated with those for whom emissions reduction would is cheapest / most efficient. {Hsu}

2. *Advantages*

a. Benefit certainty - while the expected reduction from system is known, cost certainty for emitters is not known due to the market nature of the C&T system. Can only be defeated through safety

valve (fixed price purchase of credits) which defeats benefit certainty. Further, benefit certainty always eludes due to global nature of the problem. {Avi}

b. *Coordination* - easier to coordinate if other nations impose C&T regimes. {Avi}

c. *Resistance* - U.S. public shows support for decisive action against climate change, and does not differentiate between C&T or CT to get there. {Avi}

3. *Disadvantages*

a. *Overview* - More complicated to design and implement than CT system. {Avi}

b. *Revenue* - only generates revenue where there is an auction concerning allowances. If allowances given for free, then no revenue generated. However, promotes spending on research / technical innovation within industry. {Avi}

c. *Implementation* - complex, as the government must set baseline allowances, determine how to distribute these (free or auction?), monitoring system, penalties for exceeding, and provisions for banking/borrowing. Would take time to develop system and train people to administrate it. {Avi}

d. *Cost uncertainty* - while the expected reduction from system is known, cost certainty for emitters is not known due to the market nature of the C&T system. Can only be defeated through safety valve (fixed price purchase of credits) which defeats benefit certainty. Further, benefit certainty always eludes due to global nature of the problem. {Avi}

e. *Signalling* - message is that emissions are acceptable so long as the toll is paid; manipulation of market system to allow for maximum emission is encouraged. {Avi}

f. *Exemptions* - may be weakened through enhanced grants of allowance to political allies. {Avi}

4. *Jurisdiction*

a. *Fed jurisdiction to implement C&T* - a plan which is limited to Fed industries, eg. aeronautics, nuclear power, international trade would pass muster - as either fed undertakings or via t&c, s. 91(2). For other areas, however, would need to seek justification under other heads of power: {Hsu}

i. *Criminal law* - regulatory character of C&T would probably preclude s. 91(27) application; not the same as prohibiting toxic substance release; further, C&T not prohibitory, but rather restrictive. {Hsu}

1. While (1) protection of a (2) public purpose is valid based on case law (eg. Hydro-Quebec), seems either colourable or regulatory or both.

ii. *National concern (POGG)* - unlikely that Courts will find that GHG is a national concern - while it is certainly of national importance, it lacks singleness, indivisibility, and distinctiveness, due to large variety of emitters (commercial, non-commercial, industrial, agricultural). {Hsu}

1. Further, national concern is plenary, therefore if GHG is a national concern then PG

precluded from legislating emitting industries - problematic.

iii. *National emergency (POGG)* - includes new and existing emergencies, economic and other emergencies; could uphold C&T; however, would require inadequate PG response, and have to be drafted carefully to avoid appearing as long-term regulation rather than temporary intervention. {Hsu}

1. Encroachment is of temporary duration, and is not plenary. Fed must declare that such an emergency exists, have a rational basis for doing so. Legislation to that end must declare relation to the emergency.

b. *Jurisdiction to implement C&T* - dependent on the form the system takes, and the entities to which is applies. s. 92(13), p&cr would support such a system so long as it did not affect Fed undertakings. {Hsu}

i. *Fed undertakings* - necessarily incidental doctrine would apply, requiring consideration of (1) the extent of encroachment (severe), (2) validity of the statute (likely valid), (3) sufficient integration (likely valid). The first branch would likely cause this to fail - encroachment too severe. {Hsu}

iv. Intensity-based trading

1. *Overview* - rather than instituting a hard cap, allowances are issued to emitters based on productive output. Therefore, more efficient emitters are given more allowances. Favoured by each of the last two Fed governments. {Hsu}

2. *Jurisdiction*

a. *Same as C&T, as above.*

3. *Issues*

a. *Benefit uncertain* - as there is no hard cap on emissions, it is difficult to determine how much actual reduction will take place - allowances are keyed to productive output. {Hsu}

v. Carbon tax

1. *Overview* - payment based on the actual or anticipated quantity of carbon emissions released into the atmosphere. {Hsu}

2. *Advantages*

a. *Overview* - most straightforward approach, cost could be imposed on all GHG industries and imports, based on the marginal (social) cost of CO2 emissions; increased annually to reflect increase in harmful effects. CT could be adjusted; increased where reductions not achieved, or decreased where overcorrection has occurred. {Avi}

b. *Revenue* - generates revenue which can be used to defray the social costs of emissions and of emissions reductions. Also used to fund innovations to reduce further emissions; could even be revenue neutral, where 100% of revenues are reinvested to defray cost of emissions / cost of

reducing emissions. {Avi}

c. *Implementation* - simple, as government merely needs to stipulate a dollar amount per tonne of emissions, measure and collect revenues. This perhaps overlooks the complexity of achieving set reduction targets without directly imposing a cap. Could be imposed tomorrow, administered by RevCan. {Avi}

d. *Cost certainty* - while the amount of reduction achieved (benefit certainty) is not known in CT, cost certainty is available for emitters. However, this can be achieved through adjustment of the tax through correction. Further, benefit certainty always eludes due to global nature of the problem. {Avi}

e. *Signalling* - message is clear, that emissions impose negative externality on others which therefore must be internalized through the tax. {Avi}

f. *Resistance* - U.S. public shows support for decisive action against climate change, and does not differentiate between C&T or CT to get there. Further, once CT in place, resistance to adjustments dwindles. {Avi}

3. *Disadvantages*

a. *Exemptions* - may be weakened by the gifting of exemptions to political allies of those administrating the tax or other politicians. However, none of the industries involved in emissions are in a different situation from the others such that they could argue for exemption. {Avi}

b. *Coordination* - difficult to coordinate carbon tax if C&T regimes are prevalent elsewhere (consider the Western Climate Initiative, for example). {Avi}

c. *Benefit uncertainty* - while the amount of reduction achieved (benefit certainty) is not known in CT, cost certainty is available for emitters. However, this can be achieved through adjustment of the tax through correction. Further, benefit certainty always eludes due to global nature of the problem. {Avi}

4. *Jurisdiction*

a. *Fed jurisdiction to implement carbon tax* - Federal taxation power under s. 91(3) is very broad, allow for raising of funds through any mode - therefore, must entail (1) taxation for the purposes of (2) raising money. Therefore, would pass muster. {Hsu}

b. *PG jurisdiction to implement carbon tax* - under s. 92(2), PG has jurisdiction to undertake (1) direct (2) taxation (3) in the province (4) to generate revenue for (5) PG purposes. This would appear to be determinative of the matter. {Hsu}

i. *Revenue neutrality* - consideration may have to be given as to whether (4) is fulfilled in circumstances where the tax is revenue neutral. {Hsu}

c. *GHG in environmental tort actions*

i. *Overview* - attention increasingly paid to torts as a means for responding to climate change impacts; failure of Canadian jurisdictions to innovate means that Canada is a more difficult venue for

environmental litigation than the U.S. {Curran} (see also: environmental tort actions)

ii. *Types of action* - could mean actions against governments for failing to regulate, against emitters for damages, and actions by emitters against regulators. {Curran}

1. *Negligence* - rests on the duty of care, therefore must determine at what point the harm from GHG emissions became foreseeable. {Curran}

a. *Duty of care in GHG actions* - generally, increased likelihood that emission of GHGs causes an unreasonable risk of injury. {Curran}

2. *Public nuisance* - Plf. must show special injury as a result of the D.'s actions, weighed against the reasonableness and utility of the harmful activity (and its adherence to industry norms). Special injury must be different in both kind and in degree. {Curran}

3. *Private nuisance* - D. owes duty to not interfere unreasonably with the use and enjoyment of another's property; reasonableness analysis includes nature, severity, foreseeability of the impugned interference. {Curran}

iii. *Causation in GHG actions* - traditionally, relies on the but for test, difficult in diffuse field of insignificant individual contributions. Therefore, material contribution ideal. {Curran}

1. *Material contribution* - more than de minimus, has also been formulated as "significant contributing cause". {Curran}

iv. *Remedies in GHG actions* - market share has not been adopted here, therefore joint and several liability for all tortfeasors in BC. {Curran}

d. GHG in environmental assessment

i. *Overview* - while generally, application of EA to GHG has been limited in Canada, this is changing over time - for instance, was a consideration in the Kearl Oil Sands case. {Hsu} (see also: environmental assessment}

ii. *Convenience* - easiest means for effecting GHG changes - no court has questioned the appropriateness of a detailed evaluation of GHG on Fed decisions or projects. Not a requirement of the Act, but a valid consideration. {Hsu}

iii. *Constitutional validity* - very likely that EA consideration of GHG would be valid, as EA able to take into account all possible environmental effects of projects subject to assessment. Answer is the same regardless of whether the project falls under Fed or PG jurisdiction generally. {Hsu}

iv. *Pembina Institute v. Canada* - joint panel review under the CEAA was insufficient because it did not adequately address GHG emissions in approving the project. {Hsu}

v. *Potential shortcomings* - under CEAA, goal is to determine whether there are significant adverse environmental effects, not whether the project fits into the GHG strategy of the PG or Fed; this might cause EA to miss cumulative effects. SAEE not well suited to GHG issues. {Hsu}

vi. *Potential solution* - instead of SAEE for GHG considerations, might require carbon neutrality or other

mitigative efforts to be taken. {Hsu}

e. Disproportionate effect of AGW on Northern peoples

i. *Overview* - Arctic indigenous peoples are very susceptible to the immediate impacts of climate change. Dependence on local ecosystems undermines autonomy, leads to other social problems (eg. diabetes due to diet change). {Kazarian}

1. *Canada* - for instance, consider Nunavut; made a deal with the Canadian *government* ceding Aboriginal title claim to the territory in exchange for rights grant; something which could be revoked through constitutional amendment. (Though, not really - Honour of the Crown would preclude this).

2. *U.S.* - no precedent yet set concerning climate change, environmental protection, and Aboriginal self determination.

ii. *Public nuisance* - Alaskan tribe files public nuisance complaint against oil companies for GHG emissions leading to AGW, thus causing ice melt threatening existence. Seek damages for cost of displacement of peoples to new area. However, case was dismissed as the injury was not sufficiently special - no different than that of non-native Alaskans, despite cultural, spiritual, and psychological damage related to distinct culture. {Kazarian}

iii. *International remedies* - international law developing more quickly than domestic law in addressing needs of indigenous peoples with respect to AGW; however, as solutions need to come from binding domestic authorities, definitive steps need to be taken to achieve compliance between international trends and domestic needs. {Kazarian}

f. History of Canadian involvement in climate change regulation

i. *Previously at forefront* - Canadians were at the forefront of global environmental concerns from the 1970s through the 1990s; until 1992, held that climate change approaches must promote economic growth, facilitate innovation to be effective, for instance. {Bernstein}

ii. *Involvement in Kyoto* - during Kyoto negotiations, Canada lobbied to maximize allowable activities under carbon sink articles of the protocol. However, withdrawal of the U.S. gave Canada leverage to gain traction re: forest sinks as a means of carbon storage. {Bernstein}

iii. *Loss of credibility* - current trends in domestic policy, particularly with withdrawal from Kyoto, mean that while Canada has attempted to portray itself as a broker between the EU and the U.S. on climate issues, it does not have much credibility in this role. {Bernstein}

iv. *Domestic inaction* - Canada has done little to reduce GHG emissions domestically; Voluntary Challenge Registry had little effect. Liberal government's "Project Green," a cap and trade system for large emitters, was not implemented. Subsequent Conservative government held that intensity targets were more appropriate for Canada, applying these to certain industries, appliances, etc. {Bernstein}

v. *Scope of AGW* - IPCC reports hold that warming is unequivocal, and has a greater than 90% chance of being anthropogenic; stabilization below the change threshold of 2~C versus pre-industrial levels requires a 60-80% cut by industrialized nations by mid-century. {Bernstein}

vi. *Nature of domestic policy impotence* - policy process is complicated, by the competing industrial interests

involved, numerous options available for pursuit, and the complexity of Canadian federalism. {Bernstein}

10. Cases and materials

- Environmental tort materials

- Palmer v. Nova Scotia Forest Industries, NSR 1983

- Facts - claimants are landowners in NS who oppose the D.'s proposed use of herbicides using phenoxy herbicides. Seek an injunction against such activity. Plf. claims that these herbicides are harmful and toxic; D. holds the contrary position.

- Issue - does the D.'s proposed use of phenoxy herbicides pose a "strong probability" of harm to the Plf.'s health? Can nuisance, trespass, negligence, or strict liability offer injunctive relief to the plaintiffs?

- Rule - substance associated with less than one in a million risk of harm. Without health risk, there is no nuisance, real or probable. There is no proof that trespass is "probable" to occur, merely possible. Strict liability fails on the basis that neither the danger of the substance nor the probability of escape are proven.

    - *Private nuisance* - an act or omission whereby a person is prejudiced in the enjoyment of land, whether by physical damage or by other interference.

    - Only substantial interference with a person's enjoyment of property gives rise to an action in nuisance. Equally clear is the requirement that there must be proof of damage.

    - Damage need be pecuniary loss but it must be material or substantial; must not be merely sentimental, speculative or trifling, temporary, or evanescent.

    - Chemical contamination interfering with the health of plaintiffs and thereby enjoyment of lands is clearly within the purview of nuisance. Therefore, grounds for action in nuisance exist provided that the Plf. proves that the D. will cause it.

    - *Trespass* - if D. places anything upon the Plf.'s land, or causes any object or noxious substance to cross the boundary of the Plf.'s land, trespass stands.

    - Entitlement to a remedy, will be based upon proof as to whether such substances will be deposited on the lands of the plaintiff.

    - *Strict liability* - occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even absent negligence.

    - *Quia timet* - "which he fears" - Plf. does not have to wait for damage to occur; where merely apprehended, can obtain *quia timet* injunction to prevent the occurrence of the harm. Plf. must show "strong case of probability" that the harm will materialize.

    - Injuctive relief is discretionary, therefore only applicable where there are sufficient grounds to warrant its exercise.

- A serious risk to health would constitute irreparable harm, damages not an adequate remedy (money cannot restore health); therefore, such a situation would be one of the strongest in which an injunction would be appropriate.

- The Court does not have the training or staff to regulate the use of chemicals, particularly where broad areas of social policy are involved. Opponents to certain chemicals should direct their activities towards regulatory agencies.

- The expert evidence suggests that there are no obvious ill effects of the use of phenoxy herbicides. There is not sufficient acceptable evidence of a probability of risk to health from this chemical (other than in massive accidental exposure).

- Risk in the present case is many times less than one in a million which level, apparently, is regarded as a safe and acceptable risk by most of the world's regulatory agencies.

- Plf. experts seemed protagonists for their position, with a confirmation bias; the D. experts seemed more credible on this basis.

- Costs awarded, despite the fact that the case has many hallmarks of public interest litigation; Plf. had to abandon appeal in exchange for abandonment of costs apportionment.

- *Cambridge Water Co v Eastern Counties Leather Plc*, HL 1993

- Fact - Plf. water company claiming against D. tanning company; latter used PCE in order to degrease pelts; chemical leaked into Plf.'s water supply 170 miles away via percolating water, rendering it "unwholesome" for use as drinking water.

- Issue - is the contamination of the Plf.'s borehole actionable in either nuisance or strict liability? Do these torts require foreseeability of harm?

- Rule - while certainly damage has been established, it was not foreseeable, and therefore actions in strict liability and nuisance must fail. Chemical use and storage found to be a non-natural use of land, however.

    - Reasonable person would not have been able to foresee that the small amount of PCE spillage would lead to any environmental hazard or damage, beyond perhaps causing a person on site to faint from the fumes.

    - Spillage would have been expected to evaporate rapidly in the air, and would not have been expected to seep through the floor of the building into the soil below.

    - Foreseeability is a prerequisite of liability in damages for nuisance, as it is of liability in negligence.

    - Difficult to see why Plf. be in a stronger position to claim damages for interference with the enjoyment of his land where the defendant was unable to foresee such damage; this is why foreseeability is a prerequisite.

    - In nuisance, the fact that the defendant has taken all reasonable care will not of itself exonerate him from liability, the relevant control mechanism being found within the principle of reasonable user.

- In strict liability, knowledge or foreseeability is also at play, in that the impugned object must be "likely to do mischief" and liability stems from the "natural and anticipated consequences" of its escape.

- However, strict liability still applies in the sense that the defendant may be held liable notwithstanding that he has exercised all due care to prevent the escape from occurring.

- Social policy suggests that the cost of damage resulting from ultra-hazardous operations should be absorbed as part of the overheads of the relevant business.

- However, more appropriate for such liability to be imposed by Parliament than by the courts - relevant activities can be identified, and those concerned can know where they stand; statute can where appropriate lay down precise criteria establishing the incidence and scope of such liability.

- Further, there is already legislation being put in place for this purpose, therefore no need to develop a common law principle to achieve the same end.

- Appropriate now to take the view that foreseeability of damage of the relevant type should be regarded as a prerequisite of strict liability.

- When D. created the conditions which have ultimately led to the present state of affairs, by bringing PCE onto its land, it could not possibly have foreseen that damage of the type now complained of might be caused thereby.

- While D. is now aware of the damage caused, it does not have liability going forward, as the activity which caused the damage occurred before the damage became foreseeable. As a result, there is no responsibility to remediate either.

- Liability for historic pollution is not imposed under statute, and therefore it would be strange is such liability were to arise in the common law.

- The storage and use of substantial quantities of chemicals does not fall under the "natural use" exception. Consider that if the damage *were* foreseeable, to find otherwise would be to exclude the D. from liability regardless, untenable.

- The mere fact that the use of chemicals is common in an industry is insufficient to bring the application within the "natural use" exception.

- *Smith v. Inco Limited,* ONCA 2011 (main decision)

- Facts - Plf. class action claim based on contamination of soil by nickel caused by D.'s nickel refinery. The amounts were found to be insufficient to be a risk to health, so the claim is based on the contention that the concern over the contamination reduced property values. Concerns over contamination began in early 2000s, nickel refining ceased in 1985.

- Issue - can the Plf. claim damages for reduction in property value based on public concern over nickel contamination caused by D.'s nickel refinery?

- Rule - nuisance inapplicable, as the damage was not foreseeable; strict liability inapplicable, as not hazardous, nor non-ordinary use of land (though not for community benefit); claim fails.

- Evidence indicated that Inco complied with the various environmental and other governmental regulatory schemes applicable to its refinery operation.

- Private nuisance balances the concerns of private citizens against one another; one person's lawful use of property may indirectly harm the property of another or interfere with that person's ability to fully use and enjoy his or her property.

- Determination is made by asking whether in all the circumstances the harm caused or the interference done to one person's property by the other person's use of his or her property is unreasonable.

- Defendant's conduct may be reasonable and yet result in an unreasonable interference with the plaintiff's property rights.

- Amenity, or non-physical nuisance, involves weighing factors such as nature of interference and the character of the locale in which that interference occurred.

- Where nuisance produces physical damage to land, damage is taken as an unreasonable interference without the balancing of competing factors.

- Actual, material damage is more than trivial; refers to damage which has actually occurred, and not merely potential damage which may occur. Readily ascertainable damage is that which can be observed.

- A change in the chemical composition of the soil measurable through scientific techniques would constitute a *readily ascertainable change*. However, this, *without more, does not amount to physical harm or damage to the property.*

- Where the nuisance is said to flow from the physical harm to land caused by the contamination of that land, the claimants must show that the contaminant in the soil had some detrimental effect on the land or its use by its owners.

- *Raison d'être* of nuisance is to equip a party who is suffering damage to his land or interference with his use of the land with a means of forcing the party causing that damage to stop doing so.

- Inconsistent with the essential nature of nuisance as an interference with property to hold that Inco was not engaged in any interference with property when it operated the refinery and emitted the particles, but that it was engaged in an actionable nuisance 15 years after it stopped operating the refinery,

- Do not accept that strict liability based exclusively on the "extra hazardous" nature of the D.'s conduct is or should be common law in this province.

- There is no basis in the evidence upon which D.'s operations or emissions of nickel could be described as "extra hazardous" or "fraught with danger".

- Only non-natural, special land uses associated with increased danger to others evoke the strict liability principle. The touchstone is damage occurring from a user inappropriate to the place where it is maintained (pig in a parlour).

- Compliance with various environmental and zoning regulations is not a defence to a strict liability claim. However, compliance is an important consideration in light of the approach to non-natural user, however.

- Any industrial activity, and perhaps even more so a refinery, certainly carries with it the potential to do significant damage to surrounding properties if something goes awry.

- For non-natural use to be established, the D. must be involved in "an exceptionally dangerous or mischievous thing" or in circumstances which are "extraordinary or unusual". Further, the use must not be "proper for the general benefit of the community."

- D. operated a refinery in a heavily industrialized part of the city in a manner that was ordinary and usual and did not create risks beyond those incidental to virtually any industrial operation. Therefore, natural use not impeached.

- General benefit of the community refers to entities, usually governmental, acting under statutory authority and engaged in activities that benefit the community or at least a significant segment of the community at large.

- Incidental benefit to the community flowing from the operation of industry (eg. employment) does not bring it within the phrase "for the general benefit of the community."

- There is no requirement that the escape of the impugned object in strict liability claims must have been foreseeable. The type of damages caused must be foreseeable, however.

- Danger posed by the escape can rest in the repeated and cumulative effect of the escape of the substance; not limited to a single escape - nor is there any reason to distinguish these types of occurrences or damages.

- Application of strict liability to consequences that are the intended result of the activity undertaken is doubtful; odd to impose strict liability where activity that is carried out in a reasonable manner and in accordance with regulations.

- Once a class is certified in BC, the plaintiff is immune to any adverse costs awards. This is not the case in Ontario, however. A class can still be subject to adverse costs awards post-certification in Ontario.

    - This situation is said to be mitigated through the creation of a fund which indemnifies the costs incurred by class action plaintiffs, administered by the Law Foundation of Ontario.

    - Fund consists of $8m-$10m at present, and considers applications for indemnity in circumstances of adverse cost rewards in class actions, or disbursements to sustain such litigation (takes cut of winnings)

    - Law Foundation of Ontario incurs a not-insignificant liability in the cost disbursements. Argued that *Inco* was a public interest case, so should be alleviated of some of this liability (Tollefson testified at hearing).

- Material Contribution to Justice? Toxic Causation after Resurfice Corp. v. Hanke, *Collins / Kilmurray*

- *Statutory environmental law* - historically operated on an "innocent-until-proven-guilty" paradigm that discourages rigorous research and encourages the manufacture of ignorance.

- *Tort law* - for its part, has required the injured plaintiff to present evidence proving on a balance of probabilities that the defendant's substance caused his or her illness, even where the data to support or refute such a claim simply does not exist.

- *Traditional approach* - plaintiffs who cannot prove that the defendant's substance caused their injury will recover nothing. This is the case even where plaintiffs have succeeded in showing that the defendant owed them a duty of care and breached the requisite standard of care in its treatment of the substance at issue.

    - Plaintiffs can show that a class of defendants owed them a duty, breached that duty, and that the alleged breach produced their illness. However, because of the fungible nature of the product or substance at issue, they cannot demonstrate which specific defendant among the group of possible tortfeasors produced the agent that caused their injury.

    - Absence of evidence of causation has been taken to be evidence of the absence of causation, despite that this is a known logical fallacy in science.

- *Change initiated through Resurfice* - framework for exemption from the traditional but-for test and opened up the possibility of recovery for toxic tort plaintiffs faced with a previously insurmountable burden of scientific uncertainty. Shifted the focus of the causal inquiry from injury to risk.

- *Sliding scale following Resurfice* - causation law now incorporates a sliding scale of causation standards, ranging from the traditional but-for requirement at one end to the *Snell* test in the middle, and the *Resurfice* material contribution to risk test at the other.

- *Generic causation* - the capacity of the substance to cause the illness in question. Is Bisphenol A a hormone disruptor? Specific causation becomes relevant only after an affirmative response is provided to the generic causation inquiry.

- *Specific causation* - determine whether it actually did cause the illness in his or her specific case. At this stage, a plaintiff must adduce evidence of the nature, duration, and extent of his or her exposure to the substance in question.

- *But for test* - the default standard for proving causation in negligence. The plaintiff must prove, on a balance of probabilities, that but-for the defendant's breach of the standard of care, the loss at issue would not have been sustained. The *Resurfice* decision clarified that but-for is the default test even in multiple cause scenarios.

- *Material contribution to injury* - established *in Athey v. Leonati,* holds that where the but-for test is unworkable, the causation requirement may be satisfied "where the defendant's negligence 'materially contributed' to the occurrence of the injury." Something less than but-for causation but also stood outside the *de minimis* range.

    - Criticized for issues relating to indeterminate liability owed to indeterminate class of persons, indeterminate time (latency).

- *Snell v. Farrell test* - stems from *Snell*, held that the ostensible failure of the but-for approach was not

inherent in the test itself but resulted from its "too rigid" application by courts - should instead take a "robust and pragmatic" approach to evidence of causation. SCC 1990

- *Sindell v. Abbott Laboratories test* - not applicable in Canada, stems from California; applies where a plaintiff has joined a "substantial percentage" of the market and where the product at issue is "fungible," making it difficult or impossible to identify its specific producer - liable to the extent of market share, absent exculpatory evidence.

    - Creates indeterminate defendants issue, could bar recovery, or provide for unjust recovery.

- *Issues with several liability* - given the long latency involved in many toxic illnesses, there is a realistic chance that one or more negligent defendants will be insolvent by the time of trial. As a result, the imposition of several-only liability may frequently result in a plaintiff receiving no more than a partial recovery.

- *Material contribution to injury vs. risk* - former addresses how far liability will extend in a group of two or more causal contributors. It does not address the scenario of intransigent scientific uncertainty obscuring the causal mechanism itself. Where the claim involves a poorly understood chemical, however, the MCI test is of little utility.

    - Each of three assailants who struck an otherwise healthy plaintiff on the head materially contributed to that person's brain injury, because we know that brain injury can be caused by blunt trauma to the head -> MCI.

- *Application of the material contribution test* - as determined in the *Resurfice* decision; imposes liability though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach. Burden on the Plf. to BOP:

    - (1) Must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test.

    - (2) Impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge.

    - (3) Must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury.

    - (4) Plaintiff's injury must fall within the ambit of the risk created by the defendant's breach.

- *Material contribution in toxic torts* - Where the increased risk is less than 51 per cent, the plaintiff cannot show that it is more likely that she would not have sustained the injury absent exposure; in other words, the plaintiff would fail on the traditional but-for test.

    - However, this would be sufficient if the Plf. proved a 25 per cent increase in risk, which surely meets the standard of materiality, and has sustained injury within the area of risk. Again, assuming that the risk was created negligently, all requirements of the *Resurfice* test have been met

- *State of the law following Resurfice* - there is now a "sliding scale" of causation standards in Canadian tort law.

- *But for test* - Where cause is readily ascertainable, a strict application of but-for remains appropriate.

- *Snell test* - Where there is some scientific uncertainty and the facts lie peculiarly within the knowledge of the defendant, the *Snell* modification of the but-for test may be employed, allowing a court to draw an inference of causation based on very little affirmative evidence adduced by the plaintiff.

- *Material contribution test* - in the minority of cases in which it is scientifically impossible to prove causation of injury, the *Resurfice* exception will apply.

- *Remnant issues in toxic torts following Resurfice* - degree of uncertainty associated with many chemical substances is so high as to preclude proof of material increase in risk.

  - Indeed, the *Resurfice* test still privileges the manufacture of total ignorance: where a substance is too poorly understood to make any definitive conclusion about its characteristics, plaintiffs will fail to meet the *Resurfice* standard.

  - There are many thousands of chemicals for which data sufficient to demonstrate a material increase in risk are simply unavailable.

- *Unable to prove a material increase in risk* - this inability will stem from one of two causes.

  - First, it may be that adequate data exist demonstrating the safety of the chemical at issue, ergo apt that Plf. should fail.

  - Second, may be that the plaintiff's failure to prove material contribution to risk stems from the defendant's failure to adequately investigate its own substance.

- *Toxic battery* - where the D. did not adequately investigate own substance, exposure of the plaintiff (and others) to the substance in effect constitutes a form of involuntary experimentation, sufficient to create a claim in battery. If courts are willing to impose liability in battery, then the *Resurfice* tendency to reward intentional ignorance will be effectively counterbalanced.

  - Rather than penalizing plaintiffs for their inability to prove the characteristics of a substance, the information-based claims impose liability on defendants for releasing the substance before discovering these characteristics themselves.

- Failure to investigate or disseminate health information - this has been put forth as the basis for a potential negligence action, similar to the involuntary experimentation suggested with toxic battery. Rather than penalizing Plf. for lack of information, liability falls on the D. for exposing Plf. to a substance about which it did not have sufficient information.

- The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific, Preston

  - Public trust - roots found in Roman law, idea that that certain common resources such as the air, waterways and forests were held in trust by the State for the benefit and use of the general public. A broader conception of the public trust holds that the earth's natural resources are held in trust by the present generation for future generations.

- Trustee - state has a fiduciary duty to deal with the trust property in a manner that reflects the interest of the public, and therefore property cannot be alienated unless the benefit outweighs the loss of "social wealth"which occurs as a result.

- Restrictions placed on government authority through trust relationship - property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public. Secondly, the trust property may not be sold. And thirdly, the property must be maintained for particular types of uses, such as navigation, recreation, or fishery.

- *Revitalizing Environmental Class Actions,* Kneteman

- Three main benefits of class actions in environmental law- all of these are well served in the domain of environmental torts and class action, as these wrongs affect large numbers of people, but cost and complexity render individual actions non-viable.

    - Improvement of access to justice - costs for individual environmental actions often exceed potential for recovery, particularly where damage is to property rather than to person (diminution of market value not lucrative).

    - Encouragement of behaviour modification - can help to directly force corporate change through large damage awards, or stimulate the tightening of environmental regulations, thus indirectly causing change.

    - Serving judicial economy - reduce the total amount of litigation arising out of a dispute; however, of course, if the litigation is *not* viable on an individual basis, then judicial economy is contradictorily served by denying certification.

- Quebec has gained a reputation as Canada's "class action haven", particularly in the domain of environmental class actions. 2.5x as many as the rest of Canada combined, 68% certification rate.

- Most environmental class actions that have been granted certification in English Canada have focused on property value diminution and have excluded personal injury claims.

- Courts in Quebec have been willing to certify environmental class actions that involved personal injuries.

- Representative plaintiff in Quebec has the right to appeal a decision refusing certification, but a defendant has no right of appeal from a decision certifying a class action.

- In addition, there is no risk to class representatives or class counsel of heavy costs if certification is denied.

- Class actions in environmental law will be easier to sustain as legislatures move toward the creation of statutory civil remedies for environmental damage.

- Alcan, at the QCCA, is exemplary of the Quebec approach; Air or water pollution rarely affects just one individual or one piece of property. Issues similar in each claim, but they may be complex and expensive to litigate, while the amount involved in each case may be relatively modest.

- In refusing certification in *Hollick*, McLachlin cautioned that while the appellant has not met the certification requirements in that case, it does not follow that those requirements could never be met in an

environmental tort case.

- In *Hollick*, decision gave the impression that environmental class actions were generally – or even inherently – undesirable due to their perceived overwhelmingly "individualized" nature.

- Preferable procedure / predominance

    - Predominance tests outside of Quebec prioritize concerns of *judicial economy*. In contrast, the Quebecois approach to preferability focuses on *access to justice*.

    - Courts outside of Quebec ignore the question of whether there would be any realistic chance of redress for plaintiffs with individually non-viable claims if a class action was not certified.

    - Predominance / preferable procedure often depends on whether resolving general causation will significantly advance the action; Courts outside of Quebec refuse class actions where general causation resolution does not advance the action overall.

    - Causation analysis in two steps:

        - General - substance is capable of having a particular effect; common to all class members.

        - Specific - exposure led to this effect in a particular individual.

- Judicial creativity - certification of environmental class actions in Quebec is facilitated by the creativity of judges in establishing subgroups among class members.

- Environmental class actions can be useful tools to improve the health and well-being of Canadians and their environment, but their potential is being stifled in most provinces.

- English Canada should be guided by precedents such as St-Laurent, Alcan, and Inco, which acknowledge how class actions are well-suited to resolving environmental problems.

- Common Law Environmental Protection in Canada: *British Columbia v. Canadian Forest Products Ltd.*, Demarco

    - Binnie, in failing to award enhanced damages in BC v. Canfor, overestimates the novelty of questions with respect to public nuisance. Public nuisance is a well-established cause of action in Canadian law used in a wide range of circumstances and does not raise policy concerns about Crown duties and liability for inaction.

    - This leaves the issue of standing for the public as one of the only remaining hurdles to the development of a more environmentally beneficial common law jurisprudence in Canada.

- Asserting the Public's Environmental Rights, Gage

    - A public right is a legally enforceable right held not by an individual, or a community, but by the public at large.

    - By public rights is not meant rights owned by government, but rather those vested in the public generally, rights that any member of the public may enjoy. Also called public environmental rights.

- Traditionally, public rights have been understood in terms of the public's right to make use of land or a resource. As such, they are a mixed blessing from an environmental point of view, since they are a consumptive right.

- However, may also have a more general environmental protection or conservation aspect. For instance, in Canfor, there was no suggestion that the public was likely to directly use that timber; nor was there evidence that the river, fish or wildlife likely to be impacted by the forest fire were used by the public.

- *Canfor* therefore suggests that the public may have a right to the conservation of environmental features, independently of any actual use of the resource.

- Public includes not just the user but also the community at large and even future generations. However, this is problematic for the tort action, as it raises the spectre of indeterminacy.

- Aboriginal cases indicate that conservation is a valid legislative objective that can justify interference with Aboriginal rights.

- When legislation regulates the use of public environmental rights, it is natural for the courts to assume that it is ensuring conservation of the public right.

- The primary obstacle to asserting public rights through the tort of public nuisance has been the restrictive rules about who can bring such a claim.

- Exception to the rule of standing requires an individual who has suffered "special harm" as a result of the public nuisance will have standing to bring a claim.

- Amidst uncertainty, Courts have adopted an extremely restrictive definition of "special harm" for the purposes of adjudicating standing claims - for instance, *Hickey*.

- Hickey has been rarely followed, as vast majority of public nuisance cases have held that individuals suffering direct financial loss as a result of interference with a public right do suffer special harm.

- Courts might consider abandoning the public nuisance standing rule altogether. Since *Hickey*, a new public interest standing test in constitutional and administrative law challenges has arisen.

- Legislation should be interpreted, where possible, as not infringing existing legal rights. The principle is routinely applied in relation to private property rights and aboriginal rights, and is also applicable to public rights.

- Public right can only be modified or extinguished by an authorizing statute. So, for instance, a Crown grant of land of itself does not and cannot confer a right to interfere with navigation.

- Common law has, since its inception, recognized public rights in respect of the environment. Environmental concerns may now have an unprecedented importance, but they have always been an important concern of the legal system.

- Private property owners have acquired their property subject to a pre-existing common law duty not to negatively affect
the rights of their neighbours, including public environmental rights.

- Public trust doctrine - holds that there are certain public rights which are so important that the Crown holds them in trust for the public at large. Existence of a trust in respect of public environmental rights could only strengthen the legal effect of such rights, and may expand their impact beyond the walls of statutory authority.

- *Hickey v. Electric Reduction Co.*

- Facts - fishermen bring claim in public nuisance arising out of oil spill.

- Issue - do plaintiff fishermen have standing to bring claim in public nuisance, that is, have they suffered special harm?

- Rule - No.

- Special harm does not arise merely because one has suffered a greater amount of harm through the impact of a nuisance on the public harm; must be a harm "peculiar" to selves.

- *British Columbia v. Canadian Forest Products Ltd.*, SCC 2004

- Facts - forest fire in BC caused through D.'s negligence, includes swaths of Environmentally Sensitive Areas on watercourses deemed too valuable environmentally to permit logging.

- Issue - as trustee of the environment on behalf of the public, can the Plf. provincial government claim damages arising out of the destruction of environmentally valuable forest land?

- Rule - the Crown can claim damages, but such a claim is not supported in this case.

- The Crown in right of British Columbia says it sues not only in its capacity as property owner but as the representative of the people of British Columbia, for whom the Crown seeks to maintain an unspoiled environment

- Evidentiary record is also singularly thin on what precise environmental loss occurred, apart from damage to trees, and what value should be placed on it.

- The Crown did not establish its claim for compensation for environmental damage.

- Crown suggested that it was entitled to collect damages in negligence, "to effectively deter environmental harm and compensate the public for environmental damage".

- Attorney General, representing the Crown, has been the appropriate party to sue for abatement of a public nuisance.

- Any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience is capable of constituting a public nuisance.

- Act of Canfor in burning down a public forest is capable of constituting a public nuisance. It was also negligence.

- Some commentators regard the injunction as the "public remedy" obtained by the Attorney

General, while damages are a "private remedy" available to those private citizens who have suffered a special injury as a result of the public nuisance.

- However, it would be impractical in environmental cases for members of the public to show sufficient special damages to serve the twin policy objectives of deterrence to wrongdoers and adequate compensation of their victims.

- The notion that there are public rights in the environment that reside in the Crown has deep roots in the common law.

- Public rights and jurisdiction over these cannot be separated from the Crown.

- Notion of the Crown as holder of inalienable public rights in the environment and common resources is accompanied by the right to sue to protect these elements as *parens patriae*.

This is an important jurisdiction that should not be attenuated by a narrow judicial construction.

- There is no legal barrier to the Crown suing for compensation as well as injunctive relief on account of public nuisance, negligence causing environmental damage to public lands, or other torts.

- This recognition of the Crown's role brings to light the spectre of government liability for inaction with regard to environmental protection.

- *McGhee v. National Coal Board*

- Facts - defendant negligently failed to provide on-site shower facilities to the plaintiff employee, with the result that the plaintiff had to bicycle home covered in brick dust and perspiration; may have caused Plf.'s dermatitis, but impossible to determine causation on a but for basis.

- Issue - is the D. liable despite the impossibility of establishing causation on a but for analysis?

- Rule - where proof of causation is unavailable due to limits in scientific knowledge, the burden of proof on causation should be shifted to the defendant after the plaintiff has shown:

- (1) that the defendant materially (and negligently) increased his risk of sustaining a particular harm; and

- (2) that the plaintiff actually suffered injury within the area of risk created by the defendant.

- *McGhee* would have reversed the burden of proof on causation where the requisite factors are made out, the *Resurfice* decision appears to leave the legal burden of proof with the plaintiff.

- Division of powers materials

- *Morton v. British Columbia (Minister of Agriculture and Lands), BCSC 2009*

- Facts - petitioners argue that jurisdiction to regulate the management of fisheries in Canada is vested in Parliament pursuant to s. 91(12). PG argues that this falls under s. 92(13), s. 92(16), s. 95, s. 92(5). Therefore, licences to farm Atlantic Salmon issued by the PG are invalid.

- Issue - is the aquaculture licencing regime under the BC *Fisheries Act* UV the PG?

- Rule - yes, it is UV. 12 months, then invalid.

    - "Fish habitats" are defined as those parts of the environment "on which fish depend, directly or indirectly, in order to carry out their life processes"

    - Under the *Constitution Act (1982)*, the federal government has authority for all fisheries in Canada

    - The mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter.

    - Legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional.

    - Dominant purpose of the legislation is still decisive. Its secondary objectives and effects have no impact on its constitutionality - merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law

    - Where interjurisdictional immunity applies, the result is that the impugned law is not held to be invalid, but simply inapplicable to the federal undertaking, person or thing, and is limited in application to matters within the jurisdiction of the Province by reading down the legislation.

    - Dominant tide of constitutional interpretation does not favour interjurisdictional immunity as a mode for interpreting and applying the constitution; inconsistent with living tree dicta.
    - Not a doctrine of first recourse; however, BC *Fisheries Act* constitutes an interference with the core of a matter within the exclusive jurisdiction of Parliament: the management and regulation of fisheries.

    - Subsidiarity does not apply to matters which have been delegated to the Federal government in the *Constitution Act*.

    - Paramountcy ensures that valid provincial legislation does not encroach too far into the federal sphere. It applies where there are two valid laws, one federal and one provincial, that are inconsistent with each other.

    - If the doctrine is triggered, then the federal law prevails over the provincial law. The PG law becomes inoperative and is held in abeyance unless and until Parliament repeals the federal law.

    - Doctrine of paramountcy does not apply because there can be no valid inconsistent provincial legislation where the jurisdiction is exclusively federal.

    - Granting of fish farm licenses by the provincial Crown purports to permit those to whom such licenses are granted to introduce fish into significant areas of B.C.'s coastal waters, up to sev- eral hectares in size, which would otherwise be frequented by wild fish. This disruption is directly contrary to s. 35 of the federal ***Fisheries Act***.

    - Federal fisheries power 'is concerned with the protection and preservation of fisheries as a public

resource,' extending even to the 'suppression of an owner's right of utilization'

- Unable to conclude, as the respondents argue, that the activity of finfish aquaculture is an activity other than a fishery.

- Fish which are reared in finfish farms on the coast of British Columbia are either a part of the overall British Columbia Fishery or are a fishery unto themselves. In either case they fall under the jurisdiction of Parliament under s. 91(12).

- Fisheries, as a national resource, require uniformity of the legislation which affects and protects that national resource.

- The land beneath the fish farms is the property of the provincial government; but, jurisdiction over land management is not sufficient to permit PG to legislate the fish farming activities taking place above provincial land

- P&CR power does not extend so far as to permit a Province the "right to pass any laws interfering with the regulation and protection of the fisheries"

- Unable to accept that the jurisdiction of the provincial Crown over matters of a lo- cal or private nature in the Province could entitle the Province to legislate under the double aspect doctrine with respect to a matter that was singled out as a national resource to be managed and preserved by Parliament.

- Where fishing, such as lobster fishing, requires use of subsoil belonging to the province, provincial permission will be required even though a Dominion licence has been granted.

- Only in the case of ordinary fishing in tidal waters may the Dominion completely ignore provincial ownership of fisheries.

- Implicit in the Oyster Fisheries Agreement is the assumption that "cultivation and production of oysters" is distinct from agriculture. Thus, rearing of fish in coastal waters cannot, in my view, be considered to be agriculture for jurisdictional purposes.

- *R. v. Fowler*, SCC 1980

  - D. deposits wood debris into stream, violating the *Fisheries Act*. D. challenges portion of the *Act* as *ultra vires*, alleging that there was no nexus between fish welfare and provision, because no requirement that the dumping be harmful.

  - There was no nexus between the prohibition and the *Fisheries Act*, because there was no requirement that the dumping of debris actually cause harm to fish or fish habitat.

- *R. v. Crown Zellerbach*, SCC 1988

  - Facts - D. charged with dumping under Fed *Ocean Dumping Control Act*, attempts to rely on *Fowler* to render provision UV the Fed. Fed holds that marine pollution is a matter of national concern.

  - Issue - is ocean dumping a matter of national concern, under POGG?

- Rule - yes

    - The P&S of the *Ocean Dumping Control Act* was to regulate the dumping of substances of sea in order to prevent harm to the marine environment

    - s. 91(10) cannot support the OCDA on its own, as it fails to establish the nexus required by *Fowler*; cannot be grounded elsewhere under heads of power, therefore POGG essential.

    - Requirements for POGG, under the NC branch:

        - National concern is not temporary; if temporary, then emergency branch is the more appropriate head of power.

        - Applies to matters which did not exist at the time of confederation, or which have in the interim increased in importance such that they are now matters of national concern.

        - Matters must have singleness, distinctiveness, and indivisibility that clearly distinguishes them from matters of PG concern;

        - Must consider PG inability, or, put another way, the effects on extra-provincial interests if one province fails to regulate effectively in this area.

        - For a matter to qualify as one of national concern under POGG, it must have ascertainable and reasonable limits re: encroachment on PG jurisdiction.

    - Power established through national concern is plenary in nature, unlike emergency doctrine powers, which contemplate concurrent jurisdiction.

    - In legislating to prevent ocean pollution, Fed not limited to activities taking place in that region; rather, may take steps to prevent activities in PG control, where these activities would have the potential to pollute beyond PG territory.

- Dissent (LaForest) - ocean pollution meets national concern test, but provisions fail on *Fowler* analysis.

    - Power proposed by majority would not be limited to coastal and internal waters, but extends to the control of deposits in fresh water that have the effect or potential effect of polluting externally.

    - Pollution of the ocean also results from aerial pollution rather than dumping into waters; therefore, the Fed has jurisdiction to regulate this matter.

    - Combination of the Fed legislative power and the criminal law power could prohibit the pollution of both internal and external waters.

    - However, the foregoing does not mean that the Fed has authority to prohibit or regulate *any* substance or emission; rather, to meet *Fowler*, must have nexus with the valid Fed purpose which authorizes it.

    - To allocate environmental regulation entirely to the Fed would sacrifice the principles of Federalism in the Constitution.;

- Ocean pollution is not sufficiently discrete upon which POGG national concern can rest; really, a truncated Fed pollution control power; taken to logical conclusion (eg. covering air and water pollution, because covering only one or the other wouldn't achieve purpose) would subsume PG legislative powers.

- The issue with the present provisions is that they prohibit activities which cannot be shown to have a reasonable potential of polluting the ocean.

- An activity such as the deposition of innocuous substances on provincial lands cannot be a Federal domain; must be provincial.

- *Friends of the Oldman River Society v. Canada*, SCC 1992

- Facts - application for certiorari and mandamus to force Minister to seek environmental assessment for a dam project, in accordance with Fed guidelines established by the Minister of the Environment.

- Issue - is s. 6 of the *Department of the Environment Act*, and the *Guidelines Order* issued pursuant to this section UV the Fed?

- Rule - no, within Fed power; the EA's ordered under the Guidelines are supported by the heads of power which initiate them, and other effects are incidental to the P&S

- The Guidelines Order is legislation which is p&s in relation to matters within the Fed's exclusive jurisdiction; facilitates Fed decision making on matters within Fed jurisdiction.

- P&S analysis analyzes the dominant or most important characteristic of the challenged law.

- The environment is not an independent matter to be legislated upon, but rather a polycentric matter relevant to many heads and subject to concurrent jurisdiction.

- Conceivably, both the Fed and the PG may act with respect to the environment under any head of power.

- Environmental assessment is a planning tool that is now generally regarded as an integral component of sound decision making.

- Due to auxiliary nature, Guidelines Orders cannot be used as a colourable device to invade extra-jurisdictional domains; will only affect matters otherwise within jurisdiction of party initiating environmental assessment.

- No authority need be cited for the exclusive power of Fed to legislate in relation to the operation and administration of Fed institutions and agencies.

- Any intrusion into PG matters is merely incidental to the P&S of the legislation, which is to ensure sound Fed decision making.

- *R. v. Hydro-Quebec,* SCC 1997

- Facts - charges laid against hydro company for release of PCBs under *CEPA*.

- Issue - is the impugned section of *CEPA UV* the Fed?

- Rule - no, valid under the criminal law power.

    - The environment is a diverse matter which cuts across many areas of constitutional responsibility, both Fed and PG.

    - If a provision dealing with the environment is aimed at promoting the dominant purpose of a valid statutory scheme, then the provision is valid.

    - The Constitution should be interpreted so as to ensure that both levels have sufficient power to protect the environment within their legislative ken; this is inconsistent with the wielding of the national concern branch of POGG, which is plenary.

    - Crim power given a wide jurisdiction, the only restriction on legislation under this power is that this head must not be invoked colourably to invade PG domain.

    - The protection of the environment is a public purpose which Fed can legitimately safeguard through criminal legislation.

    - The criminal law power is plenary, but it does not grant full control to legislate in subject matter areas it touches on, but rather only allows for discrete criminal prohibitions pertaining to those subjects.

    - ITC, the Fed stayed well within the borders of criminal law power with respect to release of toxic substances.

    - Environmental protection legislation should not be approached with the same rigour as statutes dealing with less complex statutes where s. 7 vagueness is concerned.

    - There was nothing in the act to suggest control of use/importation/manufacture of chemical products, but rather only control of release of toxic products which are not otherwise regulated by law.

    - In criminal prohibition, the prohibited action must be tailored to meet the specific circumstances which constitute the harm protected against.

    - While environmental law is not something which can be entirely Fed, nor can it be entirely under PG control; Fed expected to take leadership role, and to implement obligations imposed by international treaties.

- Dissent (Lamer) - yes; not crim, not POGG, not t&c

    - First step, characterization according with p&s and location of result within the heads of power. ITC, P&S of Part II is regulation of substances to protect human health, environment. Must consider which heads of power relevant.

    - Criminal law power - broad, plenary power to legislate the criminal law. Must be prohibitions backed by a penalty, aimed at a legitimate public purpose, and not a colourable attempt to legislate in PG domain.

- The protection of the environment, in addition to health, safety, and other items enumerated in *Re Margarine* are valid public purposes under criminal law power.

- The legislation does not require that any risk to human health be proved before the substance is considered toxic and therefore prohibited under *CEPA*; therefore, fails to have a nexus with purpose, a la *Fowler*.

- Criminal law need not be blanket prohibitions, nor does regulatory law need to avoid all use of prohibitions.

- Regulatory schemes tend to involve a measure of discretionary authority. Increasing elaborateness, discretion, schematic nature, the more regulatory a provision is.

- Rather than consisting of broad prohibitions with narrow exceptions, present legislation has no broad prohibitions; therefore, not criminal.

- Broad concern, such as chemical release, more likely to be regulatory than narrow concern, such as control of tobacco advertising.

- A decision by the constitutional framers to not give one level of government exclusive control can be taken as a signal that the levels are to act in tandem concerning that subject matter.

- The matter is not one with sufficient singleness, distinctiveness or indivisibility such that it can be saved by POGG (probably correct: so many industries, methods, means, and chemicals involved, too broad for POGG).

- The P&S of the legislation is not trade and commerce, despite that the legislation will undoubtedly have an effect on matters concerning t&c.

- *Federalism,* MacKay

- Three explanations for weak federal role in the environment, interspersed by periods of federal intervention:

- *Constitutional restraint* - following *Zellerbach*, POGG expanded to allow for greater involvement in environmental regulation; seen as the primary impetus for Fed involvement in environmental management.

- *Canadian Environmental Protection Act* - consolidated other Fed environmental acts including *Clean Air Act.*

- *Canadian Environment Assessment Act* - statutory obligation for Fed environmental impact assessments for development projects which fall under Fed purview due to funding, oversight, etc.

- *Green Plan* - designed to promote and fund sustainable projects and programs across departments, coordinating with PG and private sector actors.

- *Provincial resistance* - however, in the years following the decision, the Fed was reluctant to use its

newly granted powers; this is due to the possibility of conflict with PG interests.

- Critics contend that the excuse of constitutional difficulties is just that, an excuse to cover up for basic unwillingness to take necessary action.

- However, there is no doubt that PG are highly protective of jurisdiction over natural resources.

- PG continues to exercise greater share of environmental authority; Fed involvement generally limited to matters with interprovincial or international implications; unwilling to press for greater role.

- *External pressures* - cannot completely understand Fed and PG respective roles in environmental regulation without considering electoral incentives to defend or extend environmental jurisdiction. Public concern is the impetus for involvement.

  - The costs of environmental protection are concentrated, while the benefits are diffuse; therefore, policy in this area is often seen as being saddled with an unacceptable political costs.

  - Further, the opponents of environmental initiatives are generally better funded, informed, and organized than their proponents.

  - As a result, the success of environmental initiatives is often dependent on the political climate; in the time following an environmental disaster, or when the economy is doing well, voters are more likely to sympathize with environmental concerns.

- *Collaborative model* - this is the dominant pattern of jurisdiction over environmental regulation, favoured in all policy fields.

  - *Equivalency agreements* - holds that PG laws apply if their standards are equivalent to those set by Fed legislation.

  - *Circumstances in which cooperation is likely to occur:*

    - *Control* - where this gives a government greater control over domestic policy than unilateralism; therefore, where there are interdependencies or externalities beyond the government's control cooperation is necessary for effective policy.

    - *Cost* - where intergovernmental imposes political or other costs; therefore, it is in governmental best interest to induce cooperation.

  - *Agreements under the collaborative model* - all of these emphasize delivery of protection by the party best situated to do so, almost always the PG; generally, bars action by other levels of government absolutely.

    - *Statement on Interjurisdictional Cooperation* - PG and Fed agreement which commits the governments to cooperate on environmental policy in order to avoid duplication and to harmonize standards. Led to establishment of the *CCME*.

- *Environmental Management Framework Agreement* - tentative agreement which committed the PG to conclude sub-agreements in areas of environmental regulation that harmonize standards and reduce duplication; *ultimately rejected*.

- *Canada-Wide Accord on Environmental Harmonization* - revitalization of the *EMJA*; calls for consensus based decisions driven by a commitment to high environmental protection standards, sustainable development. Produces non-binding commitments which are generally unenforceable.

- *Canadian Council of Ministers of the Environment* - group formed out of SIJC. Government falling under standards must undergo six months of consultation; if these are fruitless, the offending party may withdraw. Therefore, not really legally enforceable.

- *Regionalization and experimentation* - diversity possible in PG policies means that legislation may be better able to satisfy diverse citizen preferences concerning the environment. Also allows for policies to be "tested" before they are adopted on a large scale.

    - *Quality undermined* - engenders a *race to the bottom* mentality, in which the Fed is rendered impotent; certain parties are incentivized by the private sector to become pollution havens, which leads others to follow suit, undermining the regime.

    - *Devolution of power* - the literature tends to criticize the collaborative model because it results in the devolution of legislative power to the provinces, which, through the race-to-the-bottom, lead to weak environmental protection. This approach suggests that POGG should be used to take unilateral action.

- *Taku River Tlingit First Nation v. British Columbia*, SCC 2004

    - Facts - Redfern seeks to reopen mine in Northern BC. Requires road which will cut 160km through area which is subject to a landclaim by the Plf. Three year assessment follows, with the Plf. having a place on the Project Committee; process and requirements altered to some extent in accordance with Plf.'s wishes. Redfern's application is ultimately approved.

    - Issue - Is there a duty to consult concerning an operation which will potentially adversely affect land which is subject to a *pending* land claim? What is the scope of this duty?

    - Rule - there is a duty to consult; the scope of this duty is meaningful consultation, and, where indicated, accommodation. In the present matter, duty was discharged.

        - PG had a duty to consult meaningfully with the Plf. as part of the decision making process. However, this is not commensurate with a duty to reach an agreement.

        - FN concerns have to be balanced reasonably with the potential impact of the decision on those concerns, and with competing societal concerns.

        - PG was unable to address certain concerns directly because they were outside of the purview of the *Environmental Assessment Act*. Advised Plf. of this, facilitated access to decision makers in those areas, however.

- There is a duty to consult and where indicated to accommodate FN peoples *prior* to proof of rights or title claims; triggered in this case as the PG was aware of the pending land claim / treaty negotiation.

- Honour of the Crown duty arises from Crown assertion of sovereignty in the face of prior Aboriginal occupation; enshrined in s. 35 of the Constitution.

- Requires that Crown must act honourably in accordance with historical and future relationship with peoples in question; not narrow or technical, but broad and to be given full effect in order to enhance reconciliation efforts.

- Consultation duty arises where there is knowledge, whether real or constructive, of the *potential* existence of Aboriginal rights or title, and conduct is being contemplated which might adversely affect these rights. There is a commensurate duty to change plans or policy in order to accommodate Aboriginal concerns.

- Scope of the duty is proportionate to preliminary assessment of the strength of the case supporting the existence of the Aboriginal right or title claimed, and to the seriousness of the potentially adverse effect upon that right or title.

- Minimal requirement is that there be meaningful, good faith consultation and willingness on the part of the Crown to make changes based on this.

- Acceptance of a land claim into the treaty negotiation process establishes a *prima facie* case in support of Aboriginal rights and title. There is a high potential for negative impacts of Redfern's project, as the road would cut through an area which is critical to Plf.'s economy. Therefore, more than minimal action such as notice, disclosure, and discussion necessary to discharge duty to Plf.

- *Environmental Assessment Act* - requires that Aboriginal peoples whose territory includes site of reviewable project be invited to participate on project committee.

- Present matter, Plf. participated as committee members; additional studies consulted; financial assistance given to ensure participation.

- PG was not required to develop special consultation measures outside of the process provided for in the *EAA*; set up own process following the legislation, and the information and analysis required of Redfern were clearly shaped by Plf.'s concerns.

- Duty to consult can lead to duty to accommodate through policy alterations; however, must balance societal and Aboriginal interests in making decisions which affect Aboriginal claims.

- Majority report identified Plf. concerns, recommended mitigation strategies which were adopted into the certification conditions of the project.

- *114957 Canada Ltee (Spray-Tech) v. Hudson (Town)*, SCC 2001

- Facts - town passes by-law which bars use of pesticides within municipal limits, except for certain purposes (eg. farming) or in certain areas. Plf. challenges laws as *UV.*

- Issue - can a municipality pass legislation which bans the use of certain pesticides for certain purposes in certain places within its borders?

- Rule - legislation is enacted under the general welfare power delegated to municipalities, and is not rendered invalid through Fed or PG paramountcy as dual compliance is possible.

    - In *Hydro Quebec*, SCC ruled that the protection of the environment is a major challenge, one which requires actions by governments at all levels; that is not to say, however, that each government can ignore the division of powers in Fed system.

    - Municipalities may exercise only those powers expressly conferred by statute, those necessarily or fairly implied by express power, and those indispensable powers essential to, and not merely convenient to their purposes.

    - Includes general welfare powers; follows from the fact that the legislature cannot possible foresee all the powers that are necessary to the statutory equipment of its creatures.

    - General welfare means laws genuinely aimed at furthering health, safety, other goals, though this does not obviously confer an unlimited power; law must be scrutinized for true purpose - laws enacted under general welfare but truly serving an ulterior motive, regardless of mischievousness, are ultra vires.

    - As per *Shell Canada Products v. Vancouver* (SCC 1994), Courts should not strike down municipal legislation unless there is clear demonstration that the law is UV.

    - The bylaw is not a blanket ban, or a total prohibition; rather, it differentiates based on use (eg. not purely aesthetic) and area.

    - Municipal legislation is to be read to fit within the parameters of empowering legislation where susceptible to multiple interpretations.

    - Legislation can be struck down where it affects matters beyond the boundaries of the municipality without delivering any identifiable benefit to its inhabitants.

    - Purpose under general welfare need not be express; rather, can be read in from the nature of the legislation itself. For instance, here the distinctions in use clearly show that the purpose is to minimize health risk of pesticides; falls under health provision in empowering legislation, ergo intra vires.

    - Discrimination can only occur where enabling legislation specifically so provides, or where the discrimination is a necessary incident to exercising the power delegated by the province. For instance, here the distinctions are necessary incidents; minimize impairment, maximize beneficial effect.

    - *Precautionary principle* - to achieve sustainable development, policies must anticipate, prevent, and attack the causes of environmental degradation. Included in virtually every governmental document and policy concerning environmental law.

    - *Not invalid through Fed or PG paramountcy* - simultaneous compliance with both the bylaws and the relevant Fed legislation, which is permissive, not exhaustive (eg. *Pest Control Products Act*) is

possible under the "express contradiction test." Ditto PG (eg. *Pesticides Act).*

- Environmental regulation materials

- *McAllister Opinion Research*

  - 70% of Canadians call pollution laws inadequate, increase substantially from 11 years previous; 66% view climate change as a serious problem.

  - Stronger regulations to combat global warming supported for various resource industries (though not forestry, manufacturing, or mining).

- Greening of environmental law, Emond

  - Overview - legislation concerning the environment has evolved over time, and greening reflects this process over three stages. Regulation is response to market and technical failures; assessments attempt to anticipate these failures and environmental problems they cause; negotiation and problem solving attempt to address these issues in highly sophisticated ways.

  - Symbolic regulation

    - Overview - focus on the obvious; smoke stacks, outfall pipes, responses to major environmental disasters ore revelations about consumption practices. The regulator and the regulated strike a symbiotic balance in which each contributes to the political well-being of the other.

    - Failures

      - Reactive, rather than anticipatory - the damage has been done by the time that it is realized that regulatory mechanisms are even necessary.

      - Legitimacy - by excluding public from participation, the measures are viewed as mere symbolic reassurance; regulated industry makes small concessions in exchange for government approval.

      - Liability shift - the regulator assumes liability by entering the field, as the regulated industry able to shift blame once standards are met.

      - Knowledge gap - knowledge concerning the problem increases proportionally with the regulatory effort, thus requiring constant adjustment of standards; the alternative is immediate obsolescence.

  - Preventative regulation

    - Overview - focus on less obvious problems, such as the odourless, colourless, tasteless, and lethal substances known as exquisite toxics. Problem now framed as "environmental risk" exposed through epidemiological information, among other things.

    - Failures

      - Adjudicative dependency - adjudication used to fashion and implement policies, as well as

to enforce policies. Therefore, diminishes role of innovative and collaborative solution.

- Resource consumption - byproduct of adjudicative nature of this form of regulation, resources consumed mean that each side saves for "mega projects" thus leaving most problems to be dealt with through other means.

- Status quo - there is a built in bias for the status quo, by loading the approval process with hearing and assessment requirements. While this avoids innovations that are worse from the environment, this can also hold back innovations which are more environmentally sound.

- Cooperativeness - having removed the vestiges of the relationship between regulator and regulated, there is no longer any incentive to work together.

- Mutual problem solving

- Overview - there is great doubt as to the extent to which negotiation and compromise may be useful, particularly as environmental protection to some degree now reflects values and ethics; these are not subject to compromise. Therefore, a scheme of negotiation, presupposing compromise, is not compatible.

- Recommendations - recognize the legitimacy of negotiation, mediation, and other new means of problem solving; establish a regime of rights and obligations concerning participation in the process; recognize the limits of cooperative problem solving.

- Taking Uncertainty Seriously, M'Gonigle

- Dramatic increase in artificial chemical substances has rendered approach which permits specific discharges within an acceptable limit based on uncertain scientific information no longer acceptable.

- Patterns of legislation at present focus on what we know, rather than what we do not know; on observable cause and effect relationships, and not those which may exist but remain hidden due to limits of scientific knowledge.

- Effectively, this is an issue of permissive regulation versus preventive design.

- Permissive regulation - paradigm which allows for discharges into a receiving environment up to a specified limit which purportedly reflects safe levels.

- Assumptions underpinning current approach to regulating pollutants

- Assumption of assimilative capacity - theory which holds that the environment has an enduring capacity to assimilate prescribed levels of pollutants without harm. Mounting criticism for this model, as there may not be in fact any assimilative capacity; further, it is impossible to gauge assimilative capacity without knowing the full consequences of introducing chemical into the environment.

- Assumption of scientific knowledge - issue is that there are too many chemicals introduced every year, therefore many or most escape regulation; assessment is expensive and time consuming. Priority based on (primarily acute) toxicity, persistence, and bioaccumulation. Chronic effects at

sub-lethal levels are not generally a focus. Further, deal with probabilities, leading to causation issues in tort actions.

- Assumption of effective regulation - for a regulatory system based on substance-by-substance analysis to succeed, there must be high level of funding, expertise, and enforcement facilities available. The lack of these resources effectively commoditizes the environment, with the substantial transaction costs being externalized to the government and to the public.

- Potential solutions

- *Lowering the standard of proof* - lowering the standard of proof by accepting uncertain scientific information as sufficient on BOP is a means which has been adopted by the American courts; however, following Resurfice, it is clear that this is not the way the wind is blowing in Canada.

- *Risk creation as causation* - by accepting creation of risk as evidence of causation, the Courts are able to assign liability in a manner which minimizes judicial subjectivity. This is a risk-benefit analysis: the harm was created, and the costs of that risk to the Plf. outweigh the benefits to the D. However, risks and benefits may not be so amenable to quantification.

- *Establishing a legal right to environmental quality* - jurisdictions in the US have enacted legislation which enshrines a right to environmental quality; this includes a lowering of the standard of proof, and shifting the burden onto the defendant once a prima facie case has been established (eg. the Plf. shows that the actions are *likely* to harm the environment). The D. must then show that actions were reasonable. Not yet apparent in Canadian law.

- *Shifting burden of proof*

- *Alternate liability* - (eg. Cook v. Lewis) where, having proven negligence, but not which of multiple tortfeasors caused the harm, the burden shifts; the D.s must then absolve themselves on BOP or else be held liable. Limited application, since it requires proven and limited causes of harm, establishment of negligence, and of course, is a reactive solution in any case.

- *Strict liability* - (eg. Rylands v. Fletcher) where, a person who has a harmful thing under their care or control is to be held strictly liable for the consequences should it escape; removes the need to prove negligence. The tort is made out once the harm and causation are proved, subject to a defence of due diligence. The difficulties in disproving a due diligence defence add cost and difficulty to trial process.

- Preventative design - end of pipe solutions are not sufficient; smoke stacks were made to enhance air quality, a solution which contributed to acid rain. A holistic approach which accords with the precautionary principle is necessary; based on a presumption of harm. Permissiveness not viable in the face of uncertainties.

- Environmental Standard Setting, Tollefson

- Process

- Setting objective - broad categorical terms (eg. safe drinking water) set out either in law or code of practice, depending on proponent agency. Values carry additional objectives; for instance, to

conserve value in question without unduly reducing supply of timber from BC forests, as per the *Forest and Range Practices Act*.

- Developing criteria - gauge whether the objective is currently being achieved or compromise. Due to complexity of dose-response relationship, a pragmatic approach is adopted, basing results on limited parameters of greatest concern.

- Establishing ambient quality standard - identification of how the objectives can best be achieved with view of costs, benefits, and risk acceptability; typically informal, policy-based.

- *Defining individualized operational standard* - moving from a statement of the desired ambient outcome to standards that define permissible behaviour of an individual party - eg. discharge standard for air pollution. Generally, limits for concentration released within a time period. In the US, they instead use discharge limits set with reference to best available technology standard.

- *Forms*

  - Performance based

    - Overview - specific, measurable indicator of a desired objective, leaving broad discretion with how it is achieved. Intervention at output stage. Work best where actual performance can be measured and verified. Preferential in circumstances where performance is measurable.

    - Measurement

      - The best performance indicator is one which directly measures the ambient environmental value being protected.

      - While such values subject to a number of other influences, the measure usually crafted to isolate impact of regulated activity; however, uncertainty cannot be eliminated.

      - If measurement responsibility remains with regulator, then there will be an increase in costs to the government in administrating the standard.

    - Autonomy

      - Can preserve private autonomy, with autonomy increasing with congruency between the standard and the objective it protects.

      - Further, qualitative measures more autonomic for private actors than quantitative measures, which can be proscriptive.

      - Increased autonomy can alienate public participation and reduce transparency.

  - Technology based - silent about desired outcomes; rather, specify a mode or technology which optimally promotes objective. Intervention at action stage. Proscriptive, but alleviate the regulator of having to spend resources on measurement or other initiatives.

- Management based - eschew specification of outcome and means, instead promoting achievement of policy objectives by imposing management-planning activities. Intervention at planning stage. Preferred where the regulated community comprises heterogeneous enterprises facing heterogeneous conditions.

- Cooperative Approaches, Harrison

  - Adversarial approach precludes opportunities for creative solutions and collaborative outcomes; industry can be an agent of change, rather than the culprit of environmental degradation.

  - Command and control - disenchantment with this model, due to economic inefficiency, the glacial pace of the regulatory process, and the reactive nature of its solutions; in the US, stifles innovation through BAT approach.

  - Cooperative - working together to the same end; commonality of objectives predicated on agreement between the parties.

  - Typology of approaches to implementation of policy - from most to least coercive. Most government activities fall within regulation, exhortation, and inaction.

    - Regulation - legal requirements enforced through sanction;

      - Can be cooperative by resorting less to the stick with a view to enforcement; this is predicated on the assumption that there are more companies willing to act in good faith than otherwise, though this runs counter to economic theory.

      - Cooperativeness can also be relevant at the development stage; this has implications for speed and efficiency of development process. Further, if participant opinions are given considerable weight, it may be difficult to appease the varying interests at play.

      - Examples of cooperative enforcement include reduced monitoring of firms with certified systems, variances for firms pursuing innovative control strategies, reduction or waiver of penalties in event of voluntary disclosure and correction.

    - Government enterprise - direct provision of services by government agencies;

    - Expenditure;

    - Exhortation - persuasion of private actors to change their behaviour in a nominally voluntary manner (though some coerciveness is involved).

      - Voluntary agreements between governments and industry carry strong expectations of performance, and a threat of regulation if there is noncompliance.

      - On the other hand, education and information dissemination do not explicitly encourage particularly actions, but instead attempt to influence behaviour.

    - Inaction - civil society is left to address environmental problems; may involve the threat of government intervention; similar to exhortation, but with a proponent other than the government.

- Freeman, Modular Environmental Regulation

    - Market mechanisms - such as emissions trading schemes, thought to be more efficient than command and control approach. Based on the idea that firms able to reduce emissions at a lower cost will be encouraged to do so by being able to sell excess allocation to other firms.

        - Regulation, on the other hand, requires that all firms reduce emissions equally (not exactly), which is more costly because it fails to account for the marginal cost of compliance among differently situated firms; it is too coarse grained to suit all actors, effectively.

        - Regulation also stifles technological innovation; firms meeting the standard have no incentive to develop new technologies that could further reduce emissions.

        - However, market mechanisms are dominated by political considerations (particularly with a view to allocations), are difficult to tax due to difficulty in valuation, and may create hotspots of concentrated pollution. Further, require monitored indicator for the purposes of trading or taxing; this is not always feasible.

    - True answer is likely a mixture of both; for instance, levels established by regulation operate more like targets than strict requirements - these are market driven limits, therefore, which are inherent even in the command and control system.

- Setting the Standard, Tollefson

    - Virtually all standards set in the US during the 1970s were based on BAT standards (*Clean Air Act, Clean Water Act,* etc.); very much successful: significant improvements in environmental quality.

    - Standard required regulated facilities to install most stringent technology available, up to the point where the cost of doing so would cause a shut down.

    - Provided for citizen suits, whereby private agents could challenge permit holders and the government with failed compliance and enforcement.

    - Effect of BAT and citizen suits was to minimize monitoring and enforcement costs while increasing public participation in compliance efforts.

    - Critics say that BAT only effective for industry laggards, in fact stifles the bleeding edge of innovation by removing any incentive to innovate. Regardless, reform began in the 1990s; left regime intact, but provided benefits to overachievers, and allowed for credit trading.

    - By harnessing resources from private society, governments can reduce costs; this allows for "steering, not rowing" and governance from a distance.

- Next Generation Policy Instruments, Gunningham

    - Command and control - specifies standards and occasionally technologies which must be used (command), otherwise subject to sanction (control). Criticized for stifling innovation and for high costs.

    - Challenge is to find ways to minimize inefficiencies in current scheme, encourage innovation, and ensure environmental protection.

- Means

    - Self-regulation - industry-level organization sets rules and standards relating to the conduct of actors within industry. Should lead to more practicable standards through expertise, but which exceed the letter of the law; enforceable through peer pressure; minimizes cost to regulator. However, fails to achieve compliance in practice without standalone sanctions.

    - Voluntary agreements - covenants between governments and industry actors involving non-mandatory contracts between equal partners; offers incentives for action. Can be "public voluntary" (challenge) agreements, or "negotiated voluntary" agreements. The former is a non-factor; the latter is a factor where it is proposed against a backdrop of government intervention (though evaluation of success has proven difficult).

    - Informational regulation - state merely encourages or requires information about environmental impacts, though this is not accompanied by a requirement to change activities. Rather, seeks to encourage and to influence through dissemination of information. Can also be carried out by non-government actors (civic regulation), for instance where high-profile businesses are subject to market campaigns.

- *Ecology Action Centre Society v. Canada*

    - Facts - MoFO issues one year ban on groundfishing in a region in BC pursuant to *Fisheries Act*. The MoFO later issues a Variation Order repealing this ban. Plf.'s challenge the Variation Order holding that it is contrary to law because it allows for HADD.

    - Issues - can the MoFO issue Variation Orders which lead to HADD? Does this violate the *Fisheries Act?*

    - Rule - MoFO authorized to make the Variation Order, which itself complies with the regulations.

        - Groundfishing indiscriminately picks up undersized fish and plant forms that are critical to the marine ecosystem. This has long-term negative consequences.

        - The *Fisheries Act* confers a broad power on MoFO to manage and regulate the fisheries, including absolute discretion with regard to issuing licenses.

        - If Parliament had intended for words "work or undertaking" to include fishing, the definition should have been made clear, as was done elsewhere in the Act.

        - In any case, s. 35 is not an absolute bar against causing HADD; s. 35 only bars unauthorized activities that lead to HADD. Authorized activities may cause HADD.

        - Under s. 34, fish habitat means spawning grounds, nursery, rearing, food supply, and migration areas on which fish are dependent.

- *Harmless pollution, Richler*

    - Questions whether someone who deposits a demonstrably benign amount of ammonia should face prosecution (is there such thing as a demonstrably benign amount in an age of scientific uncertainty?)

- Questions whether we can rely on prosecutorial discretion to spare "innocent" offenders, particularly concerning provisions which can be started as private prosecutions.

- Argues that while it may be difficult for the Crown to prove harm, it should be hard for the Crown to make out a quasi-criminal conviction. Not everyone who falls under s. 36 prosecution will have "chosen" to enter a regulated arena. Further, Crown is already relieved of having to prove *mens rea*.

- Argues that there is no benefit in deterring "harmless" pollution, therefore deterrence cannot be the justification for breadth (misses the point: it's about indeterminacy, not harmlessness).

- Argues that there is a difference between persistent, bioaccumulative, inherently toxic substances and others such as ammonia, and that a distinction must be drawn (again, it's about indeterminacy; we are not capable of understanding assimilative capacity or ancillary, chronic effects of such substances, so it is nonsense to make distinctions on this basis).

– *Indicators of Effective Environmental Enforcement, Castrilli*

- Compliance - the state of conformity under the law; measured with relation to regulations at Fed levels, and with relation to licencing and regulations at PG levels.

    - Fed regulations are substance specific, or substance-industrial sector-medium specific; PG regulations are substance-medium specific, or industrial sector-medium specific.

- Enforcement - activities that compel offenders to comply with their requirements.

    - Fed enforcement is prosecutorial; PG enforcement includes alternatives, such as administrative orders, cancelling of permits, admin. penalties. More flexibility and less cost associated with the PG approach.

- As regulations are unable to take into account every aspect of regulated topics, and do not regulate comprehensively, a perfect compliance rate with regulations does not equate to perfect protection of the environment.

- Indicators include outputs, outcomes, and the resulting improvements in environmental quality; however, on the latter end of the spectrum, efforts for measurement are less developed.

- Outcome initiatives could include reporting of significant offenders, recidivism, voluntary compliance, exceeding regulatory requirements, to encourage further compliance.

– *Smarter Regulation, DeMarco*

- Initially, common law environmental protection gave way to statutory administrative orders and penalties in the 1970s; this gave way to increasing prosecutions and regulation, peaking in the 1990s. Thereafter, political trend for smaller government, led to a backlash against interventionism; retraction somewhat from previously aggressive regulation and prosecution in the environment.

- Deregulation led to self-regulation as the means for achieving environmental protection, reliant on voluntarism, codes of conduct, and voluntary agreements. However, there are areas of environmental management (water pollution) which are subject to high risk of opportunistic behaviour by bad actors, requiring strong enforcement regime.

- *Policing Environmental Enforcement, Zinn*

- Advocates of deterrence hold that environmental compliance can be achieved only where the cost of noncompliance, through sanction, exceeds the cost of compliance.

- Further, deterrence advocates argue that cooperative enforcement is uncertain and insufficiently punitive, thereby failing to achieve compliance.

- Cooperative enforcement may eschew penalties altogether, or imposes only small penalties, so that violators have minimal material disincentives for violating regulation; the cost of compliance may be greater than the cost of minimal penalties.

- The failure to sanction violators delegitimizes the regime for good faith actors, thereby encouraging noncompliance from those who would otherwise voluntarily comply.

- The public enforcement and prosecution of environmental regulation is an expression of public disapprobation for violations; to negotiate enforcement behind closed doors is to take compliance out of this realm.

- Cooperative enforcement advocates assert the premise that corporations are *not* amoral calculators, and will not necessarily choose to violate regulation based on economic benefit.

- Cooperative enforcement advocates hold that there are three classes of regulated corporation (presumably, in addition to good-faith actors):

    - Amoral calculator - agents that will choose to violate regulation wherever this poses a potential for economic benefit.

    - Political citizen - complies with rules viewed as legitimate, but not with those which are considered unreasonable.

    - Incompetent - ignorant of the rule, or otherwise incompetent to comply.

- Further, cooperation reduces friction between the regulator and the regulated firms, thus reducing the costs of the regulatory process; this is particularly true with small firms, where the cost of prosecution may outweigh the benefits of compliance.

- Cooperation allows agencies to mitigate perceived irrationality and unfairness; this may spark recalcitrance in firms that would otherwise comply voluntarily, and redirect political attacks on the regulator.

- Flexibility in the approach allows for sanctioning of noncompliance where this is beneficial (eg. to allow innovative firms to experiment with new control technologies), or trades of overcompliance in one area for undercompliance in another.

- However, the issue with such flexibility is the faith that it places in the ability of regulators to understand the regulated industries, as well as the public interests involved. This is likely a matter better left with the legislature.

- Neither strategy is completely satisfactory; however, clearly adversarial tactics should take into account the

history of a given firm in any regulatory proceeding (eg. recidivistic history versus voluntary compliance history).

- Optimal strategy is for the regulator to choose action based on:

    - Behaviour immediately preceding the current proceeding - if the regulated firm cooperated in the "last round," the agency should cooperate; if the regulated firm defected in the "last round," the agency should adopt sanctions.

    - Nature of firm - determine whether firm is an amoral calculator, political citizen, or incompetent, where the latter two are dealt with under the auspices of cooperation, and the former under regulatory sanction. Severe penalties where violations are intentional or negligent.

- Agency must develop reputation for cooperation, and do so by formalizing and disseminating enforcement strategy.

- *R. v. MacMillan Bloedel Ltd.,* BCCA 1979

    - Facts - D. spilled oil, responded promptly with cleanup. D. holds that offence not complete, as the substance was cleaned before it could render the water deleterious.

    - Issue - What is the scope of s. 36 - does it prohibit the introduction of a deleterious substance, or the rendering of the water deleterious through the introduction of such a substance?

    - Rule

        - s. 36 prohibits the deposit of a deleterious substance, not the deposit of a substance that causes water to become deleterious.
        - Impugned substance in this matter, bunker c oil, is a deleterious substance, and therefore the offence was complete when this was introduced into fish habitat.

        - D. argues that the *Fisheries Act* therefore prohibits putting a teaspoon of oil in the Pacific Ocean, which would be an absurdity.

        - However. to do otherwise would be to legitimate all conduct falling short of rendering the water deleterious; would be difficult to prove that damage had gone that far (or to link the damage to any particular offender).

- *R. v. Kingston (City),* ONCA 2004

    - Facts - D. operated dump near river; citizen takes out private information after contaminants leaked; Ministry joins. Ammonia is the main toxicant.

    - Issue - is the leaching of ammonia prohibited by s. 36 of the *Fisheries Act*?

    - Rule

        - Ammonia is naturally occurring and is necessary for life at certain concentrations.

        - There is no stipulation in s. 36 requiring that the substance be proven deleterious to the *receiving*

water, but rather must be deleterious to *any* water.

- This begs the question - would not any substance cause water to become deleterious to fish at sufficiently high concentrations?

- *Fisheries Act changes, Hume*

- *Jobs, Growth and Longterm Prosperity Act* - or Bill C-38,

- *Effects* - many activities previously reviewed under the Fisheries Act, and scrutinized for their impact on fish habitat, may now be ignored.

- Includes projects that result in the temporary removal of vegetation from spawning grounds and the disruption of gravel or sediment as a result of road construction.

- Could exclude harm done to fish or fish habitat by certain projects (i.e. a specific mine, a type of mine, a specific hydroelectric project or all small hydroelectric projects) or harm done to fish or fish habitat in specific fisheries waters.

- Only fish that are established to be of value to humans (via commercial, recreational, or Aboriginal fishery, or support of that fishery) will be protected by s. 35.

- Changes in force

- Environmental assessment - previous to changes, provisions in the Fisheries Act triggered an environmental assessment. This is no longer the case.

- Exceptions under s. 35(2) - expanded considerably:

- Previously limited to (1) means or conditions authorized by the Minister, or (2) under regulation from the GIC.

- Now includes (1) prescribed works or activities, (2) works or activities carried on in or around prescribed water, (3) authorized by the Minister or (4) by a prescribed person or (5) by this Act.

- Changes not yet in force

- s. 35(1) - will be altered by s. 142(2) when this comes into force by order of the GIC. Only protects commercial, recreational, or Aboriginal fishery, fish which support such fisheries; only prohibits serious harm to fish, not to habitat.

- Current: No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

- Proposed: No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery

- Judicial review materials

- *Discretion under the CEAA, Green*

    - Act only provides vague guidance concerning the scope of the project to be considered, and the scope of the assessment to be undertaken; thus discretion is nearly completely vested in decision makers.

    - Discretion under the CEAA is potentially dangerous, as there is a possibility that political or economic factors might unduly influence the decision making process.

    - For the CEAA regime to be meaningful and consistent, amendments creating specific criteria for exercise of discretion with a view to scoping of project and assessments it required.

    - Further creation of an expert tribunal tasked with undertaking more detailed and substantive review of exercise of discretion under CEAA would be ideal.

- *New Brunswick Board of Management v. Dunsmuir, SCC 2008*

    - *Rule of law* - all exercises of public authority must find their source in law; decision making powers have legal limits shaped by statutory authority, the constitution, the *Charter*, and the common law. Judicial review ensures that all exercises of power are effectively compliant.

    - *Tension dealt with* - rule of law is maintained because courts determine jurisdiction, but legislative supremacy is assured because legislative intent guides the process of determining the applicable standard of review.

    - Review mandatory - as judicial review finds its source in the principle of the rule of law, it is not something which can be legislated out of through a privative clause or otherwise.

    - Need for reform of standards - previously, three standards of review applicable (unreasonableness, reasonableness simpliciter, and correctness). Previously, struggled with differentiating between unreasonableness and reasonableness
    simpliciter.

    - Reasonableness - deferential standard premised on understanding that not all circumstances lead to a single reasonable conclusion; may be a range of reasonable conclusions possible. Decisions must fall within this range, must also be j*ustified,transparent, and intelligible*.

    - *Correctness* - maintained in true jurisdictional (eg. tribunal must decide the limits of its own jurisdiction with respect to a matter), constitutional, and some other questions of law (interpretation relating to jurisdiction, however). In such circumstances, there is no deference due to the decision maker; rather, the Court will undertake its own analysis.

    - Process

        - *Jurisprudence* - must first determine whether the standard of review has already been satisfactorily determined with regard to a particular category of question.

        - *Functional* - where the above inquiry is fruitless, must proceed to analysis of factors, including presence or absence of privative clause, purpose of the statute (generally) and provision (specifically), nature of the question at issue (law, fact, or mixed law and fact), and the expertise of

the tribunal (relative to the reviewing court).

- *Weir v. BC Environmental Appeal Board, BCSC 2003*

  - Facts - judicial review of decision of the D. tribunal holding that the *Spray-tech* decision's discussion of the precautionary principle was inapplicable to a licence under the *Pesticide Control Act* in BC.

  - Issue - what is the appropriate standard of review?

  - Rule - applicable standard of review is correctness; question of law.

    - There are no privative clauses and no statutory rights of appeal under the relevant acts (neutral factor).

    - Question at issue is the proper application of a two part legal test required by the enabling Act, a pure question of law (weighs in favour of correctness).

    - The tribunal does not have enhanced expertise concerning questions of law relative to the Courts (weighs in favour of correctness).

    - The purpose of the statute contemplates numerous interests, balance of these interest (neutral factor).

    - Therefore, the applicable standard of review is correctness.

- *Algonquin Wildlands League v. Ontario (Minister of Natural Resources), ONCJ 1998*

  - Facts - Plf. NGOs seek review of forest management plans approved by the Plf. The *Crown Forest Sustainability Act* requires all such plans to comply with Forest Management Planning Manual, which had not been completed when the Plf. approved forest management plans.

  - Issue - what is the standard of review applicable to the Minister's approval of forest management plans?

  - Rule - correctness; no deference due whatsoever.

    - Statutory provisions in issue limit the jurisdiction of the minister to approve plans by imposing a condition precedent (compliance with the Manual).

    - Provisions which limit the jurisdiction of an administrative actor involve a correctness standard of review.

    - If the authority for approval were set out in a manner such that the Minister had merely to be satisfied in own mind that the plan should be approved, great deference would be required. However, this is not what is set out in the law.

    - Compliance with an enabling statute is a jurisdictional question, and not an exercise of discretion. Therefore, correctness applies; no deference due whatsoever.

    - Minister may have had discretion as to whether a plan substantively complies with the Manual; this appears to be within jurisdiction. But there is no authority for approval without having

considered the Manual, or compliance with the Manual.

- *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage), FC 2003*

    - It is not the purpose of judicial review to subject Ministerial discretion regarding competing priorities to a standard of correctness.

    - Authority is centred on polycentric issues, weighing competing interests, determining what public interest is through exposure to multiple difference claims and perspectives; a matter of discretion.

    - Broad authority conferred on the Minister for management of the subject matter at hand, indicating legislative intent that the standard of review be deferential. In such circumstances, the agent is responsible to Parliament, not the Courts, except for actions which exceed defensible reasonableness.

- *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans), FCA 2006*

    - Where the decision under review is one having to do with interpretation of the Act granting authority to have made that decision, the standard of review is correctness.

    - No applicable privative clause in the *CEAA*, polycentric, no expertise with relation to legal interpretation, therefore standard is correctness.

    - Exercise of discretion is generally reviewed on a deferential, reasonableness standard, which requires consideration of all relevant and no irrelevant factors.

- *Dene Tha' First Nation v. Canada (MoE), FC 2006*

    - Facts - FN alleged breach of duty to consult with relation to exclusion from discussions and decisions regarding the regulatory and assessment processes related to the Mackenzie Gas Pipeline.

    - Issue - what is the standard of review with regard to the decision to exclude FN representatives from the MGP process?

    - Rule

        - Pragmatic and functional approach along with deference are tools used to establish jurisdictional respect by the Courts for tribunals and administrative decision makers.

        - However, this approach is inappropriate in considering a decision as to whether there is an obligation under s. 35 of the Constitution. There is of yet no legislated process, and so one must be derived from the common law.

        - Generally, the situation is as follows. On questions of law, the standard is correctness. On questions of fact or mixed fact and law, deference is owed to the decision maker.

        - The existence of the duty to consult is one of mixed law and fact; therefore, there is some need for deference to the original decision maker; this is dependent on the nature of the question:

            - Absent error on legal issues, the tribunal *may* be in a better position to evaluate facts; deference is owed; standard is correctness.

- However, where there is a legal error, or the issue of pure law can be isolated from issues of fact, the standard is reasonableness.

- A process for adjudicating decisions concerning the duty to consult would likely be examined on a reasonableness standard;

- Should the government misconceive the impact of the infringement, this would be judged on the correctness standard.

- Where the above is met, the question is whether the action viewed as a whole, accommodates the collective aboriginal right in question; reasonableness standard.

- Government process for duty to consult does not have to be perfect. It merely has to be reasonable.

- The issue of when the duty to consult arises is one that goes to the definition of the scope of the duty, and therefore is a question of law, subject to review on a correctness standard.

- Whether or not government actions in fulfilling the duty to consult, after it has been determined to have been invoked, are to be judged on a reasonableness standard.

- *Wimpey Western Ltd. v. Alberta (DoE), ABCA*

- Facts - sought declaration compelling DoE to issue permit for waste-water treatment facility. Denied permit on the basis of DoE policy holding that permits are not granted until a long-term servicing option is operational.

- Issue - is it within the discretion of the DoE to not issue a permit based on policy which is not specified or mentioned in enabling legislation?

- Rule

- Plf. hold that the DoE policy, which prefers larger regional facilities to individual water treatment plants is an irrelevant consideration in their application for a permit.

- Act states that the DoE may issue or refuse to issue a permit, and does not qualify this in any way except to add that a permit may be granted contingent on a change in location or plans.

- Irrelevant consideration re: grounds for review

- There is no limitation placed on the DoE's power to refuse to issue a permit in the Act. This does not mean that authority is unfettered, however. Discretion must be used in a manner that promotes the policy and objects of the Act.

- There are specified considerations given in other sections of the Act, but the DoE is in no way required to issue a permit once these are satisfied; may refuse a permit notwithstanding satisfaction.

- Where factors are provided for consideration in exercise of discretion, it is for the Courts to decide whether they are exhaustive, or compulsory, or otherwise explicitly or impliedly restricted.

- Factors which are relevant need not be limited to those in the enabling Act, test is whether the consideration in question is within the intent and purpose of the Act.

- In the present matter, within the scope of Act for DoE to seek to limit points of discharge of contamination by managing proliferation of water treatment facilities.

- Relevant to consider the policies of the DoE keeping in mind that this should not lead to action under dictation, nor in any way fetter discretion.

- *Imperial Oil Ltd. v. BC (Ministry of Water, Land, and Air Protection), BCCJ 2002*

- Facts - Plf. applies for permission to remediate lands contaminated with oil; order for mandamus, alleging that the D. had withheld such permission until the Plf. had settled civil claims, a factor it contends is irrelevant under the BC *Waste Management Act*.

- Issue - did the D. consider settlement of the civil suits in its decision concerning permission for remediation, and if so, was this an irrelevant consideration?

- Rule - D. did make such considerations, this was irrelevant, and so mandamus was ordered.

- *Waste Management Act* does not confer any jurisdiction concerning tort claims or compensation (other than cost of remediation). Therefore, the civil claims are not within the ambit of the *Waste Management Act*.

- The D. does not have authority to order compensation to be paid under civil claims; compensation (and adjudication) other than that considered within the ambit of the *Waste Management Act* is irrelevant to permission sought by Plf..

- Where an irrelevant factor has been considered with respect to decision making power under the *Waste Management Act*, the D. has exceeded jurisdiction.

- Where the irrelevant consideration is the only reason for the failure to render the decision, mandamus is the appropriate remedy.

- *Moresby Explorers v. Canada,* FCA 2007

- Facts - dispute over management of ther Gwaii Haanas National Park Reserve. Fed policy includes distributing access to the park equally between independent users, Haida guides, and non-Haida guides. Plf. non-Haida guide business, takes issue with distribution as non-Haida are oversubscribed, Haida undersubscribed; alleges administrative discrimination.

- Issue - does this management policy constitute administrative discrimination?

- Rule - yes; but administrative discrimination does not exceed the ambit of the Act or its regulations, and is not negatived by public policy, so the action is valid.

- Delegated powers exercised by a subordinate authority (eg. parks superintendent, as opposed to the delegating minister) must be exercised strictly within mandate of empowering legislation, particularly where restricting employment.

- Remaining question is whether the superintendent can differentiate between classes of business.

- Where broad regulation making power is bestowed on the GIC, administrative discrimination is permitted unless expressly prohibited. Situation is the opposite of that prevalent in municipal legislation, where discrimination is prohibited unless expressly allowed.

- However, present matter does not deal with challenge to regulation making power of GIC, but rather decision making power of subordinate authority.

- Mere policies are not generally subject to review, and are afforded much deference. Exceptionally, policies may be reviewed: not for wisdom or soundness, but rather for legality.

- As illegality of a policy goes to its validity, rather than its application, the policy need not be applied before it is challenged. It may be challenged as soon as it is formulated.

- Regulation making power conferred in the enabling act does not prohibit distinctions between classes of business; nor do the regulations prohibit subordinate authorities from doing so.

    - Further, classes of business may be used to distinguish between classes of business for the purpose of licencing under the Act; however, it is one thing to differentiate between a marina and a grocery store, and another thing to ground this in ethnic origin, according to the Plf.

- Administrative discrimination deals with drawing distinctions, rather than with the basis on which such distinctions are drawn. Therefore, unless the distinction is contrary to public policy, the regulations would not prevent it from being drawn.

- Further, s. 15(1) jurisprudence reveals that while discrimination which furthers stereotyping is contrary to public policy, ameliorative discrimination is acceptable.

- Superintendent's actions were authorized, and not negatived on public policy grounds; therefore, acceptable.

- *Le Chameau Exploration Ltd. v. Nova Scotia*, NSCJ 2007

- Facts - Plf. sought permit to salvage a shipwreck under the *Special Places Protection Act*, but was denied. Seeks judicial review on the basis that the director exceeded jurisdiction by determining that the UK owned the wreck.

- Issue - was it beyond the jurisdiction of the Executive Director of the NS Museum to deem that the wreck belonged to the UK?

- Rule - doesn't matter; ultimately, Plf. was not given notice and comment obligations under procedural fairness, *certiorari* granted on that basis.

    - *Special Places Protection Act* and the *Treasure Trove Act* do not permit the Director of the NS museum to determine ownership of a vessel or artifact.

    - There is a duty of procedural fairness, involving an obligation to give a party affected by a decision

notice and the opportunity to comment.

- The purpose is to ensure that a fair and open procedure, appropriate to the decision being made, are in place. Considerations of fairness relevant to judicial review include:

    - Judicial nature of proceedings - more that the decision making process, decision itself, and determinations made en route resemble judicial decision making, the more the process will have to resemble a trial; increased fairness and procedural protections will be required, in other words.

    - Finality of decision - where no appeal process is available by statute, or where the decision is determinative with no further requests available, greater protections apply.

    - Importance of decision - the more important the decision is to the lives of the persons affected, the more stringent the procedural protections will be.

    - Legitimate expectations - the understanding of the person challenging the decision determines to some extent the scope of the duty of fairness.

    - Procedural discretion - should take into account the choices of procedure which are made by the agency itself, and the extent to which this is reflected by discretion in the enabling statute, and the agency's own expertise concerning fairness in the circumstances.

- The issue for review is not in the merits of the decision, but in procedural fairness; the applicant was denied the opportunity to make submissions concerning legal ownership of the wreck, despite that this was the purpose for denying the permit.

- *Pembina Institute for Appropriate Development v. Canada*, FC 2008

- Facts - Plf. holds that the environmental assessment undertaken by a Joint Review Panel did not comply with the requirements of the *CEAA*.

- Issue - can the approval of the permit for an oil sands project premised on the impugned assessment be overturned for lack of provided reasons?

- Rule - No - matter remitted to the panel for articulation of decision regarding approval.

    - There is no evidence to suggest that the panel failed to consider all the evidence that was before it.

    - The panel did not comment specifically on greenhouse gas emissions, this does not contravene a specific requirement of the CEAA.

    - As the report was to serve as an objective rationale for the decision reached, the panel must, at least, explain in a general way why the potential environmental effects will be insignificant or mitigated. Does not have to provide an in-depth explanation of scientific data underlying all conclusions, however.

    - Should the panel determine that proposed mitigation measures are incapable of satisfactorily reducing potential adverse environmental effects, this must also be stated.

- The panel is limited to consideration of the relevant scientific data; it is only the final decision maker that may take wider factors into account.

- Articulated decisions made by expert decision makers who had ample material before them on substantive issues should be afforded deference; however, this is only triggered *where those conclusions are articulated.* Expertise commands deference only where the expert is coherent.

- Panel did not explain why its mitigation measures would be effective, without providing reasons it is to be afforded no deference.

- Given that the evidence indicates that the mitigation measures will not address the problem, it was incumbent on the Panel to justify its recommendation on this issue.

- *Recommendations for tribunal reform in BC (Haddock)*

- *Consolidation* - tribunals with similar mandates should be consolidated to make the system more efficient and consistent. For instance, there are three separate forestry tribunals (Forest Appeals Commission, Private Managed Forest Land Council and the Forest Practices Board). Not all should be merged, eg. not where they serve discrete regulatory functions.

- *Mandate expansion* - Establish and implement principled criteria for determining which decisions should be appealable. Often the mere possibility of appeal acts as an important check to initial decision-making, providing incentive to more carefully consider the perspectives and interests of those affected by the decision.

- *Accessibility* - appeal "triggers" should be impacts-based, not just rights-based - i.e. those impacted by a decision should be able to appeal, not just those who are the subject of the decision. Tribunals should be accessible when the impacts occur, not just at the first instance when a permit, licence or other approval is granted or amended.

- *Standing* - rules should be more consistent and ensure that affected parties may bring appeals.

- *Costs awards and participant funding* - BC tribunals appear reticent to award costs. To be meaningful, costs must be available in advance of or during the hearing, to allow expert witnesses the opportunity to review the evidence of other parties and to prepare their own opinion evidence.

- *Limitation periods* - must be reasonable and practical, must not prejudice those whose rights have been adversely affected.

- *Environmental protection* - can become too legalistic and lose sight of the purpose of the statutory scheme; should have clearer purpose clauses in legislative schemes and in acts empowering tribunals.

- *Modernization of procedures* - case management, clear process and mandate for ADR, purposive approach towards environmental problem solving, and time limits for rendering decisions (otherwise, might as well have recourse to the courts)

- *Investigative powers* - Invest tribunals with greater investigative powers to aid their ability to "get to the truth of a matter" and resolve or adjudicate environmental disputes. Also requires measures to ensure neutrality and fairness.

- *Tenure and appointments* - Consideration should be given to increasing the number of full time tribunal members and the length of their appointment terms where justified by case loads. Ensures a more skilled, dedicated, and experienced tribunal.

- *Unnecessary appeals* - multiple levels of appeal should be eliminated, such as internal agency reviews prior to tribunal appeal.

- *Watchdog reconfiguration* - reconsider how the environmental watchdog role currently served by the Forest Practices Board, Ombudsperson and Auditor General is delivered. British Columbia needs an environmental watchdog with a mandate across environmental issues that can investigate like the Ombudsperson, carry out performance audits like the Auditor General, and dig down to the substantive, on-the-ground environmental impacts like the Forest Practices Board.

- Public interest materials

- *Canada v. Downtown Eastside Sex Workers United Against Violence Society, SCC 2012*

- Facts - R. granted public interest standing in suit against A. for the purposes of launching a constitutional challenge against *Criminal Code* provisions concerning prostitution.

- Issue - should R. have been granted PIS?

- Rule - Yes.

- PIS test is not to be applied rigorously or independently, but rather purposively, flexibly, and cumulatively weighed to satisfy purposes underlying:

- Whether there was a serious justiciable issue raised;

- Whether the plaintiff had a real stake or a genuine interest in it; and,

- Whether, in all the circumstances, the proposed suit was a reasonable and effective way to bring the issue before the courts; weighs between the need for adversarial presentation and judicial economy:

- Public interest litigation - does it raise issues of public importance that transcend immediate interests of litigants?

- Comprehensive - does it assesses the overall effect of this scheme on those most directly affected by it, so as to prevent a multiplicity of individual challenges?

- Proximity - risk of the rights of others with a more personal stake being adversely affected by badly advanced claim?

- Parallel litigation - existence of a civil case in another province is not necessarily a sufficient basis for denying standing.

- Other plaintiffs - existence of other potential plaintiffs, while relevant, should be considered in light of practical realities;

- For instance, no DES sex workers willing to bring suit. Further, while they were willing to testify / swear affidavits, this is not the same thing as being willing to bring suit.

- Present litigation constituted an effective means of bringing the issue to court in that it would be presented in a context suitable for adversarial determination.

- *Lockridge v. Ontario (Ministry of the Environment), ONSC 2012*

- Facts - MOE allows for increase in sulphur production at a Suncor plant. Plf. wants judicial review of decision, byt seeks protective costs order to insulate from adverse costs order should litigation prove unsuccessful. D. not prepared to undertake not to seek a costs award, but will not collect on any costs other than those arising from improper or clearly unnecessary steps.

- Issue - should the Plf. be awarded a protective costs order?

- Rule - No; doesn't meet criteria, and other options are available.

- Protective costs have never been awarded in Ontario. Once awarded in BC, occasionally in England.

- English requirements for protective costs order:

- Issue is of general public importance;

- Plf. has no private interest in the outcome;

- Order is just in view of relative financial resources of Plf. and D.;

- If the order is not made, Plf. will discontinue proceedings, and be acting reasonably in doing so.

- Requirements suggested by ONSC for protective costs order:

- Impecunious Plf., or otherwise one willing to make contribution, and no other reasonable option to bring the issues to trial;

- Meritorious claim, therefore contrary to interests of justice to forfeit case for financial reasons;

- Issues of general public importance, and injustice of discontinuing must harm both Plf. and public;

- Exceptional measure, awarded only after demonstrated attempts for private funding.

- No injustice if the issue could be settled or public interest satisfied without advance costs award;

- Plf. must relinquish some control over how litigation proceeds.

- Plf. in this case represented by Ecojustice pro bono; while of modest means, they have access to justice.

- Issue in this appeal is very narrow; not a broad issue, despite *Charter* implications.

- Case is neither prima facie meritorious nor frivolous; it is also not representative of other members (eg. not a class action), therefore not clear that it is supported by the community.

- Other alternatives might be considered later in the litigation, depending on the course of the proceedings.

- *Smith v. Inco* , ONSC 2012 (Costs Decision)

- Facts - following successful Appeal, ONCA returns the matter to the trial judge for awarding of costs. Inco claiming from the Class Proceedings Fund of the Law Foundation of Ontario (because it's a class action suit).

- Issue - was the trial public interest litigation, such that Inco is precluded from receiving full costs?

- Rule

- s. 31(1) of the *Class Proceedings Act* holds that the TJ has discretion to consider whether the proceeding was a test case, raised novel law, or was in public interest. If so, this would militate for reduced costs awards to D.

- Action involved environmental issues in the context of a class proceeding, therefore a compelling matter of public interest; combines A2J and environmental law in one proceeding.

- Therefore, the litigation had specific, special significance to the community at large beyond the class members.
- Proceeding involved ancient causes of action (trespass, nuisance), but applied these to novel material, the environment;

- Also the first to deal with physical environmental damage to large number of properties through industrial emissions.

- Claim for environmental damage advanced through class proceeding is also novel.

- But for s. 31(1) of the *CPA*, Inco would be entitled to full costs; however, cut in half as a result of the novelty of the proceedings.

- Court must balance the chilling effect of large costs awards against the need to discourage frivolous and unnecessary litigation.

- *Costs in public interest litigation revisited, Tollefson*

- Now plausible to talk about this area of law as a distinct and coherent jurisprudence in its own right.

- Access to justice / public interest litigation not served by the two-way conventional "English Rule" as to costs - this should be replaced by a one-way rule. Under this approach, a public interest litigant could

recover its costs if successful but would not be liable for adverse costs awards.

- U.S., default position in ordinary civil litigation is a no-way rule, though certain fee-shifting legislation exists favouring litigation victors.

- In Canada, growing judicial comfort with the practice of ordering that prevailing public interest litigants be awarded "special" or "solicitor and client" costs, and with excusing unsuccessful public interest litigants from adverse costs liability.

- Protective costs orders are now regularly sought by public interest litigants at or near the commencement of litigation. Degree of immunization against adverse costs liability.

- PCOs occur by means of an order that "caps" at a predetermined amount what a litigant will recover (if successful) or for which they will be liable (if not).

- In *Okanagan Indian Band*, SCC made clear that courts should regard their power to award costs as a legitimate "instrument of policy" to be deployed in a manner that "helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole".

- Four types of special costs order - ex post protective, ex post special costs, ex ante advance, and ex ante protective.

- In *Victoria v. Adams*, BCCA recognized criteria developed by Ontario Law Reform Commission re: departure from normal costs orders:

    - (1) Matters of public importance that transcend the immediate interests of the named parties, and which have not been previously resolved; (2) no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically; (3) party opposing has a superior capacity to bear the costs of the proceeding; (4) not abusive, vexatious or frivolous litigation.

- Impecuniousity of the Plf. should not be a determinative factor, as this does not really relate to public interest (but only A2J).

- Not merely public interest, but something *more*; either in the nature of the case, or the identity/ motivation of the plaintiff; weighed against any countervailing factors.

- In *Okanagan*, SCC set out requirements for advance costs:

    - Party seeking costs cannot afford litigation, no other reasonable option exists for bringing litigation before the courts;

    - Claim is prima facie meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
    - Issues raised transcend the individual interests of the particular litigant, are of public importance, and have not
    been resolved in previous cases.

- In *Little Sisters,* McLachlin noted that the injustice at stake here is not denial to the appellant of an anticipated remedy, nor denial to the public of a desired outcome, but the injustice of denial of an opportunity to have a vital private and/or public issue judged and resolved

- Farlow v. Hospital for Sick Children - only case where PCO has been considered; denied, as there were no public concerns, and issues concerning whether the suit would actually be abandoned.

- *Financing Public Participation, Anand*

- Barriers to public participation:

- *Economic barriers* - economic barriers to participation in environmental decision making are well documented, particularly in litigation, and particularly for those vulnerable due to socioeconomic or other factors.

- *Homogeneous interests* - unlike concentrated producer interests, environmental interests are not homogeneous; environmentalists are also consumers and producers of products, and therefore will see things differently based on these roles.

- *Free rider phenomenon* - rational and self-interested individuals will not act to achieve their common or group interests unless a group is small, or there is some special incentive at play.

- Factors which produce agency capture:

- *Resource scarcity* - limited resources allocated to administrative agencies in relation to those required to monitor and test their domains necessitates close cooperation between regulators and industries. Regulators come to be dependent on those industries for information.

- *Political support* - regulators can become dependent on regulated industries for political support in order to protect them from legislative attack.

- *Fragmented public interest* - the interest theoretically protected by the decision maker is not unitary, but rather diverse, comprising countervailing interests; therefore, cannot expected to become guardian with absolute success.

- Benefits from public participation:

- *Diversity* - provides decision makers with greater range of ideas and information on which to base their decisions; includes viewpoints that might not otherwise be available.

- *Acceptability* - increases public acceptance of decisions, increases legitimacy by ensuring that a number of important societal concerns are considered, if not reflected in the ultimate decision. This eases implementation of decisions.

- *Independence* - involvement of other parties may ease the extent to which regulators are reliant on regulated industries for support, whether informationally or politically.

- *Thoroughness* - presence of alternative viewpoints causes decision makers to be more thorough in considerations, as well as in articulating their decisions.

- Advancing an Agenda, Tollefson

    - Test for interlocutory injunctions established in RJR-MacDonald:

        - *Serious issue to be tried?*

        - *Irreparable harm suffered if the injunction not issued?*

            - *Obstacle of irreparable harm* - in private litigation, this focuses on the risk physical injury or economic loss to the plaintiff were the relief not granted. In public interest litigation, such considerations are precluded; therefore, must be argued that the irreparable harm is harm to the environment.

                - *Wilderness Society v. Banff*, the Court held that irreparable harm does not include logging of old growth trees which take hundreds of years to mature; recent jurisprudence has been more forgiving.

                - *Irreparable* - refers to the *nature* of the harm (as being unable to be repaired) not the magnitude or severity of the harm; irreparable therefore means a permanent loss (or a loss which could not be replaced in a person's lifetime, following the words of the FCJ).

        - *Balance of the convenience justify the relief?*

        - Indemnification - traditionally, though not necessarily, Courts have required the applicant to undertake indemnity of the respondent for damages in the event that the claim is ultimately dismissed.

            - Obstacle of indemnification - environmental groups often lack the financial resources necessary to make an undertaking as to damages. As this traditional requirement arises out of a need to avoid unjust enrichment, a factor not at play in public interest litigation, it seems logical that it should be abandoned.

            - However, recent jurisprudence suggests a shift away from this requirement, as per *Friends of Stanley Park et al.*

- *Shiell v. Canada (Atomic Energy Control Board)*, FC 1995

    - Facts - application for review of a decision by the control board to approve an operating licence; also for mandamus to review a waste management plan. Plf. lives several hundred miles from the proposed mine.

    - Issue - does the Plf. have standing to bring the mandamus and application for review?

    - Rule

        - While Plf. is interested in uranium mining, and has been involved in other proposals, this is distinguishable from cases where there is a direct personal interest.

        - Interest of a person living several hundred miles away, with no other stake, is neither direct nor personal.

- The decision will not affect the Plf. any more than it would any other member of the general public; therefore reluctantly denied standing, despite bona fide interest and concern for the matters to be adjudicated.

- *Algonquin Wildlands League v. Ontario (Minister of Natural Resources),* ONCJ

- Facts - applicants, non-profit organizations with history of responsible involvement in forest and land planning issues. Have no standing as of right to seek injunction or declaratory relief; seek standing as public interest litigants. Also seek stay order concerning forestry activities, dealt with as analogous to an injunction.

- Issue - do the applicants qualify for public interest standing? Do the applicants qualify for an injunction?

- Rule - Yes to standing, no to injunction.

    - Standing

        - Applicants have a history of responsible involvement in forest and land planning issues, include many members who live in the area or frequent it for pleasure or business.

        - Issues raised by applicants are justiciable and there is no other manner, reasonable or effective, in which the issues will likely be brought forth (particularly as other members of the community do not oppose the actions).

    - Injunction

        - The balance of convenience question can be restated as asking, which of the parties would suffer the greater harm from granting or refusing the relief sought?

        - Unless the case is frivolous or vexatious, the consideration should proceed to the next stage. Not a consideration of merits, but of justiciability.

        - Would be a rare case where a public interest litigant would directly suffer irreparable harm; therefore, the proper consideration of "harm" is at the balance of convenience stage.

        - There will be some irreparable harm to the natural growth and wildlife in the area despite efforts to minimize this; environmental harm is the harm of the applicants.

        - Harm to the respondents is different, in that revenue and jobs will be deferred or lost. Difficult to quantify, but there will be some harm.

        - Must also consider at this stage the nature of the relief sought, nature of the legislation/ authority under attack, and where the public interest lies.

        - Obvious goal of the Ministry to maintain a sustainable environment while balancing other interests; the plan is substantially compliant with the draft manual for forestry practices, and any deficiencies are not connected with alleged harms.

        - Inappropriate to interfere with government action under these circumstances.

- *Miningwatch Canada v. Canada (MoFO)*, FC 2007 ("RedChris")

  - Issue - does the applicant apply for public interest standing? Can this be used to claim an interlocutory injunction under the *FCA?*

  - Rule - Affirmative on both questions.

    - While the *Federal Courts Act* limits claims for injunction those "directly affected" this is not determinative when applied to potential public interest litigants.

    - Applicant who satisfies the requirements of discretionary public interest standing may seek relief in the form of an interlocutory injunction under s. 18.1(1) of the *Federal Courts Act*, regardless of whether they are "directly affected."

    - Serious issue concerning the legality of the decision of the D. has been raised; this is a final decision, subject to judicial review.

    - The impugned decision represents a departure from a positive duty of the Fed to consult the public under the *CEAA*, and as such, the issue of public participation is of import, within and without the confines of this case.

    - The issues of standing and whether there is a reasonable cause of action are closely related and tend to merge.

    - The applicant shows a genuine interest in the issues raised;

    - More than a mere bona fide interest or concern is necessary; rather, must demonstrate a longstanding reputation involving significant work on the subject matter of the challenge. The interest must be greater than that of a member of the general public.

    - Public interest standing may yet be denied, where other criteria are met, because there are persons more directly affected who are reasonably likely to institute proceedings concerning the issue at hand.

    - Geographic proximity is not the determinative factor when considering public interest standing.

    - Suggests a shift in the burden of proof - "where there is no evidence of another or others with a genuine interest that could reasonably be expected to bring a challenge" - as in, once the other criteria has been met, the BOP shifts to the party opposing standing to show that another party will likely bring suit.

- *Imperial Oil Resources Ventures Ltd. v. Canada (MoFO), FC 2008*

  - Facts - Plf. seeks stay or injunction prohibiting the D. from revoking authorization for Kearl Oil Sands project (KOS). D. issued an approval despite the fact that the environmental assessment on which this was premised was under judicial review at the time.

  - Issue - can the Plf. claim injunctive relief, thus ensuring that the KOS authorization is not revoked?

- Rule

    - There is a serious issue to be tried, namely that the *Fisheries Act* does not appear to grant the Minister discretion to revoke authorizations made under that Act. However, the D. holds that the result of the judicial review rendered the authorization a legal nullity.

    - Not convinced that irreparable harm will be suffered but for the stay of proceedings; there will be delay in work, but the timelines for that are not certain on the record in any case.

    - The costs are difficult to assess, as is the extent to which these costs will be recouped. However, a short-term delay will not be a major impediment.

    - Of great significance is the need to resolve all uncertainties before embarking on such an important project involving such substantial investment. As the Plf. relied upon the authorization notwithstanding applications for judicial review, it chose to act in the face of uncertainty and is now reaping the consequences of that decision.

- Environmental assessment materials

- *Prairie Acid Rain Coalition v. Canada (MOFO)*, FCA 2006 ("TrueNorth")

    - Facts - proponent wants to build oil sands facility in Alberta, requiring the destruction of a watercourse. The latter activity requires approval under s. 35 of the *Fisheries Act* and therefore triggered an assessment under the *CEAA*. This was granted following an EA by MOFO, which only considered the discrete issue of the watercourse destruction (eg. it did not consider the impact of the whole project). Plf. holds that the Minister should have assessed entire project.

    - Issue - what is the appropriate scope of the project for the purposes of CEAA consideration - the watercourse destruction alone, or the entire project?

    - Rule - the watercourse destruction alone; the PG is already considering the entirety of the project. Fed involvement is only invoked through watercourse destruction, therefore not improper that scoping should be limited to this portion of the project.

        - Interpretation of the CEAA by the Government is reviewable on a standard of correctness.

        - The words "in whole or in part" recognize that assessment undertaken may relate only to a part of a project.

        - The proponents argued that the limitation of scoping to part of a project would then reduce the mitigative measures available; however, the Court held that the only mitigative measures required would be those related to impacts identified through the assessment.

        - When a project is listed in the Comprehensive Study List regulations, it must undergo a study and not a screening; however, this does not mean that the Minister cannot scope the project according with discretion.

        - Environment is not the exclusive domain of either level of government, and therefore it is within the powers of each level to determine how the EA process will occur concerning a project which touches on domains associated with each.

- The scope of an assessment is not the same as the scope of a project. That is, while the assessment may look at the effects of the scoped project which fall outside of Federal jurisdiction, the assessment should not look at the effects caused by factors other than the scoped project.

- If the Minister was required to consider the entire undertaking, without scoping, then the scoping provisions in the *CEAA* would not have any meaning.

- *Independent utility principle fails* - where weighing the adverse effects versus justifications, while the adverse effects do have to arise from the scoped project, the justifications do not have to directly arise from the scoped project.

- Further, there is nothing in the *CEAA* which requires that adverse environmental effects must have a measurable benefit in every case.

- Not delegation, as the facility is properly within the power of the PG to assess. Fed jurisdiction only invoked through watercourse.

- As a matter of policy it is sensible that undertakings with potential adverse environmental effects be subject to only one environmental assessment. The Governments of Canada and Alberta are parties to agreements that express this policy.

- *Recommendations for EA reform in BC* (Haddock)

- *Comprehensive review of PG activities* - provincially regulated activities that are likely to impact the environment should be reviewed to determine the best mechanism for assessing and evaluating those impacts, including project level assessment, strategic assessment, etc.

- *Triggering criteria for project assessments* - should be redesigned and based on factors additional to project size or production rate. Should also incorporate factors going to impacts such as location of a project (e.g. fisheries critical wildlife habitat) and the environmental values at stake (e.g. threatened or endangered species)

- *Threshold review* - thresholds, such as those in the Reviewable Projects Regulation - should be reviewed based on the outcome of Recommendations 1 & 2 above: project level thresholds should be revised to capture projects that are likely to have adverse environmental impacts.

- *Strategic environmental assessment* – of government's policies, enactments, plans, practices and procedures should be utilized in British Columbia. While presently enabled in the Environmental Assessment Act, this important tool needs to be more robust - for instance, by clearly linking SEA to project assessment.

- *Land use planning* - PG should reaffirm the importance of land use planning in addressing regional environmental impacts and restore the mandate of the Integrated Land Management Bureau to address strategic level environmental effects. Needs to be done in a manner that is consistent with First Nations rights, strategic assessment.

- *Traffic light approach* - for strategic and land use issues before a given project proceeds to the detailed technical assessment stage of environmental assessment. Green light could mean approval subject to resolution of environmental impacts; yellow light, approval to proceed to technical EA subject to strong cautions identified, and red light could mean that the project may not proceed to technical EA due to

unacceptability based on social, political or land use factors

- *Scoping of EAs - Act* should specify the key mandatory "scope" requirements for an assessment, while leaving room for discretion and project-specific and location-specific details. Includes evaluation of need for a project, reasonable alternatives, cumulative effects and worst-case scenario assessment, etc.

- *Section 11 orders* - should incorporate more substantive details on the scope, procedure and methods for an assessment, rather than addressing mostly procedural issues and methodology.

- *EA guidance* - EA office should continue to develop detailed guidance on standard issues that arise in similar projects, as it has done in its helpful "Common Issues and Commitments" for landfills.

- *Public engagement* - EAA should allow for engagement in project assessment, planning and design that is more meaningful than the rudimentary "review and comment" opportunities now provided. Should include mandatory entry points for public engagement opportunities.

- *Information release* - rules should be developed concerning the timely posting of information relating to a project. Records that would be releasable under FIPPA should be posted routinely.

- *Professional assessments* - rules should be developed concerning the use of qualified professionals in the assessment process, and requirements for their signature and/or seal on reports and related documents. Professional associations should be encouraged to develop practice directives concerning conflict of interest, standards, etc.

- *Line agency participation* - government needs to ensure that line agencies have the resources necessary to diligently participate in the EA process, including attending project locations in the field and not just "paper reviews."

- *Transparency in fact-finding* - between agencies and the EAO on matters involving expert opinion. EAO should be required to justify its rationale for rejecting the opinion evidence of agency experts.

- *Sustainability* - criteria should be explicitly incorporated into the Act. These should be used as the foundation for developing project-specific evaluation criteria relevant to the local context.

- *Independent review* - such panels should be utilized more frequently, particularly for controversial projects. There should be an open and transparent process for appointing panel members and developing the panel terms of reference.

- *Conflicting expert opinion* - should be a more robust and transparent means of dealing with conflicting expert opinion. This could include use of independent review panels, appeals to the Environmental Appeal Board, etc.

- *Appeal mechanisms* - dispute resolution and appeal mechanisms should be available to parties to provide greater accountability for decision-making.

- *Amendment of certificates* - EAA should provide broader ministerial authority to amend EA certificates in response to unexpected or changing circumstances identified through project monitoring.

- *Proponent-hired monitors* - rules should be developed to govern the use of environmental monitors hired by proponents while a project is in the operational phase. The rules should address qualifications,

conflicts of interest, etc.

- Species at risk materials

– *Northern Spotted Owl et al. v. Hodel (WA, USA, 1988)*

- Facts - Spotted Owl closely associated with old growth forests; majority of remaining suitable habitat on public land available for harvest. *ESA* did not list the species as endangered, despite petitioning and scientific data, so court action initiated.

- Issue - was the minister's decision not to list the species as endangered lawful?

- Rule - No. The minister has 90 days to reconsider, and must produce an answer which is not arbitrary (eg. must be based on rebutting scientific data).

    - Courts will not accept statements of agency expertise in the face of unrebutted expert opinions providing a credible alternative explanation. Mere assertion of expertise insufficient.

    - The decision not to list the species as endangered was arbitrary, capricious, and therefore contrary to law

– *Northern Spotted Owl et al. v. Lujan (WA, USA, 1991)*

- Facts - having listed the Spotted Owl as threatened, the *ESA* opted not to identify any critical habitat for the species. This decision was again challenged.

- Issue - Was the decision not to list critical habitat lawful?

- Rule - No; minister has a few months to produce a plan.

    - Determination of critical habitat is to be made on the best scientific data available; areas where the benefit to conservation is outweighed by the detriment to human activities may be excluded where to do so would not lead to extinction.

    - *ESA* allows for twelve additional months where unable to list habitat concurrently with species listing.

    - No support for the claim that the critical habitat was not determinable; rather, evidence indicated that the requisite analyses had in fact not been performed.

    - The amount of money spent by the *ESA* on litigation concerning the species do not alleviate it of its obligations under the act.

    - Decision not to list the species, with no explanation given, is capricious, arbitrary, and therefore contrary to law.

– *Babbitt v. Sweet Home Chapter of the Communities for a Great Oregon (OR, USA, 1995)*

- Facts – Unlawful for person to "take" member of a species under ESA. Take defined as including harassing, hunting, harming, pursuing, etc. Further regulations define "harm" as killing, injuring, or interfering with habitat in a manner which disrupts essential behaviour patterns (feeding, breeding, sheltering).

- Issue – does "take" within the ESA include habitat modification?

- Rule – yes; Congress had habitat modification specifically in mind when enacting the ESA.

– *0707814 BC Ltd. v BC (Assistant Regional Water Manager), EAB 2008*

- Facts – D. refused developer application to infill a wetland, holding that it would negatively impact habitat for several listed species. Decision appealed to this Court.

- Issue – given that the species are likely to be extirpated from the impugned wetland due to surrounding development in any case, should the decision of the appeal manager be upheld?

- Rule – No.

  - Infilling the ravine will destroy habitat; thereby the magnitude and gravity of the harm of development is at the most severe end of the scale.

  - Evidence indicates that, notwithstanding the current development application, there are already too many threats to the impugned wetland such that the species would not be able to survive there in any case.

  - The presence of threats to the species does not mean that they can or will not persist in any case. However, in the present matter the pressures are too overwhelming; there is no confidence in the assertion that the species will survive in the wetland.

  - Protection of these species needed to have been implemented some time ago for the ecosystem to have a chance of persistence; though it is a functioning ecosystem now, it is no longer of "high value"

  - Therefore, the best way to protect the species is through allowing development on this site, in recognition of a covenant to provide thorough protection at an alternate and more viable site.

– *Allan Adam v. Minister of the Environment, FC 2011*

- Facts – Plf. Bringing suit in order to force MoE to finalize recovery strategy for boreal Caribou, as well as to make s. 80 emergency order to protect this species.

- Issue – as the MoE has failed to post a recovery plan for the caribou within the imposed time limits, can the Court rule that it must now do so?

- Rule

  - It is the GIC who has discretion whether to issue an emergency order under s. 80 of SARA. However, the MoE must make a recommendation that the GIC do so where the former is of the opinion that the species faces imminent threats to survival or to recovery.

  - There is a draft of Species at Risk Policies, issued by Environment Canada in 2009, which provides guidance to MoE recommendation decisions under s. 80:

    - Sudden decline in population or habitat that requires immediate protective actions;

    - Strong indication of impending danger or harm, with inadequate mitigation measures in place; or,

    - Gaps identified in protection measures that will jeopardize survival or recovery, not otherwise able to be dealt with in a timely manner.

  - The decision of the MoE acknowledged that while it was able to consider threats to survival, the lack of a finalized recovery plan meant that the considerations regarding recovery were less straightforward.

- Decision also noted that recovery of the herds in question would be challenging, and that this would have negative consequences on the species as a whole with a view to demographic processes and range retraction.

- The negative effects of an unmitigated threat to the herds in question would have an impact on the population in other provinces and territories.

- Regardless of the health of the herds in question, the Board held that it would be possible to maintain a self-sustaining herd in eastern Canada, which could form the basis of a national recovery objective.

- The interpretation of a decision maker's home statute or other closely related statutes is usually accorded deference, as per Dunsmuir, unless there are constitutional implications at play.

- Further, all government action, including interpretation of treaties and statutes, which has an impact upon treaty or aboriginal rights must maintain the honour of the Crown; this is a constitutionally entrenched principle.

- When interpreting provisions which implicate aboriginal issues and treaty rights, the standard of review is correctness insofar as those issues are implicated.

- Aboriginal/treaty interpretation issues aside, the standard of review applicable to decisions under s. 80 of SARA are mixed law and fact, to be judged on a reasonableness standard.

- The decision stated explicitly that aboriginal rights, treaty issues, and the honour of the Crown were not relevant in determining whether the species' survival or recovery were threatened under s. 80.

- The relevant treaties protect the rights of aboriginal persons to pursue traditional lifestyles, including hunting; this includes caribou, a species which the aboriginal persons in question have voluntarily ceased hunting in an attempt to address the current threat.

- Any ambiguities or doubtful expressions in the wording of a treaty must be resolved in favour of the aboriginal persons; restriction of their lifestyles must be narrowly construed.

- The decision of the MoE not to recommend an emergency order under s. 80 may be set aside merely on the basis that the minister did not give consideration to aboriginal interests commensurate with the honour of the Crown.

- It is not sufficient to determine whether active conduct would affect first nations' rights. Rather, must consider the extent to which a lack of a recovery strategy and continued inaction would impair FN rights. To do otherwise would be an impoverished view of honour of the Crown.

- In the process of considering an s. 80 recommendation, the Minister may consider the best scientific information, but also other factors (necessary aboriginal consideration, socio-economic factors, etc.)

- The requirement of s. 80 does not stipulate that the scope of the threat at issue be national.

- Constitutional issues, questions of general law that are important to the legal system as a whole in addition to the specialized statute, the drawing of jurisdictional lines between tribunals, or true questions of jurisdiction are those which are reviewable on correctness. Otherwise, reviewable on reasonableness.

- There is nothing in s. 80 which precludes its application in anticipation of the completion of other, less temporary recovery strategies.

- Recovery objectives identified in any draft strategy are relevant to the opinion of a minister under s. 80, though this is merely one factor to consider.

- MoE not required to make a recommendation unless of the opinion that the listed species faces imminent threats to survival or recovery.

- It is not immediately apparent how the MoE could have reasonably concluded that there were no imminent threats to the survival or recovery of boreal caribou, national or otherwise.

- Decision does not include basis for which conclusion of non-threat reached; therefore, not rightful to adjudicate on whether it was reasonable. Rather, should be set aside because it lacks justification, transparency and intelligibility – because it failed to provide an adequate basis.

- Mandamus cannot be used to compel the exercise of discretion in one manner or another; it commands a result, not the very result.

- Therefore, the correct outcome is to set aside the MoE's decision and remit it back for consideration.

- What was missing was not a consideration of the recovery objective; it is not a reviewable error to fail to address these objectives. What was reviewable was a lack of meaningful explanation for how the minister reached his conclusion.

- Specifically, the explanation should reconcile the scientific data, the recovery objectives for the species, and the language of s. 80 in light of the conclusion reached, such that a meaningful review of the decision may be conducted.

- Cost-effective measures to prevent reduction or loss of species should not be postponed for lack of full scientific certainty, following s. 38 of SARA.

- *Minister of Fisheries and Oceans v. Consolidated Orcas, FCA 2012*

- Facts – responsible minister must make statement concerning how, legally, protection of critical habitat will be effected by the government, under s. 58. MoFA does so, refers to Fisheries Act as legislation protecting orca habitat; this is challenged by ENGOs who assert that as the Fisheries Act is subject to ministerial discretion, and therefore not capable of fulfilling ministerial obligation under s. 58.

- Issue – are provisions which are subject to ministerial discretion sufficient to fulfil the protection obligations under SARA?

- Rule – No. A provision only legally protects critical habitat under s. 58 where it prevents the destruction of habitat through legally enforceable means which are not subject to ministerial discretion.

- Under s. 58(5), responsible minister must make an order to protect the critical habitat of threatened or endangered species if it is not otherwise protected by SARA or other legislation.

- A critical habitat protection order may only be issued where the legal protection offered through other means is the same as that provided under a protection order. In other words, must not be discretionary.

- Reasonableness standard of review does not apply to statutory interpretation by minister responsible for its implementation unless Fed has said otherwise.

- Allegation that minister has misinterpreted SARA or Fisheries Act as it relates to SARA must therefore be reviewed on correctness standard, with no deference owed.

- The intent of Fed in enacting SARA was to provide for compulsory, non-discretionary legal protection for critical habitat. Therefore, absent a legally enforceable provision to that end, the minister must make a

protection order under ss. 58(1), 58(4) of SARA.

- To allow discretionary protections to supplant compulsory protection orders would be to dilute the power and defeat the intent of SARA.

- There may be circumstances where s. 36 of the Fisheries Act, including its regulations, may be sufficient to protect critical habitat: namely, where the protection is such that it is outside of the realm of ministerial discretion.

- Recovery strategies – must address threats to survival and recovery, including loss of habitat, and must identify critical habitat to the extent possible.

- Action plans – based on recovery strategy, must include identification of critical habitat, activities which will likely disrupt or destroy habitat, and proposed measures for protecting the habitat.

- Due to limited Fed jurisdiction under SARA, action to prohibit destruction to critical habitat must be closely linked with PG action to that same end.

- SARA prohibitions do not apply to Fed acts related to health, public safety, national security, under s. 83

- Under s. 58(5), the posting of a recovery strategy in the public registry comes with a linked obligation to ensure that critical habitat identified therein be protected within 180 days; can be done through protection order, or through statement concerning other means of legal protection.

- The recovery strategy identified key factors (such as acoustic degradation) as features of critical habitat, but these were not identified or accounted for in the protection statement.

- Critical habitat is not merely a location, but one with special identifiable features.

- Moot cases can be heard where considerations concerning adversarial context, judicial economy, and role of adjudicative branch suggest that this should be done.

- No deference is owed by the FCA to the MoE or MoFA concerning interpretation of SARA or the Fisheries Act.

- If there is a privative clause protecting the decisions of an administrative tribunal or decision maker such that they should not be subject to judicial review for error of law, this should be respected; the standard in such cases is reasonableness.

- However, privative clauses are themselves only one consideration; should also consider the nature of the problem, the wording of the statute, etc. – a pragmatic and functional approach.

- Must determine whether the jurisprudence already suggests a standard of review, and if not, then the pragmatic and functional approach must be taken to determine the appropriate standard.

- Ministers, not acting as adjudicators, have no implicit power to determine questions of law, and as such are due no deference concerning legal decisions.

- SARA does not provide for replacing a non-discretionary critical habitat protection scheme with a discretionary management scheme under a different Act.

- Fed intent with s. 58 was to avoid destruction of critical habitat; this is not management, but rather prohibition on interference or destruction with no ambiguity. Measures must be legally enforceable.

- While conservation agreements under s. 11 are allowable means of ensuring protection under s. 58, this is only the case where the agreements are legally enforceable and thus functionally equivalent to an s. 58 protection order.

- Minister cannot allow for disturbance of critical habitat unless this is done in order to, under s. 74, allow for scientific research, to benefit the species, or the effect on the species is incidental. Further, all reasonable alternatives must have been considered, the s. 74 allowance must be the best solution available, and must not jeopardize survival or recovery.

- Critical habitat of endangered or threatened species which is subject to s. 58 is protected by that section, regardless of whether a permit has been issued under s. 74, under s. 77(2).

- A provision only legally protects critical habitat under s. 58 where it prevents the destruction of habitat through legally enforceable means which are not subject to ministerial discretion.

- As protection under Fisheries Act s. 35 may be waived with ministerial discretion, it does not fulfil the requirements of s. 58, regardless of whether the minister states that the discretion will not be used.

- The fact that a provision may be modified does not entail that it may not be relied upon for the purposes of habitat protection under s. 58 of SARA; otherwise, no such provision would be valid under that section.

- Critical habitat is both location and attributes (such as the availability of salmon prey in an area). Therefore, measures may be required outside of critical habitat in order to ensure the recovery of the critical habitat.

- *Environmental Defence Canada v. MoFO (Nooksack Dace), FC 2009*

-Facts - recovery strategy posted, does not identify critical habitat in violation of the requirements of *SARA*, noted in comments, but finalized without identification of critical habitat (only identifies features of critical habitat) nonetheless. Government memo restricted identification of critical habitat pending a clear policy direction.

-Issue - is it lawful to finalize a recovery strategy without identifying critical habitat geospatially, as required by s. 43(2)?

-Rule - No; MoFO acted unlawfully in failing to identify critical habitat location.

- Recovery Strategy does not identify critical habitat while identifying loss of habitat as one of the main threats to the Nooksack dace's survival

- Government memo claims, "better to have thoughtfully considered the impacts of critical habitat identification and to move forward in a coherent manner consistent with national direction."

-Minister did not have the authority to defer the identification of critical habitat pending a scientific peer review after the timelines set out in ss. 42-43 of SARA had expired;

-No support within s. 41(1)(c) and (c.1) for the Minister's position on the law that "where available information is adequate, the competent minister must identify critical habitat to the extent possible"

-Under s. 41(1)(c), the phrase "best available information" comprises relevant scientific, community, and Aboriginal traditional knowledge

-Definition of "habitat" places a focus on a certain location but it is implicit that the location is only identifiable because special features exist at that location upon which the species depends to carry out its life processes.

-In the definition of "habitat", a location is inextricably linked to its special identifiable features and includes its special identifiable features.

-Precautionary principle is enshrined in s. 38 of *SARA*, and is therefore a mandatory principle in developing a recovery strategy.

-Further, must avoid any interpretation of *SARA* which runs contrary to the international obligations of Canada under the *Convention*.

- *Alberta Wilderness Assoc. v. MoE (Greater Sage Grouse), FC 2009*

- Facts – Greater Sage Grouse listed as endangered, facing imminent extirpation. Appellants contend that MoE had obligation under SARA to identify critical habitat concurrent with posting of recovery strategy. MoE claims that this was due to gaps in knowledge.

- Issue – was the MoE obligated to identify critical habitat of the species when posting the recovery strategy?

- Rule – Yes, clear obligation under s. 41, failure to do so unacceptable based on record available.

- Under s. 39, responsible minister must prepare recovery strategy when species listed as endangered.

- Under s. 41, content based on whether recovery of species is held to be feasible. Where feasible, strategy must address specific threats to the species, including loss of habitat.

- Recovery strategy must also identify critical habitat to the extent possible based on the best possible information. Merely stating means of identifying critical habitat in the future is inadequate under the section.

- There is no discretion in identification of critical habitat under SARA; even if all habitat cannot be comprehensively be identified, must be done to the extent possible done on best information available, under s. 41.

- The Court is not an academy of science; what exactly constitutes critical habitat is a question which must be left to the experts.

- Recovery strategy identifies four habitat requirements of the species; breeding, nesting, brood-rearing, wintering, and noted that each is essential to the species. Therefore, in claiming that it could not identify any habitat, it was claiming that it could not identify any breeding, nesting, or wintering habitat (etc.).

- The record suggests that critical habitat, other than wintering habitat, can be described with some accuracy. They are sufficiently notorious to be named and labelled, thereby unreasonable that they cannot be described.

- As critical habitat can be identified based on best available information, the decision to not identify any critical habitat in the recovery strategy is unreasonable. Does not fall within a range of acceptable, defensible outcomes.

- Information concerning critical habitat may change over time; however, protection must be granted as best as possible at any given time, and cannot be postponed for that reason alone.

- *Globally Integrated Climate Policy, Bernstein*

- Canadians were at the forefront of global environmental concerns from the 1970s through the 1990s; until 1992, held that climate change approaches must promote economic growth, facilitate innovation to be effective, for instance.

- During Kyoto negotiations, Canada lobbied to maximize allowable activities under carbon sink articles of the protocol. However, withdrawal of the U.S. gave Canada leverage to gain traction re: forest sinks as a means of carbon storage.

- Current trends in domestic policy, particularly with withdrawal from Kyoto, mean that while Canada has attempted to portray itself as a broker between the EU and the U.S. on climate issues, it does not have much credibility in this role.

- Canada has done little to reduce GHG emissions domestically; Voluntary Challenge Registry had little effect. Liberal government's "Project Green," a cap and trade system for large emitters, was not implemented.

- Subsequent Conservative government held that intensity targets were more appropriate for Canada, applying these to certain industries, appliances, etc.

- IPCC reports hold that warming is unequivocal, and has a greater than 90% chance of being anthropogenic; stabilization below the change threshold of 2~C versus pre-industrial levels requires a 60-80% cut by industrialized nations by mid-century.

- Policy process is complicated, by the competing industrial interests involved, numerous options available for pursuit, and the complexity of Canadian federalism.

- Climate change materials

- Regulation of GHG: Constitutional and Policy Dimensions, HSU

- Issue pits PG against Fed, economic activities of the provinces versus national and international obligations of the Fed government concerning the environment.

- No longer makes sense for Canada to unilaterally and immediately cease the upward momentum of emissions re: Kyoto (which would require 25% per year as of 2008).

- *Purpose behind C&T and CT* - same for each: impose a marginal cost on emissions, to ensure that emitters who are able to most cheaply reduce emissions will do so.

- Overly cynical treatment of the possibility of reducing GHG is counterproductive. Challenging, but not the political football it is made out to be.

- *Command and control*

    - *Overview* - GHG could take traditional command and control form, either through results-oriented, strategic management, or BAT means. Effectively, set targets or means of emission and enforced through penalty.

- *Cap and trade*

    - *Overview* - alternately, could use C&T programs, where hard cap for emissions instituted (across industry or territory, etc). Allowances are issued to emitters. These can be traded, so that emissions are concentrated with those for whom emissions reduction would is cheapest / most

efficient.

- *Intensity-based trading*

    - *Overview* - rather than instituting a hard cap, allowances are issued to emitters based on productive output. Therefore, more efficient emitters are given more allowances. Favoured by each of the last two Fed governments.

    - As there is no hard cap on emissions, it is difficult to determine how much actual reduction will take place - allowances are keyed to productive output.

- *Carbon tax*

    - *Overview* - payment based on the actual or anticipated quantity of carbon emissions released into the atmosphere.

- *Federal plans* - CPC plan aimed at 20% reduction below 2006 levels by 2020, 60% by 2050. Covers highest GHG industries (energy, cement, pulp and paper). Similar to Martin government's plan.

    - *Jurisdiction to implement carbon tax* - Federal taxation power under s. 91(3) is very broad, allow for raising of funds through any mode - therefore, must entail (1) taxation for the purposes of (2) raising money. Therefore, would pass muster.

    - *Jurisdiction to implement C&T* - a plan which is limited to Fed industries, eg. aeronautics, nuclear power, international trade would pass muster - as either fed undertakings or via t&c, s. 91(2). For other areas, however, would need to seek justification under other heads of power:

        - *Criminal law* - regulatory character of C&T would probably preclude s. 91(27) application; not the same as prohibiting toxic substance release; further, C&T not prohibitory, but rather restrictive.

            - While (1) protection of a (2) public purpose is valid based on case law (eg. *Hydro-Quebec),* seems either colourable or regulatory or both.

        - *National concern (POGG)* - unlikely that Courts will find that GHG is a national concern - while it is certainly of national importance, it lacks singleness, indivisibility, and distinctiveness, due to large variety of emitters (commercial, non-commercial, industrial, agricultural).

            - Further, national concern is plenary, therefore if GHG is a national concern then PG precluded from legislating emitting industries - problematic.

        - *National emergency (POGG)* - includes new and existing emergencies, economic and other emergencies; could uphold C&T; however, would require inadequate PG response, and have to be drafted carefully to avoid appearing as long-term regulation rather than temporary intervention.

            - Encroachment is of temporary duration, and is not plenary. Fed must declare that such an emergency exists, have a rational basis for doing so. Legislation to that end must declare relation to the emergency.

- *Jurisdiction to implement c&c* - same as C&T.

- *PG plans* - AB has a lax, intensity-based plan which might allow for 72% increase by 2020. BC and QC have each implemented CT solutions at point of sale for fossil fuels. BC also introduced C&T bill, details to follow once Western Climate Initiative finalized.

    - *Jurisdiction to implement carbon tax* - under s. 92(2), PG has jurisdiction to undertake (1) direct (2) taxation (3) in the province (4) to generate revenue for (5) PG purposes. This would appear to be determinative of the matter.

        - *Revenue neutrality* - consideration may have to be given as to whether (4) is fulfilled in circumstances where the tax is revenue neutral.

    - *Jurisdiction to implement C&T* - dependent on the form the system takes, and the entities to which is applies. s. 92(13), p&cr would support such a system so long as it did not affect Fed undertakings.

        - *Fed undertakings* - necessarily incidental doctrine would apply, requiring consideration of (1) the extent of encroachment (severe), (2) validity of the statute (likely valid), (3) sufficient integration (likely valid). The first branch would likely cause this to fail - encroachment too severe.

    - *Jurisdiction to implement c&c* - same as C&T, would likely stand or fall on scoping re: Federal undertakings.

- Federalism, generally

    - Concurrence - courts have encouraged PG and Fed to legislate GHG within their own respective jurisdictions.

    - Fed - SCC has allowed the Fed to regulate certain polluting activities under POGG or the criminal law power. However, has not recognized that implementation of international treaty obligations necessarily defeats PG jurisdiction.

- EA and GHG

    - *Overview* - while generally, application of EA to GHG has been limited in Canada, this is changing over time - for instance, was a consideration in the Kearl Oil Sands case.

    - *Convenience* - easiest means for effecting GHG changes - no court has questioned the appropriateness of a detailed evaluation of GHG on Fed decisions or projects. Not a requirement of the *Act*, but a valid consideration.

    - *Constitutional validity* - very likely that EA consideration of GHG would be valid, as EA able to take into account *all* possible environmental effects of projects subject to assessment. Answer is the same regardless of whether the project falls under Fed or PG jurisdiction generally.

    - *Pembina Institute v. Canada* - joint panel review under the CEAA was insufficient because it did not adequately address GHG emissions in approving the project.

- *Potential shortcomings* - under CEAA, goal is to determine whether there are significant adverse environmental effects, not whether the project fits into the GHG strategy of the PG or Fed; this might cause EA to miss cumulative effects. SAEE not well suited to GHG issues.

    - *Potential solution* - instead of SAEE for GHG considerations, might require carbon neutrality or other mitigative efforts to be taken.

- *Why CT is better re: GHG than C&T, Avi-Yonah*

    - *Definition of upstream* - meaning, rather than at point of distribution, imposed at the point of extraction, manufacture, or import.

    - *Upstream CT* - is the most straightforward approach, cost could be imposed on all GHG industries and imports, based on the marginal (social) cost of CO2 emissions; increased annually to reflect increase in harmful effects. CT could be adjusted; increased where reductions not achieved, or decreased where overcorrection has occurred.

        - *Revenue* - generates revenue which can be used to defray the social costs of emissions and of emissions reductions. Also used to fund innovations to reduce further emissions; could even be revenue neutral, where 100% of revenues are reinvested to defray cost of emissions / cost of reducing emissions.

        - *Implementation* - simple, as government merely needs to stipulate a dollar amount per tonne of emissions, measure and collect revenues. This perhaps overlooks the complexity of achieving set reduction targets without directly imposing a cap. Could be imposed tomorrow, administered by RevCan.

        - *Certainty* - while the amount of reduction achieved (benefit certainty) is not known in CT, cost certainty is available for emitters. However, this can be achieved through adjustment of the tax through correction. Further, benefit certainty always eludes due to global nature of the problem.

        - *Signalling* - message is clear, that emissions impose negative externality on others which therefore must be internalized through the tax.

        - *Resistance* - U.S. public shows support for decisive action against climate change, and does not differentiate between C&T or CT to get there. Further, once CT in place, resistance to adjustments dwindles.

        - *Exemptions* - may be weakened by the gifting of exemptions to political allies of those administrating the tax or other politicians. However, none of the industries involved in emissions are in a different situation from the others such that they could argue for exemption.

        - *Coordination* - difficult to coordinate carbon tax if C&T regimes are prevalent elsewhere (consider the Western Climate Initiative, for example).

    - *Upstream C&T* - establish a cap on amount of emissions allowed in industry or geographic regions; cap declines over time to achieve desired level of reductions. More complicated to design and implement than CT system.

- *Revenue* - only generates revenue where there is an auction concerning allowances. If allowances given for free, then no revenue generated. However, promotes spending on research / technical innovation within industry.

- *Implementation* - complex, as the government must set baseline allowances, determine how to distribute these (free or auction?), monitoring system, penalties for exceeding, and provisions for banking/borrowing. Would take time to develop system and train people to administrate it.

- *Certainty* - while the expected reduction from system is known, cost certainty for emitters is not known due to the market nature of the C&T system. Can only be defeated through safety valve (fixed price purchase of credits) which defeats benefit certainty. Further, benefit certainty always eludes due to global nature of the problem.

- *Signalling* - message is that emissions are acceptable so long as the toll is paid; manipulation of market system to allow for maximum emission is encouraged.

- *Resistance* - U.S. public shows support for decisive action against climate change, and does not differentiate between C&T or CT to get there.

- *Exemptions* - may be weakened through enhanced grants of allowance to political allies.

- Coordination - easier to coordinate if other nations impose C&T regimes.

- *Climate Change Backgrounder, Curran*

- *Overview* - Attention increasingly paid to torts as a means for responding to climate change impacts; failure of Canadian jurisdictions to innovate means that Canada is a more difficult venue for environmental litigation than the U.S.

- *Types of action* - could mean actions against governments for failing to regulate, against emitters for damages, and actions by emitters against regulators.

- *Duty of care in GHG actions* - generally, increased likelihood that emission of GHGs causes an unreasonable risk of injury.

    - *Negligence* - rests on the duty of care, therefore must determine at what point the harm from GHG emissions became foreseeable.

    - *Public nuisance* - Plf. must show special injury as a result of the D.'s actions, weighed against the reasonableness and utility of the harmful activity (and its adherence to industry norms). Special injury must be different in both kind and in degree.

    - *Private nuisance* - D. owes duty to not interfere unreasonably with the use and enjoyment of another's property; reasonableness analysis includes nature, severity, foreseeability of the impugned interference.

- *Causation in GHG actions* - traditionally, relies on the but for test, difficult in diffuse field of insignificant individual contributions. Therefore, material contribution ideal.

    - *Requirements of material contribution* - must be (1) impossible to make out claim on but for

analysis, (2) due to factors not within Plf.'s control (eg. limits of science), (3) in a circumstance where a duty of care was owed and breached by the D., (4) the injury complained of is of the type expected from the breach.

- *Material contribution* - more than de minimus, has also been formulated as "significant contributing cause".

- *Market share liability* - as in *Snell v. Abbot*, movement in U.S. towards holding all participants in impugned activity responsibility proportionate to market share controlled.

- *Remedies in GHG actions* - market share has not been adopted here, therefore joint and several liability for all tortfeasors in BC.

- *Conserving Endangered Species in an Era of Global Warming, Kostyack*

- *Overview* - 20-30% of species are at increased risk due to the advent of AGW; reducing GHGs alone not sufficient, as raiase of 0.6~C inevitable.

- *Effect on ESA* - radical changes to ESA not necessary, as it is neutral on the *source* of threats. Rather, merely reduces the acceptable margin of error.

- Recommendations

- *Funding* - within any climate change legislation, provisions and funding related to biodiversity must be a consideration. Also achievable by granting C&T auction proceeds to conserve wildlife.

- *Affirmation* - must be reaffirmed that the ESA is the primary tool for protecting species, regardless of threat.

- *Adaptive management* - must be able to change approaches, respond to new information due to the rapidly changing environmental conditions. Includes research, funding, and planning based on projections.

- *Ecosystem based approach* - listing and strategies should be approached on ecosystem, rather than species basis; means of addressing displacement of species, avoiding disassembly of ecological communities.

- *Reactivity - Act* should recognize that any non-trivial net increase of GHG is an activity which meets the threshold of harming listed species.

- *Cap* - national cap with aggressive annual reductions, and pursuit of equivalent actions on the international scale must be undertaken.

- *Climate change and the ESA, Ruhl*

- *Priority is to contain GHG worldwide* - FWS (U.S. Department re: wildlife) might as well close shop if the global community fails to contain GHG, as otherwise AGW will overwhelm initiatives at maintaining biodiversity.

- Recommendations

- *Aggressive identification* - ESA must be proactive and aggressive in monitoring and identifying species threatened by climate change, as early identification and intervention is crucial, allows for additional flexibility in responses.

- *GHG regulation* - ESA is not the apt agency to undertake GHG emission limiting; this would squander agency resources on a Sisyphean quest. Other legislation must contain GHG emissions. The proper place for s. 7 and s. 9 are to regulate activities unrelated to AGW which directly threaten ESA species.

- *Ensure maximum survival* - objective should be to get as many species with long-term survival prospects as possible through AGW. Recovery plans should identify intensity of assistance required, and be flexible and responsive.

- *Trade offs* - ensure that where mitigative measures harm other species, that decisions are made to promote long-term diversity; where a species is "doomed," measures to protect it which harm non-doomed species should be avoided, for instance.

– *Forgotten North, Kazarian*

- *Overview* - Arctic indigenous peoples are very susceptible to the immediate impacts of climate change. Dependence on local ecosystems undermines autonomy, leads to other social problems (eg. diabetes due to diet change).

    - *Canada* - for instance, consider Nunavut; made a deal with the Canadian government ceding Aboriginal title claim to the territory in exchange for rights grant; something which could be revoked through constitutional amendment. (Though, not really - Honour of the Crown would preclude this).

    - *U.S.* - no precedent yet set concerning climate change, environmental protection, and Aboriginal self determination.

- *Public nuisance* - Alaskan tribe files public nuisance complaint against oil companies for GHG emissions leading to AGW, thus causing ice melt threatening existence. Seek damages for cost of displacement of peoples to new area.

    - However, cause was dismissed as the injury was not sufficiently special - no different than that of non-native Alaskans, despite cultural, spiritual, and psychological damage related to distinct culture.

- International remedies - international law developing more quickly than domestic law in addressing needs of indigenous peoples with respect to AGW; however, as solutions need to come from binding domestic authorities, definitive steps need to be taken to achieve compliance between international trends and domestic needs.

– *Death of Environmental Common Law: Kivalina Appeal, Taylor*

- Despite the trial court in 2009 dismissing the case on political question and standing grounds, the focus of the Ninth Circuit's decision was the arcane and rarely invoked doctrine of displacement.

- There is no federal general common law, but in certain areas of national concern, such as environmental protection, federal courts have the power to fill in "statutory interstices" and, if necessary, fashion federal law.

- When there is a federal statute that speaks directly to the issue posited by the federal common law action, then courts find that the federal common law has been displaced.

- If federal common law cause of action has been displaced by legislation, that means that the field has been made the subject of comprehensive legislation' by Congress - that action displaces any previously available federal common law action. Lack of a federal remedy is not dispositive.

- *Friends of the Earth v. Canada (GIC), FC 2008*

- Facts - action for mandamus concerning the breach of the *Kyoto Protocol Implementation Act* by the Fed.

- Issue - did Minister breach s. 5 of the *KPIA* by preparing a climate change plan which does not comply with Article 3. 1 of the protocol? Did the GIC breach ss. 7-9 by failing to post Article 3.1 compliant regulations, and statement concerning effects of regulations on GHG? Are these matters justiciable?

- Rule - matters are not justiciable. Political and policy questions which are best answered in a political forum.

    - Climate Change Plan as released implies that the GIC and Minister believe that the *KPIA* is discretionary, and further, that it does not intend to fulfil obligations under the protocol.

    - GHG emissions have not declined; 33% reduction per year over the next five years would be necessary to meet protocol targets.

    - To meet targets, drastic action would have to be taken. This would likely overwhelm environmental / other benefits of climate change, and would have to be buttressed through the purchase of carbon credits.

    - The effect of rushed compliance would likely be a 6.5% decrease in Canada's GDP relative to current projections, at a price tag of $51b.

    - The court's interpretation of statutes should comply with legislative text, purpose, Parliamentary intent, and produce a reasonable and just meaning.

    - Justiciability requires an understanding that each branch of government must be sensitive to the balance of powers between the branches; this requires interpretation of sections to determine whether they were enacted with the intent that decisions should be subject to judicial scrutiny.

    - Justiciability includes both institutional and constitutional standards - the question of both adequacy and legitimacy of applying judicial machinery to the proposed issue.

    - Justiciability decreases as policy considerations increase. For instance, as s. 5 of the *KPIA* involves "just transition" for workers and "equitable distribution" of reduction levels among industries, policy-laden, weighs against justiciability.

    - Where there are no objective legal criteria to be applied and no facts to determine to guide

judicial decisions, the matter is not justiciable.

- The discretionary or mandatory language of a section is relevant; for instance, an ongoing process of adjustment implies discretion.

- Dictation of the content of regulatory arrangements by the courts would be an inappropriate interference by the judiciary into the executive role.

- Where an Act contemplates Parliamentary and public accountability for achieving the purposes of the Act (eg. democratic accountability), this will often imply that justiciability is displaced.

- *Massachusetts et al. v. EPA et al., US 2007*

- Facts - states and NGOs challenge EPA decision not to regulate emissions of GHGs as pollutants under the *Clean Air Act*. EPA holds that it does not have the authority to regulate GHGs, and even if it did, it would not be a good idea to do so given other frameworks available.

- Issue - is the EPA bound to regulate GHGs under the *CAA?*

- Rule

  - *CAA* holds that pollutants include any agent which is emitted that has the ability to endanger public welfare; latter includes weather and climate. Broad definition.

  - The use of discretion does not provide carte blanche to ignore the text of the legislation; rather, the judgment contemplated by the *Act* is limited to whether a given pollutant poses a threat to the public.

- *State of Connecticut v. American Electric Power Company, US 2005*

- Facts - Plf. bringing action in public nuisance against large emitters in the energy sector.

- Issue - is the suit precluded because it would violate the division of powers, or, put another way, is this issue justiciable?

- Rule - yes.

  - Determining causation and redressability in GHG context would require judgments to be made which could alter ability of the executive or legislative branches to respond to what is a political question.

  - Resolution of the issues presented requires identification and balancing of economic, environmental, foreign policy, and national security interests; non-justiciable.

- *Kivalina v. Exxon Mobil, US 2009*

- Facts - public nuisance suit by indigenous village in Alaska, holding that the D.'s GHG emissions have led to erosion and destruction requiring relocation of village inhabitants.

- Issue - is the public nuisance claim displaced by Fed statute?

- Rule - Court concludes that Plaintiffs' federal claim for nuisance is barred by the political question doctrine and for lack of standing. Non-justiciable.

    - Certain questions are political as opposed to legal, and thus, must be resolved by the political branches rather than by the judiciary.

    - Generally, foreign policy is the province and responsibility of the Executive, though the mere fact that foreign affairs may be affected by a judicial decision does not implicate abstention.

    - Court must determine whether it would be impossible for the judiciary to decide the case without an initial policy determination of a kind clearly for nonjudicial discretion.

    - Requirement that plaintiffs' injuries be 'fairly traceable' to the defendant's conduct does not mean that plaintiffs must show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs.

    - Clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, group at any particular point in time.

    - Genesis of global warming is attributable to numerous entities which individually and cumulatively over the span of centuries created the effects they now are experiencing.

    - Court concludes that Plaintiffs' federal claim for nuisance is barred by the political question doctrine and for lack of standing.