How Environmental Tribunals Contribute
To Important Advances in Environmental Laws

By

Marilyn Grace Lee

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Abstract

This article offers an analysis of how environmental tribunals contribute to important advances in environmental laws. The article compares the legislative and adjudicative administrative processes and examines decisions from environmental tribunals and courts in Canada. The author also reviews developments in environmental protection legislation since the 1970s. Consideration is also given to whether environmental laws are better framed on a model of comprehensive rationality or an incrementalist approach. The article concludes such tribunals make significant contributions to environmental laws by articulating emerging principles of environmental law. In doing so, the author examines the legislative underpinning and characteristics of tribunals which enable them to articulate such principles, namely that the statute express as its purpose protection of the environment. Also, the tribunal should have expertise in environmental matters, permit participation by third parties in the proceedings, be independent and be accountable through providing written reasons and the mechanism of judicial review.
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Marilyn G. Lee

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[Administrative bodies] have become a veritable fourth branch of the Government, which has deranged our three-branch-legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.¹

In his iconic article, *The Tragedy of the Commons*, Garrett Hardin described humans’ propensity to overuse the air, water and land comprising the natural environment. In Hardin’s opinion, “coercive laws” were required to curtail the effect of mankind’s activities on the environment.² How those coercive laws should be structured has been the enduring challenge facing society in modern times. Originally, activities which affected the environment were restricted through cases of private nuisance. In the 1970s, growing public concern over the environment gave rise to a wave of environmental legislation. Acts for the protection of the environment were passed, including the Environmental Protection Act of Ontario and the United States’ Environmental Protection Act. As well, during the latter half of the twentieth century, the modern administrative state evolved. Therefore, with the passage of such environmental protection legislation came the environmental departments of government and administrative agencies, including the Ontario Environmental Appeal Board, the Environmental Protection Agency in the United States and others.

In the 1990s, the impetus for environmental protection legislation stalled. Many legislative developments since then have been largely symbolic. For example, Ontario’s *Toughest Environmental Penalties Act, 2000*\(^3\) raised maximum fines for environmental offences, although actual enforcement of environmental laws has dropped dramatically since 1995.\(^4\) There has been much criticism of the state of environmental laws in Canada,\(^5\) including the professors of environmental law at Osgoode Hall Law School who recently referred to Canada as an “environmental laggard.”\(^6\) As well, although emerging principles of environmental law, such as the precautionary principle or the ecosystem principle, are referred to in some environmental or resource management statutes, they have yet to be incorporated in the bulk of environmental protection legislation in Canada. In summary, there have been few fundamental reforms to much of the environmental protection legislation in Canada and such legislation has accordingly failed to keep up with contemporary views on how environmental protection laws could best be structured.

In contrast, recent decisions from environmental tribunals in Canada have contained important developments in environmental laws. Many of these decisions have articulated important principles of environmental law which were not set out in the legislation under consideration. The thesis of this paper is that the administrative adjudicative process is often superior to the legislative process in formulating and applying innovative and significant developments in environmental laws. The reasons for this are

\(^3\) SO 2000, c 22.


\(^6\) Wood, Tanner & Richardson, supra note 5 at 1009.
twofold. First, there are institutional differences between an administrative tribunal and the legislature which make the tribunal better able to give effect to emerging principles of environmental law. The legislature is subject to influences from a range of different interests and actors, including environmental groups, business associations and industry. Moreover, the legislature must balance environmental, economic and social goals. Finally, elected representatives cannot avoid considering how their decisions will affect their future electoral fortunes. Secondly, an adjudicative tribunal is able to develop laws in a more dynamic and adaptive manner than laws created by statute. The legislature is often not able to respond quickly to emerging environmental issues due to the necessary time-lines involved in generating new legislation. Also, legislation is typically expressed in more general terms than decisions of adjudicative tribunals which arise from specific fact situations. Accordingly, administrative tribunals perform a critical function by “filling in the gaps” and thereby enhancing the provisions set out in the underlying legislation.

An analysis of why the administrative adjudicative process is better than the legislative process in this respect is an exercise of comparative institutional analysis. Such enquiry is inherently a comparison of two imperfect alternatives. Accordingly, in comparing the legislative process and the administrative adjudicative process, it is necessary to consider whether one institution, overall, does a better job at achieving a particular goal than another. The goal that is sought to be achieved through environmental protection legislation is the protection and preservation of the environment. Therefore, the question is not whether an environmental tribunal always issues decisions which are “correct” from an environmentalist’s standpoint or which are a complete solution to all potential environmental problems. The point is that, in many cases, the administrative tribunal is better than the legislature at articulating significant environmental law principles and therefore better in that respect at achieving the goal of environmental protection.

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The second part of my argument is that, in order for an environmental tribunal to be able to articulate and implement emerging principles of environmental laws, certain basic requirements must exist. These requirements are both extrinsic and intrinsic to the tribunal. The extrinsic requirement consists of the legislative framework creating the tribunal and the laws which it administers. First, such legislation must have as its purpose environmental protection. Also, the legislation must give the non-adjudicative decision-maker authority to issue approvals for activities with potential environmental effects or must empower such decision-maker to issue orders stating a party is not in compliance with environmental laws. The legislation must also provide that decisions of the decision-maker can be appealed to an environmental tribunal and that parties other than the permit-holder can apply for standing to participate in such appeals. Finally, the environmental tribunal needs to function as an independent tribunal, the members of which are selected on a merit basis. Because an environmental tribunal is a creature of statute, in order to be an effective source of environmental laws, the foregoing basic statutory framework needs to exist. An environmental tribunal must also possess certain intrinsic characteristics in order to be a meaningful source of environmental law principles. Firstly, the members of the tribunal must have expertise in environmental matters. Secondly, the tribunal must be independent from both the legislature, the non-adjudicative administrative branch of government, business interests and the public. Thirdly, the tribunal must be accountable by being obliged to provide written reasons and also through the application of judicial review. Finally, the tribunal needs to have input from all interested actors, the administrative branch of government, industry and the public. Such broad participation provides the tribunal with a fulsome body of information on which to make a decision.

It may seem the forgoing analysis is overly concerned with institutional structure rather than the substance of environmental laws. However, procedure and substance are
interrelated. Therefore, an examination of different institutions, such as the legislative and the administrative adjudicative processes, is integral to the question of “how a legal system can best give content to the law.” Procedural reforms can create structures which contribute to important advances in the law, such as when an environmental tribunal’s decisions give expression to emerging principles of environmental law. Therefore, developments in the laws which govern how environmental tribunals operate have been an important factor in advances in environmental laws.

Part 1 of this paper analyses sources of emerging principles of environmental law. Part 2 contains a comparison of the institutional differences between environmental tribunals and the legislature. Part 3 discusses why principles of environmental law are often better expressed through tribunal decisions than in statutes. This is sometimes referred to as a rules versus standards analysis or a comparison between an incrementalist and comprehensive rationality approaches. Part 4 will examine the extrinsic and intrinsic requirements which are necessary for an environmental tribunal to be able to express important principles of environmental law. Part 5 will examine recent decisions from tribunals which illustrate how they have contributed to significant advances in environmental laws. Part 6 will consider criticisms of my argument and possible responses to such criticisms.

1. Principles of Environmental Law

In recent years, several principles of environmental law have been identified. Sources of these principles of environmental law include statutes, case law, academic writing and ministerial statements and policies. Statutory references to

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principles of environmental law are discussed in the next part. To the extent that principles of environmental law are not expressed in legislation, they are referred to in this paper as emerging principles of environmental law.

Two principles which are mentioned frequently and which are relevant for the purposes of this paper are the precautionary principle and the eco-system or cumulative effects principle. The precautionary principle states that lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. The principle was applied by the Supreme Court of Canada in *Canada Ltée (Spray-Tech, Société d’arrosage) v. Hudson (Ville) (Spraytech)* when it upheld a municipal by-law which restricted the use of pesticides. Writing for the majority, L’Heureux-Dubé J. stated “Scholars have documented the precautionary principle’s inclusion ‘in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment’” [11]. This case illustrates how a principle originally expressed in international treaties and then referred to in academic writings can subsequently be given effect by the courts. Although the principle is viewed as having its origin in various international declarations, it is significant that the principle was applied by the Supreme Court to uphold a municipal by-law enacted pursuant to a provincial statute. The case also indicates the court’s willingness to apply a principle arising both in international law and academic writings as part of domestic law in Canada, notwithstanding that the principle was not referred to in the statute under consideration.

Principles of environmental law can also be found in the Statements of Environmental Values (SEVs) issued by various provincial ministries pursuant to the Ontario

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Environmental Bill of Rights, 1993 (the EBR).\textsuperscript{12} For example, the SEV issued by the Ontario Ministry of the Environment refers to the eco-system principle.\textsuperscript{13} This principle stands for the proposition that effective environmental decision-making requires authorities to consider the effect of an action on the environment as a whole. For example, in assessing whether the emission of a contaminant is allowable, it is not sufficient simply to ascertain whether the levels of contaminant being released are in compliance with environmental regulations. It is also necessary to determine the cumulative effects which the release of such contaminant will have on the ecosystem in its entirety.\textsuperscript{14} This principle was applied by the Ontario Environmental Review Tribunal (the ERT) in two recent cases, Dillon v Ontario (Director, Minister of the Environment)\textsuperscript{15} and Dawber v Director Ministry of the Environment (“Dawber”) (subsequently considered by the Divisional Court under the name Lafarge Canada v Ontario Environmental Review Tribunal “Lafarge”).\textsuperscript{16} In both cases the ERT referred to the Ministry of the Environment’s SEV in applying the eco-system principle. The ERT’s reference to the SEV was subsequently approved by the Divisional Court in Lafarge. Lederman and Swinton JJ., speaking for the Divisional Court, stated:

Upon a consideration of ss. 7 and 11 of the EBR, it is arguable and, therefore, reasonable for the Tribunal to have regarded the SEV as relevant policy which should guide the decisions of the Directors.

... We conclude that the Tribunal was reasonable in finding that leave should be granted because of the failure to apply the SEV. The Tribunal concluded that the SEV falls within “government policies developed to guide decisions of that kind”, which was consistent with past jurisprudence of the Tribunal on SEVs—see for example [Dillon].\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{12} SO 1993 c 28.
\item \textsuperscript{13} Ontario Ministry of the Environment, “Statement of Environmental Values”, online: Ontario Environmental Registry <http://www.ebr.gov.on.ca>
\item \textsuperscript{14} DeMarco, supra note 9 at 68-69.
\item \textsuperscript{15} 45 CELR (NS) 9, 202 CarswellOnt 948.
\item \textsuperscript{16} Dawber, [2007] OERTD No. 25, 28 CELR (3d) 281; Lafarge, Canada Inc. v Ontario (Environmental Review Tribunal) [2008] O.J. No. 2460; 36 CELR (3d) 191 (leave to appeal refused see note 18).
\item \textsuperscript{17} At paras 56 and 57.
\end{itemize}
The Ontario Court of Appeal denied Lafarge’s application for leave to appeal the Divisional Court’s ruling, without written reasons.\(^{18}\) It is also worth noting that, in both *Dillon* and *Lafarge*, the eco-system principle was not referred to in the statutes under consideration, the *Ontario Water Resources Act* and the *Environmental Protection Act*, respectively.

Ministerial policies can also constitute an important source of principles of environmental law. In a recent decision, *City of Kawartha Lakes v Director, Ministry of the Environment*\(^{19}\), the Ontario ERT overturned a previous decision of the Ontario Environmental Appeal Board.\(^{20}\) In the previous decision, the Environmental Appeal Board had held that a party named in a clean-up order under the *EPA* could argue it should not be so named if certain fairness factors were established, essentially that it was an innocent party which had not contributed to the contamination which was the subject matter of the order. In the *Kawartha Lakes* decision, the ERT noted the previous decision had been rendered when there was an absence of legislative or policy guidance on how provincial officers were to exercise their discretion under the act. The ERT stated, since that decision, the Ministry of the Environment had filled that vacuum by publishing a Compliance Policy... the stated purpose of which is to provide guidance to Ministry staff.\(^{21}\) The compliance policy specified that fault was not a factor to be considered by the statutory decision maker in deciding whether to name a party in a clean-up order under the act. *Kawartha Lakes* was appealed to the Divisional Court, which upheld the ERT’s decision and agreed that the Ministry’s compliance policy could properly be considered by the ERT.\(^{22}\)

The foregoing cases illustrate the different sources of principles of environmental law in addition to environmental or resource management statutes. Accordingly,

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\(^{18}\) M36552 (November 26, 2008).

\(^{19}\) (2010), 52 CELR (3d) 273; aff’d 2012 ONSC 2708, [2012] O.J. No. 2378 (*Kawartha Lakes*).


\(^{21}\) Supra note 19 at para 66.

\(^{22}\) Supra note 19 at para 69.
articles by academics and environmental writers can form the basis for emerging principles of environmental law, as can policies and statements issued by various ministries.

2. **Comparison of Institutions**

Before comparing the institutional characteristics of the legislative process and the administrative process, it is worthwhile examining the assertion that there has been little substantive reform to much of the environmental protection legislation in Canada. In particular, most environmental protection statutes have not been amended to incorporate emerging principles of environmental law such as the precautionary or eco-system principles. For example, Ontario’s *Environmental Protection Act*\(^{23}\) (the EPA), the bedrock of Ontario’s environmental protection legislation, makes no reference to principles of environmental law. Section 3(1) of the *EPA* has remained unchanged since its enactment in 1975, stating, “The purpose of this Act is to provide for the protection and conservation of the natural environment.” As well, the *Ontario Water Resources Act*\(^{24}\) does not refer to either the precautionary or eco-system principles. British Columbia’s *Environmental Management Act* makes no mention of environmental principles.\(^{25}\) The Ontario *Environmental Assessment Act* states only that its purpose is the betterment of the people of Ontario by providing for the “protection, conservation and wise management” of the environment.\(^{26}\) This is not to say there have been no advances in environmental protection legislation in Canada, or that there are no legislative expressions of principles of environmental law. A number of statutes, including the *OWRA*, make reference to the concept of sustainability, either in their preamble or in their operative sections.\(^ {27}\) Alberta’s *Water Act* refers to the need to manage water resources to ensure

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\(^{24}\) RSO 1990, c O-40.
\(^{25}\) SBC 2003, c 53.
\(^{26}\) RSO c 1990, c E-18, S. 2.
\(^{27}\) S. 0.1 of the *OWRA* refers to the “sustainable use” of Ontario’s water resources; the *Canadian Environmental Protection Act*, SC 1999 c 33, the *Canadian Environmental Assessment Act*, 2012, SC 2012, c19 s 52 and the *Alberta Environmental Protection and Enhancement Act*, RSA 2000, c E-12 all refer to
a high quality of life “in the present and future.”28 The federal Species at Risk Act29, the Canadian Environmental Assessment Act, 201230 and the Canadian Environmental Protection Act, 199931 are some of the few statutes which refer to the precautionary principle. However, in general, emerging principles of environmental law have received little, if any, recognition in the various environmental protection statutes. This is particularly true for provincial legislation, which is significant because the provinces have extensive jurisdiction in the area of environmental protection. The Ontario EBR, enacted in 1993, is largely procedural. Although the preamble states: “The People of Ontario have the right to a healthful environment”, it does not guarantee fundamental environmental rights. Accordingly, there have been few substantive reforms to many environmental protection statutes since their initial enactment.

There are major institutional differences between a legislature and an administrative tribunal, which explain in part why environmental protection statutes have not been amended to incorporate emerging principles of environmental law. Legislatures are made up of elected officials who are subject to a variety of influences. The legislative process has been described as a “largely unstructured process of pulling and hauling by individuals directly accountable to the citizenry.”32 Because of the competing influences on the legislature, it can be difficult for its members to reach agreement on statutory provisions. The legislature can also be subject to either majoritarian or minoritarian bias.33 Minoritarian bias means the over-representation of a concentrated few, such as when a small group has significant influence over the political process, stemming from an interest group or lobbying efforts. This can also occur when the majority has diffuse and unexpressed interests. As well, there can be majoritarian bias,

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28 S.2, RSA 2000, c W-3 (S. 2).
29 SC 2002, c 29 (preamble).
30 SC 2012, c 19 (s 52).
31 SC 1999, c 33.
33 Komesar, supra note 7 at 54.
the domination of the many over the interests of a few, which can skew the political process. Finally, although the legislature is accountable to the populous through a general election, in an election, any number of issues, in addition to environment considerations, can affect the electorate’s decision.

The foregoing observations are illustrated by comparing the creation of the Ontario EBR with ongoing efforts to enact a Canadian Environmental Bill of Rights. A Background Paper prepared by the Library of Parliament in 1991 states environmentalists have been seeking a federal environmental bill of rights since the early 1970s. Nonetheless, Canada has not realized a Canadian Environmental Bill of Rights in the forty years which have passed since the 1970s or in the twenty years since the writing of the Background Paper. This is the case even though environmentalists have been persistent in their quest and environmental issues have long been of concern to Canadians. The first attempt to enact a federal environmental bill of rights consisted of a private members bill tabled in the House of Commons in 1981. Moreover, although environmentalists pressed to have the right to a healthy environment included in the Canadian Charter of Rights and Freedoms this did not come to pass, possibly because of other issues which had to be resolved in the passage of the charter. Subsequently, in October 2009, during a minority parliament, a proposed Canadian Environmental Bill of Rights was again introduced as a private member’s bill. The bill was reinstated in the 2010 session and received second reading and was sent to committee. The current status of the bill is that the

37 Background Paper, supra note 34 at 14, citing House of Commons, Hansard, 9 July 1981, 11385
38 Background Paper, supra note 34 at 15.
committee has recommended an extension of time to study it.\textsuperscript{40} However, the Conservative party’s success in attaining a parliamentary majority in the federal election in May, 2011 will likely put the proposed bill on hold indefinitely, particularly in light of recent federal actions concerning the environment, such as the latest amendments under the \textit{Fisheries Act}.\textsuperscript{41}

It is instructive to compare the federal experience with the evolution and passage of the Ontario \textit{EBR}. When the NDP formed the government of Ontario in 1990, Ruth Grier as Minister of the Environment tabled a proposed environmental bill of rights and established a task force to bring the bill to fruition. The task force consisted of a large group of stakeholders, including environmentalists and business members. There were reportedly significant disagreements among the members of the task force on the form the bill should take.\textsuperscript{42} However, the Ministry of the Attorney General had recently succeeded at getting class action legislation passed, with the support of a multi-stakeholder group. Upon advice from the Attorney General’s department, Minister Grier withdrew her original environmental bill of rights and struck a new, smaller task force which was charged with achieving stakeholder agreement on a proposed environmental bill of rights.\textsuperscript{43} The new task force was comprised of representatives from government, business interests and environmental groups\textsuperscript{44} and submitted its report with proposed legislation attached on June 22, 1993.\textsuperscript{45} The history of the enactment of the Ontario \textit{EBR} is striking in two respects. Firstly, it exists. This is in contrast to the federal Environmental Bill of Rights which has still not come to pass and to the situation in most provinces, which also

\textsuperscript{40} Ibid.
\textsuperscript{41} Infra, note 53.
\textsuperscript{42} Michael Cochrane, Co-Chair of Task Force on the Ontario Environmental Bill of Rights, Interview by the author, August 3, 2012.
\textsuperscript{43} Ibid.
\textsuperscript{44} The members were Robert Anderson, Business Council on National Issues, Richard Lindgren, Canadian Environmental Law Association, Andrew Roman, George Howse, Canadian Manufacturers’ Association, John Macnamara, Ontario Chamber of Commerce, Paul Muldoon, Pollution Probe and Sally Martin, Ministry of the Environment. The names of these individuals are listed on the signature page of the report of the Task Force on the Ontario Environmental Bill of Rights, submitted to the Honourable Ruth Grier, Minster of the Environment, June 22, 1992.
\textsuperscript{45} Ibid.
do not have environmental bills of rights. Secondly, it is arguable it exists only because a compromise was reached between a range of stakeholders. For example, with respect to the third party leave to appeal test contained in Section 41 of the Act, Michael Cochrane, co-chair of the task-force, comments it was a “hard fought section” consisting of “brokered wording . . . which satisfied all the parties at the table.” These accounts of the efforts to enact the two environment bills of rights exemplify the difficulties embodied in the legislative process. The legislature, because of the range of constituencies to which it must answer, may be slow to act or may not act at all. As well, when the legislature does act, the product will often be a compromise, such as the Section 41 wording. In contrast, decisions of an administrative tribunal do not have to depend on a brokered compromise being struck between competing interests.

Legislatures can also be especially susceptible to economic issues. The recent loss of legislative appetite for improving environmental laws is sometimes attributed to the “economic cost of reform, which eventually would result in major policy shifts and retreats.” The legislature must consider and balance a number of factors, including environmental, social and economic goals. The importance the legislature attributes to economic matters is evident in many recent statutes. Although economic considerations were not referred to in the environmental protection statutes enacted in the halcyon days of the 1970s, economic concerns came to the forefront in the 1990s. Therefore, although emerging principles of environmental law have received little legislative expression, many statutes now reflect economic considerations. Accordingly, the OWRA refers to the need to conserve, protect and manage water resources in order to promote “Ontario’s long-term environmental, social and economic

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46 The Quebec Environmental Quality Act has been referred to as a ‘partial environmental bill of rights’ see Background Paper, supra note 34 at 11. The only other jurisdictions in Canada having environmental bills of rights are the Northwest Territories and the Yukon, see Wood, supra note 2 at 1001.
47 Discussed in detail, infra note 162.
48 Interview with Michael Cochrane, supra note 43.
49 Wood, Tanner & Richardson, supra note 5 at 1000.
50 Jamie Benidickson, Environmental Law in Canada (Frederick, MD, Kluwer Law International, 2011) at 46 and Wood, Tanner and Richardson, supra note 5 at 1000.
well-being.”\textsuperscript{51} In the Alberta statutes, the tribunals are charged with determining whether a project is in the “public interest” having regard to the “social and economic effects of the project and the effects of the project on the environment.”\textsuperscript{52}

The importance of economic considerations underlies recent government actions which have come under criticism by environmentalists. For example, the federal Conservative government has been criticized for amendments to the \textit{Fisheries Act} which “will undermine a stable, predictable regulatory regime, one that for more than 35 years balanced economic and environmental objectives and was based on sound science.”\textsuperscript{53} These changes were contained in an omnibus budget bill on the “advice of its industry-dominated Major Projects Management Office.”\textsuperscript{54} It has also been asserted the Ontario Liberals recently “buried several proposed changes in their new budget bill that strike at the heart of Ontario’s Endangered Species Act.”\textsuperscript{55} Accordingly, although the legislature can act very slowly or not at all, as is the case with the proposed federal environmental bill of rights, it can also act very quickly when it wishes to implement perceived legislative priorities, such as economic concerns.

The enactment of the \textit{Green Energy and Green Economy Act}\textsuperscript{56} by the government of Ontario in 2009 is another example of the legislature balancing economic considerations with environmental ones. The Act, which contained provisions to stimulate the economy through encouraging wind and solar power projects, was completed in roughly five years.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{51} S. 0.1.
\item \textsuperscript{52} \textit{Energy Resources Conservation Act} RSA 2000, c E-10 (S. 3), \textit{Natural Resources Conservation Board Act} RSA 2000, c N-3 (S. 2).
\item \textsuperscript{53} Douglas MacDonald, David Microbert and Miriam Diamond, “How Ottawa Fumbled the Fisheries File” \textit{The Globe and Mail} (6 July 2012), online: The Globe and Mail <www.theglobeandmail.com>
\item \textsuperscript{54} Ibid.
\item \textsuperscript{55} Kelly McParland, “Ontario Accused of Mimicking Ottawa in Hiding Environmental Changes in Omnibus Budget Bill” \textit{National Post} (May 10, 2012), online: National Post <http://fullcomment.nationalpost.com>
\item \textsuperscript{56} SO 2009, c 12.
\end{itemize}
\end{footnotesize}
months from the time it was first publically announced to when it was enacted. The economic ambitions of the Act are evident in statements by the Minister of Energy, to the effect that the Act promoted “the creation of clean energy jobs” and that the energy sector is “one of the engines that drives our provincial economy.” Despite support from many environmentalists, the act has evoked intense objections from other environmental groups and has been the subject of challenges before the ERT and the courts. Significantly, the Green Energy and Economy Act amended the EPA with respect to appeals relating to renewable energy installations. The general provisions of the EPA provide expansive guidelines on when an environmental approval should be issued, generally, when an “adverse effect” ensues. “Adverse effect” is expansively defined in the EPA to include “harm or material discomfort to any person”, “loss of enjoyment of normal use of property” or “injury or damage to property or to plant or animal life.” In comparison, the EPA as amended by the Green Energy and Economy Act, provides that a renewable energy approval will be refused only if it results in “serious harm to human health” or “serious and irreversible harm to plant life, animal life or the natural environment.” This is not a comment on the desirability or undesirability of renewable energy

57 By directive dated September 17, 2008 the Ontario Ministry of Energy (ME) required the Ontario Power Authority to review “the amount and diversity of renewable energy sources in the supply mix and how transmission capacity in northern Ontario and other parts of the province could be improved.” The ME requested a revised Integrated Power System Plan be available within six months, i.e. by the end of March, 2009. However roughly five months later, in February, 2009, the ME tabled Bill 150, the proposed Green Energy and Green Economy Act, 2009 in the Legislature. Ontario, Ministry of Energy and Infrastructure, Letter to Mr. Colin Anderson, Chief Executive Officer, Ontario Power Authority (September 17, 2008), online: Ontario Power Authority: <http://www.powerauthority.on.ca>
61 Erickson v Director, Ministry of the Environment, [2011] OERTD No. 29, 61 CELR 1 with respect to the third party appeal provisions under S. 142.1 of the EPA and Hanna v Ontario (Attorney General), 2011 ONSC 609, 105 OR (3d) 111 with respect to Regulation 359/09 prescribing minimum setback requirements for wind energy facilities.
62 EPA, Clause 9(4)(b).
63 EPA, Subs. 1(1).
64 EPA, S. 145.3(1).
projects. This is simply intended to illustrate how the legislative process can be skewed by a majoritarian bias. When it was perceived by the political process that renewable energy projects were to be encouraged for both environmental and economic reasons, the general sections of the *EPA* were amended so that a more rigorous standard applied to the potential effects on human health and welfare arising from renewable energy installations, as opposed to such effects from any other type of installation. Clearly, the different treatment accorded to effects arising from renewable energy installations involved a balancing by the legislature of the perceived economic benefits arising from renewable energy installations against the potential environmental harm arising from such installations. This is evident from the name of the Act itself, the *Green Energy and Economy Act* (emphasis added).

A cynical view would therefore caution environmentalists when requesting further legislative reform. For example, one commentator has noted that the “public interest” mandates contained in Alberta’s Energy *Resources Conservation Act* and *Natural Resources Conservation Board Act* provide limited guidance to environmental boards making decisions about natural resource development. In that commentator’s view, the public interest has become dominated by economic considerations, particularly in relation to the ERCB. She suggests the answer is for the legislature to give greater guidance to the boards on what constitutes the public interest by specifying “the objectives, values and guidance on trade-offs that must be considered in the boards’ public interest mandate.” Nonetheless, she notes,

> The difficulty in considering the public interest has been exacerbated by Alberta’s economic boom . . . The pace and scale of development has also led to the difficult problem of managing cumulative effects, the phenomena which is sometimes called ‘death by a thousand cuts.’ All of these factors in Alberta have in turn, heightened the number and intensity of viewpoints that come before the ERCB and NRCB.

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66 Supra note 65 at 295.
67 Supra note 65 at 281.
However, it must be remembered that the legislature could decide not to adopt the principle of cumulative effects, having regard to economic considerations. Accordingly, given the range of influences on the legislature and the diverse goals it seeks to achieve, particularly economic ones, a request for more legislative involvement might not have the desired result, depending on the viewpoint of the party requesting the change.

The legislature can also be very susceptible to partisan influences. An example from the energy field exhibits minoritarian bias. The Ontario Power Authority, the statutory entity responsible for energy planning in Ontario, had recommended that a gas fired electrical plant be constructed near the greater Toronto area, partly to provide a more efficient supply of electrical power and partly to replace power generated by coal fired electrical stations.68 However, the provincial government, in the middle of a closely fought election campaign, cancelled the plant although all planning and environmental approvals had been obtained and construction had started. The decision to cease construction of the plant gave rise to allegations by the other political parties that the Liberals had cancelled the gas plant “solely to save government seats in the election and not because of power needs or energy policy.”69

Government actions which followed the ERT’s decision in Dillon70 also illustrate how elected officials, acting in their executive capacity, can be highly susceptible to the influence of a narrow interest group. In that case, the Director had granted a permit to OMYA (Canada) Inc. to take water from the Tay River for the purpose of manufacturing slurry to be used for industrial purposes. Citizens’ groups appealed the Director’s decision. The ERT, having regard

68 The Integrated Power System Plan issued by the Ontario Power Authority had recommended “new gas generation be sited close to load so that transmission losses are reduced” and that gas-fired generation facilities be installed in the areas of Northern York Region, Kitchener-Waterloo and the Greater Toronto Area by 2014. Exhibit E Tab 2 Schedule 1 page 7 of 22 and Exhibit B Tab 1 Schedule 1 Page 2 of 34.


70 Supra note 15.
to the eco-system and precautionary principles, allowed the permit, but for a reduced quantity. The ERT’s decision was reversed by the Ontario Minister of the Environment. The Ottawa Citizen reported the government had “overruled the province’s Environmental Review Tribunal and bypassed the courts.”\textsuperscript{71} The Citizen stated further that the company had “threatened to warn international investors against doing business in Ontario.”\textsuperscript{72} This decision illustrates how the political process may be more easily influenced by a particular interest group than an environmental tribunal would be.

In comparison to the legislature, an administrative tribunal is not subject to a range of interest groups attempting to influence its decisions. Moreover, an administrative tribunal does not have to balance social, economic and environmental goals as does a legislature (except to the extent it is obliged to do so by its governing statute), nor is an administrative tribunal subject to minoritarian or majoritarian bias. That said, an administrative tribunal is a creature of statute and will be governed by the directions imposed on it by the legislature in its governing legislation. Nonetheless, for the purposes of my argument, it is sufficient at this point to define an administrative tribunal by what it is not. In other words, it is not subject to a range of influences or constituencies as is a legislature, nor is it required to achieve a compromise among stakeholders or concern itself with re-election.

3. Filling the Gaps—Comprehensive Rationality and Rules vs. Standards

In addition to an institutional comparison of the legislative and administrative processes, it is important as well to consider how the type of laws promulgated by a legislature differs from that developed by a tribunal. The difference can be analyzed in terms of two paradigms, one which looks at the differences between rules and standards and one which

\textsuperscript{71} Dave Rogers & Kevin Ritchie, “OMYA Gets Approval to Triple Tay River Water Taking” \textit{The Ottawa Citizen} (15 February 2003), online: The Ottawa Citizen, <www.vce.orgéapproval.html>

\textsuperscript{72} Ibid.
compares a “comprehensive rationality” approach with an incrementalist approach to lawmaking. The comprehensive rationality approach involves the legislator specifying the goals he wishes to attain, identifying the methods for attaining such goal and selecting the alternative which will best achieve that goal.\textsuperscript{73} The approach has been described as “structural, static [and] prophylactic.”\textsuperscript{74} Because laws developed pursuant to this approach must clearly set out a goal, the values involved “cannot change too much over time, because the controls must be set today for destinations that will be reached only by tomorrow.”\textsuperscript{75} In comparison, an incrementalist approach involves policymaking which is restricted in scope to a consideration of the situation at hand. The process is dynamic and remedial, based on a series of small adjustments.\textsuperscript{76} Finally, incrementalism is decentralized: “Policy is made by many actors at many levels of government and indeed in the society at large.”\textsuperscript{77} The incrementalist model is has also been described as the “expert model” which leaves regulatory officials to adapt decisions to “varied and changing situations on the basis of their accumulating knowledge, making intuitive judgments as to what result will maximize the public interest.”\textsuperscript{78} In other words, incrementalism embodies a flexible approach having regard to changing circumstances and evolving goals, whereas comprehensive rationality involves explicit goal setting and a determination of acceptable alternatives at the outset.

The advantage of a comprehensive rationality approach is that goals and the method by which they are to be achieved can be openly discussed and identified. The legislature is suited to this type of endeavour. The legislature has the benefit of participation from a wide

\textsuperscript{73} Diver, supra note 32 at 396.
\textsuperscript{74} Ibid at 395.
\textsuperscript{75} Ibid at 398.
\textsuperscript{76} However, the incrementalist approach has also been described as “a belief by pluralists that regulators should react only to interest groups that find the status quo sufficiently intolerable to incur the costs of complaining, and regulators should change policy only as much as is needed to quell these complaints.”: Mark Seidenfeld, “A Civic Republican Justification for the Bureaucratic State” (1991-1992) 105 Harv LR 1511 at 1521. An early description of the model can be found in Charles E. Lindblom, “The Science of Muddling Through”, (1959) 19 Pub.Admin.R.79.
\textsuperscript{77} Diver, supra note 32 at 406.
range of interest groups together with a deliberative decision making mechanism which is open and accountable through elections. The legislature also makes decisions as a result of open debate and under media and public scrutiny. Laws developed in this manner can be set out in statutes and regulations and are therefore clear and unambiguous, at least in relation to laws developed through tribunals’ decisions. However, legislation also tends to be expressed in general terms. One reason is that:

[L]legislators never have complete information about the future. They cannot possibly know all the different ways in which optometrists may act unprofessionally, or all the different pollutants that may be released in to the atmosphere, or the different types of securities that may be developed. Legislation is therefore necessarily and unavoidably incomplete.\(^79\)

Accordingly, legislation has been called “an exceedingly blunt instrument for regulating the policymaking process.”\(^80\) Laws developed by the legislature must be broadly drafted to apply to a range of situations. As well, such laws are time-consuming to change and indeed it may be difficult to do so, such as when there is legislative disagreement on how they should be amended or because of changes in government. Therefore, it can be difficult to formulate changes in laws adopted on the basis of a comprehensive rationality approach.

The advantage of an incrementalist approach is that it is reactive to the problems at hand and can incorporate changing information and evolving ideas. This approach is characterized by laws developed through adjudication,\(^81\) as is often the case with decisions by courts or administrative tribunals. An adjudicator is able to consider problems in a more concrete way than a legislature. Decisions by a court or tribunal can fill in the gaps in legislation and build on the basic legislative provisions. A tribunal is therefore able to articulate laws in a dynamic and adaptive manner in response to the problems at hand. Because legislation can be


\(^80\) Diver, supra note 32 at 433.

\(^81\) Diver, supra note 32 at 403.
difficult and time-consuming to amend, delegating decision-making to an administrator allows laws to be developed as new information arises and new principles evolve. The tribunal is also able to respond in a timely way when a case comes before it. The legislature may not be able to deal with such situation expeditiously, as other priorities may have the attention of the elected representatives. A tribunal can make a decision which relates to the fact situation which has arisen. Legislatures cannot generally enact legislation arising from a specific fact situation, as legislation is almost never retroactive. Finally, the speed and frequency at which legislation is amended may depend in part on the subject matter of the legislation. It is the norm to submit federal and provincial budgets yearly to the legislature, resulting in frequent updates to taxing statutes to reflect changing economic conditions. However, such regular amendment is not the norm with respect to other statutes and changes to environmental protection legislation clearly occur on a much less frequent basis. Therefore, there is a good argument that many developments in environmental laws are better achieved through an incrementalist approach.

The two approaches are informative in comparing environmental laws developed by the legislative and the administrative processes. For example, the Ontario Ministry of the Environment was able to articulate the ecosystem principle in its Statement of Environmental Values and the ERT was able to apply that principle in the Dillon and Lafarge cases. This is to be compared with the failure to give expression to the ecosystem principle in statutes such as the Ontario EPA, the Ontario Water Resources Act, the Alberta Energy Resources Conservation Act and the Alberta Natural Resources Conservation Board Act. Of course, it is an open question whether such failure is a result of the legislative agenda being engaged with other matters, whether it is due to legislative reluctance to deal with the issue or possibly a deliberate choice by the legislature not to include the principle in environmental protection statutes. The

82 Green, supra note 79 at 340.
83 Of course; “It is nearly always artificial to attribute a single goal to a group of legislators who cast votes with divergent objectives and degrees of awareness.”: Timothy H. Jones, “Administrative Law, Regulation and Legitimacy” (1989) 15 JL & Soc’y 410 at 413.
benefit of the incrementalist approach can also be seen in adjudicative proceedings. As well, the court was better able than the legislature to express the precautionary principle in the *Spraytech* decision. These cases are evidence that many developments in environmental laws will be better achieved through an incrementalist approach to lawmaking.

The *Green Energy and Economy Act* is an example of a law developed on a comprehensive rationality approach. The law identified a narrow goal, which was to facilitate the rapid development of a renewable energy industry in Ontario. By creating an expedited approvals process for renewable energy projects and limiting the challenges to these projects which could be brought, it adopted an inflexible approach which was subject to minimal input from groups opposed to renewable energy installations. Whether the mechanism of the *Green Energy and Economy Act* was warranted is a matter for open and public debate, as is any such statutory program adopted by the legislature. What is important for the purposes of this paper is to note how a law which is narrowly framed can have disadvantages in terms of a loss of flexibility and a lack of susceptibility to evaluation based on evidence which emerges after the law is passed.\(^8\ underway\) Accordingly, laws expressed in broad terms, such as the *EPA*, are generally better able to adapt to evolving approaches to environmental laws, as opposed to laws with a narrow scope, such as the *Green Energy and Economy Act*.

Laws can also be analyzed on the basis of whether they are better formulated as rules or standards. The difference between rules and standards has been expressed as a distinction between the extent to which efforts to give content to the law are undertaken before or after individuals act.\(^9\) The difference is therefore based on whether the content of a legal command is articulated in advance, hence a “rule” or left to the enforcement authority to specify, hence a “standard.” Rules and standards can be examined from the point of view of the

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\(^8\) Such evidence was submitted to the ERT in the *Erickson* and *Hanna* cases, supra note 61.

\(^9\) Kaplow, supra note 8 at 560.
institution promulgating the law or from the point of view of the persons whose actions are intended to be regulated by the law. From the institutional point of view, rules require greater expenditure of effort from the party promulgating the law. Standards require less effort from the rulemaker but more input from the decision-maker when it applies the standard. Therefore, rules can be more difficult to achieve in the legislative context because of the numbers of decisionmakers involved. Moreover, standards have the advantage of allowing a decisionmaker, such as a tribunal, to examine the concrete facts of a particular case. These considerations would favour general matters of environmental protection being expressed as standards but narrower issues such as principles of environmental law being left to the administrative branch of government.

There are however advantages to rules. Although rules require greater expenditure of effort when they are created, rules generally allow individuals to determine the potential effects of the law on their contemplated acts at less cost. Therefore, individual conduct is more likely to reflect the content of previously promulgated rules than of standards which are given content only after individuals act. Hence, it sometimes argued that environmental laws should be expressed as rules in order to give rise to more predictability in the application of laws. However, such predictability can also be achieved by other means. One way is through the creation of precedents by publishing decisions which interpret a standard. It is also possible that parties whose actions are sought to be controlled will expend effort to inform themselves on the content of the laws, thereby making standards as effective as rules in this regard.

86 Kaplow, supra note 8 at 608.
87 Ibid at 610.
88 Ibid at 563 and 564.
89 See e.g. Guy L. F. Holburn, “Creating a Stable Policy Environment” Richard Ivey School of Business, Smart Governance Conference (12 April, 2012), online: Richard Ivey School of Business <www.thinkingpower.ca>
However, it should also be noted business leaders often express a preference for generally worded “standards” which permit them to assess the best means to achieve compliance with such laws: see e.g. Tara Radin, “Stakeholders and Sustainability: An Argument for Responsible Corporate Decision-Making” (2006-2007) 31 Wm. & Mary Envtl. L & Pol’y Rev. 363 at 369.
90 Ibid at 577.
Therefore, to the extent that decisions of an environmental tribunal are published and to the extent parties seek to educate themselves on laws promulgated by administrative bodies, environmental legislation initially expressed as a standard can have the same degree of predictability as laws which are expressed as rules. In the environmental area, principles expressed in legal cases are widely disseminated. A number of environmental organizations publish developments in environmental law. The Dillon and Lafarge cases were the result of active community associations and citizens’ groups who were well informed about environmental law issues. An active legal community distributes information on developments in environmental law. Moreover, ministerial policies and SEVs are available online from the relevant ministries. Finally, the Environmental Registry, an online resource published by the Ministry of the Environment pursuant to the EBR, contains information with respect to proposed regulatory changes, applications under various statutes such as the EPA and the Ontario Water Resources Act and the SEVs of various ministries. Accordingly, it is not that clear materially higher effort is required to comply with environmental laws which are initially expressed as “standards”, in the sense that they arise from generally worded statutes and become “rules” through decisions of environmental tribunals. Moreover, the importance of environmental laws being responsive to developing issues and emergent concepts, and consequently being expressed in part through administrative adjudicative decisions, ministerial policies and statements of environmental values, outweighs the concerns that “rules” are more easily followed by the relevant actors than “standards.”


[92] E.g. a Google search under the phrase “environment fairness defence” produces numerous “hits”, including pieces relating to the ERT Kawartha Lakes decision prepared by a number of law firms and appearing on the first page.
4. **Important Characteristics of an Environmental Tribunal**

   a) *Legislative Underpinnings*

   Certain legislative provisions need to exist in order to facilitate an environmental tribunal’s ability to shape advances in environmental laws. Because an administrative body is required to execute the objectives of its governing statute, it is important first of all that the statute contain a clear statement of purpose which includes protection of the environment. This is the case with most environmental statutes today. The Ontario ERT recently commented on the purposive nature of environmental statutes:

   ... The Tribunal’s course of action should also be informed by the purposes of environmental legislation such as the EPA. ... statutory decision-makers, including the tribunal itself, have an authority and a “duty to choose the best course of action, from the standpoint of the public interest, in order to achieve the objectives of the environmental protection legislation” (*Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624 at para 38.

   Accordingly, it is important the statute include as its purpose the protection of the environment, because an environmental tribunal is both required and empowered to give expression to environmental principles which will further the purpose of the statute under consideration.

   The dual structure which exists in many administrative departments is also important. The administrative branch of government generally has a permitting and rulemaking function on the one hand and an adjudicative function on the other. In Canada, the permitting and rulemaking functions are performed by the federal or provincial Ministries of the Environment. The adjudicative function is performed by administrative tribunals. Most proceedings before these tribunals will involve the appeal of a decision that was made by the government decision-maker performing its permitting function. The three main environmental tribunals in Canada are the Ontario ERT, the Alberta Environmental Appeals Board and the

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93 See for example *ERT S. 3(1)*, supra note 18.
British Columbia Environmental Appeal Board. These tribunals hear the majority of appeals under provincial environmental laws in Canada, being those tribunals which have appellate jurisdiction.\textsuperscript{95} Discussion of specific cases and legislation in this paper is therefore limited to those arising in these jurisdictions.

It is also important that third parties be given the ability to appeal consents issued to parties under environmental statutes. Most environmental statutes prohibit actions which will adversely affect the environment, such as the release of a contaminant above a certain limit or the usage of water in certain quantities, unless such action is permitted pursuant to a consent issued by the permit granting authority. Recently, third parties have also been able to apply for standing to appeal the issuance of such consents.\textsuperscript{96} Historically, the public could make submissions relating to projects having government involvement, pursuant to the environmental assessment process.\textsuperscript{97} However, the ability of members of the public to participate in decisions concerning consents issued to private entities has greatly expanded the ability of environmental tribunals to address environmental issues. Although the orders are addressed to the participants in the adjudication, they have precedential effect on similarly situated parties.\textsuperscript{98} Therefore, the ability of third parties to appeal consents issued by the permit granting authority is also an important feature of the underlying legislation.

In summary, the legislative basis necessary for an environmental tribunal to formulate important principles of environmental law consists firstly of a strong purposive statement in the applicable statute directed to the protection of the environment. This must be


\textsuperscript{96} DeMarco and Muldoon, supra note 95 at 41 and 45.


supplemented by legislation which establishes the tribunal as an independent body with adjudicative powers and which gives third parties the right to challenge the decisions of the non-adjudicative branch of the government.

b) **Expertise**

One of the most critical attributes enabling an environmental tribunal to contribute to important developments in environmental laws is its expertise. Indeed, “a primary reason the legislature delegates decisions to administrative bodies is *expertise*. . .”99 Expertise is also a reason courts defer to the decisions of an administrative tribunal. This principle was recently reaffirmed by the Supreme Court of Canada in *Dunsmuir v New Brunswick*.100 The court stated a policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime.”101 *Dunsmuir* was followed by the Divisional Court when it upheld the decisions of the ERT in *Kawartha Lakes* and *Lafarge*. In both cases, the Divisional Court found the ERT had specialized expertise in matters relating to the *EPA*, its home statute.102 The Alberta Court of Appeal has also commented on the expertise of the Alberta Environmental Appeals Board, stating “The Board is an expert appellate tribunal, established to decide polycentric fact and policy intensive issues about the protection of the environment.”103 Therefore, the expertise of the environmental tribunal is a major factor enabling it to articulate significant advances in environmental law.

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100 2008 SCC 9, [2008] 1 SCR 190. 
The expertise of environmental tribunals arises because those appointed are typically highly qualified. The former chair of the Alberta Environmental Appeals Board, William Tilleman, taught as Adjunct Professor at the University of Calgary Faculty of Law and held a Doctor of the Laws from Columbia University. The current Associate Chair of the Ontario ERT, Jerry DeMarco, is a lawyer and professional planner with Masters Degrees in Science and Environmental Studies. Paul Muldoon, one of the vice-chairs of the Ontario ERT is an environmental lawyer who has held positions as Counsel and Executive Director of the Canadian Environmental Law Association and teaches environmental studies at the University of Toronto and at York University. As the tribunals frequently decide mixed questions of law and procedure and must also assess facts which are often technical and scientific, members also need to fill the three general categories of expertise, technical, scientific and legal. Members are therefore frequently appointed because of their expertise in related fields, such as engineering, biology and land use planning. For example, in 2005, the Alberta Environmental Appeal Board had three lawyers, a landscape architect, two engineers, a biologist and an ecologist. Members of the Ontario ERT are environmental lawyers, mediators, a hydrogeologist and professors of law at various law faculties. Therefore, the qualifications of individuals appointed to environmental tribunals demonstrate the tribunals have a substantial level of expertise.

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104 Tilleman, supra note 99.
105 Public Appointments Secretariat, Ontario, Agency Details, Environmental Review Tribunal, online: Public Appointments Secretariat Environmental Review Tribunal <http://www.pas.gov.on.ca> Environmental Review Tribunal: online: Environmental Review Tribunal www.ert.gov.on.ca; Environmental and Land Tribunals Ontario, Annual Report 2010–2011, (Toronto: Queen’s Printer for Ontario, 2011) at 7. The ERT is one of a cluster of five tribunals operating as Environmental and Land Tribunals Ontario, which has as its head an Executive Chair who is also named as chair of all five tribunals. However, much of the role of chair is delegated to the Associate Chair of the ERT pursuant to Subs. 17 (2) of the Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009, infra note 113.
106 Ibid.
107 Tilleman, supra note 99 at 28.
108 DeMarco & Muldoon, supra note 95 at 12.
110 Public Appointments Secretariat, Agency Details, supra note 105.
An important development in recent years has been the implementation of merit based appointments. This has led to the increased expertise of many government agencies. A number of governments have engaged in an appointments policy review and have concluded that appointments should “be merit based rather than based on political affiliation.”\textsuperscript{111} For example, members of the Ontario ERT are appointed by the Lieutenant Governor in Council\textsuperscript{112} following a merit-based, competitive process. This process has been set out in the policies of the Ontario Public Appointments Secretariat for some years\textsuperscript{113} and was recently confirmed in the \textit{Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009}.\textsuperscript{114} Accordingly, the practice of making merit based appointments to environmental tribunals, although procedural in scope, has contributed substantively to advances in environmental laws.

There is good evidence members of administrative bodies are highly committed to the goals and values of the agency they serve, which is also an indication of the expertise they bring to the position. Stephen Croley notes “administrators are not drafted into public service; they choose it. Nor are they seduced by irresistible salaries.”\textsuperscript{115} Croley’s point about salaries is supported by the Public Appointments Secretariat webpage which states under Compensation: “An element of public service is expected in all appointments . . . Consequently, rates of remuneration are not competitive with the marketplace.”\textsuperscript{116} Such commitment can be seen in the actions of many members of environmental tribunals. For example, both Jerry Demarco and Paul Muldoon have written extensively on environmental issues.\textsuperscript{117} Bruce Pardy, a part-time

\begin{enumerate}
\item \textsuperscript{111} Manitoba, Law Reform Commission, \textit{Improving Administrative Justice in Manitoba: Starting with the Appointments Process Executive Summary}, Report # 121, November, 2009 at 1, online: Manitoba Law Reform Commission <www.manitobalawreform.ca/pubs>
\item \textsuperscript{112} S. 1(2) \textit{Environmental Review Tribunal Act}, 2000, SO 2000 c 26.
\item \textsuperscript{113} Public Appointments Secretariat, supra note 103.
\item \textsuperscript{114} SO 2009 c 33, sh 5.
\item \textsuperscript{115} Croley, supra note 98 at 139
\item \textsuperscript{116} Ontario Public Appointments Secretariat, \textit{General Information}, online: Public Appointments Secretariat <http://www.pas.gov.on.ca>
\item \textsuperscript{117} See e.g. notes 8, 31 and 79.
\end{enumerate}
member of the Ontario ERT is a professor of law at Queen’s University and has written a number of articles on environmental matters.\textsuperscript{118} Similarly, William Tilleman, while Chairman of the Alberta Environmental Appeals Board, wrote a lengthy survey article with respect to environmental appeal boards in various jurisdictions.\textsuperscript{119} Accordingly, members of environmental tribunals frequently evidence a high degree of commitment to environmental matters, which is a reflection of the expertise they bring to their respective tribunals.

It is clear therefore that the expertise of environmental tribunals is a key factor in enabling those tribunals to consider and apply emerging principles of environmental law in the cases before them, thereby resulting in significant advances to environmental laws.

c) Independence

Another important requirement is that the environmental tribunal be independent. It is essential that an adjudicative administrative tribunal be free from the influence of the legislature, the non-adjudicative branch of government, interest groups and business entities and that it base its decisions solely on principles and considerations relevant to the case under consideration.\textsuperscript{120} Moreover, because administrators need not seek re-election, they are not as susceptible to political calculations as politicians when considering regulatory alternatives.\textsuperscript{121} It is interesting to note that, when the Alberta Environmental Appeals Board was created as an independent body, both environmental and industrial groups were concerned about how it would decide cases. Nonetheless, the Alberta board functioned well and was able to reach a balanced decision among competing interests.\textsuperscript{122} Accordingly, an environmental tribunal is

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\textsuperscript{118} Supra note 2.\\ 
\textsuperscript{119} Tilleman, supra note 99.\\ 
\textsuperscript{120} Honorable Lori Kyle Endris and Honorable Wayne E. Penrod, “Judicial Independence in Administrative Adjudication: Indiana’s Environmental Solution” (1996-1997) 12 St. John’s J. Legal Comment 125.\\ 
\textsuperscript{121} Croley supra note 98 at 298.\\ 
\textsuperscript{122} Bankes, supra note 109 at 136.
\end{flushleft}
needs to be independent from government, industry and the public in order to reach a reasoned and impartial decision.

The independence of most tribunals is confirmed in their enabling statutes and practice guides. The *Environmental Review Tribunal Act, 2000* provides in Subsection 1(3) that none of the members of the Tribunal shall be public servants who work for the Ministry of the Environment. Moreover, the Rules of Practice of the ERT state, “The purposes of these Rules are: to provide a fair, open, accessible and understandable process for parties and other interested persons.” The Public Appointments Secretariat describes the ERT as follows: “The tribunal provides an independent and impartial review of decisions. The Tribunal also provides a fair and unbiased public hearing process which assesses the merits of proposed development projects, plans or programs that may impact the environment.” The need for the tribunal to function independently is also reflected in the Mission Statements of both the AEAB and the BCEAB. Therefore, environmental tribunals’ governing legislation and rules of practice clearly support their operation as independent bodies.

The independence of the tribunal is therefore fundamental to its ability to function as an expert tribunal which grounds its reasoning on environmental principles, rather than an entity which is subject to influence of different interest groups.

d) *Participation*

Although it has been stated practice before an administrative tribunal needs to be “even-handedly closed” in the sense that it must be independent, in fact, in order to be able to

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125 DeMarco & Muldoon, supra note 95 at 5-6.
126 Croley, supra note 98 at 121.
consider all sides to an issue, the tribunal needs to be even-handedly open. In other words, the administrative tribunal will benefit from having as much information as possible in making its decision. The ERT expressed this view in a recent case:

Public notification and participation are important aspects of sound environmental decision-making and administrative law proceedings affecting the public interest. Fostering public involvement not only assists those affected by Tribunal proceedings, but also leads to well-informed decisions. This, in turn, helps the Tribunal better accomplish the public interest in environmental protection set out in the EPA’s purpose section.\textsuperscript{127}

Therefore, it is essential that proceedings before an environmental tribunal involve participation from all affected parties in order that it can consider all aspects of the issue in rendering its decision.

For an environmental tribunal to have the optimum amount of information, parties representing all sides of the issue need to be able to make submissions to the tribunal. Therefore, it is important that third parties be given status to participate in a proceeding.\textsuperscript{128} The ERT stated recently that: “Broad participatory rights are necessary to give all parties access to the decision-maker to ensure that the decision-maker has a range of ideas and information to consider and is not captured by regulated interests.”\textsuperscript{129} Similarly, the ERT remarked recently:

\ldots even if many of the criteria considered by courts and tribunals in assessing requests for status are similar, the threshold for granting status is often lower for tribunals. This is especially true for tribunals, such as the Environmental Review Tribunal, which have a public interest mandate that may be broader than the \textit{lis} between the two main parties.\textsuperscript{130}

\textsuperscript{128} DeMarco and Muldoon, supra note 95 at 48.
\textsuperscript{130} Stericycle Inc. v. Ontario (Ministry of the Environment), [2006] O.E.R.T.D. Case No.: 05-145/05-150 at 6. (Ont E.R.T.)
In other words, public participation is meaningful only if the information, interests and values that are relevant are brought to the ear of the decision-maker. For example, the ability of the public in Ontario to make submissions with respect to instruments granted to other parties was significantly enhanced by the EBR by the creation of “third-party” appeal rights, which enables citizens to seek leave to appeal environmentally significant instruments to the ERT. Statutes in other jurisdictions also allow parties to participate if they can show they are “directly affected” by the decision or within a certain geographic area. Therefore the provisions enabling affected parties to make submissions to the tribunal are key to its ability to make a decision based on fulsome evidence.

The ability to participate in hearings before a tribunal can also level the playing field for interest groups with limited resources. The currency of administrative decision-making is information, not votes or potential campaign contributions. Therefore, those parties with the most credible and verifiable information have a greater opportunity to impact the tribunal’s decision. Accordingly, interest groups with fewer resources than others can have an effect on an administrative proceeding vastly disproportionate to the relative size of their budgets. This was evident in the Lafarge case where a number of environmental groups were able to affect the granting of the permits to burn waste tires.

There is also a practical component to allowing greater participation before tribunals. For example, the ERT permits a party to participate in only part of a hearing, making

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131 Hierlmeier, supra note 65 at 297. See also Tilleman supra note 99 where he states that the balance among several competing ‘public interests’ is best achieved by broad standing rules that allow a Board to listen to all competing interests. (at 67).
133 Bankes, supra note 109 at 5, referring to the test under the Alberta Water Act in the Capstone decision; see also DeMarco and Muldoon, supra note 95 at 45.
134 Croley supra note 98 at 135.
135 Croley supra note 98 at 136.
it more accessible to parties who want to make some submissions but who do not have the resources to attend the entire hearing. The ERT may sit in the evening or in local jurisdictions, thereby enabling more parties to participate. Finally, many tribunals do not follow a “loser-pays” principle in respect of costs, instead recognizing that a party which has made a significant contribution to the issues under consideration will not have costs assigned against it. For example, the Alberta Environmental Appeals Board has stated:

As the public interest is part of all hearing before the Board, it must take the public interest into consideration when making its final decision or recommendation. Therefore, the Board is not bound by the “loser-pays” principle used in civil litigation.

These examples are important because they illustrate procedural ways in which boards can make themselves more accessible, thereby ensuring a broader range of information is available to them.

However, there are limits on parties’ rights to participate in an appeal. For example, there has been substantial criticism of the difficulty experienced by parties in being granted leave to appeal under Section 41 of the EBR. Richard Lindgren states, “Leave to appeal has been refused far more often than it has been granted under the EBR.” Several senior environmental lawyers recently described the leave to appeal provisions in the EBR as “problematic” with “insane time restrictions” and “too high a threshold” that were not “citizen friendly.” Similar criticism has been expressed with respect to the Alberta Environmental Appeals Board which has adopted a “narrow and conservative” approach to when parties are able to trigger the board’s appellate jurisdiction. Nonetheless, there is some reason to impose limits on parties’ ability to participate in a hearing. One reason is the limited nature of

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136 DeMarco and Muldoon, supra note 95 at 27-28.
137 Ibid.
138 Ibid.
140 Lindgren, supra note 132 at 11.
141 Emond, supra note 5 at 238.
142 Bankes, supra note 109 at 163.
administrative resources. Another reason is to prevent proceedings from becoming unworkable. For example, in the *Lafarge* case, a coalition of industry associations applied to be heard as interveners in the judicial review application, but this motion was dismissed by a motions judge.\(^{143}\) Komesar in his analysis of comparative institutions concludes that biases in other institutions, particularly the political process, are sometimes avoided or reduced in the adjudicative process. However, such independence comes to judges at a significant cost; “With the luxury of contemplation and deliberation comes the responsibility to use court's limited resources in the most effective way.”\(^{144}\) While Komesar’s comments were intended for the judicial process, they have relevance to the administrative adjudicative process. It is important to note as well, with respect to the Ontario *EBR*, the third party appeal rights set out in that Act are a result of the initial legislative compromise struck when the Act was passed. Therefore, although there is some basis for arguing that third parties should have greater ability to be involved in tribunal decisions, it is necessary to impose some limits on the number of parties who can participate. This is also a function of the statutory provisions, which may simply be a product of the original legislative bargain.

In summary, it is important that participation by all affected parties be available before environmental tribunals in order that the tribunal can consider all relevant information and perspectives in coming to its decision.

\(e\) **Accountability**

The final critical factor which must exist in order for an environmental tribunal to contribute to advances in environmental laws is that it be accountable for its decisions. This accountability is achieved in the first instance by requiring that a tribunal give reasons for its decisions. In fact, with respect to the ERT, the *Statutory Powers Procedure Act* requires that it

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\(^{143}\) Supra note 16.

\(^{144}\) Komesar, supra note 32 at 150.
provide reasons. Written reasons also make administrative agencies more effective because they are the means by which they can articulate principles and establish general rules of law, much as do courts. Many tribunals have a policy of “generally trying to decide similar cases similarly.” Tribunal are required to consider previous applicable tribunal or court decisions and consistently follow those decisions where appropriate. Accordingly, decisions by tribunals can have important precedential effect. Therefore, providing published reasons for its decisions is a critical factor which makes the tribunal effective in promulgating important legal principles.

The second means by which an administrative agency is accountable is through the mechanism of judicial review, whereby the courts can oversee administrative action and ensure that action is properly within that prescribed by statute. Judicial review provides a control of administrative agencies by ensuring that agency decisions are faithful to the text of legislation agencies implement. Judicial review sustains protects political neutrality in agency decision-making, by requiring such things as consideration of all relevant facts, openness with respect to access to the relevant agency decision-makers. Accordingly, judicial review deters illicit delivery of regulatory rents. In Dunsmuir, the Supreme Court of Canada stated:

Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

Therefore, judicial review ensures that an environmental tribunal’s decision is within the legislative mandate applicable to the agency and means that the tribunal is accountable to the statutory intent of the legislature.

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145 R.S.O. 1990, c S.22. Subs 17(1).
146 AEAB Rule 3, online: <http://www.eab.gov.ab.ca/rules.html>
147 DeMarco and Muldoon supra note 95 at 125.
148 Croley supra note 98.
149 Croley supra note 98 at 100.
150 Croley supra note 98 at 100.
151 Supra note 100, at para 28.
However, it is important to distinguish between accountability achieved through an obligation to provide reasons which are subject to judicial review and accountability through a direct obligation. If an agency is required to be directly accountable to the legislature, it cannot retain its independence. There is an inherent tension: “Too much emphasis on accountability might tend to defeat the purpose of creating an independent agency in the first place”. Sometimes the argument is made that the legislature should exercise more control over administrative bodies. Nonetheless, this reasoning should be applied with caution. A tribunal should be accountable to the legislative intent as expressed through statute. However, it would defeat the purpose of the tribunal if it were required to be subject directly to elected representatives, who may legitimately make decisions based on “economic policy and politics” instead of principles of environmental law. Accordingly, the accountability of an agency must occur through the mechanism of written reasons and judicial review and not by direct accountability to government. Legislative oversight must be achieved through legislative amendment instead of direct control.

\[f/\textit{Combined Effect}\]

It is the combined effect of the foregoing factors, legislative underpinning, expertise, independence, participation and accountability which enable an environmental tribunal to contribute so effectively to advances in environmental law. In particular, a legislative provision which contain a statement of purpose is a key component. A tribunal can only act within its statutory mandate. Therefore, without such statement of purpose, the tribunal has no basis for articulating principles which would give effect to that purpose. As the tribunal is required to “choose the best course of action to achieve the objectives of the

\[152\text{ Jones, supra note 83 at 415.}\]
\[153\text{ Jones, supra note 83 at 417, Hierlmeier, supra note 65 at 307.}\]
\[154\text{ Hierlmeier supra note 65.}\]
It is not an absolute necessity that the principles by which that purpose will be carried out also be set out in the statute, so long as the legislative purpose is clear. The legislative underpinning and the tribunal’s obligation to carry out the objective of the legislation form the basis upon which the intrinsic characteristics of the tribunal enable it to formulate and apply emerging principles of environmental law. Moreover, it is clear from the Divisional Court decisions in *Lafarge* and *Kawartha Lakes* that this approach is receiving the support of the courts.

It is important to note the intrinsic characteristics of an environmental tribunal on their own do not provide sufficient justification for embracing principles of environmental law expressed by the tribunal. For example, the tribunal’s expertise *simpliciter* is not why tribunal’s decision is given deference by the courts; such deference is accorded because the tribunal’s expertise enables it to interpret the provisions of the statute under consideration. Accordingly, expertise on its own cannot support a tribunal’s findings. For example, in a critique of Britain’s Independent Broadcasting Authority, Timothy Jones states the “ideology of expertise” does not mean an agency can take the position that policy decisions “flow directly from the expert judgment of its officials, even where the conceptual basis for those decisions has been uncertain and controversial. Similarly, Cass Sunstein has observed that expertise cannot eliminate the need for an agency to make choices among competing values. Overreliance on expertise is therefore countered by the requirement that tribunals provide reasons for their decisions and that such reasons are supported by valid legal providence. In other words, the purpose of the regulatory process must therefore be to select

155 *Imperial Oil Ltd. v. Quebec (Minister of the Environment)* in *Johnson v. Ontario (Ministry of Environment, supra note 97.

156 *Georgia Strait Alliance v Canada (Minister of Fisheries and Oceans)* 2012 FCA 40 at para 104, 427 NR 110.

157 Jones, supra note 83 at 421.

and implement the values that “underlie the governing statute and in the absence of statutory guidance, must be found through a process of deliberation.” Consequently, a tribunal can be expected to support its expressions of principles of environmental law with references to cases (Spraytech), ministerial policies (Kawartha Lakes), ministerial Statements of Environment Values (Dillon) or by inference from the statutory wording itself (Capstone). In the environmental context, such deliberations are satisfied through written reasons. Judicial review also guards against overreliance on the expertise of the tribunal or the imposition by it of its own value judgments not supported by the underlying legislation. The considerations of the tribunal must be subjected to general scrutiny and review. Accordingly, the legitimacy of the tribunal’s decision receives substantial support by means of the requirement for written reasons setting out the basis for the tribunal’s decision, together with the prospect of judicial review.

The following decisions issued by the Ontario ERT and the Alberta Environmental Appeals Board demonstrate how the tribunals have been able to give effect to such principles of environmental law and thereby substantively advance the state of the environmental laws within their respective jurisdictions.

5. **Examples of Tribunal Decisions**

In *Dawber v Director, Ministry of the Environment*, the Ministry of the Environment had issued certificates of approval to Larfarge Canada Inc. which permitted it to burn waste materials, primarily used tires, as alternative fuels in its cement plant. A number of individuals and environmental groups applied under Section 38 of the EBR for leave to appeal

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159 Supra note 152 at 282.
160 Infra note 165.
161 Supra note 182 at 281.
the Ministry’s decision to issue the C of As. In rendering the ERT’s decision, Member Bruce Pardy considered the test under Section 41 of the EBR, which provides:

41. Leave to appeal a decision shall not be granted unless it appears to the appellate body that,
   (a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and
   (b) the decision in respect of which an appeal is sought could result in significant harm to the environment.

Member Pardy expressed the view the ERT could consider, not only the emission standards set out in the legislation and regulations, but other relevant principles as well. Therefore, the ERT was entitled to utilize the ecosystem approach, which required analysis of the potential cumulative ecological consequences of waste-burning at the Lafarge facility and not only the point of impingement analysis utilized by the Ministry of the Environment (the MOE). The ERT also applied the precautionary approach mandated by the MOE’s Statement of Environmental Values (SEV). Accordingly, Member Pardy held the Section 41 test had been met and the appellants were entitled to appeal the issuance of the approvals by the Director. Lafarge applied for judicial review to the Divisional Court, \(163\) which application was denied on the basis that it was reasonable for the ERT to apply the precautionary principle and the ecosystem approach. Lafarge appealed the decision of the Divisional Court to the Ontario Court of Appeal, which declined to hear the appeal. \(164\)

The Lafarge case illustrates how an environmental tribunal can adopt emerging principles of environmental which become part of the body of environmental laws. The decision confirmed that the eco-system approach and the precautionary principle will apply with respect to the granting of environmental permits in Ontario, even when those principles were not set out in either the legislation or the regulations. The case also shows how the particular characteristics of the tribunal made it uniquely suited to give effect to these environmental

\(163\) Lafarge, supra note 16.
\(164\) Supra note 18.
principles. Firstly, the expertise of the ERT meant it was aware of these principles. Secondly, because the ERT was independent from the legislature, it was not subject to partisan influence regarding concerns over jobs or the local economy. Moreover, because it was independent from the permit granting branch of government, it could go beyond the position taken by the Director in applying only the point of impingement emission standards. The decision involved participation by citizens groups which raised the issues with the ERT and then provided information to assist the ERT in making its finding. It was accountable through providing written reasons, which were upheld in the subsequent application for judicial review and appeal.

In *Mountain View Regional Water Services Commission (Re) (Capstone)*, the Alberta Environmental Appeal Board also applied considerations beyond the strict wording of the statute. In that case, the board was considering appeals to a water licence granted to Capstone Energy by the Director under the Alberta *Water Act*. The licence permitted Capstone to divert water from the Red Deer River for the purposes of injecting it into an underground oil-bearing formation, thereby increasing the recoverable oil reserves. The appellants, adjacent landowners, the City of Red Deer and a local water utility, sought to appeal the granting of the licence on the grounds that deep well injection effectively removes the water from the hydrologic cycle forever, unlike other uses of water. They also argued the Director, in issuing the licence, had failed to consider the purpose for which the water was to be used and whether there were alternatives available to the licence-holder, such as purchased carbon dioxide. The Director argued that the *Water Act* did not direct him to consider the purposes for which the water was to be used when granting a water licence. However, the board held that since the purpose of the Act was “the conservation and management of water, including the wise allocation of water”, the director was required to consider the purpose for which water would be used in connection with

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a particular licence. As well, although the Act did not require the Director to require that the applicant consider whether there were alternatives to utilizing the water, the reference in Act to the interests of future generations meant the Director needed to apply a “higher level of scrutiny of the alternatives,” in view of the fact the water would be removed from the hydrologic cycle, if not forever, then for a “million years.” Accordingly, the board required that Capstone provide a more detailed assessment of options and reduced the allocated water amount originally allowed by the Director. The Capstone decision is significant because the Board adopted a “cautious or precautionary approach” that was “more sensitive to the public interest values embodied in the purposes of the Act than was the Director’s original decision.” It is also noteworthy that the Alberta Environmental Appeal Board went beyond the bare wording of the statute to adopt a more expansive approach to environmental protection.

Wier v British Columbia (Environmental Appeal Board) involved a decision by the British Columbia Supreme Court on judicial review. The British Columbia Environmental Appeal Board had upheld the granting of a permit to the Minister of Forests to use a pesticide spray which contained arsenic. At the hearing before the Board, Wier had argued that the Board should have overturned the issuance of the permit on the basis of the precautionary principle as articulated in Spraytech. The Board held that the permit was validly granted on the basis that “the majority decision in Spraytech did not affect the legal test applied by the Board in pesticide appeals.” Ross, J. for the British Columbia Supreme Court quoted at length from the Spraytech decision and found the precautionary principle, as articulated in that decision should help to inform the process of statutory interpretation and judicial review. The Court held the

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166 At para 164.
167 At para 194.
168 Bankes, supra note 109 at 154.
169 Bankes, supra note 109 at 139.
171 Supra note 170 at para 6.
172 Supra note 170 at para 37.
Board should have considered evidence of toxicity prior to upholding the granting of the permit and referred the matter back to the board for further consideration.

The foregoing cases are examples of how environmental tribunals or courts are prepared to go beyond statutory provisions to apply broader concepts of environmental law. The Lafarge case in particular demonstrates how an environmental tribunal can draw on sources external to the statute to give effect to its statutory mandate.

6. Objections and Criticisms

One problem with my argument is that the model of an expert and independent environmental tribunal, combined with purposive legislation, will not unfailingly produce decisions which apply emerging principles of environmental law. In other words, the institutional model cannot ensure environmental tribunals will apply the reasoning evident in the cases discussed above.¹⁷³ In fact, this is illustrated by a recent decision of the British Columbia Environmental Appeal Board. In Burgoon v British Columbia (Ministry of the Environment)¹⁷⁴ two individuals were granted a permit to operate a mini-hydro project to supply electrical power for residential purposes. The Burgoons, who were owners of a downstream property, objected to the grant of the licence on the basis the mini-hydro project would cause degradation to their water supply. They argued the “precautionary principle requires a “proactive orientation to environmental protection” and that it is not only “proven impacts” but “potential impacts” which must be considered”, in reliance on the Weir case.¹⁷⁵

The British Columbia Environmental Appeal Board found the precautionary principle did not apply and upheld the permit, although its reasons were not entirely clear. It declined to follow

¹⁷³ Except to the extent future tribunals feel an obligation to follow earlier tribunal decisions from the same jurisdiction: see discussion at note 147.
¹⁷⁵ Ibid at para 122.
Weir, a decision under the Pesticide Control Act, on the basis there was “no evidence that the precautionary principle applied to decisions made under Section 12 of the Water Act.”\textsuperscript{176} The board also distinguished Spraytech on the basis there was no evidence of “sufficient state practice”\textsuperscript{177} to suggest a regional water manager must consider matters beyond site specific and application specific concerns.\textsuperscript{178} The board also noted there are various versions of the principle and it was not clear which should be applied.\textsuperscript{179} Finally, the board was of the view that, even if the precautionary principle applied, the mini-hydro licence did not “violate the goals or objectives of the principle.”\textsuperscript{180} It is evident from the ninety-three page decision the case involved a highly acrimonious disagreement between two residential landowners. However, it is unfortunate the board took a somewhat inexact approach to consideration of the precautionary principle, particularly when it distinguished Spraytech, with respect to “sufficient state practice.” As well, the board’s rejection of the precautionary principle is somewhat surprising given the strong statements of the British Columbia Supreme Court in the Wier decision. It is possible the source of the board’s discomfort was the somewhat inexact nature of the principle in practice and that, fundamentally, the Board felt it should not apply in the case. Nonetheless, the objection to my argument stands and the Burgoon case shows not every environmental tribunal will make the same determinations as were made by the tribunals in the other cases mentioned in this article. Suffice it to say, however, the bulk of the cases evidence a trend in decisions by environmental tribunals and by the courts in applications for judicial review of

\textsuperscript{176} Supra note 196 at para 129. It is interesting to note that many environmental protection statutes in British Columbia do not have a statement of purpose. For example, none of the Water Act, RSBC 1996 c 483, the Pesticide Control Act, RSBC 1996 c 360, the Integrated Pest Management Act, SBC 2003 c 58, which replaced the Pesticide Control Act and the Environmental Management Act SBC 2003 c 53, which established the British Columbia Environmental Appeal Board contain a statement as to the statute’s purpose.

\textsuperscript{177} The phrase “sufficient state practice” as used in Spraytech referred to whether the precautionary principle itself could be considered as customary international law for the purposes of its application in Canada: see note 10. The phrase would not typically refer to whether a specific provision of a statute should be interpreted in a particular way.

\textsuperscript{178} At para 129.

\textsuperscript{179} At para 132, referring to the statement of the principle in Spraytech and in the Canadian Environmental Protection Act.

\textsuperscript{180} At para 135.
tribunal decisions. Therefore, such cases are clear support for the arguments advanced in this paper.

Another criticism which can be raised is that the progressive approaches exhibited by the Ontario ERT and the Alberta Environmental Appeals Board are a function of the individuals on those tribunals, rather than a product of the institution itself. The answer to this is, of course, the individuals on an adjudicative body play a huge role in the outcome of cases heard by that body. As noted above, many members of the various boards display a strong commitment to environmental issues in various ways, including through published articles, post-secondary degrees and affiliations with environmental groups. However, this comment applies to the actions of many institutions. The actions of any organization are a result in part of the individuals who lead or make up that body. WW II was won in part because Sir Winston Churchill was Prime Minister at the time. The Canadian Charter of Rights was possibly forced through parliament because Pierre Trudeau was Prime Minister. It is usual to refer to the various benches of the United States Supreme Court by the name of the Chief Justice, and to attribute various decisions to the make-up of the court at the time. Accordingly, the effectiveness of the tribunal will in part be a product of the individuals on the tribunal. Nonetheless, the argument is still valid that an environmental tribunal as an institution has characteristics enabling it to contribute to significant advances in environmental laws. What is important is the extent to which the structure of the institution itself enables the individuals to make such pivotal decisions.

It must be acknowledged however that the ability to appoint the members of a tribunal is one means by which the legislature can exercise control over the tribunal, despite a competitive merit based appointments process. Accordingly, individuals may be appointed to tribunals who may not hold the same view as their predecessors. For example, the current chair

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181 For example, the “Warren Court” in the United States is known for various progressive decisions.
of the Alberta Environmental Appeals Board is a former judge and crown prosecutor with no formal environmental qualifications. However, the requirement a tribunal provide written reasons which are based on principled decision making is still an important factor. Also, although an appointee may be expected to make certain decisions based on his or her previously expressed views or prior experience, the resulting decisions from that person can sometimes be unexpected. For example, the recent decision by Chief Justice Roberts upholding the Affordable Care Act in the United States caught many by surprise as he had been perceived as a conservative leaning justice. Accordingly, while the trend towards appointment of highly qualified persons to environmental tribunals will not unfailingly lead to developments in environmental laws, the institutional underpinnings applicable to environmental tribunals are still of critical importance.

Another objection to the potential effectiveness of an environmental tribunal is that it, like a court; can consider only what comes before it. It cannot initiate proceedings or inquiries. To be sure, this is a characteristic of any adjudicative body. However, the point is not that an environmental tribunal can consider all issues and correct all problems. My point is that a tribunal can develop important principles of environmental law when a legislature might not. I do not argue however that such tribunal can serve as a complete replacement for a forward thinking and progressive legislature.

The tribunal’s ability to effect developments in environmental laws is also limited by parties’ resources to mount objections and files appeals. Accordingly, it is argued that funding should be available to parties in order for their right to voice objections to an

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182 Justice Delmar Perras, (ret.), Environmental Appeals Board, Members, Online: Environmental Appeals Board <www.eab.gov.ab.ca>
environmental tribunal to be meaningful. However, in these times of governmental fiscal restraint, it can be expected that funding for environmental groups will not be forthcoming. Nonetheless, involvement in all institutions requires resources, be it the political or adjudicative. Moreover, interest groups with few resources can have an effect on an administrative agency vastly disproportionate to the relative size of their budgets. Indeed, a single interest group submitting unique arguments can have more marginal influence on an agency’s final decision than many groups presenting the same opposing argument duplicative. Accordingly, although it can be argued access to justice would be served by improving funding to environmental groups, the existence of cases such as Dillon and Lafarge are evidence that lack of such funding is not prohibitive. Self-funding initiatives by concerned citizens is a reality of making submissions in both the legislative, adjudicative and administrative areas.

Another objection to the argument set out in this paper is that the institution is only as effective as the legislation which supports it. But clearly this is the case. In Erickson v Director, Ministry of the Environment, Vice Chair Jerry DeMarco of the ERT considered an application for leave to appeal a renewable energy approval, which had to meet the more stringent test of serious harm to human health set out in Subsection 145.2.1(2) of the EPA. Vice Chair DeMarco held the precautionary principle did not act to fundamentally change the nature of the test in that section. The ERT concluded the Tribunal had to follow the direction given by the legislature. In other words, a programme of regulation will only be as effective as the underlying legislation permits it to be. Therefore, an environmental tribunal will only be an effective source of advances in environmental laws to the extent it is enabled to do so by the legislation, as is the case with the Ontario EPA or the Alberta Environmental Protection and Enhancement Act, and also to the extent it is not expressly overruled by the legislation, as is the

184 Emond, supra note 5 at 241.
185 Croley, supra note 98 at 136.
186 Supra note 61.
187 Ibid at page 121.
188 Jones, supra note 83 at 415.
case with the *Green Energy and Economy Act*. Nonetheless, even in the latter case, the need to set out in the statute wording which effectively excludes consideration of established principles of environmental law, such as the precautionary principle or overrides a previous expansive definition, such as the term “adverse effect” serves a valuable purpose. An onus of accountability and transparency is thereby imposed on the legislature by requiring it to take such measures expressly and openly.

A somewhat cynical criticism of administrative tribunals is that the legislature creates them for the purpose of insulating itself from interest group pressures. As one commentator observed, matters have been directed to administrative agencies, “where massive expertise seemed called for and where public feeling was intense but its drift was obscure.” These observations no doubt have more than a grain of truth—politicians do find it convenient to delegate to an administrative body. Nonetheless, whatever the legislative motivation may be, even in part, the result can still be beneficial.

Another objection to my argument is that, in many cases, the tribunal's enabling legislation provides the tribunal’s decision can be overturned by cabinet or the relevant ministry. In other words, although the politician may want to insulate himself from a contentious decision, he does not want to give up control completely. For example, in the *Dillon* case, the Minister of the Environment overruled the ERT’s decision and granted the permit for the larger amount of water requested by the company. Nonetheless, there are counterarguments to this objection. Firstly, although the Minister had the power to overrule the ERT, he had to do it openly and in the media spotlight. Again, this imposes an obligation of transparency and accountability on governmental actions. Secondly, the Minister’s action does not overrule the

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189 Croley, supra note 98 at 143.
191 That the government was forced to openly overrule the ERT was significant, as virtually every subsequent news article on the issue was quick to point out this fact.
precedential effect of the ERT decision, which still stands. Accordingly, the ERT’s finding that
the eco-system and precautionary principles must be considered by the Director when issuing
permits to take water remains valid. Finally, the case is an indication of the sometimes fickle
nature of the political process. Within a year of the minister’s decision to grant the permit for
the larger volume of water, the elected government changed. The new Liberal government
cancelled the controversial water-taking permit issued by the previous Conservative government
and approved a new permit restricting the volume of water that could be taken from the Tay
River.\textsuperscript{192}

Finally, it has been argued that much of the operation of an environmental
tribunal, as evidenced by the Section 41 leave to appeal test in Ontario, is procedural rather than
a source of substantive legal rights.\textsuperscript{193} However, as noted at the beginning of this paper,
procedural issues and substantive issues are intertwined. Although all legislation can
continuously be improved, this is not always possible. It may not be feasible to amend
legislation extensively, especially when the reality of the political landscape is such that the
legislation itself was a significant achievement, such as the Ontario EBR. Perhaps there is no
more illustrative example than the American Bill of Rights which, through judicial
interpretation, now has far greater scope than might have been expected from the original
wording.\textsuperscript{194} On a more local and immediate scale, it should be noted that the procedural decision
in \textit{Lafarge} had substantive consequences. When Lafarge was unsuccessful in its application for
judicial review of the ERT’s decision to grant third parties leave to appeal the approvals issued
by the Director (at which point the validity of the approvals themselves had not been considered
by the ERT) and upon its application for leave to appeal to the Ontario Court of Appeal being
refused, Lafarge chose to withdraw its applications and abandoned, at least for the time being,

\textsuperscript{192} Sara Ehrardt, “Victory for the Tay River” \textit{Canadian Perspectives} (Spring 2004), online: reprinted by The
Council of Canadians <www.canadians.waterissues/Tay-River/index.html>
\textsuperscript{193} Emond, supra note 5 at 237.
\textsuperscript{194} For example, the right to privacy has been interpreted to flow from the right to security set out in the
Bill of Rights.
its plans to burn tires and other waste as an alternative fuel. Therefore, the substantive outcome and the procedural aspects of that decision were very much related.

Conclusion

Since environmental issues have come to the forefront of humankind’s concerns, various means have been utilized to give content to Hardin’s “coercive laws.” Many environmental protection statutes enacted in the 1970s continue to exist substantially in the same form as when they were enacted. Nonetheless, the creation of environmental tribunals and the evolution of the laws governing such tribunals have gone a long way to enabling such tribunals to give expression to emerging principles of environmental law. This trend has profoundly enriched and advanced environmental laws.

A basic legislative framework is necessary for the tribunals to make these types of decisions. The statute must provide that its purpose is the protection of the environment, which is the case in most environmental legislation. It is important that the members of the tribunals’ members have expertise in the environmental area. It is also important that the tribunal be independent and that affected parties can apply for standing to make submissions on matters under consideration by the tribunal. It is also necessary that there be checks on the tribunal’s deliberations by requiring the tribunal to give written reasons and through the mechanism of judicial review.

The judicial and administrative decisions discussed in this paper are clear evidence that environmental tribunals have made substantial contributions to the development of environmental law and have filled in gaps in the underlying statutes. This is not however a disparagement of the original legislation. There is also a good argument that many advances in environmental laws are better achieved through an incrementalist approach predicated on a
general statute with strong purposive wording, rather than by attempting to formulate the
details of environmental principles in advance through the legislative process. Accordingly,
when the foregoing institutional framework exists, the administrative adjudicative process is
superior in many ways to the legislative process at contributing to significant advances to
environmental laws.
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