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Environmental Law

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Introduction

The Federal Courts of Canada have matured alongside modern environmental law. Created in 1971, the Federal Courts' origin falls squarely between the 1969 enactment of the influential National Environmental Protection Act (US) and the United Nations' 1972 Stockholm Declaration on the Human Environment. These mark the birth of the modern era of environmental law, a time when degradation of land, air and water became unignorable. Canada began to do its part. The 1970s saw the creation of a separate Department of the Environment (now known as Environment and Climate Change Canada), the enactment of the *Canada Water Act* and *Clean Air Act*, significant environment-protection changes to the *Fisheries Act*, the internationally-renowned Mackenzie Valley Pipeline Inquiry and the development of environmental assessment review.¹ This was the era in which a corpus federal environmental law was formed.

Reforms to Canadian environmental law that attempt to address pressing environmental issues have ebbed and flowed.² In many ways, the Federal Courts' jurisprudence reflects this pattern. Faced with reviewing decisions taken under equivocal and discretionary environmental legislation, the Federal Courts have only partially incorporated and elaborated the well-known principles of environmental law that populate the realm of international environmental law and which have seen robust development in other jurisdictions.³ At the same time, there are pockets of the Federal Courts' jurisprudence that serve as important toeholds for future development as the Courts continue to grapple with the legal dimensions of urgent and ongoing environmental challenges.

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¹ These developments are summarized in Stepan Wood, Georgia Tanner and Benjamin J. Richardson, "What Ever Happened to Canadian Environmental Law?" (2010) 37 Ecology L. Q. 981 at 996-997.

² *Ibid*; David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003); David R. Boyd, *Cleaner, Greener, Healthier: A Prescription for Stronger Canadian Environmental Laws and Policies* (Vancouver: UBC Press, 2015).

³ Philippe Sands, Jacqueline Peel and Adriana Fabra, *Principles of International Environmental Law*, 3d ed (Cambridge: Cambridge University Press, 2012) [Sands]; Natasha Affolder, "Domesticating the Exotic Species: International Biodiversity Law in Canada" (2006) 51 McGill L. J. 217 [Affolder]. The Court of Justice of the European Union and the New South Wales Land and Environment Court are prominent counter-examples.

The focus of this chapter is on these cross-cutting legal principles, such as the precautionary principle, sustainable development, and participatory rights to access environmental justice. In addition to their existing or emerging status as customary international law, these principles are codified in most federal environmental statutes. While environmental principles cannot perform the Herculean task of unifying the complex and diverse strands of environmental law, they do allow for a thematic synthesis of much of the Federal Courts' environmental caselaw. As Eloise Scotford, a scholar of principles in environmental law, writes, "...environmental principles are significant focal points for determining the nuanced evolution of environmental law within discrete legal systems, in terms of their own legal frameworks, doctrines and cultures..."⁴ This chapter examines these focal points, and in so doing, it illustrates broader aspects of the Federal Courts' doctrine and culture and it portends some future pathways as the Federal Courts are confronted with super wicked environmental problems,⁵ "hot" environmental issues⁶ and the legally-disruptive climate emergency.⁷

This chapter proceeds in three parts. Part I offers a brief introduction to the Federal Courts' environmental jurisprudence by highlighting key trends and milestones. Part II turns to central principles of environmental law. After introducing the principles of precaution, sustainable development and access to (environmental) justice, this part argues that the Courts have developed very different doctrinal roles for these principles across different contexts. These roles vary from being treated as binding and influential requirements of statutory interpretation to justification for specific applications of common law tests to legally-irrelevant policy objectives. Part II also highlights instances in which the Courts have actively avoided engaging with environmental principles. Part III reflects on what this nascent and uneven pattern of environmental principles says about Federal Courts' culture and what it means for the future of federal environmental law at the Federal Courts.

I. Environmental Law at the Federal Courts

The Federal Courts have exclusive supervisory jurisdiction over federal environmental decision-makers. Since the environment is a "diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial,"⁸ federal jurisdiction over the environment has been exercised in a piecemeal fashion. This jurisdiction is grounded in a range of federal matters notably: fisheries; navigation and shipping; "Indians, and lands reserved for the Indians;" federal lands (e.g. national parks); interprovincial undertakings; criminal and

⁴ Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Oxford: Hart Publishing, 2017) [Scotford] at 4. See also Nicolas DeSadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford: Oxford University Press, 2002) [DeSadeleer] at 1-2.

⁵ RJ Lazarus, "Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future" (2009) 94 Cornell Law Review 1153.

⁶ Elizabeth Fisher, "Environmental law as 'hot' law," (2013) 25:3 J Envtl L 347.

⁷ Elizabeth Fisher, Eloise Scotford, and Emily Barrett, "The Legally Disruptive Nature of Climate Change" (2017) 80 Modern Law Review 173.

⁸ *Canada (Attorney General) v Hydro Quebec*, [1997] 3 SCR 213, 24 CELR (NS) 167 at para 112.

taxation powers; and the peace order and good government clause.⁹ The Federal Courts' environmental jurisprudence is, accordingly, limited to these matters in which Parliament is constitutionally permitted to legislate. This body of Federal Courts caselaw focuses on federal environmental assessment (EA), fisheries, pollution and toxics regulation, and protected species and spaces.

The vast majority of environmental decisions rendered by the Federal Courts address federal EA legislation and regulation. EA is a decision-making practice that requires government agencies to assess the potential environmental impacts of a development proposal (e.g. a pipeline) prior to granting it an approval for construction and operation. As a planning regime, it requires decision-makers to 'look before they leap' and consider a wide range of environmental impacts prior to rendering a decision. Transparency and public involvement in the process have always been of paramount importance in this area of environmental law.¹⁰

The Federal Courts have played a transformative role in the development of EA law in Canada first by triggering the development of federal EA legislation, and later by shaping its implementation in crucial ways. First, the Federal Court catalysed the development of the first federal legislated scheme for EA with its 1989 decision, which ruled that the federal government's unevenly-applied, ambiguously-labelled *Guidelines Order* imposed legally-binding assessment obligations on federal departments.¹¹ Justice Cullen ruled that the *Guidelines Order* was "not a mere description of a policy or programme;"¹² rather, it was "a duty owed to the public – an essential part of the process."¹³ This ruling was upheld on appeal to the Federal Court of Appeal¹⁴ and by the Supreme Court of Canada in subsequent litigation. Resting on a foundation of the Federal Courts' jurisprudence, the Supreme Court, in its seminal decision in *Friends of the Oldman River*, ruled that EA is "a planning tool that is now generally regarded as an integral component of sound decision-making."¹⁵ The Supreme Court affirmed that Parliament had ample constitutional scope to implement EA procedures. The road to robust federal EA legislation was paved. Since then, however, the Federal Courts' oversight of this legislation and its successor has allowed EA implementation to drift away from its planning function. Reasons for this are discussed in Part II.

⁹ *The Constitution Act, 1867*, 30 & 31 Vict, c 3, ss 91, 92(10).

¹⁰ I argue elsewhere that EA is essential to fulfilling the rule of law in the environmental context: Jocelyn Stacey, *The Constitution of the Environmental Emergency*, (Oxford: Hart Publishing, 2018); Jocelyn Stacey, "The environmental, democratic, and rule-of-law implications of Harper's environmental assessment legacy" (2016) 21:2 Rev Const Stud 165 [Stacey, Harper's Legacy].

¹¹ Meinhard Doelle, *The Federal Environmental Assessment Process – A Guide and Critique* (Toronto: LexisNexis Canada, 2008) [Doelle Federal EA] at 9-10.

¹² *Canadian Wildlife Federation Inc. v Canada (Minister of the Environment)*, [1989] 3 FC 309, 3 CELR (NS) 287 at 11 (pinpoints to original format).

¹³ *Ibid* at 14.

¹⁴ *Canadian Wildlife Federation Inc. v Canada (Minister of the Environment)* (1989), 27 FTR 159, 4 CELR (NS) 1.

¹⁵ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 88 DLR (4th) 1, at 71.

The Federal Courts have played a similarly influential role in protection of endangered species, acting as indispensable guardians of the rule of law. The *Species at Risk Act* (SARA)¹⁶ was brought into force over a decade after Canada was the first country to sign the international *Convention on Biological Diversity*. Complementing national parks legislation and the *Migratory Birds Convention Act*, national endangered species protection through SARA was needed fulfill Canada's international obligations.

The Federal Courts have played a vital role in ensuring government compliance with SARA. They have not shied away from calling out prolonged government foot-dragging. In one early SARA decision, Justice Campbell introduced his decision as “a story about the creation and application of policy by the Minister in clear contravention of the law, and a reluctance to be held accountable for failure to follow the law.”¹⁷ Five years later, Justice Mactavish identified “an enormous systemic problem within the relevant Ministries” in issuing mandatory recovery strategies that were long past their statutory timelines.¹⁸ She observed that systemic non-compliance with binding legislation jeopardized the survival of at-risk species and eroded the rule of law.¹⁹

The Federal Courts have played a less prominent role in interpreting the legal demands of pollution prevention and toxics regulation. This may seem surprising because the federal *Fisheries Act* contains pollution prevention and habitat protection provisions which are stable cornerstones of federal environmental law. The *Canadian Environmental Protection Act* (CEPA), which regulates toxic pollution, is “the most comprehensive federal environmental law in Canada.”²⁰ Generally speaking, interpretation and enforcement of these statutes' prohibitions occur through criminal proceedings. As these matters proceed through provincial and superior courts, the Federal Courts have had fewer opportunities to shape these areas of environmental law.

Finally, the Federal Courts' role in overseeing Canada's response to climate change is an important space to watch. The Federal Courts deflected an early opportunity to play a formative role in enforcing Canada's climate change mitigation obligations when both Courts held that seemingly binding substantive provisions in the *Kyoto Protocol Implementation Act* were not justiciable.²¹ This allowed the federal government to explicitly backtrack on Canada's greenhouse gas emissions reduction commitments. The Federal Court similarly ruled that the Act posed no constraints on the federal government's troubling subsequent decision to

¹⁶ *Species at Risk Act*, SC 2002, c 29.

¹⁷ *Environmental Defence Canada v Canada (Minister of Fisheries and Oceans)*, 2009 FC 878, [2009] FCJ No. 1052, at para 2.

¹⁸ *Western Canada Wilderness Committee v Canada (Minister of Fisheries and Oceans)*, 2014 FC 148, 448 FTR 72, [Western Canada] at para 85.

¹⁹ *Ibid* at paras 90-92 and 101.

²⁰ Duncan Cameron, *Annotated Guide to the Canadian Environmental Protection Act* (Aurora, Ont: Canada Law Book, 2004) at I-1.

²¹ *Friends of the Earth - Les Ami(e)s de la Terre v Canada (Governor in Council)*, 2008 FC 1183, 299 DLR (4th) 583 [Friends of the Earth]; *Friends of the Earth - Les Ami(e)s de la Terre v Canada (Governor in Council)*, 2009 FCA 297, 313 DLR (4th) 767; leave to appeal to SCC dismissed ([2009] SCCA 497).

formally withdraw Canada from the *Kyoto Protocol*.²² Since then, however, the Federal Court has upheld the *Renewable Fuels Regulations* as a valid exercise of federal jurisdiction over criminal law,²³ a decision that will hopefully deter future federalism challenges from industry on any similar fuel regulations. Finally, the Federal Court of Appeal quashed the approvals of the Northern Gateway and Trans Mountain Expansion proposals.²⁴ The effect of these decisions has been to halt or delay interprovincial pipeline projects that would further entrench Canada's commitment to exploiting the emissions-intensive Alberta oil sands.

Within these general contours of the Federal Courts' environmental jurisprudence we can now turn to doctrinal nuance. Three environmental principles – precaution, sustainable development, and access to (environmental) justice – provide insight into how the Federal Courts address endemic challenges of environmental law.

II. Environmental Principles at the Federal Courts

Environmental law is a field populated by principles (e.g. prevention, precaution, polluter pays).²⁵ There are many theories as to why.²⁶ Plausible hypotheses are that principles promise a desirable and functional middle-ground between all-or-nothing determinate rules (e.g. complete prohibition on specific pollutants or destructive activities) and open-ended policy objectives. Principles have the capacity to guide action while also retaining flexibility needed to address the complexity and interconnectedness of ecological systems and human interactions within them.²⁷ Principles also focus attention on the life-sustaining capacity of ecological systems that produce clean air, clean water, a stable climate, etc., and the unique regulatory challenges that come with governing such a vital set of concerns.

The UN's Stockholm (1972) and Rio (1992) Declarations along with the Brundtland Report (1987) helped the rise of environmental principles both in international environmental law and in domestic environmental law in jurisdictions around the world.²⁸ In particular, the Rio

²² *Turp v Canada (Minister of Justice)*, 2012 FC 893, [2014] 1 FCR 439.

²³ *Syncrude Canada Ltd. v Canada (Attorney General)*, 2014 FC 776, 461 FTR 53 [*Syncrude*]; upheld by the Court of Appeal though without reference to precaution: *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160.

²⁴ *Gitxaala Nation v Canada*, 2016 FCA 187, [2016] 4 FCR 418 [*Gitxaala Nation*]; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153, [2018] 3 CNLR 205 [*Tsleil-Waututh Nation*].

²⁵ Dworkin's classic statement that a principle is "a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality" is relied on by environmental law scholars for positioning environmental principles between rules and policies: Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 22.

²⁶ Scotford, *supra* note 4, summarizes these theories at 30-49.

²⁷ See, e.g., a discussion of the Supreme Court of Canada's appreciation of this in: Jerry V. De Marco, "The Supreme Court of Canada's Recognition of Fundamental Values: What Could be Next in Canadian Environmental Law?" (2007) 17 JELP 159; Charles D. Gonthier (Hon), "Sustainable Development and the Law" (2005) 1 McGill JSDLP 11.

²⁸ Scotford, *supra* note 4 at 32-33; Sands, *supra* note 3 at 38-57.

Declaration crystallized specific principles that have come to form a core set of environmental principles known around the world, notably:²⁹

- *Sustainable development*, which recognizes that social, economic and environmental concerns are interlinked and commits to safeguarding resources for future generations;
- *Precaution*, the notion that scientific uncertainty should not post-pone cost-effective action to prevent environmental harm
- *Polluter pays*, that those who pollute should bear its cost;
- *Participation*, that environmental decisions are best made with the participation of concerned citizens and citizens ought to have the ability to access (environmental) justice through information, participation and legal remedies.

Many of these principles have been adopted in international treaties and in domestic laws around the world. Some constitute customary international law.³⁰

The legal status of environmental principles receives considerable attention in environmental law scholarship.³¹ Suffice it to say that, in many jurisdictions, the fact that environmental principles are legal principles with precise legal implications is well-documented.³² The objective of this chapter is to discern what legal status the Federal Courts have ascribed to environmental principles within Canadian law.

This part focuses on three environmental principles, introduced below: the precautionary principle, sustainable development and access to (environmental) justice. It argues that these environmental principles have played different roles across a range of environmental contexts. The Federal Court has begun to elaborate the doctrinal potential of the precautionary principle, identifying several distinct legal functions performed by the principle. In contrast, both the Federal Court and Court of Appeal have labelled sustainable development a policy objective of EA which necessitates judicial deference, and otherwise lacks legal implications. Recent Federal Courts' jurisprudence, which takes an expansive and contextual approach to public interest standing and public interests costs, reflects the Courts' sensitivity to access to justice concerns in the environmental context. Finally, this Part identifies instances in which the Courts actively avoid engaging with principles. This principle avoidance is signalled by the Courts' invocation

²⁹ *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992) [Rio Declaration], principles 1-5, 15, 16, 10, respectively. For a summary of the most commonly known and broadly accepted principles see Sands, *supra* note 3 at Ch 6.

³⁰ DeSadeleer *supra* note 4 (polluter pays and prevention) at 26 and 67. Sands, *supra* note 3 at 279 and 364. See *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 [Spraytech] on the precautionary principle.

³¹ Scotford, *supra* note 4; Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (New York: Routledge, 2017) [Bosselmann]; DeSadeleer, *supra* note 4; Sheridan and Lavrysen (eds) *Environmental Law Principles in Practice* (Bruxelles: Bruylant, 2002), Stephen Tromans, "High talk and Low Cunning: Putting Environmental Principles into Legal Practice", 1995 JPEL 779.

³² The specific application of these principles in given cases might be controversial. However, the fact that in many instances these principles have legal status is not. Notably, the legal implications of the same nominal principles can look quite different in different jurisdictions. See Scotford, *supra* note 4 at Ch 4 and 5 and DeSadeleer, *supra* note 4, Ch 6.

that that “courts are not academies of science,” which counsels a posture of judicial submissiveness to environmental decisions.

The analysis of principles that follows provides insight into Federal Courts’ doctrine and culture. But an important caveat is first needed. This insight is necessarily tentative and partial because it relies only on a close reading of the published decisions of these Courts. It does not, for example, consider the litigation strategies of the parties who play the essential role of framing disputes and bringing relevant arguments before the courts.³³ With that caveat in mind, this Part shows that it is possible to delineate distinct doctrinal roles for environmental principles and to posit that, where engaged, these principles are doing important work to refine, clarify and stabilize the legal obligations created across federal environmental law.

A. *Precautionary Principle*

The precautionary principle addresses the challenge of decision-making under conditions of uncertainty and the potentially serious and permanent environmental harms that can result from such decisions. Its most common formulation is contained in the Rio Declaration: “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”³⁴ The Supreme Court of Canada has recognized the precautionary principle as an emerging principle of customary international law.³⁵

The precautionary principle has been mentioned or analysed by the Federal Courts in the context of species protection, EA, toxics and fisheries regulation. The principle has been ascribed four specific roles: a mandatory principle for statutory interpretation of text that codifies the principle and for text that does not; a factor that constrains the reasonable exercise of administrative discretion; a principle of constitutional interpretation; and, a misinterpreted and therefore unenforceable legal rule.

The most sustained and influential engagement with the precautionary principle has happened in the context of enforcing SARA. The Federal Court has recognized that the precautionary principle is fundamental to understanding the unlawful delay and obfuscation of the federal government. In applying the precautionary principle, Courts have paid particular attention to the Convention on Biological Diversity, its recognition of the precautionary principle, and SARA’s role as a major component of Canada’s implementation of its commitments under international law.

³³ See, e.g., Affolder, *supra* note 3.

³⁴ Rio Declaration, *supra* note 29. On the incorporation of the precautionary principle into Canadian law, see: *Spraytech*, *supra* note 30; *Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52 [*Castonguay*] at para 20 and the principle’s incorporation and codification in *Canadian Environmental Assessment Act*, SC 1992, c 37 and *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52 [CEAA 2012], *Canadian Environmental Protection Act*, SC 1999, c 33 [CEPA], *Species At Risk Act*, SC 2002, c 29 [SARA], *Pest Control Products Act*, SC 2002, c 28 [PCPA].

³⁵ *Spraytech*, *supra* note 30 at para 32; *Castonguay*, *supra* note 34 at para 20.

First, the Federal Court has held that the precautionary principle is a mandatory component of statutory interpretation with respect to critical habitat, recovery strategy and emergency protection decisions under *SARA*. In *Alberta Wilderness* and *Environmental Defence*, two 2009 decisions regarding the Greater Sage-Grouse and the Nooksack Dace respectively, the federal government attempted to defend its policy of removing known critical habitat from recovery strategies and delaying the publication of this information, contrary to the requirements of *SARA*. Both decisions held that the Act's requirement to include in the recovery strategy "an identification of the species' critical habitat, to the extent possible, based on the best available information" had to be interpreted consistently with the precautionary principle.³⁶ This interpretation followed from the precautionary mandate of *SARA*. It meant that there was no discretion to withhold information about critical habitat. Justice Campbell held unequivocally that the department policy was "in clear contravention of the law."³⁷

Six years later, Justice Martineau confirmed the mandatory interpretive role for the precautionary principle under *SARA*. He quashed the Minister of Environment's determination, under *SARA*'s emergency protection powers, that the Western Chorus frog did not face an imminent threat despite a provincial development which would eradicate the entire metapopulation. The government unsuccessfully argued that the precautionary principle did not impose a positive obligation on the Minister. Expanding on prior decisions, Martineau J. emphasized that "[t]he precautionary principle applies to material determinations under the federal Act."³⁸ He reasoned that "[t]his principle stands in contrast to administrative or ministerial *laissez-faire*."³⁹ It "justifies a dynamic and liberal interpretation of the provisions of the federal Act..."⁴⁰ Here the Minister's decision failed to apply the precautionary principle because it accounted only for a threat to survival and not, as the legislation required, survival *and recovery*.⁴¹ The Federal Court again gave specific legal effect to the precautionary principle.

The Federal Court has also found an interpretive role for the precautionary principle in fisheries regulation, ruling as unlawful Fisheries and Oceans Canada practice and policy that failed to require testing of farmed salmon for disease agents prior to permitting their transfer to open ocean operations.⁴² Relying on the Supreme Court of Canada's decisions in *Spraytech* and

³⁶ *Alberta Wilderness Association v Canada (Minister of Environment)*, 2009 FC 710, 349 FTR 63 [*Alberta Wilderness*] at para 25; *Environmental Defence Canada v Canada (Minister of Fisheries and Oceans)*, 2009 FC 878, 349 FTR 225 [*Environmental Defence*] at para 40.

³⁷ *Environmental Defence*, *supra* note 36 at para 2.

³⁸ *Quebec Center for Environmental Law v Canada (Minister of the Environment)*, 2015 FC 773, 483 FTR 147 [*Quebec Center*] at para 76.

³⁹ *Ibid.*

⁴⁰ *Ibid* at para 7.

⁴¹ See also *Adam v Canada (Minister of the Environment)*, 2011 FC 962, 62 CELR (3d) 218, and *Western Canada*, *supra* note 18 for additional decisions that address statutory interpretation of *SARA* in a manner consistent with the precautionary principle.

⁴² *Morton v Canada (Minister of Fisheries and Oceans)*, 2015 FC 575, 480 FTR 148 [*Morton* 2015] and *Morton v Canada (Minister of Fisheries and Oceans)*, 2019 FC 143, 27 CELR (4th) 31 [*Morton* 2019]. See Pierre Cloutier de

Castonguay, Justice Rennie reasoned that “the precautionary principle is at a minimum, an established aspect of statutory interpretation, and arguably, has crystallized into a norm of customary international and substantive domestic law.”⁴³ The compulsory interpretive role of the precautionary principle thus informed Rennie J.’s enforcement of the *Fishery (General) Regulations*, which allows the approval of a fish transfer (of farmed fish) to open ocean only if “the [transferred] fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish.”⁴⁴ Justice Rennie held that he was not ruling on the merits of the scientific debate. “Rather, the argument having been raised, and the assertion made that the conditions reflect a precautionary approach to aquaculture, the issue had to be considered.”⁴⁵ He held that the regulatory provision “embodies the precautionary principle,” and that the fish transfer license and its conditions therefore “cannot derogate from the precautionary principle.”⁴⁶ Justice Strickland applied this ruling on the precautionary principle when, four years later, she quashed the unlawful continuation of the no-testing policy and emphasized that the department policy derogated from the precautionary principle.⁴⁷

Secondly, the Federal Court has found that the precautionary principle acts as a mandatory constraint on the reasonableness of discretionary and factual determinations. In quashing the Minister of Health’s decision to not initiate a re-evaluation of a particular pesticide under the *Pest Control Products Act*, Justice Kelen succinctly noted that the Minister failed to comply with the precautionary principle. Despite scientific debate over the environmental impacts of the pesticide, the Minister determined that the pesticide did not present an unacceptable risk. Kelen J. held that “the precautionary principle would require that the Minister initiate a special review”⁴⁸ and that the Minister’s determination was not justified, transparent or intelligible because it did not address the environmental risk to amphibians.⁴⁹

In the environmental assessment context, Justice Phelan upheld as reasonable the review panel’s rejection of the industry proponent’s “vague assurances” about future adaptive management which led to a finding of significant adverse environmental effects. Phelan J. stated the Panel’s finding, “was entirely reasonable, and in line with the Panel’s (reasonable) interpretation of the precautionary principle.”⁵⁰ The precautionary principle has thus come to shape the scope of reasonable decision-making across a range of environmental decisions.

Repentigny, “Precaution, sub-delegation and aquaculture regulation: *Morton v Canada (Fisheries and Oceans)*” (2015) 28 JELP 125.

⁴³ *Morton* 2015, *supra* note 42 at para 43.

⁴⁴ *Fishery (General) Regulations*, SOR/93-53, s. 56.

⁴⁵ *Morton* 2015, *supra* note 42 at para 47.

⁴⁶ *Ibid* at paras 97-98.

⁴⁷ *Morton* 2019, *supra* note 42 at (in particular) paras 159, 165, 170.

⁴⁸ *Weir v Canada (Minister of Health)*, 2011 FC 1322, 400 FTR 212 at para 101.

⁴⁹ *Ibid* at paras 105-106. See also *Alberta Wilderness* *supra* note 36, where the Court holds the determination to be unreasonable (tacitly relying on the precautionary principle invoked in other places in the judgment).

⁵⁰ *Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1009, 287 ACWS (3d) 411 [*Taseko Mines* 2017] at paras 122-123 (upheld by the Federal Court of Appeal without comment on the precautionary principle: 2019 FCA 319 [*Taseko Mines* 2019]). *Morton* 2015 and *Morton* 2019, *supra* note 42 demonstrate that courts must be willing to

Third, the Federal Court has used the precautionary principle to inform its determination of the pith and substance of a federal regulation when determining its constitutional validity.⁵¹ A pith and substance analysis requires the consideration of the purpose and effects of the impugned law. Justice Zinn held that the precautionary principle is relevant to considering the effects of environmental provisions. He reasoned that,

[t]here is nothing unconstitutional about Parliament taking steps to address the threat of [greenhouse gases] in the way it thought best, based on the evidence available to it at the time... as the preamble to CEPA states, Parliament must act to address environmental threats on the best evidence available at the time and not await scientific certainty.⁵²

The precautionary principle helped to ensure that the Court interpreted the effects of the regulation in a constitutionally appropriate matter. The principle guarded against the risk of judicial overreaching by second-guessing the efficacy of the enhanced pollution standard in reducing greenhouse gas emissions.⁵³

Finally, the precautionary principle has also, on occasion, been the subject of misinterpretation. In *Pembina Institute*, the Federal Court understood the principle as a blunt tool that has “potentially paralyzing effects,”⁵⁴ which suggests that any uncertainty about potential serious and irreversible effects would prevent a project from being approved.⁵⁵ This concern is overblown, in large measure, because it fails to account for the structure of EA legislation which does not outright prohibit the approval of environmentally-harmful development projects. In contrast, Justice Russell articulated a more justified, fine-grained role for the precautionary principle under the *Canadian Environmental Assessment Act*.⁵⁶ Russell J. reasoned along the lines of the SARA decisions: the precautionary principle informed the reasonableness of the implementation of specific requirements under the Act. It did not operate as a rule that paralyzed development; rather, it required a level of detail and transparency in the assessment

scrutinize whether decision-makers’ proclaimed precautionary approaches are reasonably supported as precautionary.

⁵¹ *Syncrude*, *supra* note 23.

⁵² *Ibid* at para 48.

⁵³ In this way, it refined the application of *Ward v. Canada (Attorney General)*, 2002 SCC 17 at para 18 for environmental legislation and regulation.

⁵⁴ *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302, 323 FTR 297 at para 32; *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2003 FCA 197, [2003] 4 FC 672 at para 24.

⁵⁵ For commentary on the *Pembina* decision’s use of precaution, see: Nathalie Chalifour, “A (Pre) Cautionary Tale About the Kearl Oil Sands Decision: The Significance of *Pembina Institute for Appropriate Development*, et al. v. Canada (Attorney-General) for the Future of Environmental Assessment” (2009) 5 McGill Int’l J Sust Dev L & Pol’y 251. Many EA decisions simply reference the principle in passing but ascribe no legally relevant role to it: see, for example, *Tsleil Waututh Nation*, *supra* note 24; *Nunatsiavut v Canada (Department of Fisheries and Oceans)*, 2015 FC 492, 478 FTR 240 at paras 39-40; *Group Maison Candiac Inc. v Canada (Attorney General)*, 2018 FC 643, 19 CELR (4th) 193 at para 13.

⁵⁶ *Greenpeace Canada v Canada*, 2014 FC 463, 455 FTR 1 especially at paras 237, 331 and 382 [*Greenpeace* 2014]. For analysis, see Martin Olszynski, “Environmental Assessment as Planning and Disclosure Tool: *Greenpeace Canada v Canada (AG)*,” (2015) 38 Dalhousie LJ 207. See also, *Taseko Mines* 2017, *supra* note 50.

that allowed such consequential decisions to be made in a democratically accountable manner. While this decision was overturned by a split Federal Court of Appeal, the appellate decision did not engage with Russell J.'s specific reasoning on the precautionary principle.⁵⁷

This section has shown that the Federal Court has begun to articulate several distinct and promising legal roles for the precautionary principle in Canadian environmental law. This development has not been uniform, with SARA decisions leading this doctrinal evolution. Nonetheless, in most instances when the Federal Court has engaged with the principle it has sought to give it specific legal effect.

B. Sustainable Development

Sustainable development, the idea that “development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations,”⁵⁸ makes at least three demands of environmental decisions. First, that the economic and social aspects of development decisions must be *integrated* with environmental considerations. Second, it addresses the fact that development and environmental needs are not distributed evenly over geography and time. Therefore, sustainable development requires regard to *intergenerational equity* (i.e. the needs of future generations) along with the role of sustainable development in lifting communities out of poverty. Third, some formulations of sustainable development contain the idea of an *ecological baseline*.⁵⁹ This is the idea that development decisions are sustainable only if they allow ecosystems to sustain themselves over time and retain their natural character.⁶⁰ Protecting ecological baselines goes a step further than integration, ensuring that long-term environmental considerations are protected in a fundamentally life-sustaining way and are not overshadowed by near-term economic concerns.

Sustainable development is intertwined with EA and its concerns have been addressed by all iterations of federal EA, beginning with the earliest and most inchoate federal policy.⁶¹ CEAA 2012, defined sustainable development consistently with international definitions as “development that meets the needs of the present, without compromising the ability of future

⁵⁷ See discussion of this decision in the text surrounding note 97 below.

⁵⁸ Rio Declaration, *supra* note 29 at Principle 3. Sustainable development is described in the literature as a principle (Sands, *supra* note 3), a meta-principle (Vaughn Lowe, “Sustainable Development and Unsustainable Arguments” in A Boyle and D Freestone, eds, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999) 19 at 31 and its own body of law [Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford: Oxford University Press, 2004)]

⁵⁹ World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future*, (Oxford: Oxford University Press, 1987), at Ch 8 para 47, Overview para 27, Ch 2 para 9. For foreign interpretation, see the New Zealand Supreme Court’s decision in *Environmental Defence Society Inc. v The New Zealand King Salmon Company Ltd* [2014] NZSC 38.

⁶⁰ See, e.g., Bosselmann *supra* note 31 at ch1 (on ecological sustainability as the core of sustainable development).

⁶¹ Provisions of the Policy of the Government of Canada Establishing the Federal Environmental Assessment and Review Process (Ottawa: Federal Environmental Assessment Review Office, 1974). See also CEAA *supra* note 76, s. 4(1)(h); *Impact Assessment Act*, SC 2019, c 28, s 1 [IAA], s 6(1)(a).

generations to meet their own needs.”⁶² The Newfoundland Court of Appeal has eloquently captured the connection between EA legislation and the demands of sustainable development, stating:

these statutes represent a public attempt to develop an appropriate response that takes account of the forces which threaten the existence of the environment. If the rights of future generations to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of the legislation. Environmental laws must be construed against their commitment to future generations and against a recognition that, in addressing environmental issues, we often have imperfect knowledge as to the potential impact of activities on the environment. One must also be alert to the fact that governments themselves, even strongly pro-environment ones, are subject to many countervailing social and economic forces, sometimes legitimate and sometimes not. Their agendas are often influenced by non-environmental considerations.

The legislation, if it is to do its job, must therefore be applied in a manner that will counteract the ability of immediate collective economic and social forces to set their own environmental agendas. It must be regarded as something more than a mere statement of lofty intent. It must be a blueprint for protective action.⁶³

This reasoning strongly reflects the three demands of sustainable development and thus provides a useful benchmark for evaluating the decisions of the Federal Courts. The Newfoundland Court of Appeal recognizes that EA decisions have intergenerational implications and therefore must attend to the right of future generations to not bear disproportionate environmental harms. It observes that integrating economic, social and environmental considerations carries the risk that “countervailing social and economic forces” tend to easily overshadow environmental concerns; therefore, courts play an important role in counteracting the effect of these forces on the administration of legislative responsibilities. It recognizes that the “existence of the environment” is at stake and that EA laws must protect the basic integrity of ecological systems. The Newfoundland Court of Appeal understands these demands in legal terms – they must shape the interpretation and administration of environmental statutes.

This line of reasoning has not influenced the Federal Courts’ jurisprudence. The limited explicit engagement with the principle by the Federal Courts suggests they understand sustainable development as a policy goal, not as a legally relevant principle that informs the obligations for how public decision-makers achieve it. When the language of sustainable development is

⁶² *CEAA 2012*, *supra* note 34, s2(1). Notably, its successor replaces this definition with a more specific definition of “sustainability”, yet to be interpreted by the Courts: *IAA*, *supra* note 61, s 1.

⁶³ *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)* (1997), 1997 CanLII 14612 (NLCA), 152 DLR (4th) 50 (NLCA) paras 11-12.

explicitly invoked by the Federal Courts it tends to be as a justification for judicial non-interference. For example, in *Bow Valley*, the Federal Court considered whether the proposal to upgrade resort facilities in Banff National Park complied with the federal EA requirements. The Court correctly observed that the purpose of the Act, “is to ensure the integration of environmental factors into planning and decision-making processes so as to promote sustainable development in a coordinated manner.” However, it went on to state:

The objective of the legislation therefore, is not to prevent any or all development of environmentally sensitive areas, but to balance that development against the unique ecological circumstances of the area in question. When dealing with this type of legislative objective, the Court must be sensitive to the limited scope of its judicial review power.⁶⁴

In contrast to the Newfoundland Court of Appeal, this Federal Court reasoning converts the sustainable development demand of integration into a balancing exercise between economic and environmental considerations. Construed as such, it follows that the Court should defer to such a policy-laden determination. Unfortunately, alternative definitions and specific doctrinal roles for the demand of integration are left unexplored.

The *Canada National Parks Act* imposes a clear duty on the Minister maintain ecological integrity as a “first priority” in parks management.⁶⁵ This legislative language would seem to give a specific legal dimension to the third demand of sustainable development. Yet the Federal Courts interpreted this requirement as one of many policy objectives. The Federal Court and Court of Appeal upheld the Minister’s decision to approve a winter road through Wood Buffalo National Park, a vulnerable UNESCO world heritage site, despite the Minister failing to reference – let alone explain – how the decision was consistent with maintaining ecological integrity.⁶⁶ The Courts viewed this decision as a balancing exercise between social, economic and ecological factors; accordingly, it was not for the Courts to reweigh.⁶⁷

The Federal Courts cannot, however, entirely bracket sustainable development as a policy objective and thereby avoid engaging with its demands. Since EA legislation prescribes how federal decision-makers plan future development, judicial review of these decisions is necessarily about the interpretive and administrative dimensions of sustainable development contained in the legislation. Even when the Federal Courts avoid the language of sustainable development, they cannot avoid its demands of integration, intergenerational equity and protecting ecological baselines. In other words, judicial deference is not a neutral position on sustainable development given the structure of the legislation. The result of the Federal Courts’

⁶⁴ *Bow Valley Naturalists Society v Canada (Minister of Canadian Heritage)* (1999), 91 ACWS (3d) 763, 175 FTR 122 at para 25. The Federal Court of Appeal reiterated this point when it upheld the Federal Court’s decision: *Bow Valley Naturalists Society v Canada (Minister of Canadian Heritage)*, [2001] CanLII 22029 (FCA), [2001] 2 FC 461, at para 77. See also *Tsawwassen Indian Band v Canada (Minister of Finance)*, 2001 FCA 58, 37 CELR (NS) 182 at para 11 noting that sustainable development is the policy goal of EA legislation.

⁶⁵ *Canada National Parks Act*, SC 2000, c 32, s 8(2).

⁶⁶ *Canadian Parks and Wilderness Society v. Copps*, 2001 FCT 1123 (CanLII) and *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2003 FCA 197 [Wood Buffalo].

⁶⁷ *Ibid.* para 52 and para 99, in the respective decisions.

lack of explicit engagement with sustainable development is an interpretive approach that allows EA implementation to drift away from its legislated mandate.

Take the example of integration. The integration of economic, social and environmental concerns is embedded in a series of essential decisions taken under the federal EA regime. First, federal decision-makers must determine the appropriate scope of the project to be assessed. Under *CEAA 1995*, some decision-makers adopted a narrow scoping practice that determined ‘the project’ to be only the component that required a federal permit. For example, if the proposed project was a forestry operation with roads and a bridge, these decision-makers would purport to exercise discretion to determine only the bridge (which would require a federal fisheries or navigation permit) was subject to a federal assessment.⁶⁸ This narrow determination of project scope undermines the demand of integration. When the project scope fails to include the primary development – the forestry operation – of the proposal, it becomes impossible to integrate economic and social considerations (related to forestry development) with environmental factors. The EA is reduced to a technical, regulatory hurdle rather than serving as a planning process that seeks to resolve interrelated economic, social and environmental concerns.

Federal Court and Court of Appeal decisions upheld this practice as consistent with the Act. These decisions did not rely on the contextual and purposive statutory analysis evident in the *SARA* decisions. When presented with arguments on how the scope of the project affects integration, the Federal Court of Appeal held “I see nothing in the words of the *CEAA* that makes that a requirement in every case.”⁶⁹ The result was that much of federal EA was rendered duplicative of existing regulatory processes under, for example, the *Fisheries Act*.⁷⁰ According to this line of Federal Courts caselaw, fulfilling the “planning function” of EA law and encouraging “actions that promote sustainable development” were left entirely to the discretion of executive actors implementing the Act.

Similarly, the EA requires that decision-makers demonstrate that proposals with “significant adverse effects are justified in the circumstances” before granting an EA. Reviewing these decisions for their compliance with this requirement again necessarily implicates sustainable development’s demand of integration.⁷¹ While one would not expect a reviewing judge to

⁶⁸ The Supreme Court of Canada (upholding the Federal Court) held in 2010 that federal decision-makers could only increase the scope of the project beyond that proposed and they could not decrease the scope (e.g., to only include the portion that triggered federal jurisdiction): *MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 SCR 6. Prior to this decision, however, there were numerous Federal Court and Court of Appeal decisions on scoping. For summary and commentary, see Doelle Federal EA, *supra* note 11 at 121-136.

⁶⁹ *Prairie Acid Rain Coalition v Canada (Minister of Fisheries & Oceans)*, 2006 FCA 31, [2006] 3 FCR 610 at para 37. See also *Friends of the West Country Association v Canada (Minister of Fisheries and Oceans)* [2000] 2 FC 263, 169 FTR 298 at para 22. See *Quebec (Attorney General v Canada (National Energy Board)*, [1994] 1 SCR 159, [1994] 3 CNLR 49, at para 60 for a different conclusion on scoping, holding that “I would find it surprising that such an elaborate review process would be created for such a limited inquiry.”

⁷⁰ Doelle Federal EA *supra* note 11 at 132-3.

⁷¹ It also implicates the demands of intergenerational equity and ecological baselines, both of which the Courts could require the decision-maker to explicitly attend to in its justification.

lightly second-guess the justification offered, ensuring that the justification obligation is fulfilled within the meaning of the Act is properly the function of the Court. Unfortunately, the Federal Courts have shown exceptional deference to these decisions and have not required reasons that transparently evidence integration of environmental, social and economic concerns. Indeed, the Federal Court upheld the Site C Dam approval as meeting the “justification” legal requirement despite the decision not referencing any of the identified significant environmental effects,⁷² the greatest number of negative effects identified in the history of Canadian EA law.⁷³

This section has argued that the Federal Courts’ treatment of sustainable development as mere policy objective does not allow the courts to avoid engaging with its underlying concerns. Integration, ecological baselines and intergenerational equity are bound up in the interpretation and implementation of the legislation. Embracing sustainable development as an interpretive framework for EA law and developing incrementally the specific doctrinal roles for the principle would allow the many strands of EA caselaw to develop in a more coherent and purposeful manner.

C. Access to Environmental Justice

Access to environmental justice is also a central environmental principle. The Rio Declaration recognizes that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities ...and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.⁷⁴

Access to information, participation in decision-making and access to legal remedies comprise the commitment to access to environmental justice. Some of these features are incorporated

⁷² Even the press release issued after the Order in Council failed to reference these effects, but the Court found both were legally sufficient: *Peace Valley Landowner Association v. Canada (Attorney General)*, 2015 FC 1027, 97 CELR (3d) 1 [*Peace Valley*] at para 66. See also: *Gitxaala Nation*, *supra* note 24 at para 155 (“widest margin of appreciation over these questions”), but compare with *Tsleil-Waututh Nation*, *supra* note 24 at para 481-2 (where the Court of Appeal did examine the reasons offered as justification).

⁷³ Water Governance Project, “Briefing Note #2: Assessing Alternatives to Site C (Environmental Effects Comparison)” at 4, online: Water Governance Project <http://watergovernance.ca/category/site-c-dam/>.

⁷⁴ Rio Declaration, *supra* note 29 at Principle 10; *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79, (entered into force 29 December 1993), Part 13; *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*, 25 June 1998, 2161 UNTS 447 (entered into force 20 October 2001). Canada is not a party to this agreement. The stated rationale is because “Canada maintains a well-established system of engaging the public.” Available online: Government of Canada <<https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/convention-access-information-public-participation-aarhus-convention-kiev-protocol.html>>.)

into federal environmental statutes. For example, *CEPA* requires polluters to report on pollution release, which is posted to the National Pollution Release Inventory.⁷⁵ Many environmental statutes create online registries to which regulatory developments must be posted for easy public access.⁷⁶ Federal EA provides crucial opportunities for public input on a range of environmental issues that is typically lacking in other Canadian jurisdictions and areas of environmental regulation.⁷⁷ And since there is no federal environmental appeals tribunal, access to a legal remedy is through statutory appeal or judicial review to the Federal Courts.

This part focuses on access to the Federal Courts through the public interest standing and public interest costs doctrines. First, we will see the Federal Courts have come to develop the public interest standing doctrine in a contextual manner that facilitates access to environmental justice. Second, the public interest costs test applied by the Courts has the potential to help fulfill the promise of access to (environmental) justice.

First, the availability of public interest standing plays a gatekeeping function that impacts the availability of legal remedies for environmental harms. Harms to land, air, water, non-human species are often temporally and geographically diffuse. To rely on direct standing – the fact of sufficiently-motivated and resourced individuals who experience direct harm to their health or property – to challenge federal decisions would significantly reduce the availability of legal remedies. As Justice Evans explained,

since the public interest in the global environment is very fragmented, public interest groups with a relevant track record will often be the only likely litigants willing and able to institute legal proceedings to ensure that statutory duties are discharged by the public officials upon whom they have been imposed.⁷⁸

The Federal Courts have taken a generous approach to granting public interest standing in the environmental context. The test to attain public interest standing requires: (i) a serious issue to be tried, (ii) the claimant to have a genuine interest in the matter, and (iii) that the claim is, all things considered, a reasonable and effective way to bring the matter before the courts.⁷⁹ For environmental NGOs and committed community groups and citizens, public interest standing no longer poses a significant legal barrier.

⁷⁵ *Canadian Environmental Protection Act*, SC 1999, c 33, s 95(1) – (8), interpreted and enforced in *Great Lakes United v Canada (Minister of Environment)*, 2009 FC 408, 346 FTR 106. For commentary on this regime, see Greg Simmons, “Clearing the Air? Information Disclosure, Systems of Power and the National Pollution Release Inventory” (2013) 59:1 McGill LJ 10, 25.

⁷⁶ *IAA*, *supra* note 61, ss 104-105; *CEAA* 2012, *supra* note 34, s. 78(1) – (3); *SARA*, *supra* note 34, s. 120; *PCPA*, *supra* note 34, s. 42(7).

⁷⁷ See, e.g., Shaun Fluker, “The Right to Public Participation in Resources and Environmental Decision-Making in Alberta” (2015) 52 Alberta Law Review 567.

⁷⁸ *Sierra Club of Canada v Minister of Finance*, [1999] 2 FC 211, 157 FTR 123 [Sierra Club] at para 54.

⁷⁹ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524. The majority of the Federal Court and Court of Appeal cases considered here applied the *Finlay* version of the test, for which the third part required showing there was no other reasonable and effective way to bring the matter before the Court (*Finlay v. Canada (Minister of Finance)*, [1986] 2 SCR 607, [1987] 1 WWR 603 at para 39).

This was not inevitable. In applying the Supreme Court of Canada's tripartite test, the Federal Courts had to grapple with the language of the *Federal Courts Act*. Subsection 18.1(1) of the Act allows "anyone *directly* affected by the matter..." to bring an application for judicial review.⁸⁰ The Federal Court, affirmed by the Court of Appeal, held that this provision preserved the discretion of the Court to "grant standing when it is convinced that the particular circumstances of the case and the type of interest which the applicant holds justify status being granted."⁸¹

The tripartite public interest standing test has played an important role in shaping the Federal Courts environmental jurisprudence, with many of the most influential decisions having been launched by public interest litigants. All along the Federal Courts have taken a contextual approach to its application that looks for serious engagement on the part of the claimant with the environmental matters at stake.⁸² This approach recognizes the many ways in which environmental concerns are represented in the public sphere and acknowledges that it is unnecessary to maintain additional legal barriers to seeking legal remedies in the environmental context. The Federal Courts have consistently rejected spurious arguments to deny standing based on physical location,⁸³ political motivation,⁸⁴ novelty of the organization,⁸⁵ and hypothetical alternative claimants.⁸⁶ Challenges to the standing of environmental claimants have diminished⁸⁷ and this test no longer poses a significant barrier to attaining environmental remedies through judicial review.

Second, a principled approach to public interest costs is necessary to realize the goals of a generous public interest standing doctrine. One of the greatest barriers to accessing (environmental) justice is the threat of an adverse costs award that requires a public interest litigant to bear the legal costs of the government respondent and any private parties who have joined the litigation.⁸⁸

⁸⁰ *Federal Courts Act*, RSC, 1985, c. F-7, s 18.1(1) emphasis added.

⁸¹ *Friends of the Island Inc. v Canada (Minister of Public Works)*, [1993] 2 FC 229, 10 CELR (NS) 204 at 46; affirmed by FCA in *Sunshine Village Corp. v. Superintendent of Banff National Park* (1996), 44 Admin. L.R. (2d) 201, 65 ACWS (3d) 437. Note that government parties continued to argue that the test did not apply until *Sierra Club*, *supra* note 78 (but see also *Communities and Coal Society and Voters Taking Action on Climate Change v Canada (Attorney General)*, 2018 FC 35, 288 ACWS (3d) 5 [*Communities and Coal*]) industry parties continued to bring standing challenges much longer (e.g. *MiningWatch Canada v Canada (Minister of Fisheries & Oceans)*, 2007 FC 955, 33 C.E.L.R. (3d) 1 [*MiningWatch 2007*]).

⁸² One notable exception is *Shiell v Canada (Atomic Energy Control Board)* (1995), 17 CELR (NS) 286, 98 FTR 75 in which the court seems to have misunderstood the standing test from *Finlay*. This error is cabined by subsequent cases: *Citizens Mining Council of Newfoundland and Labrador Inc. v Canada (Minister of Environment)* (1999), 29 CELR (NS) 117, 163 FTR 36 [*Citizens Mining*] at para 34; *Environmental Resource Centre v Canada (Minister of Environment)*, 2001 FCT 1423, 45 CELR (NS) 114 at paras 134-135.

⁸³ *MiningWatch 2007*, *supra* note 81 at para 183.

⁸⁴ *Sierra Club*, *supra* note 78 at para 58.

⁸⁵ *Citizens Mining*, *supra* note 82; *Communities and Coal*, *supra* note 81.

⁸⁶ *Citizens Mining*, *supra* note 82 at para 35.

⁸⁷ E.g. *Sandy Pond Alliance to Protect Canadian Waters Inc. v Canada (Attorney General)*, 2013 FC 1112, 81 CELR (3d) 175.

⁸⁸ Chris Tollefson, "Costs in Public Interest Litigation Revisited" (2011) 39 Advocate's Q 197.

While the Federal Courts' public interest costs jurisprudence has lagged behind its standing jurisprudence, recent decisions have crafted a doctrine that is capable of supporting more robust access to environmental remedies. These recent decisions apply *Harris*, a decision in which Justice Dawson adopted a set of criteria that "recognizes that absent an award of costs public interest status may be of theoretical but not practical effect."⁸⁹ In broad strokes, these criteria require the court to consider the public benefit of the litigation, the financial circumstances of the parties, and the parties' conduct in the litigation proceedings. While, in the majority of environmental decisions post-*Harris* the losing party bears an adverse costs award, there are some promising applications of the public interest costs doctrine in the environmental context.

For example, in *Georgia Strait Alliance*, Justice Russell awarded the environmental claimants solicitor-client costs (nearly four-times the amount set out in the party-party costs tariff). Russell J.'s ruling was grounded squarely in access to environmental justice concerns. He reasoned that an enhanced costs award was justified because "the nature of species-at-risk legislation is such that only through the efforts of human champions will issues of ambiguity in, or failures to apply or enforce, the law be addressed."⁹⁰ Furthermore, the Court held that government respondent "adopted an unjustifiably evasive and obstructive approach to these proceedings for no other purpose than to thwart the Applicants' attempts to bring important public issues before the Court." *Georgia Strait Alliance* demonstrates the role of costs rulings in upholding the rule of law in the environmental context. Beginning with granting public interest standing, through the interpretation of SARA, to awarding costs, the Federal Court has enforced species-at-risk legislation in a manner consistent with environmental principles.⁹¹

D. Principle Avoidance

Despite the promising tendrils of principle development discussed so far, the vast majority of decisions do not explicitly engage with environmental principles. This means there are numerous missed opportunities for developing federal environmental law in a nuanced and coherent way. One distinctive set of missed opportunities is flagged by the Courts through their oft-repeated expression that the "courts are not academies of science." This platitude is invoked roughly as frequently as the precautionary principle and it has come to shape an exceptionally deferential stance taken by the Federal Courts when applying the standard of

⁸⁹ *Harris v R*, [2002] 2 FC 484, 214 FTR 1 at para 223.

⁹⁰ *Georgia Strait Alliance v Canada (Minister of Fisheries and Oceans)*, 2011, 59 CELR (3d) 103.

⁹¹ Similarly, the Federal Courts often decline to order costs against unsuccessful public interest claimants. See: *Peace Valley*, *supra* note 72. See also *Grand Riverkeeper, Labrador Inc. v. Canada (Attorney General)*, 2012 FC 1520, 422 FT. 299 at para 71; *Gray v Canada*, 2019 FC 301, 306 ACWS (3d) 310 at para 156; *Ecology Action Centre v Canada (Attorney General)*, 2004 FC 1087, 262 FTR 160; *Forestethics Advocacy v Canada (Attorney General)*, 2014 FCA 71, 390 DLR (4th) 376 at para 19; *Amis de la Rivière Kipawa v. Canada (Attorney General)*, 2007 FC 1267, 318 FTR 76 at para 92; *Living Oceans Society v Canada (Minister of Fisheries and Oceans)*, 2009 FC 848, 180 ACWS (3d) 9 at para 12.

reasonableness to decisions under, in particular, EA legislation. This section suggests that the “academies of science” phrase signals a judicial unwillingness to engage with environmental principles.⁹²

The expression that courts are not academies of science has an innocuous origin that had nothing to do with the substance of environmental or administrative law. The Federal Court invoked the expression in response to a government party’s confused request to have a judicial review application converted to a full trial so that the Court could fully review the evidence and decide the matter on its merits. Justice Strayer wrote:

It is not the role of the Court in these proceedings to become an academy of science to arbitrate conflicting scientific predictions, or to act as a kind of legislative upper chamber to weigh expressions of public concern and determine which ones should be respected...[T]hey are not the roles conferred upon it in the exercise of judicial review under section 18 of the *Federal Courts Act*. I am therefore not going to direct that this matter be tried by way of an action.⁹³

The idea that courts are not academies of science was thus used to delineate between civil actions and judicial review.⁹⁴ It is understandable that the Court would respond to such a basic misunderstanding by counsel by invoking the trite observation that courts are not scientific bodies which step into the shoes of decision-makers. It was not, however, a statement on the correct approach to conducting judicial review or an attempt to clarify contemporary anxieties about the intensity or scope of the standard of reasonableness.

Since then, the phrase has become just this. Sometimes this phrase is invoked and then rejected as the Court reaffirms its role in ensuring that discretion is exercised in accordance with statutory requirements,⁹⁵ and to ensure that “the right to judicial review... [is not turned into] a hollow one.”⁹⁶ However, more recently the Federal Court of Appeal reasoned that, since it is not “an academy of science” it could only intervene in an EA decision if the assessment gave “no consideration at all” to the specific environmental effects.⁹⁷ The result of such a submissive stance, which is often taken by the Court in EA decisions, is that an unsupported conclusion or an environmental effect treated as beneficial rather than harmful would be upheld as reasonable.

⁹² These are not the only instances of principle avoidance, only the ones that are distinguished by the Court’s rhetorical indication that they are not “academies of science.” Other crucial missed opportunities for principle engagement are: *Friends of the Earth*, *supra* note 21, *Wood Buffalo*, *supra* note 66 and *Burns Bog Conservation Society v Canada (Attorney General)*, 2012 FC 1024, 417 FTR 98.

⁹³ *Vancouver Island Peace Society v Canada*, [1992] 3 FC 42, 53 FTR 300 at 8.

⁹⁴ See also Martin Olszynski and Meinhard Doelle, “Ontario Power Generation Inc. v Greenpeace Canada: Form over Substance Leads to a ‘Low Threshold’ for Federal Environmental Assessment” (22 Sept 2015) ABLawg, online: <<https://ablawg.ca/2015/09/22/ontario-power-generation-inc-v-greenpeace-canada-form-over-substance-leads-to-a-low-threshold-for-federal-environmental-assessment>>.

⁹⁵ *Nunavut Tunngavik Inc v Canada (Minister of Fisheries and Oceans)* (1998), 162 DLR (4th) 625 (FCA) at para 55.

⁹⁶ *Inverhuron & District Ratepayers' Association v Canada (Minister of the Environment)*, 2001 FCA 203, 39 CELR (NS) 161 at para 37.

⁹⁷ *Ontario Power Generation Inc. v Greenpeace Canada*, 2015 FCA 186, 95 CELR (3d) 1, at para 130. Affirmed in *Taseko Mines* 2019, *supra* note 50 at para 68.

A closer examination of these decisions reveals that the Courts tend to use the “academy of science” phrase as a shield to avoid engaging with environmental principles. In *Mountain Parks*, for example, the Federal Court was asked to consider whether an approval of water withdrawals from Banff National Park was consistent with the National Parks Act’s “first priority” of ecological integrity, a defined term under the Act.⁹⁸ Ecological integrity is a principle enshrined in the Act, ostensibly binding on decision-makers. However, the Court characterized the claim as “an attack on the evidence that was before the decision-maker” and stated that “a reviewing court should decline to allow itself to become an academy of science called upon to weigh conflicting statements about the maintenance or restoration of ecological integrity so as to determine which statement is correct.”⁹⁹ The absent role of ecological integrity as a legal principle led the Court to characterize the dispute as exclusively evidentiary, rather than as a dispute about the lawful exercise of delegated power.

The cluster of Federal Court and Court of Appeal decisions that have proliferated the “academy of science” phrase dovetails with the reluctance to explicitly engage the principle of sustainable development and precautionary principle in EA decisions as discussed above. Unrefined by precaution and sustainable development, EA legislation may appear to create pockets of scientific analysis and open-ended discretion. Understood as such, it is no surprise courts are reluctant to intervene. But the nature of those pockets of delegated authority is shaped by the interpretation of the legal frameworks they are embedded within. As we have seen, environmental principles can play an important role in law interpretation and setting legal standards for review.

Lacuna in the development of environmental principles in Federal Courts jurisprudence mean that challenges to environmental decisions are often perceived as essentially evidentiary or factual concerns, not suitable for reviewing courts. As we have seen above, environmental principles have established doctrinal roles in informing statutory and constitutional interpretation, constraining the exercise of discretion and justifying the application of common law tests, all of which are the bread-and-butter of judicial review. Continued elaboration and diffusion of environmental principles across all areas of federal environmental law can help ensure that the right to judicial review does not ring hollow. At present, however, the repetition of the bromide that “courts are not academies of science” highlights judicial avoidance of environmental principles.

III. Doctrine, Culture & the Future of Environmental Law in the Federal Courts

The nascent and imperfect development of environmental principles offers insight into the culture of the Federal Courts and their own understanding of their role in Canada’s

⁹⁸ *Canadian National Parks Act*, S.C. 2000, c. 32, s 8(2).

⁹⁹ *Mountain Parks Watershed Assn. v Chateau Lake Louise Corp.*, 2004 FC 1222, 263 FTR 12, at para 15. See also *Wood Buffalo*, *supra* note 66.

constitutional order. It also forms the basis for some observations about how well the existing environmental law jurisprudence equips the Federal Courts to grapple with the pressing legal challenges that continue to arise in the environmental context.

Principles & Judicial Culture

The evolution of environmental principles at the Federal Courts reflects two features of the Federal Courts of Canada: they are specialist courts in judicial review but they are not specialist courts in environmental law. Environmental principles provide specific context for understanding the influence of these two institutional features on doctrine and culture at the Federal Courts.

The Federal Courts are experts in judicial review.¹⁰⁰ The vast majority of cases heard by the Courts are applications for judicial review or statutory appeals, rather than civil litigation against federal bodies. This means that the Courts' engagements with environmental principles happen in this appropriately constrained role as a reviewing court. In this way, the Federal Courts differ from other notable judicial institutions which have developed a rich jurisprudence around environmental principles. The New South Wales Land and Environment Court, for example, has the opportunity to develop environmental principles when reviewing decisions for their merits and this has informed the role of principles in judicial review as well.¹⁰¹ In contrast, the Federal Courts have had limited opportunity to engage with environmental principles in the context of civil litigation. Perhaps experience reasoning with environmental principles directly in civil litigation, should these cases arise, might lead the Courts to see the analytical possibilities for principles in the context of judicial review.

As Part II has demonstrated, there are important doctrinal roles for environmental principles in judicial review. Interestingly, the principles reveal tensions in the Courts' jurisprudence about their own roles in showing deference to environmental decision-makers.¹⁰² The Courts' engagements with environmental principles (and their active avoidance) reflect two distinct meanings of deference: deference as respect and deference as submission.¹⁰³

The deference-as-respect model, endorsed but not fully embraced by the Supreme Court of Canada,¹⁰⁴ requires that reviewing courts "take the tribunal's decision seriously" and "defer to [it] not on the basis of whether they agree with it, but rather, on the basis whether the agency

¹⁰⁰ David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) at 11 (available online SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733751>).

¹⁰¹ Scotford, *supra* note at ch5.

¹⁰² The peak period for the Courts' engagement with these principles seems to be from 2010-2016 which coincides with a particularly tumultuous period in the state of Canadian administrative law: Stratas, *supra* note 100.

¹⁰³ David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 [Dyzenhaus].

¹⁰⁴ See, e.g., Mark Walters, "Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law" in Hannah Wilberg and Mark Elliott, eds, *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford and Portland: Hart Publishing, 2015) 395.

has justified its determination in terms of its commitment to the value [of equality] that provides the rationale for the administrative state.”¹⁰⁵ Importantly, the court’s respect must be earned.¹⁰⁶ As the Supreme Court of Canada has recently affirmed, deference is earned through decision-makers providing coherent and reasoned justification for their decisions.¹⁰⁷

As we saw in Part II, environmental principles often mediate this respectful relationship between the Federal Courts and environmental decision-makers. The Courts intervene when decision-makers have failed to offer reasoned justification for their decisions in light of the statutory scheme and its environmental context.¹⁰⁸ Where the Courts have intervened, it has been because no justification is offered, or because the decision-maker fails to account for these principles and how they shape the statutory framework within which they must operate. The SARA jurisprudence illustrates how environmental principles can help build a coherent legal framework that holds public officials accountable to their statutory mandates. These decisions adopt a healthy attitude of deference as respect. They recognize that respect must be earned and that, in the species-at-risk context, it often is not.

Federal Court decisions which engage with environmental principles take on additional significance in light of shifting trends in administrative law and renewed demands of rigorous and responsive decisions. The guidance on reasonable decisions provided in *Vavilov* hews closer to the justification requirements of deference-as-respect. Moreover, *Vavilov* identifies the impact of the decision on vulnerable interests and international law as relevant to determining whether a decision is justified.¹⁰⁹ As noted above, environmental principles have both international law pedigree and address the vital, life-sustaining concerns. Thus, borrowing the phrasing of the Supreme Court of Canada, environmental principles must be understood as essential stars in the “constellation of law and facts that are relevant to a decision” and which “operate as constraints on the decision maker in the exercise of its delegated powers.”¹¹⁰

On the other hand, where the Courts resist or avoid applying environmental principles, they adopt a stance of deference as submission. They submit to the presumed but undemonstrated expertise of environmental decision-makers, when reflexively invoking the bromide that courts are not academies of science. Or they submit to a decontextualized understanding of legislative

¹⁰⁵ Dyzenhaus, *supra* note 103 at 303 and 306. See *Chen v. Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 170 at paras 51-56 (noting the ambiguities and complexity in the Supreme Court’s guidance).

¹⁰⁶ Murray Hunt, “Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of ‘Due Deference’” in N. Bamforth and P. Leyland eds., *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing, 2003) 339 at 340. This statement has also been attributed to Canadian administrative law scholar, Hudson Janisch in David Mullan, “The True Legacy of Dunsmuir — Disguised Correctness Review?” (15 February 2018) Double Aspect, online: <<https://doubleaspect.blog/2018/02/15/the-true-legacy-of-dunsmuir-%E2%80%95-disguised-correctness-review/>>.

¹⁰⁷ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at especially paras 85, 99, 101.

¹⁰⁸ *Quebec Centre*, *supra* note 38. *Greenpeace* 2014, *supra* note 56.

¹⁰⁹ *Vavilov*, *supra* note 107 at paras 114, 133-135.

¹¹⁰ *Ibid.* at para 105.

intent that leaves virtually no role for judicial oversight.¹¹¹ The shifting backdrop of administrative law may again provide some explanation. An underdeveloped concept of reasonableness review in the *Dunsmuir* era failed to clarify the role for environmental principles in judicial review.¹¹² What is clear, however, is that principle engagement and principle avoidance are part of a larger institutional picture, in which judges grapple with finding a consistent approach to deference.

The second institutional feature of the Federal Courts is that they are generalist courts which encounter environmental cases relatively rarely. Over their 50-year history, the Federal Court and Court of Appeal combined heard environmental cases at an average rate of only six per year.¹¹³ With few cases overall there is limited opportunity for sustained engagement with environmental principles, which inhibits the steady and coherent development of federal environmental jurisprudence. This development is further hindered by the fact the Courts deal with, in many cases, legislation that is tentative and equivocal in its specific environmental protection commitments. Conducting purposive statutory interpretation and applying the contextual standard of reasonableness against this backdrop would be challenging even to a reviewing court that specialized in environmental law. That said, this chapter has demonstrated that there is now a body of decisions that has tackled these challenges by clearly articulating legal roles for environmental principles. These decisions serve as important precedents for the next 50 years of environmental law at the Federal Courts.

The Future of Environmental Law at the Federal Courts

Environmental issues are back at the forefront of public debate. The climate crisis and the contributing role of Canada's oil and gas sector, collapsing global biodiversity, plastic pollution, and relations between Canada and Indigenous nations over lands and resources all mean that the Federal Courts will continue to be called on to adjudicate legal issues that engage contentious questions about the diverse relationships to the environment in Canada.

Notably on the eve of this 50th anniversary, many of Canada's key environmental statutes have been updated or replaced afresh. They now contain firmer commitments to sustainability, the precautionary principle, and access to environmental justice and they explicitly recognize Canada's obligation to mitigate climate change.¹¹⁴ The Federal Courts will play a vital role in

¹¹¹ *Peace Valley*, *supra* note 72. See also *Gitxaala Nation*, *supra* note 24 at paras 119-127; reaffirmed in *Tsleil-Waututh Nation*, *supra* note 24 at para 201 and *Taseko Mines* 2019, *supra* note 50 at paras 44-46. The harm of this approach has been further compounded by a recent decision in which the Court of Appeal denied leave to appeal on the basis that its posture of exceptional deference meant the application for review did not meet the minimal threshold for granting leave: *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224, 438 DLR (4th) 745.

¹¹² For an illustration of an exceptional posture of deference that influenced this era, see: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

¹¹³ This figure is approximate and includes only decisions on their merits (and not separate interim or costs orders). Notably, there is a sharp increase in the number of environmental decisions at the end of the 20th. From this time on, the Courts have decided roughly 10 environmental cases annually.

¹¹⁴ IAA, *supra* note 61, ss 2, 6(2), (3), 22, 63, 183, 262, 298; *Fisheries Act*, RSC 1985, c F-14, ss 2.5, 6.1.

interpreting and enforcing the legal obligations of these new laws. As Part II's consideration of sustainable development shows, the Courts cannot avoid becoming implicated in concerns about environmental protection, resource development and Canada's response to climate change. These concerns are built into the legislative purposes and design which the Federal Courts are tasked with supervising. The challenge moving forward is how to develop a principled and coherent approach to enforcing these laws.

Conclusion

This chapter has examined the Federal Courts' environmental jurisprudence through the lens of environmental principles. Environmental principles have the dual strengths of drawing our attention to specific, enduring challenges inherent in environmental decision-making, and providing foci for illuminating the Courts' varied understandings of their role in environmental law. We have seen that environmental principles feature in Federal Courts' environmental jurisprudence, sometimes prominently and influentially. At the same time, the majority of decisions by the Federal Courts do not engage with these principles. Indeed, we saw that, on occasion, the Courts actively avoid this engagement by invoking the platitude that they are not academies of science.

Indeed, Federal Court judges are not scientists. They are judicial experts who use the tools of statutory interpretation and common law reasoning to resolve disputes about the exercise of public power over the environment. This chapter has sought to show that environmental principles are an important part of this legal tool box, which can refine, clarify and stabilize the legal obligations created across federal environmental law. Moreover, it has argued that courts cannot avoid the underlying environmental challenges and concerns highlighted by these principles when they exercise their reviewing function. Environmental principles allow for the development of a coherent, transparent and incremental approach to performing this essential rule-of-law task.