

“An Enormous Systemic Problem”? Delegation, Responsibility and Federal Environmental Law

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Canadian environmental law has long been rooted in the legislature delegating decision-making responsibility to some part of the executive — the Cabinet, a minister, some line department or tribunal. This delegation may take the form of broad discretion to set environmental policy. The courts are one form of control over such delegated powers. However, the Supreme Court has increasingly emphasized the need for judges to defer to executive decision-makers. This paper examines how the courts have used their powers of review to see if they are able to perform an effective monitoring role given the extent of delegation in environmental law and this increased emphasis on deference. It provides an initial empirical examination of how the Federal Court reviewed government decisions both generally and in the environmental area. It focuses on two years, one before Dunsmuir and one after, to see how willing the courts were to affirm government decisions, whether the form of review was correlated with the court affirming a decision, and whether there are indications of a connection between the substance of the decision and the likelihood of affirmation. It argues that there is evidence that the courts have tended to affirm government action and given the structure of environmental and administrative law, will likely continue to do so.

Le droit canadien de l'environnement a longtemps tiré sa source dans le pouvoir décisionnel de certaines branches du gouvernement qui leur était délégué par le législateur — le cabinet, un ministre, un responsable du ministère ou d'un tribunal. Cette délégation peut prendre la forme d'une large discrétion en vue d'établir une politique environnementale. Les tribunaux constituent une forme de contrôle de ce type de pouvoir délégué. Toutefois, la Cour suprême insiste de plus en plus sur la nécessité que les juges fassent preuve de déférence devant les décideurs gouvernementaux. Dans cet article, l'auteur examine la manière dont les tribunaux ont utilisé leur pouvoir de contrôle pour vérifier s'ils sont en mesure d'assurer un rôle de surveillance compte tenu de l'étendue de la délégation en droit de l'environnement et si cela a permis d'accentuer la déférence. L'auteur analyse d'abord de manière empirique la manière dont la Cour fédérale a exercé son contrôle judiciaire à l'égard des décisions du gouvernement en général et dans le domaine environnemental. Il se concentre sur deux années en particulier, celle précédant l'arrêt Dunsmuir et celle qui a suivi, afin de vérifier si les tribunaux étaient enclins à confirmer les décisions gouvernementales, si la forme du contrôle judiciaire avait une incidence sur la confirmation d'une décisions par un tribunal et

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s'il y avait de l'existence d'un lien entre le fond d'une décision et la probabilité qu'une décision soit confirmée. L'auteur prétend qu'il y a des signes révélant que les tribunaux ont tendance à confirmer l'action gouvernementale et, compte tenu de la structure du droit de l'environnement et du droit administratif, que cette tendance va probablement se maintenir.

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I. INTRODUCTION

Caribou play a central role in two recent Federal Court decisions that show both the strengths and the weaknesses of the use of the courts to further environmental protection. In 2010 the boreal caribou in Alberta were in trouble. They were listed as a threatened species under the federal *Species at Risk Act* (SARA)¹ yet the federal government had not prepared a recovery strategy as it was required to do and their numbers were dwindling. Some environmental groups and First Nations asked the federal Minister of the Environment to recommend to Cabinet that it issue an emergency order under the Act to protect the caribou in northeastern Alberta.² When the Minister declined to recommend the order, these groups went to the Federal Court asking it to (among other things) require the Minister to make the recommendation.

In his decision, Justice Crampton of the Federal Court found that “it is not immediately apparent how, given the...facts, the Minister reasonably could have concluded that there are no imminent threats to the national recovery of boreal caribou.”³ He did not, however, order the Minister to make the recommendation. He took the more time honoured administrative law route of

¹ S.C. 2002, c. 29.

² *Species at Risk Act*, s. 80.

(1) The Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species.

(2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.

³ *Adam v. Canada (Minister of Environment)*, 2011 FC 962, para 49.

asking the Minister to decide again and this time provide meaningful reasons for his decision. The Minister eventually again decided not to recommend the order to Cabinet.

The boreal caribou was not the only species for which the federal government was failing to take action required under SARA. The South Mountain Caribou had also been listed under SARA as threatened. The Act required the federal government to prepare a recovery strategy by 2007, yet by 2012 it had failed to do so. Environmental groups went to Federal Court to try to get an order forcing the Minister of the Environment and the Minister of Fisheries and Oceans to prepare a recovery strategy for the South Mountain Caribou, along with three other representative species for which the federal government had failed to prepare required recovery strategies (the Nechako White Sturgeon, the Pacific Humpback Whale and the Marbled Murrelet).⁴ The federal government was more than five years late in preparing the recovery strategy for the South Mountain Caribou at the time the court action was launched.

Not so coincidentally, the federal government began releasing recovery strategies for these species as the court date approached—for the sturgeon and the humpback whale a few months before the hearing, for the murrelet the day before the hearing and for the caribou shortly after the hearing. The Federal Court in *Western Canada Wilderness*, rejecting the federal government's attempted explanations for the delays, found that:

It is, moreover, apparent that the delays encountered in these four cases are just the tip of the iceberg. There is clearly an enormous systemic problem within the relevant Ministries, given the [Ministers'] acknowledgement that there remain some 167 species at risk for which recovery strategies have not yet been developed. . . responding on an ad hoc basis to external pressures such as pending litigation fails to take into account the fact that Parliament has itself assigned priorities in dealing with these matters. . .⁵

The Court found the Ministers acted unlawfully by failing to prepare proposed recovery strategies in time.

So the Court in each case found that the federal government had not done what it was supposed to do. In this sense these are good news stories. The Court was willing to take action in these cases, however, in part because of the way SARA is structured. It has some mandatory language — the Minister “must” make a recommendation for an emergency order in certain circumstances and the recovery strategies must be prepared within a certain time.⁶ Yet even then the caribou did not get immediate protection — the Minister did not recommend the emergency order nor was the recovery strategy finalized for some time.

⁴ *Western Canada Wilderness et al v Minister of Fisheries and Oceans and Minister of the Environment*, 2014 FC 148.

⁵ *Ibid.* at para 85.

⁶ SARA, ss. 80(2) and 42.

These cases point to an underlying problem with environmental law in Canada — a problem that goes far beyond SARA. The concern centres on how much power the legislature has delegated over environmental protection and the lack of controls on its use. This reliance on delegation and discretion is not new.⁷ Canadian environmental law has long been rooted in the legislature granting responsibility to some part of the executive — the Cabinet, a minister, some line department — to produce a balance of environmental protection and economic development.

The discretion arises not only because the legislature is delegating decision-making power to various federal authorities as to whether a project may proceed but also, more indirectly, because environmental legislation provides opportunities for federal bodies to interpret the meaning of key statutory provisions. Delegation is beneficial to the extent it allows administrative decision-makers to make use of expertise and to adapt their rules to changing or novel situations. It is concerning, however, where there is the opportunity for decision-makers to exercise the discretion in ways not intended by the legislature including in the decision-maker's own self-interest.

Delegated decisions can be controlled in a variety of ways such as through the legislature closely specifying how the power is to be used or requiring the decision-maker to engage in fulsome public participation prior to exercising the delegated power. This paper focuses on the effectiveness of one particular form of control — review by the courts. Can courts act as an effective monitor of delegated decisions in environmental law? Two factors raise concerns about their ability to do so. First, delegation is central to environmental law and recent changes to environmental law have increased the scope of delegation and the range of decisions that are discretionary. Not only has there been an increase in delegation and discretion but who is exercising these delegated powers has been moved away from more independent decision-makers and towards political bodies such as Cabinet or at least bodies that are more closely aligned with the political leanings of the government in power. Both increased discretion and who is exercising the discretion may make judicial review more difficult.⁸

Second, the Supreme Court of Canada has increasingly favoured a more deferential approach to reviewing government decisions. The Supreme Court has attempted numerous times to clarify when judges should defer to government decision-makers and when they should look closely at decisions to see if they, the judges, feel the right decision was made. Most recently, in the key 2008 decision in *Dunsmuir*, the Court sent a strong signal to lower court judges that deference should essentially be their baseline stance.⁹ Judges should defer not only to

⁷ David Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003).

⁸ Nigel Bankes, Sharon Mascher & Martin Olszynski, "Can Environmental Laws Fulfill Their Promise? Stories from Canada" (2014) 6(9) *Sustainability* 6014 (arguing that expanded discretion makes judicial review less effective).

⁹ *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190.

discretionary decisions such as whether to issue a permit but also to a government decision-maker's interpretation of statutes it deals with regularly. The Court has attempted to be clear that deference does not mean judges cannot review these decisions at all — they are to see if the decisions are reasonable. However, the move is clearly towards a less hands-on role for judges in reviewing government decisions. As we will see, there are reasons why the Court has pushed for more deference. However, if combined with the shift in environmental law towards even greater delegation and away from independent decision-makers, the concern is that the courts will become a less effective check on government decisions that impact the environment.

This paper examines how the courts have used their powers of review both in general and in the environmental area to see if they are likely able to perform an effective monitoring role given these factors. It argues that there is reason to believe that they have not taken a particularly strong hand in policing executive action. Environmental law has a systemic problem to the extent that it relies, and needs to rely, so heavily on delegation of discretionary powers but has only weak controls on the exercise of such powers, including by the courts.

In order to provide a sense of the difficulties faced by courts in the environmental area, Part II discusses the use of discretion in environmental law while Part III examines the shift to greater deference in administrative law. Part IV then provides an initial empirical examination of the stance actually taken by the Federal Court in reviewing government decisions both generally and in the environmental area in order to provide a sense of how effective courts are likely to be as monitors. It focuses on two years, one before *Dunsmuir* and one after, to see how willing the courts were to affirm government decisions, whether the form of review was correlated with the court affirming a decision, and whether there are indications of a connection between the substance of the decision and the likelihood of affirmation. Part V concludes, discussing the implications of the empirical findings that the courts have by and large tended to affirm government action and given the structure of environmental and administrative law, will likely continue to do so.

II. DELEGATION AND DISCRETION IN ENVIRONMENTAL DECISION-MAKING

Deciding whether to allow a pipeline or protect a species' habitat involves both gathering together and understanding a potentially wide array of often-technical information as well as choosing among competing values. Who makes the decision then is critical. Does the decision-maker have the expertise necessary to understand the impacts of the decision? Whose values count? The legislature has to make two key choices. First, how much of the decision-making to delegate? Second, if it delegates, who should make the decision?

(a) Delegation in Canadian Environmental Law

The legislature has to decide whether it is too costly or even possible to set rules up front or whether it is preferable to delegate the power to a body with more time and expertise to deal with complex and ever changing situations.¹⁰ It has tended to delegate significant responsibility for making environmental decisions. The *Canadian Environmental Assessment Act (CEAA)* is a prime example.¹¹ Environmental assessments hold out considerable promise for reconciling economic progress and environmental protection. Put at its highest, the ideal behind governments requiring environmental assessments of projects is that any potential environmental harms from the project can be mitigated before they occur or, if they cannot be mitigated, the project can be prohibited. However, the Canadian federal government's attempt at utilizing environmental assessment, CEAA¹² has been criticized for not imposing sufficient controls on development.¹³ A significant concern with CEAA is its heavy reliance on discretion by federal authorities for such decisions as whether a project harms the environment and if so, whether those harms are justified by other benefits (such as economic growth).¹⁴

The extent of discretion in environmental assessments has significant implications for a number of recent and on-going controversial natural resource-related projects. These projects include pipelines (such as the Northern Gateway pipeline in BC), mines (such as the Prosperity gold-copper mine in BC and the "Ring of Fire" chromite-nickel-copper deposits in Ontario), hydro-electric projects (including the Lower Churchill project in Newfoundland and Labrador and the Site C Dam in BC) and oil sands projects in Alberta.

¹⁰ This decision is akin to deciding between making rules (such as an ex ante ban on a particular activity) or relying on standards (broadly prohibiting, for example, unreasonable pollution) which allow the decision as to actual situations to be made as they arise. The former can be very costly in terms of attempting to obtain the necessary information to set the rule ex ante but are less costly to enforce. Standards, on the other hand, are less costly to make up front but entail high case specific and enforcement costs. See Louis Kaplow, "Rules versus Standards: An Economic Analysis" (1992) 42(3) *Duke Law Journal* 557.

¹¹ *Canadian Environmental Assessment Act*, SC 2012, c 19. For a good overview of the recent changes to CEAA, see Meinhard Doelle, "CEAA 2012: The End of Federal EA As We Know It?" (2012) 24 JELP 1.

¹² CEAA was initially enacted as S.C. 1992, c. 37 (CEAA 1992).

¹³ See, for example, Bruce Parry, "Environmental Assessment and Three Ways Not To Do Environmental Law" (2010) 21 JELP 139 and Hugh J Benevides, "Real Reform Deferred: Analysis of Recent Amendments to the *Canadian Environmental Assessment Act*" (2004) 13 JELP 195.

¹⁴ Issues such as climate change illustrate both the benefits of discretion in allowing flexibility to deal with complex interconnected issues but also the risks where discretion allows a government that does not wish to deal with an issue to avoid doing so. For a discussion of climate change and environmental assessments, see for example, Toby Kruger, "The *Canadian Environmental Assessment Act* and Global Climate Change: Rethinking Significance" (2009) 47 *Alta L Rev* 161.

CEAA provides various executive decision-makers including the Responsible Authority or “RA” (the federal body taking the lead role), the Minister and the Cabinet with considerable discretion to assess the environmental impacts of the project and whether it should proceed. Part of the controversy over CEAA arises due to the apparent cost of environmental assessments, both the time and direct cost of undertaking the environmental assessment itself¹⁵ and the potential outcome of the assessment which can either stop or require significant modifications or mitigation to projects. Juxtapose against these costs is the concern that the “failure to predict and mitigate adverse environmental effects before carrying out a project can lead to significant environmental degradation and increased economic costs.”¹⁶

As a result of these apparent costs as well as the potential for environmental assessments to aid in avoidance of environmental harm, CEAA has given rise to litigation on a range of issues from the “scoping” of the project or the assessment and the mitigation measures required to satisfy the Act¹⁷ to what constitutes significant adverse environmental effects and adequate mitigation.¹⁸ Some critics have argued that the Act relies too heavily on discretion based on overly vague, open-ended language.¹⁹ Pardy has even more strongly attacked the discretion under CEAA and argued that this discretion allows RAs to trade the environment off for economic development and should be either eliminated or at least reduced.²⁰ Moreover, the courts have been argued to be too deferential to the decisions of the RAs.²¹

¹⁵ For a discussion of the efficiency concerns with CEAA, see Standing Committee on Environment and Sustainable Development, *Statutory Review of the Canadian Environmental Assessment Act: Protecting Our Environment, Managing Our Resources* (March 2012, accessed at <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5300807&Language=E&Mode=1&Parl=41&Ses=1>>) (“Standing Committee Report 2012”). The concern about costs is exacerbated where both the federal and provincial governments are involved, giving rise to fears of unnecessary cost and duplication in review. See Standing Committee Report 2012 and Commissioner of the Environment and Sustainable Development, *2009 Fall Report to Parliament: Chapter 1 Applying the Canadian Environmental Assessment Report* (accessed at <http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200911_e_33253.html>).

¹⁶ Commissioner of the Environment and Sustainable Development (2009), at 2.

¹⁷ *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31 and *Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2.

¹⁸ *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302.

¹⁹ See, for example, Andrew Green, “Discretion, Judicial Review and the *Canadian Environmental Assessment Act*” (2002) 27(2) *Queen’s Law Journal* 785; Benevides (2004); and Mary Grindley, “Discretion and Judicial Review Under the *Canadian Environmental Assessment Act*: Case Study of a Panel Review” (LLM Thesis, York University, 2009).

²⁰ Pardy, *supra* note 13.

²¹ Meinhard Doelle, “Case Comment: The Implications of the SCC Red Chris Decision for EA in Canada” (2010) 20 JELP 161.

Similarly the legislature has delegated power in vague language in other federal environmental statutes. Under the *Canadian Environmental Protection Act*, the Ministers of Environment and Health may recommend a substance be added to the list of toxic substances and the Cabinet “may, if satisfied that a substance is toxic, add it to the list”.²² In addition Cabinet has broad discretion to make a wide range of regulations controlling such substances. Likewise, under SARA, an expert body recommends whether a species should be listed under the Act but Cabinet gets to make the final decision. SARA adds the interesting wrinkle that Cabinet must give reasons if it decides not to list a species — making it what Elgie calls “constrained discretion” as there is at least the potential check of public pressure for these decisions.²³ The *Fisheries Act* provides for the Minister to exempt projects from its protective provisions.²⁴

Canadian environmental law then relies heavily on delegated power and discretionary decision-making across a range of federal environmental statutes.²⁵ In 2012 the federal government extended this discretion even further. For example, it repealed and re-enacted CEAA as part of the budget process. The changes to the Act limited the range of projects required to undergo environmental assessment and altered the decision-making structure. Instead of all projects needing to meet certain triggers to be assessed, under CEAA 2012, only projects listed by regulation or designated by the Minister must undergo an environmental assessment.²⁶ Each of these methods provides more discretion to the executive to decide which projects must be assessed. Moreover for certain projects, the Canadian Environmental Assessment Agency (a federal agency created under the Act to aid in and in some cases be responsible for environmental assessments) can decide that no environmental assessment is warranted. Similarly recent changes to the *Fisheries Act* extend powers to exempt activities that harm the environment through regulations.²⁷

(b) Who Gets To Decide

The legislature not only has to decide how much to decide itself and how much to delegate but also who it wants to make the delegated decision. It generally needs to trade-off expertise and accountability. We want experts to be involved in environmental decisions but would worry in certain cases if they

²² *Canadian Environmental Protection Act*, S.C. 1999, c. 33, s. 90.

²³ Stewart Elgie, “Statutory Structure and Species Survival: How Constraints on Cabinet Discretion Affect Endangered Species Listing Outcomes” (2008) 19(1) JELP 1 (finding listing rates in jurisdictions with constrained discretion are higher than in jurisdictions where the executive has complete discretion on when to list species).

²⁴ *Fisheries Act*, R.S.C. 1985, c. F-14, s. 35(2).

²⁵ Boyd, *supra* note 7; and Pardy, *supra* note 13.

²⁶ CEAA 2012, ss 13 and 14.

²⁷ For a discussion of the changes to the *Fisheries Act*, see Martin Z.P. Olszynski, “From ‘Badly Wrong’ to Worse: An Empirical Analysis of Canada’s New Approach to Fish Habitat Protection Laws” (2015) 28(1) JELP (forthcoming).

make decisions completely divorced from any controls. Environmental decisions contain value choices and in some cases we need elected officials directly involved.

Much of delegation in environmental law seems to flow from the need for expertise. A key rationale for delegation of powers is that the legislators do not have the knowledge or expertise to make all the decisions needed to be made — from how to regulate banks to train safety requirements and the best way to protect the Pacific Humpback Whale. We assume delegated decisions will be reasoned, based at least in part on the relevant science and information and not just politics.²⁸

There are many examples of such delegation in environmental law. Environment Canada plays a central role in regulating toxic substances and protecting endangered species. The Department of Fisheries and Oceans holds the power to protect fish and fish habitat. Health Canada helps with controls on toxic substances. These federal departments have scientists and policy experts that provide expertise for exercising the power they hold. Broad delegation to such expertise has the potential to allow flexible, rational decision-making in the face of new situations and uncertainty.

However, in some cases the delegation to experts is not so clear. Think again of CEAA. Prior to the 2012 amendments, the responsible authority that undertook the environmental assessment was the federal department taking the action that triggered the Act.²⁹ While Environment Canada and Fisheries and Oceans undertook most environmental assessments, it could be the Coast Guard making a decision about a forestry road in Manitoba.³⁰ While such delegation may have flowed from the desire to integrate environmental decision-making broadly, the delegation does not appear at least initially to be to expertise.

CEAA 2012 partly addressed the concern about expertise. It narrowed the range of agencies that undertake environmental assessments. An expert body, the Canadian Environmental Assessment Agency, took on a key role in deciding when environmental assessments were required and in leading some of these assessments. However, the Act also designated two other bodies to undertake environmental assessments — the National Energy Board and the Atomic Energy Control Board (along with any other body that Cabinet designates). These bodies do not have the environment, or certainly not solely the environment, as their core mandate. The delegation seems less to expertise than to a body whose focus is on development of resources rather than

²⁸ Daniel A. Farber & Anne Joseph O’Connell, “The Lost World of Administrative Law” *Texas Law Review* (forthcoming).

²⁹ CEAA encompasses the separation of expertise and information gathering from political decision-making: *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, para 73.

³⁰ *Manitoba’s Future Forest Alliance v. Canada (Minister of the Environment)* (1999), 30 CELR 1 (FC).

protection of the environment — a delegation which preferences the energy sector.³¹

At times, the delegation in environmental law is not to experts but to more accountable actors. Many decisions are taken not by independent bodies but by more political actors such as the Minister and Cabinet.³² Again think of CEAA. The 2012 revisions increased the decision-making role both of the Minister as to whether the environmental effects are significant and of the Cabinet as to whether any significant adverse effects are justified.³³ Cabinet plays a central role in deciding which species to protect under SARA and which substances to control under CEPA.³⁴ It makes regulations about toxic substances and protection of fish.³⁵ It also, as we have seen, decides whether a species needs emergency protection.

Delegation then requires the legislature to consider both expertise and accountability. Sometimes these qualities can be found in the same body and sometimes not. The recent changes by the Harper government gave more weight to the accountability side — more political decision-makers rather than experts or, if the decision-makers are somewhat independent tribunals, decision-makers whose values are aligned more with resource use than environmental protection. When we consider the potential effectiveness of the courts as monitors in Part IV, we will need to take into account the different types of bodies that make decisions under environmental law.

III. INCREASING DEFERENCE IN ADMINISTRATIVE LAW

Granting discretion in legislation is not inherently bad. As we have seen, it serves an essential purpose in a regulatory state, allowing legislators to make broad policy choices but leave to others decisions for which the legislators do not have the time, information or expertise.³⁶ Under CEAA, for example, legislators decided on the general process for decision-making and included some substantive direction (such as the need to take into account the precautionary principle and to consider significant adverse effects). At the same time, they provided significant discretion to various decision-makers to make decisions on

³¹ Potentially in a similar fashion, under the recent changes to the *Fisheries Act*, the Minister may be able to delegate administrative powers under the Act to others — other Ministers or potentially even those outside the federal government. *Fisheries Act*, s. 35(2).

³² Interestingly the Federal Court has recently taken the somewhat unusual step of examining the expertise of specific panel members to help in setting the standard of review: *Grand Riverkeeper, Labrador Inc v Canada (Attorney General)*, 2012 FC 1520.

³³ CEAA 2012, ss. 15 and 52.

³⁴ SARA, s. 27 and CEPA, s. 90.

³⁵ CEPA, s. 93 and *Fisheries Act*, s. 43.

³⁶ Andrew Green, “Regulations and Rule-Making: The Dilemma of Delegation” in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context (2d)* (Toronto: Emond Montgomery, 2012).

individual projects, likely because it would be too hard to make rules for the diverse forms of projects that may arise and because decisions about the environmental effects of projects require expertise.

The difficulty with discretion arises because of the underlying principal-agent problem. The agent (the party delegated the decision-making power) may make mistakes about what the principal (the legislator) believes would be socially beneficial, may substitute her own view of what is socially beneficial or, more malignly, may seek to use the delegated power to further her own self-interest. For CEAA, this concern would arise, for example, if an RA was attempting to implement the legislature's view of the relationship between development and the environment but was mistaken about what this relationship actually involved in the particular instance. Alternatively, the RA could ignore the view that the legislators or the public would have preferred but instead make decisions on projects that it believes are socially optimal (such as leaning towards allowing more projects in environmentally sensitive areas). Finally, a decision-maker such as a minister could use the discretion in an attempt to obtain personal benefits such as future job opportunities or electoral resources.

The courts play a potentially key role in ensuring that the decisions that are made are in accordance with the scheme and purposes of the Act.³⁷ Through administrative law, the courts oversee the connection between the legislators and the executive bodies to ensure that the executive bodies stay within their powers (or, alternatively, to enforce the rule of law). Courts may undertake two broad types of review under administrative law: procedural or substantive.³⁸ As the name implies, procedural review involves a claim that the process by which the decision was made was flawed. In the case of CEAA, for example, the flaw may arise from a failure of the decision-maker to follow the required process under the Act or possibly to provide certain procedures that the individual or group is owed under the common law. Substantive review, on the other hand, involves the court in examining the substance of the decision. The flaw may arise, for example, where an RA makes a mistake about a requirement under CEAA (that is, misinterprets the statute) or exercises its discretion improperly.

³⁷ There are other ways in which the legislature may control the decisions of their agents. The legislature could, for example, take away policy space from the executive by shifting CEAA to a rule-based approach explicitly aimed at protecting ecosystems in order to control the trade-offs that are made. Pardy (2010). See also Kruger (2009) (arguing for regulatory changes in the area of environmental assessments and climate change). Alternatively, legislators could attempt to exert other forms of control over the ultimate decision, such as appointing particular individuals to make the decisions or providing themselves with the power to review and alter decisions. Both of these options, however, reduce the beneficial aspects of delegation. If the concern is that the decisions do not accord with the views of the public (the ultimate principal), greater public participation could be built into the process.

³⁸ For a review of Canadian administrative law principles and rules, see Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context (2d)* (Toronto: Emond Montgomery, 2012).

One of the enduring concerns of administrative law is determining the appropriate standard of review that the court should use — that is, in broad terms, the extent to which the court is willing to either impose its view of the proper procedure or substance as oppose to defer to the decision of the executive decision-maker.³⁹ The most intrusive standard of review is correctness under which the court requires that the decision-maker make what it (the court) views is the right decision (about the proper process or interpretation of the Act). Prior to 2008, there were two other standards of review — reasonableness (under which the decision had to be able to stand up to a “somewhat searching” review)⁴⁰ and the even more deferential patent unreasonableness. The Supreme Court of Canada in *Dunsmuir*, however, collapsed these two standards into one — reasonableness.⁴¹ The Supreme Court has stated that reasonableness is “a single standard that takes its colour from the context”⁴² and so a reviewing court needs to take into account such factors as whether the issue is one of interpreting a statute as opposed to assessing the exercise of a broad grant of discretion. Courts generally use a correctness standard for procedural review but may use either correctness or reasonableness (or in the past patently unreasonableness) for substantive review.

The Supreme Court’s approach in *Dunsmuir* and subsequent cases is important to how effective courts may be as monitors of environmental law and policy. In undertaking judicial review, the Court has established two key steps. The reviewing court must first determine the appropriate standard of review and must then apply that standard. Prior to *Dunsmuir*, the Supreme Court set out factors to be considered in deciding on the appropriate standard of review in a given case. These factors included the expertise of the decision-maker (the more expert, the greater the degree of deference), the presence of a privative clause (a clause indicating that the legislators did not want judicial review points to greater deference), the purpose of Act or provision and the nature of the question (the more discretionary, the greater the deference).⁴³ In *Dunsmuir*, the Court placed greater emphasis on the use of reasonableness in a broader range of circumstances. Courts are to set the standard of review based on some categories of decisions along with potentially the same factors as used prior to *Dunsmuir*.⁴⁴

³⁹ For a discussion of choice of standard of review, see Andrew Green, “Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law” (2014) 47(2) *UBC Law Review* 443.

⁴⁰ See *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, at para. 56.

⁴¹ *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12.

⁴² *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para. 59, per Binnie J.

⁴³ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982.

⁴⁴ For an overview of the post-*Dunsmuir* case law, see Paul Daly, “Dunsmuir’s Flaws Exposed: Recent Decisions on Standard of Review” (2012) *McGill LJ* 483.

The Court used *Dunsmuir* not only to reduce the number of possible standards of review to two (correctness and reasonableness) but to clearly emphasize the need for courts to give greater deference to executive decision-makers. Whether the core of the decision related to the exercise of discretion or was the interpretation of a statute, judges were too focused on deciding if the decision was correct — whether they would decide the same way. The Court stressed that in a broader range of cases judges should instead only intervene if the decision was unreasonable.

The result from *Dunsmuir* (and some subsequent cases applying *Dunsmuir*) is that courts will review most decisions under environmental law on a reasonableness basis.⁴⁵ Prior to *Dunsmuir* it was clear that discretionary decisions would be reviewed on deferential standard (either reasonableness or patent unreasonableness) and after *Dunsmuir* discretionary decisions still clearly fall under the reasonableness standard.⁴⁶ For questions of law, however, the Court has shifted away from the use of correctness towards a strong presumption that interpretation of statutes would be reviewed on a reasonableness basis. For example, the Supreme Court of Canada recently took a broad view of the need for deference to Cabinet, finding that the *Dunsmuir* framework does apply to Cabinet including Cabinet's interpretation of statutes.⁴⁷ In part the Court found that Parliament had recognized that Cabinet had "particular familiarity" with the economic regulatory statutes at issue.⁴⁸

As a result, courts will undertake most reviews under environmental legislation on a reasonableness basis, whether they are questions of law, fact or discretion. Under a reasonableness review, the judge is to grant the decision-maker a "margin of appreciation" and to look to both the reasoning and the outcome.⁴⁹ She is to look to "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law."⁵⁰ Reasonableness "does not mean that courts are subservient to the determinations of decision-makers, or courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view."⁵¹ Instead, judges are to offer "not submission but a respectful attention to the reasons

⁴⁵ See, for example, *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 noting that there is a presumption of reasonableness, though this presumption can be rebutted in certain circumstances, such as where there is a true question of jurisdiction, certain constitutional issues or questions of law that are both of central importance to the legal system and outside the specialized expertise of the decision-maker (paras 24-6).

⁴⁶ *Dunsmuir*, at para. 53.

⁴⁷ *Canadian National Railway Co v. Canada (AG)*, 2014 SCC 40.

⁴⁸ *Ibid.* at para. 56.

⁴⁹ *Dunsmuir*, at para. 47.

⁵⁰ *Dunsmuir*, at para. 47.

⁵¹ *Dunsmuir*, at para. 48.

offered or which could be offered in support of a conclusion.”⁵² So at its best reasonableness requires some deference to expertise but not a complete absence of review.

An example of such a use of reasonableness is *Western Canada Wilderness*.⁵³ We saw that the Federal Court made a strong statement in *Western Canada Wilderness* dealing with the failure of the federal government to propose recovery plans for four representative species, pointing to “an enormous systemic problem” in the administration of the *SARA*. Although she did not decide on a standard of review in the circumstances, Justice Mactavish did not seem inclined towards a correctness standard of review as she stated the parties did not dispute the interpretation of the Act. The timelines were clear. She instead suggested she would look to whether the Minister had provided a “reasonable explanation for the delay” in deciding whether to require the Minister to prepare the plans.⁵⁴ However, she did take a very skeptical view of the actions of Environment Canada, seemingly finding at least bad management. She was willing to take a fairly close look at the scheme of the Act and the Minister’s reasons, although at the same time she was also willing to give the Minister the benefit of the doubt about following up on the proposed strategies that were issued at the time of the hearing.

Even in the case of a broad grant of discretion, the courts have a role to play in ensuring the decision-maker stays within the purposes of the Act. As the Supreme Court noted in *Catalyst Paper*, in the context of municipal bylaws,

Unlike Parliament and provincial legislatures which possess inherent legislative power, regulatory bodies can exercise only those legislative powers that were delegated to them by the legislature. Their discretion is not unfettered. The rule of law insists on judicial review to ensure that delegated legislation complies with the rationale and purview of the statutory scheme under which it is adopted. The delegating legislator is presumed to intend that the authority be exercised in a reasonable manner.⁵⁵

In another example, the Court has found that a broad discretion to collect information under CEPA must “be exercised in a way that meets the obligations of the Government of Canada, as those obligations are defined in the CEPA, and that allows the various tools necessary to fulfill the general scheme and objects of the CEPA to be assembled and used in a meaningful way.”⁵⁶

However, the Supreme Court has tended to emphasize deference as the default position, raising a concern that a more deferential position makes challenges to environmental decisions more difficult. In the context of decision-

⁵² *Dunsmuir*, at para. 48.

⁵³ *Supra* note 4.

⁵⁴ *Western Canada Wilderness*, para. 112.

⁵⁵ *Catalyst Paper Corp v. North Cowichan (District)*, 2012 SCC 2 at para 15.

⁵⁶ *Great Lakes United v. Canada (Minister of the Environment)*, 2009 FC 408 at para. 201.

making by Cabinet and RAs under CEAA, the Federal Court of Appeal has recently adopted a seemingly very deferential form of reasonableness standard of review.⁵⁷ Some courts have attempted to take a closer look at certain decisions by the federal government, possibly because of a suspicion of bad faith or at least of a failure to follow the legislature's policy preferences. For example, the Federal Court of Appeal in *Georgia Strait Alliance* reviewed a Minister's interpretation of SARA on a correctness basis — in part seemingly because of a fear that the Minister was not capable of properly interpreting the legislature's wishes.⁵⁸ The Court stated "What the Minister is basically arguing is that the interpretation of the SARA and of the *Fisheries Act* favoured by his Department and by the government's central agencies, such as the Department of Justice, should prevail. The Minister thus seeks to establish a new constitutional paradigm under which the Executive's interpretation of Parliament's laws would prevail insofar as such interpretation is not unreasonable."⁵⁹ In addition, the Supreme Court has recently found a number of instances where the presumption of reasonableness was rebutted based on statutory language or the nature of the issue.⁶⁰

It is unclear, however, the extent to which this approach will survive. The Supreme Court of Canada has seemingly (that is, without directly addressing the issue) adopted a deferential approach to Ministerial interpretations recently.⁶¹ Further, the Supreme Court and the Federal Court have not found that the presumption of reasonableness review was rebutted in a number of decisions.⁶² The courts will likely review most environmental decisions on a reasonableness basis, certainly a reasonableness review will continue for discretionary decisions but also to a greater extent than in the past for questions of law.

In summary, the outcome of any judicial review may depend on which standard of review is chosen — a correctness standard may lead to a lower probability of a judge affirming a government decision while a reasonableness standard may increase her probability of affirming the decision.⁶³ Most environmental decisions will likely be reviewed on a reasonableness basis, with an increase in reasonableness review for questions of law. As discretionary decisions were reviewed on a reasonableness or patently unreasonableness basis prior to *Dunsmuir*, the outcome in such cases will depend on how closely the Court will review such decisions under the new single reasonableness standard.

⁵⁷ *Council of the Innu of Ekuanitshit v. Canada (AG)*, 2014 FCA 189 (noting the issues did not involve statutory interpretation).

⁵⁸ *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)*, 2012 FC 40.

⁵⁹ *Ibid.* para. 98.

⁶⁰ For example, see *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3.

⁶¹ *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (note that the provision at issue involved a broad discretion relating to the "national interest", signaling that the Minister and not the courts in this case should decide the issue).

⁶² See, for example, *Greenpeace Canada v. Canada (AG)*, 2014 FC 463. Revd. on other grounds: *Ontario Power Generation Inc v. Greenpeace Canada et. al.*, 2015 FCA 186.

⁶³ Green, *supra* note 39.

In an ideal world, the Supreme Court's move towards deference is not an abdication of responsibility to review decisions but a granting of space to executive decision-makers to use their expertise.

IV. WHAT ROLE DOES THE COURT ACTUALLY PLAY?

Environmental law then is built on delegation with a considerable amount of such delegation consisting of discretion given to political actors (the Cabinet or individual Ministers) particularly with the recent changes by the federal government. The Supreme Court of Canada meanwhile has built on the traditional deference meant to be given to discretionary decisions and emphasized the overriding need for deference to executive decision-makers. One possible result of these trends is that the courts become a less effective monitor of decisions by the government. If the delegated decision-maker is given broad, vaguely worded discretion and the courts are instructed to defer to their expertise, it may be increasingly difficult to use the courts to change government decisions.

How would you know if the courts are acting as monitors? Two measures may be useful. First, you could look at the deference rates. Do judges tend to defer to executive decision-makers or do they step in and alter or strike down decisions?⁶⁴ Second, you could look at the government win rate — how often does the government win when it is before the courts? The government win rate is different from the deference rate as there are some decision-makers that are deciding between the government and someone else. For example, the Canadian Human Rights Tribunal may be asked to decide whether the government has discriminated against an individual. A judge may defer to the Tribunal in a finding against the government.

Most of the empirical work on administrative law has been done in the US. In the US judges tend to affirm challenged decisions at a high rate, with studies finding courts affirming in the neighbourhood of 60–70% of challenged agency decisions.⁶⁵ Further, empirical studies have also found that the government

⁶⁴ Thomas J. Miles & Cass Sunstein, "Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron" (2006) 73(3) *University of Chicago Law Review* 823 and Jason Czarnezki, "An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation and the Chevron Doctrine in Environmental Law" (2008) 79 *U Colorado LR* 767.

⁶⁵ See, for example, Miles and Sunstein (2006) (finding that Circuit courts affirm approximately 62% of Environmental Protection Agency decisions and 70% of NLRB decisions, although the rates vary slightly by party affiliation), Thomas Miles and Cass Sunstein, "The Real World of Arbitrariness Review" (2008) 75 *U Chicago LR* 761 (finding an affirmation rate in policy/fact decisions of 64% overall and 72% for EPA decisions) and Jay E. Austin, John M. Carter II, Bradley D. Klein & Scott E. Schang, "Judging NEPA: A 'Hard Look' at Judicial Decision-Making Under the National Environmental Policy Act" (Washington: Environmental Law Institute, 2004) (finding a 56% affirmation rate for NEPA decisions before the federal courts between 2001 and 2004), Czarnezki (2008) (in examining US Courts of Appeal review of all environmental

overall tends to win at a high rate when a litigant. For high courts in different countries, government has been found to be a “gorilla”, winning cases at a much higher rate than other parties.⁶⁶ This high win rate may be due in part to the resources of the government, to its repeat players status which allows it to pick better cases or to its longer run preferences.⁶⁷

These overall affirmation rates and government win rates may hide differences across judges or issues. An extensive literature has developed in recent years attempting to empirically test different theories about how judges decide cases. The literature tends to focus on three main models of judicial decision-making.⁶⁸ The “legal” model posits that judges mainly decide in accordance with the law and legal precedents and that these place significant constraints on how they vote in particular cases. A second model holds that judges vote not (or not mainly) according to the law but according to their own personal policy preferences. Testing this “attitudinal” model involves defining some indicator of policy preferences (or ideology) for individual judges and attempting to determine if there is a connection between these attitudes and their votes. In the US different measures of ideology have been used such as party of the appointing President, ideology scores for the legislators in the judges’ states or ideology scores based on newspaper editorials.⁶⁹ In Canada the tendency has been to use party of the appointing Prime Minister.⁷⁰

decisions (not just environmental assessments), stating that “consistent with all research, the data show that affirmance is more common than reversal of agency action” (at 802)) and finding an affirmation rate in his data of approximately 69% (at 783)) and Peter H. Schuck & E. Donald Elliott, “To the Chevron Station: An Empirical Study of Federal Administrative Law” (1990) *Duke LJ* 984 (finding a post-Chevron affirmation rate of over 80%).

⁶⁶ Herbert M. Kritzer, “The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?”, in *In Litigation: Do the “Haves” Still Come Out Ahead?*, edited by Herbert M. Kritzer & Susan S. Silbey (Stanford: Stanford University Press, 2003), at 342–370.

⁶⁷ Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculation on the Limits of Legal Change” (1974) 9(1) *Law & Society Review* 95; Donald Songer, *The Transformation of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2008).

⁶⁸ Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press, 2002).

⁶⁹ See, for example, Spaeth and Segal (2002), Jeffrey A. Segal and Albert D. Cover, “Ideological Values and Votes of US Supreme Court Justices” (1989) 83 *American Political Science Review* 557, Segal and Spaeth (2002); Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andres Sawicki, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (Brookings Institution Press, 2006) and Czarnezki (2008).

⁷⁰ Ben Alarie & Andrew Green, “Policy Preference Change and Appointments to the Supreme Court of Canada” (2009) 47(1) *Osgoode Hall Law Journal* 1 and CL Ostberg & Matthew E Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007). Ostberg and Wetstein have also created a ranking for some Supreme Court of Canada judges based on newspaper editorials (Ostberg and Wetstein (2007)).

A third model that has been developed to attempt to understand judicial behavior is the “strategic” model. Like the attitudinal model, it assumes that judges vote for their personal policy preferences. However, while in the attitudinal model judges vote for this policy option directly, in the strategic model they take into account not only their own vote in a particular case but how that vote will affect other policy makers or judges. The judges may take into account both vertical effects (such as how their votes will impact lower court judges or be perceived on appeal) and horizontal effects (such as the interaction of their vote with other judges on the same level of court or with other institutions such as the legislature).

None of these models is likely to be sufficient in itself and the relevance of each may vary between countries.⁷¹ For example, empirical studies have tended to find a strong positive relationship between indicators of ideology and voting of judges on the US Supreme Court⁷² and a positive, though weaker, connection for judges on the Supreme Court of Canada.⁷³ More recently, US studies have moved beyond the Supreme Court and examined how judges have voted on lower courts, including Federal courts. Particularly relevant for this paper, a number of studies have examined how judges on these courts decide in the context of administrative law including judicial review of environmental law decisions.⁷⁴ These studies have in general found that while not the sole factor in judicial decision-making, there is a fairly strong connection between judges’ ideology and both the form of review they undertake and their actual votes in appeals.

Some studies in the US have found a difference in affirmation rates between Republican and Democratic appointees. Revesz called this the “Consistent Deference” hypothesis — that Republican appointees tend to defer to the executive more than Democratic appointees because of an overall view of the appropriate stance of the courts relative to the executive branch.⁷⁵ Miles and

⁷¹ Alarie and Green (2009) and Ostberg and Wetstein (2007), *ibid.*

⁷² For the US, see Segal and Spaeth (2002); Sunstein et al (2006); Andrew D. Martin, Kevin M. Quinn, Theodore W. Ruger & Pauline T. Kim, “Competing Approaches to Predicting Supreme Court Decisionmaking” (2004) 2 *Perspectives on Politics* 761.

⁷³ For the Supreme Court of Canada see, for example, Alarie and Green (2009); Ben Alarie & Andrew Green, “Charter Decisions in the McLachlin Era: Consensus and Ideology at the Supreme Court of Canada” (2009) 47 *Supreme Court Law Review* (2d) 475; and Ostberg and Wetstein, (2007).

⁷⁴ See Richard L. Revesz, “Environmental Regulation, Ideology, and the D.C. Circuit” (1997) 83 *Va L Rev* 1717 (examining DC Circuit court decisions relating to the Environmental Protection Agency from 1970 to 1994); Miles and Sunstein (2006); Cass Sunstein et al, *Are Judges Political? An Empirical Investigation of the Federal Judiciary* (Brookings Institution Press, 2006) (using a larger data set than Revesz for the period 1984 to 2004); and Czarnecki (2008) (examining challenges in all US Courts of Appeal from 2003 to 2005 involving environmental decisions by a range of administrative agencies).

⁷⁵ Revesz (1997), *ibid.* at 1728.

Sunstein argue, on the other hand, that liberal judges may have higher affirmation rates than conservative judges because of a greater faith or trust by liberal judges in administrative expertise.⁷⁶

The actual evidence on the overall difference in deference rates and ideology in the US is mixed. Revesz in studying reviews of EPA decisions did not find evidence of a difference in affirmation rates between appointees of the different parties. However, Miles and Sunstein as well as Smith and Tiller found liberal judges tended to affirm decisions more often than conservative judges, though the differences were very small.⁷⁷ Czarnezki, on the other hand, found that Republican appointees tended to affirm EPA decisions at a greater rate than Democratic appointees although he was examining decisions only during the Bush administration.⁷⁸

The overall affirmation rate may hide differences in how judges vote based on their policy preferences. Conservative judges may, for example, affirm decisions that are conservative in nature at a higher rate than liberal decisions and Liberal judges will affirm liberal decisions at a higher rate than conservative decisions. Revesz has called this the “selective deference” hypothesis.⁷⁹

Judges on the US Supreme Court and other federal courts engage in such attitudinal voting.⁸⁰ This attitudinal voting includes how judges vote in environmental cases. Sunstein et al, for example, examined industry challenges to EPA decisions between 1970 and 2002 and found that Democratic appointees affirmed 64% of these decisions while Republican appointees affirmed only 46%.⁸¹ Miles and Sunstein also found strong evidence of ideological voting in examining how federal courts undertake review of decisions involving statutory interpretation and policy or factual issues. For example, in the context of statutory interpretation, they found that Republican appointees on federal courts affirmed 60% of conservative decisions and 50% of liberal decisions while for Democratic appointees the affirmation rates were essentially reversed at 40% for conservative decisions and 70% for liberal decisions.⁸² For federal court decisions involving challenges to factual or policy decisions, they found very

⁷⁶ Miles and Sunstein (2006), *supra* note 64 at 838. See also Czarnezki (2008), *supra* note 64 at 795 and 802.

⁷⁷ Miles and Sunstein (2006) (finding at the US Supreme Court liberal judges tended to affirm more than conservative judges), Miles and Sunstein (2008) and Joseph Smith and Emerson Tiller, “The Strategy of Judging: Evidence from Administrative Law” (2002) 31(1) *Journal of Legal Studies* 61 (analyzing challenges to EPA decisions in circuit courts and finding an affirmation for Republican appointees of 61% and for Democratic appointees of 69%).

⁷⁸ Czarnezki (2008), *supra* note 64.

⁷⁹ Revesz (1997), *supra* note 74 at 1728.

⁸⁰ There is a large literature on this issue. See, for example, Spaeth and Segal (2002), *supra* note 68, Miles and Sunstein (2006), *supra* note 77, and Sunstein et al (2006), *supra* note 69.

⁸¹ Sunstein et al (2006), *ibid.* at 322. See also Revesz (1997), *Supra* note 74, (finding a connection between voting rate of Republic and Democratic appointees).

similar numbers with Republican appointees affirming 72% of conservative decisions and 58% of liberal decisions and Democratic appointees affirming 55% of conservative decisions and 72% of liberal decisions.⁸³ There is some evidence from the US that judges may choose the result and then the standard of review to more easily obtain that result — that is, for example, judges with liberal policy preferences are more likely to choose a deferential standard of review when reviewing decisions that accord with these liberal preferences.⁸⁴

Finally, there is a significant difference in the US in how judges vote depending on the party controlling the executive. A change in power could signify a difference in approach to environmental policy and therefore may lead to a difference in the rate at which different judges affirm decisions. Miles and Sunstein found some connection between Republican and Democratic appointees and their voting for decisions of the party that appointed them. For example, in the context of challenges on the basis of fact or policy, they found that Democratic appointees do not affirm decisions of Democratic and Republican governments differently (they affirm both at about a 70% rate) but Republicans affirm Republican administration decisions at about an 8% higher rate than decisions of Democratic administrations.⁸⁵

⁸² Miles and Sunstein (2006), *supra* note 77. Similarly, see Czarnezki (2008), *supra* note 64, (examining US Court of Appeals decisions between 2003 and 2005 and finding that Republican appointees were more likely to find ambiguity and affirm conservative decisions) and Austin et al (2004), *supra* note 65, (finding ideological voting in NEPA decisions).

⁸³ Miles and Sunstein (2008), *supra* note 65. Further, empirical work has found that the tendency of judges to vote ideologically in cases involving environmental decisions is impacted by “panel effects”—that is, whether they sit with like-minded judges or not. See, for example, Revesz (1997), *supra* note 74, (examining DC Circuit court decisions relating to the Environmental Protection Agency from 1970 to 1994); Sunstein et al (2006), *supra* note 69, (using a larger data set than Revesz for the period 1984 to 2004).

⁸⁴ For arguments that standard of review may be used politically in the US, see Miles and Sunstein (2006), *supra* note 77, (finding that Democratic judges were more likely to apply Chevron deference for agency decisions coded as liberal than Republican appointees, though the effect was not large) and Czarnezki (2008), *supra* note 64, (finding only “very limited evidence” of ideological use of the choice of the level of deference). Smith and Tiller (2002), *supra* note 77, has an alternate theory of the connection between ideology and administrative law principles. They argue that approaching the issue as one of statutory interpretation has the benefit of increasing the policy impact of the decision but also increases the risk that the decision will be reviewed (with the opposite effect for process review). Liberal courts may therefore be expected to use process instruments at a higher rate when reversing conservative than liberal decisions. They find some evidence of this “strategic instrument” effect in that in general judges tend to use process review more when reversal advances their policy preferences (61.5%) than when it does not advance their policy preferences (35%). There does not appear to be a connection in our data between the use of procedural and substantive review and whether the decision and judge are similar or opposed. Revesz (1997), *Supra* note 74, argues that there is an additional possible explanation for the choice of procedural review—that the review is more malleable and therefore more open to political voting.

⁸⁵ Miles and Sunstein (2008), *supra* note 65. See also Miles and Sunstein (2006), *supra* note

There has been considerably less empirical work on judicial decision-making in Canada. The Canadian literature on judicial voting has focused primarily on the Supreme Court of Canada, with little work having been done on either the Federal Court or provincial courts.⁸⁶ It has tended to find a connection between the ideology of a particular judge and how she votes but the connection is much weaker than in the US.⁸⁷ The greatest indication of attitudinal voting arises in decisions relating to criminal matters and the Canadian Charter of Rights and Freedoms. However, the Canadian Supreme Court seems to lack the distinct ideologically-related factions of the US Supreme Court. In part, the difference between Canada and the US may relate to the underlying structure of the political parties and the appointments process. For the most part, Canada has lacked the very polarized two party system that has existed in the US. Moreover, the judicial appointments process in Canada tends to be much less politicized than in the US, which may also tend to lead to less of an ideological difference across appointments.⁸⁸

There has been even less empirical work on how judges decide in administrative law cases in Canada.⁸⁹ There is also some evidence of a conservative bent to Federal Court judges in the limited empirical studies that have been done of the Federal Court. For example, Rehaag examined Federal Court review of refugee decisions by the Immigration and Refugee Board between 2005 and 2010.⁹⁰ He found an overall affirmation rate of refugee decisions of 56%. However, if the decisions are coded liberal if the refugee challenges the decision and conservative if the government challenges the decision, the affirmation rate for liberal decisions was much lower for liberal decisions (37%) than for conservative decisions (56%).⁹¹

77, (finding some connection between voting for Democratic and Republican administrations though less than when decisions are directly coded liberal or conservative).

⁸⁶ One of the exceptions is a study of decision-making at the Ontario Court of Appeal: James Stribopoulos & Moin A Yahya, "Does a Judge's Party of Appointment or Gender Matter to Case Outcomes? An Empirical Study of the Court of Appeal for Ontario" (2007) 45(2) *Osgoode Hall LJ* 315.

⁸⁷ Alarie and Green (2009a), *supra* note 70; Alarie and Green (2009), *supra* note 73, and Ostberg and Wetstein (2007), *supra* note 70.

⁸⁸ Alarie and Green (2009), *ibid.*

⁸⁹ Recently some empirical work has begun on judicial decisions in some areas of Canadian regulatory law. See, for example, Benjamin Alarie and Andrew Green, "Policy Preferences and Expertise in Canadian Tax Adjudication" (2014) 62(4) *Canadian Tax Journal* 985 and Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38(1) *Queens Law Journal* 1. See also Leonard Marny and Voy Steltnaszynski, "Judicial Review of Ontario Labour Relations Board Decisions: From CUPE to Dunsmuir and Beyond" (2009-2010) 15 *CLELJ* 555.

⁹⁰ Rehaag (2012), *ibid.*

⁹¹ Note that for immigration decisions the Federal Court has an initial leave to appeal decision to make before the case will be heard by the Court (Rehaag 2012), *supra* note 89.

Similarly while tax decisions are very difficult to code as liberal or conservative, Alarie and Green found the overall affirmation rate of decision of the Canada Revenue Agency at the Tax Court of Canada (first level of appeal of a decision of the CRA) was 54%.⁹² When corporations challenged the CRA decision (arguably a liberal decision at the Canada Revenue Agency) the affirmation was much lower (45%) than when an individual challenged the decision (57%). They also found that at the FCA, the Court affirmed 76% of appeals, with an 83% affirmation rate if the TCC decision was against the taxpayer and a 65% affirmation rate if the decision was against the government. Alarie and Green found that this difference in voting was not attributable to differences in voting by Liberal and Conservative appointees.

There then is some evidence from the US that judges tend to be deferential in administrative law overall but differ in their degree of deference depending on their political preferences and the nature of the underlying decision. Much less empirical work has been undertaken in Canada. For the purposes of understanding how effective a monitor the court may be in the environmental law context in Canada, the literature provides little basis for understanding such issues as the overall degree of deference by judges to government decisions generally or to environmental decisions, the difference in judicial voting depending on the choice of the type of review (procedural as opposed to substantive) or the standard of review, or the relevance (if any) of the policy preferences of different judges. The literature also does not examine any changes in such issues over time. Each of these issues is central to examining how effective courts may be at policing government decisions given the nature of environmental law and the recent shifts in administrative law. This paper provides an initial examination of these issues with a view to beginning to flesh out areas of concern with the role of the courts as monitors in environmental law.

(a) The Data

As we saw, two important measures of the court's role in judicial reviews are the rate at which the courts tend to affirm challenged decisions and the rate at which government is successful on judicial reviews. There are difficulties teasing out the actual impacts of changes in how the courts decide. Those who challenge or may challenge the government in court will respond to how the courts decide—if, in the extreme, the courts always find for the government, individuals may almost never bring court challenges.⁹³ However the first step in understanding what role the court is playing is to look at how it decides judicial reviews and, in particular, what factors are associated with the willingness of judges to defer to executive decision-makers and to vote in favour of the government.

In order to look at how judges deal with judicial reviews, it is useful to examine two different sets of cases. First, to understand how judges treat judicial

⁹² Alarie and Green (2014), *supra* note 89.

⁹³ Green (2014), *supra* note 39.

reviews generally, we coded Federal Court decisions from two years: 2005 and 2013. The analysis covers 2005 as it was prior to *Dunsmuir* (2008), the most recent fundamental change by the Supreme Court of Canada to administrative law, and 2013 as it was after the *Dunsmuir* changes would have taken effect. In addition, the Liberal party was in power federally in 2005 and Conservative party in 2013. The Federal Court has particular expertise in administrative law given the volume of judicial reviews it hears each year and so is a valuable place to find trends in the application of administrative law principles.

Only judicial reviews were coded and only for certain areas of law (environmental,⁹⁴ immigration and refugee, aboriginal, banking and tax, national security, labour and human rights). These cases were coded for:

- the area of law;
- the party that was applying and responding (whether government, individual, business or other);
- the type of decision-maker (Cabinet, a Minister, another government official or a tribunal);
- the type of review (procedural, substantive or both);
- whether the issue was one of statutory interpretation;
- the standard of review used (correctness, reasonableness or both, with reasonableness including patent unreasonableness);
- Who appointed the judge; and
- The outcome (whether the judge affirmed the challenged decision or not).

The number of cases coded for each area of law is set out in Table 1 as is the number for each type of decision-maker.⁹⁵

Area of Law	2005	2013
Environmental	8	4
Immigration and Refugee	50	50
Aboriginal	4	14
Tax and Banking	23	19
National Security	1	1
Labour	46	54
Human Rights	35	26
Decision-maker		

⁹⁴ For environmental, we included any decisions involving the *Fisheries Act*, *CEAA*, *SARA* and the *Canadian Environmental Protection Act*. Some of the decisions, for example, related to fishing quotas under the *Fisheries Act*.

⁹⁵ The Federal Court docket is dominated by immigration and refugee cases. For example, in 2005 a little over 1000 of the 1722 decisions were immigration and refugee cases while in 2013 they composed about 700 of the 1142 decisions. We therefore used a random sample of 50 immigration and refugee cases for each year. We did not code other judicial reviews (such as patent, pensions or parole) nor did we include motions or stay applications.

Area of Law	2005	2013
Cabinet	1	2
Minister	32	27
Other Government	13	52
Tribunal, Board or individual arbitrator	121	87

Table 1: Number of Federal Court cases coded by area of law, 2005 and 2013.

Second, to examine whether judges treated environmental cases differently, all Federal Court decisions relating to CEAA from its enactment to 2013 were examined (other than minor motions or decisions which mention CEAA but are about other matters). The database includes 43 decisions of the Federal Court and Federal Court of Appeal. These decisions were also coded for the parties involved (for example, environmental group, private proponent, public proponent and RA), the government (Liberal or Conservative) making the challenged decision, the type of review (procedural or substantive), the standard of review applied by the Court, whether the case involved statutory interpretation, who appointed the judge deciding the cases and whether the Court affirmed the RA decision. The number of decisions is small but may give some indication of differences in voting patterns. Note that these decisions encompass some of the changes to CEAA in 2012 but most of the decisions would have been under the older version of the Act. CEAA was examined not to look at the effect of the 2012 changes specifically but to allow a slightly more detailed look at an important area of environmental decisions.

As we saw, the Responsible Authority (or Authorities) under CEAA administers the environmental assessment process and makes a range of decisions. A large number of government ministries or agencies have been RAs under CEAA, though with some (such as Fisheries and Oceans, Environment Canada and Indian and Northern Affairs) overseeing considerably more environmental assessments than others.⁹⁶ Judicial reviews have been brought against decisions of a number of RAs with the most frequently challenged being decisions by Fisheries and Oceans, Environment Canada and Canadian Heritage.⁹⁷

These judicial reviews of CEAA decisions are typically brought either by a non-governmental organization such as an environmental organization or by the proponent of a project challenging some constraint on the project. NGOs, which would be challenging a decision allowing a project to proceed, brought the majority of the challenges under CEAA, making up approximately 82 percent of the applicants. Proponents, which would be challenging some constraint (either

⁹⁶ Canadian Environmental Assessment Agency, Statistical Summaries, at <<http://www.ceaa.gc.ca/default.asp?lang=En&n=4F451DCA-1>> .

⁹⁷ In our dataset of CEAA cases, the Department of Fisheries and Oceans was one of the RAs named in 21 of the judicial reviews and Environment Canada was one of the RAs in 13 judicial reviews. There were nine other government agencies that were one of the RAs named in the judicial reviews.

in whole or in part) on the project, brought 18% of the applications for judicial review.

In order to examine the role of the court given the nature of environmental law and administrative law, the analysis focuses on three broad, interrelated questions. First, what are the overall outcomes on judicial review — that is, do courts generally affirm executive decisions and does the government generally win? Second, are these outcomes correlated with the type of review undertaken by the court? Finally, are these outcomes related to either the nature of the underlying decision or the identity of the judge?

(b) Overall Outcomes

As we saw, federal environmental law provides considerable discretion to the government to make decisions. Judges could attempt to cabin such discretion by overturning decisions that do not accord with the underlying statute. A high rate of affirmation of administrative decisions does not necessarily mean that the courts are providing no check on administrative decisions or that agencies are not constrained by the Act. It depends in part on the nature of the decisions that come before the court (as we will discuss). However, a high affirmation rate does provide an indication of either unwillingness by the judges to overturn government decisions in general or a desire to support certain types of administrative decisions.

Figure 1 shows the rate at which Federal Court judges affirmed challenged decisions. Judges both generally and in CEAA challenges have been quite willing to uphold challenged decisions in this period. When we look at the more general Federal Court decisions, judges affirmed about 2/3 of all challenged decisions.⁹⁸ Interestingly, in line with the Supreme Court's push towards greater deference in *Dunsmuir*, judges affirmed slightly more decisions in 2013 than in 2005, although the difference is not statistically significant. Judges affirmed CEAA decisions at a slightly higher rate than other decisions, but again the difference was not statistically significant.

⁹⁸ The difference between the affirmation rate for 2005 and 2013 was not statistically significant at the .05 level nor was the difference between the overall Federal Court affirmation rate and the affirmation rate of CEAA decisions. Note that unless otherwise noted, statistical significance was determined using a t-test of differences in means.

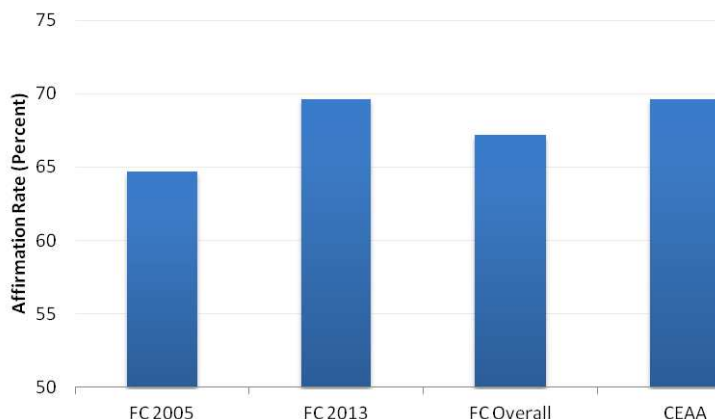


Figure 1: Rate at which the Federal Court affirmed challenged decisions (Percentage). The Court affirmed about two-thirds of decisions overall, with a slightly higher rate in 2013.

However, a judge may affirm decisions for different reasons or affirm certain types of decisions and not others. Given our discussion of the changes to environmental law and administrative law, we would in particular like to know if judges defer more depending on the area of law—that is, is environmental law different from any other area of law? Judges may be more likely to affirm decisions where the challenged decision is in a technical or scientific area.⁹⁹ They may, on the other hand, be more willing to overturn challenged decisions in areas where they feel have expertise relative to the decision-makers such as human rights law.

Figure 2 separates out the general Federal Court data by area of law. Judges affirmed environmental decisions at a higher rate than other types of decisions. However, the number of environmental decisions was small, particularly in 2013 (four decisions, all affirmed) so the higher affirmation rate for environmental decisions was statistically significant in 2005 but not in 2013.¹⁰⁰ In addition, the Federal Court was more likely to affirm decisions in 2013 than 2005 in all areas

⁹⁹ One area for future work is the connection between the affirmation rate and the types of underlying challenges. The standard of review and the willingness of judges to defer to executive decisions at the Federal Court will affect (a) the willingness of parties to bring a judicial review; and (b) the willingness of the RA to depart from a “reasonable” interpretation (Green (2014), *supra* note 39, Miles and Sunstein (2008), *supra* note 65). These effects would then alter the number and type of challenges to RA decisions.

¹⁰⁰ Statistical significance was found using a logit regression with whether the judge affirmed the decision as the dependent variable and the areas of law as independent variables, using immigration decisions as the omitted area. The affirmation rate for environmental law was significant at the .1 level overall and at the .05 level for 2005 and not statistically significant for 2013.

with the exception of immigration and refugee where the difference was very small, but the differences were not statistically significant.

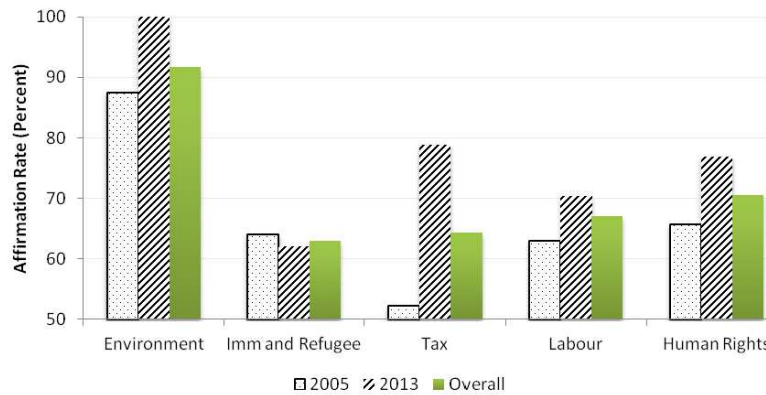


Figure 2: Rate at which the Federal Court affirmed challenged decisions, by area of law (Percent). The Court affirmed environmental decisions at the highest rate and immigration and refugee decisions at the lowest rate.

In addition to examining whether environmental law had a higher affirmation rate than other areas of law, we would also like to know if judges tended to affirm decisions of some decision-makers more than others. We saw that environmental law is built on discretion, particularly the legislature granting discretion to Ministers and the Cabinet. However, more independent bodies (such as the National Energy Board) make some decisions such as under CEEA. Does the identity of the decision-maker matter? In theory judges may be more likely to defer to decision-makers who are subject to alternate forms of accountability—they may give Cabinet, for example, an extra wide “margin of appreciation” in recognition of their greater accountability through the ballot box. On the other hand, judges may defer to more independent boards and tribunals in recognition of expertise.

As can be seen in Figure 3, judges tend to affirm both “government” decision-makers and tribunals and boards at about the same rate overall. Tribunals includes independent bodies such as the National Energy Board, the Immigration and Refugee Board, the Canadian Human Rights Tribunal and labour arbitrators. Judges tended overall to affirm both government decision-makers and tribunals about two-thirds of the time.¹⁰¹ There is a slight variance

¹⁰¹ The difference across the types of decision-makers was not statistically significant using a logit regression with the affirmation as the dependent variable and the types of decision-makers as the independent variables, omitting tribunals.

between the years with judges more likely to affirm tribunals in 2013 which may in part be accounted for by the push for deference by the Court but the difference is small.¹⁰²

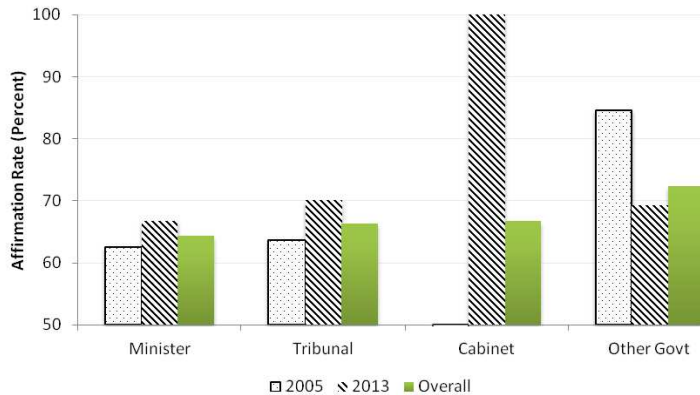


Figure 3: Rate at which the Federal Court affirmed challenged decisions, by decision-maker (Percent). The overall affirmation rates are very similar. The Federal Court reviewed one Cabinet decisions in 2005 in our dataset, which it did not affirm.

As we saw, we can attempt to assess the role of the courts either by looking at whether they generally defer to the decision-maker or at whether the government tends to win judicial challenges when it was a party to the underlying decision. Again our question is both how well the government fared and whether environmental law appeared different from other areas of law. Figure 4 looks at how often the government won — whether it is bringing the judicial review or responding to a challenge by another party. The overall win rate is not strikingly high. The government won a little over 50% overall in judicial reviews before the Federal Court. It did appear to fare differently depending on the area of law. Government won at a higher rate if the challenge was in the area of the environment, immigration and refugee law and tax. The government did not do as well in challenges in the area of labour and human rights. However, the higher government win rate for environmental decisions was only significant at the .1 level given the small number of decisions.¹⁰³ As we will discuss below when we

¹⁰² Note that the number of Cabinet decisions in the sample is very small, with only one decision reviewed in 2005 and two in 2013.

¹⁰³ Using a logit regression with government win as the dependent variable and the areas of law as the independent variables omitting immigration decisions, environmental decisions were significantly significant at the .1 level overall while human rights decisions' lower win rate was statistically significant at the .05 level. None of the other areas of law were statistically significant.

examine the substance of decisions, the government could be supporting either development or environmental protection in these wins.

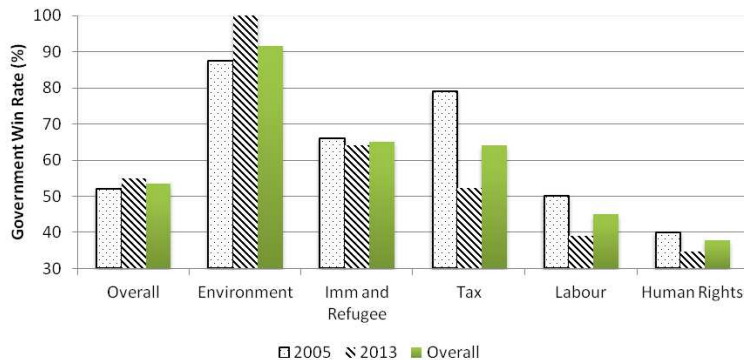


Figure 4: Rate at which the government was the winning party in judicial reviews before the Federal Court, Overall and By Area of Law (Percent). The government was most successful in environmental cases and least in human rights.

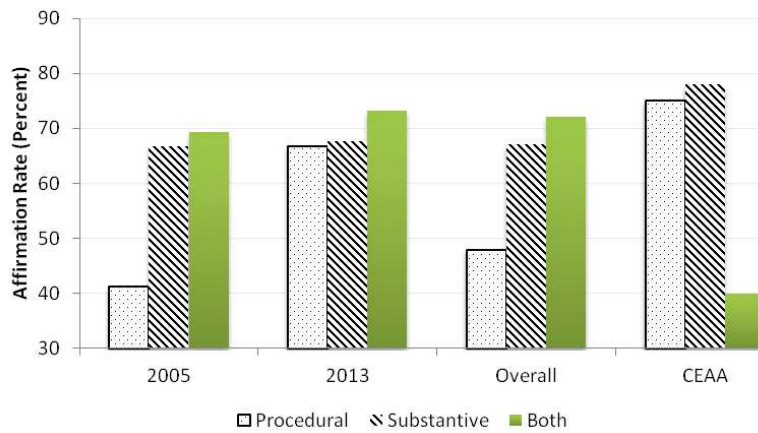
Overall then courts have tended to affirm decisions of executive bodies at a very high rate and although the small numbers do not allow for firm conclusions, environmental decisions appear to be at the high end of the affirmation rate. Moreover, the government had a slightly higher win rate than other actors, particularly in the area of environmental law. While the number of cases is small and it would be useful to look over a longer time period, the data suggests that at least in terms of the decisions which are challenged, the courts have not tended to look favourably on challenges in this area. However, it is interesting that while political actors play a large (and potentially increasing) role in environmental decisions, the court does not appear to be significantly more likely affirm decisions of political as opposed to more independent decision-makers.

(c) The Form of Review

The courts then affirmed challenged decisions at a high rate. Does this affirmation rate vary with the type of review undertaken by the court? If so, administrative law principles would be central to the development of substantive law and policy. One of the most basic divisions in administrative law is between challenges to the process by which decisions are made as opposed to the substance of decisions. As we discussed, judges review procedural challenges on essentially a correctness standard while substantive review could be either on a correctness or reasonableness standard. Greater use of procedural review may then lead to lower affirmation rate given the correctness standard but also

because courts may feel more competent to review decisions for process than for substance, whether the decisions relates to the environment or any other area.

Figure 5 separates the decisions into those that involve procedural as opposed to substantive review. Judges at the Federal Court affirmed decisions overall at a higher rate in substantive decisions or both than in procedural decisions, affirming about two-thirds of decisions when reviewing on substantive grounds but only a little less than half when reviewing on procedural grounds.¹⁰⁴ The difference was much more stark in 2005 than 2013. A higher affirmation rate for substantive review is not surprising given that a judge would likely feel more comfortable substituting her opinion on procedural matters than she would reversing decisions about what are potentially technical or scientific issues. The size of the difference is interesting, however, indicating a considerable reluctance on the part of judges to “second guess” substantive issues. For the CEAA cases, both procedural and substantive reviews had essentially the same affirmation rate, slightly higher than for all Federal Court decisions but not statistically significant except for reviews that involved both procedural and substantive reviews which were significantly lower for CEAA decisions.¹⁰⁵



¹⁰⁴ Using a logit regression with whether the decision was affirmed as the dependent variable and the types of review as the independent variables omitting procedural review, the difference between procedural review and substantive review for both was significant at the .05 level while between procedural and substantive review was significant at the .01 level overall but the .05 level for 2005. The differences in 2013 were not statistically significant.

¹⁰⁵ The difference between procedural and substantive reviews between CEAA and the general Federal Court data were not statistically significant but the differences where both types of review were involved were significant at the .05 level.

Figure 5: Rate at which the Federal Court affirmed challenged decisions, by type of review (Percent). The Court affirmed challenged decisions at a higher rate when undertaking substantive review.

Reviews may not only be differentiated by whether they are procedural or substantive reviews but also by the type of substantive review. As we discussed, environmental law relies heavily on delegation of discretion. While judges have tended to give considerable space for decision-makers to exercise discretion, they have at times found ways to review more closely grants of discretion such as where they find that the decision-maker made an error of jurisdiction and did not actually have the power she thought she had. Alternatively they may be reviewing a question of statutory interpretation as opposed to discretion. One question then is to ask whether the affirmation rate varies by whether the judge is reviewing on the basis of discretion or statutory interpretation.

As it turns out, judges affirmed fewer challenged decision when they view the issue as one of statutory interpretation (Figure 6). For cases where the main issue is one of statutory interpretation, judges on the Federal Court affirmed a little over half the decisions including the CEAA decisions. However, the affirmation rate jumped for statutory interpretation cases between 2005 and 2013. For all other decisions, the affirmation rate is close to 70 percent for most judicial reviews and over 90 percent for CEAA decisions. For all Federal Court appeals, the overall difference in affirmation rates between statutory interpretation and discretionary decisions was not statistically significant, though it was statistically significant at the .1 level in 2005. The difference for CEAA decisions was statistically significant.¹⁰⁶

¹⁰⁶ Using a logit with affirmation as the dependent variable and the types of issue as the independent variables, omitting statutory interpretation, the differences between types of review were not statistically significant overall for Federal Court decisions but was significant at the .1 level for 2005 and at the .01 level for CEAA decisions. The difference in the affirmation rate between discretionary decisions under CEAA and all other judicial reviews was significant at the .05 level.

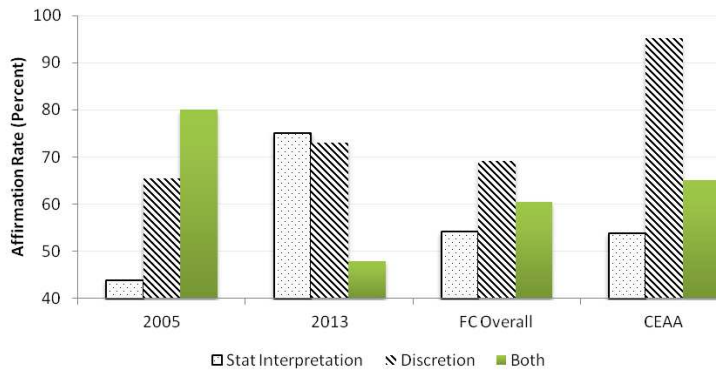


Figure 6: Rate at which the Federal Court affirmed challenged decisions, by type of decision (Percent). The Court affirmed discretionary decisions at a much higher rate.

Further, the standard of review adopted by the court may also be important to the outcome. Figure 7 illustrates the connection between the standard of review chosen and the resulting decisions. The types of standard of review have been broken down into three categories — whether the court used a correctness standard, whether the court used a mixed form of review (such as with correctness for statutory interpretation and reasonableness for any discretionary element) and whether the court solely used some form of more deferential standard such as reasonableness or patently unreasonableness.¹⁰⁷

¹⁰⁷ We do not break the decisions down by issues in part because a court only needs to find one issue to be under correctness review to be able to take a more intrusive form of review. This section takes a simplistic view of the categorization of standards of review in that it does not recognize explicitly the differences both within categories and changes to the scope of these categories over time. Future empirical research is needed on the impact of these differences. There were five decisions that could not be categorized.

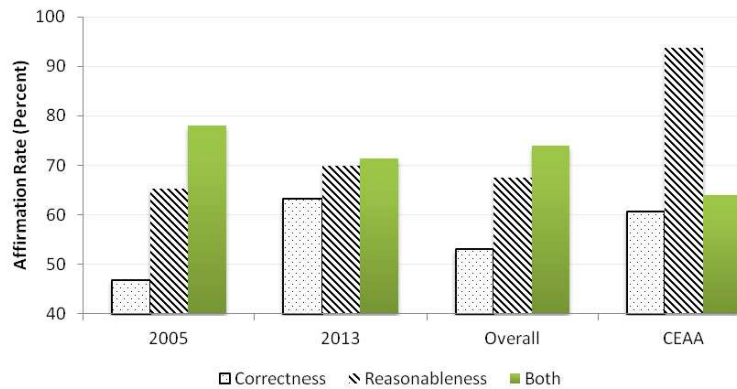


Figure 7: Rate at which the Federal Court affirmed challenged decisions, by standard of review (Percent). The Court affirmed challenged decisions at a higher rate when at least in part undertaking reasonableness review.

Perhaps not surprisingly, judges were less likely to affirm decisions when they used a less deferential standard of review — that is, correctness instead of reasonableness. The difference in affirmation rate is particularly stark for CEAA decisions, with an increase in affirmation from about 60% when there is a correctness standard up to over 90% when there is solely a deferential standard (with the difference being statistically significant). The difference is less stark for the broader Federal Court data, with the affirmation rate about 15% higher for reasonableness review than correctness (with the difference again being statistically significant).¹⁰⁸ Again there is a large difference between 2005 and 2013, this time in the affirmation rate under correctness review.

It is not possible to tell from Figure 7 whether judges chose the standard of review and then came to a particular result or whether they chose the result and then the standard of review to more easily obtain that result.¹⁰⁹ In Canada, the

¹⁰⁸ Using a logit regression with affirmation as the dependent variable and the standards of review as the independent variables omitting correctness, the differences overall and in 2005 were statistically significant at the .05 level for the Federal Court data and for the CEAA data. Further, the differences in the affirmation rate for reasonableness reviews between the Federal Court data overall and the CEAA data was significant at the .05 level but for correctness was not statistically significant.

¹⁰⁹ As noted above, for arguments that standard of review may be used politically in the US, see Miles and Sunstein (2006), *supra* note 74, (finding that Democratic judges were more likely to apply Chevron deference for agency decisions coded as liberal than Republican appointees, though the effect was not large), Shapiro and Murphy (2011) and Czarnecki (2008), *supra* note 64, (finding only “very limited evidence” of ideological use of the choice of the level of deference).

“realist” approach to choice of review would hold that if a judge wished to affirm a decision of an RA, she would choose a reasonableness (or, pre-*Dunsmuir*, patent unreasonableness) standard of review and if she did not want to affirm the decision, she would choose a correctness standard of review.¹¹⁰ Such an approach would imply that a Liberal appointee would be more likely to choose a deferential standard for liberal decisions and a correctness standard for conservative decisions. Similarly a Conservative appointee would be more likely to choose a deferential standard for conservative decisions and correctness for liberal decisions. However, as we have discussed, most environmental decisions would likely fall under reasonableness review following *Dunsmuir* so at least at the choice of standard stage it may be less of an issue in Canada.

Examining the issue of the type of review provides us with some insight into the likely role of the courts in judicial reviews of environmental decisions. To the extent that judges could be shifting to procedural review of environmental decisions to avoid the growth of reasonableness review following *Dunsmuir*, the data suggests that the affirmation overall and for CEEA decisions is not significantly different for procedural and substantive reviews. Judges then may then not be willing to turn to procedural review where substantive review is almost universally reasonableness following *Dunsmuir*. The results are more mixed if we look at the nature of the issue. Given that environmental law relies heavily on delegation of discretion, the CEEA result that discretionary decisions are affirmed at a much higher rate points to a less stringent monitoring role than if the legislature set stricter requirements in legislation. However, the differences for the broader data set were not statistically significant in the post-*Dunsmuir* era.

Finally, we can possibly explain some of this difference in types of substantive review by considering differences in affirmation rates across standards of review. As we discussed, environmental decisions are likely to be reviews on a reasonableness basis. The difference between correctness and reasonableness review were significant here both for CEEA and the broader database. As a result, the shift away from correctness at least for questions of law would then seem to imply a lighter hand from the court. However, the broader dataset points to an increase in the affirmation rate for correctness reviews in 2013 which may mean the difference is less significant than it would have been under correctness as it was applied prior to *Dunsmuir*.

¹¹⁰ It is somewhat more difficult to assess the choice of standard post-*Dunsmuir*. While the Court limited the standards of review to two (correctness and reasonableness), it also held that reasonableness “takes its colour from context”. The Court has seemed to vary the review under the reasonableness from a review that appears close to correctness (*Canada (Attorney General) v. Mowat*, 2011 SCC 53) to one that is very close to patent unreasonableness (*Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2).

(d) The Substance of the Decision and the Identity of the Judge

Judges may also vote differently depending on the substance of the underlying decision. Some judges may be more willing to make decisions that protect the environment than others or that favour individuals over business or individual human rights claimants. As we noted earlier, some recent Canadian studies have pointed to tendency towards conservative voting by the Federal Court in the areas of refugee and tax law.¹¹¹

To see if there is any distinction in voting patterns based on the nature of the underlying decision, we separated out differences in the underlying decisions across areas of law. For CEAA decisions, we coded underlying decisions pro-environment if the decision was challenged by the proponent of the project and anti-environment if challenged by an environmental group.¹¹² For both immigration and refugee decisions, we coded the underlying decision anti-individual if an individual challenged the decision. For labour decisions, we coded the underlying decision anti-labour if it was challenged by an individual or a union. Tax is trickier but we only coded those cases involving individuals, with the underlying decisions coded anti-individual if challenged by the individual.¹¹³ One way to think of these differences is based on whether the underlying decision is in favour of or against the underdog—where the underdog is the individual in immigration and refugee decisions, human rights decisions, labour decisions (along with the unions) and tax decisions and the environment in environmental decisions.

When we separate out decisions in this fashion, we can see there are differences in affirmation rates for at least the CEAA decisions. Figure 8 shows that over-all when the underlying decision is against the underdog, the affirmation rate is higher than when the underlying decision is pro-underdog with an overall difference of about 8%. However, the difference is not statistically significant. The CEAA decisions, on the other hand, do show a statistically significant difference in affirmation rate with the affirmation rate being about 50% higher for anti-underdog decisions.¹¹⁴ Further, while the difference affirmation rates for anti-underdog decisions across the Federal Court dataset and the CEAA data was not statistically significant, the lower affirmation rate for pro-underdog decisions in the CEAA data as opposed to the Federal Court dataset was statistically significant at the .05 level. As a result, at least for CEAA decision it appears that the Court is more likely to affirm decisions that are in favour of the proponent than environmental groups.

¹¹¹ Rehaag (2012), *supra* note 89, and Alarie and Green (2012), .

¹¹² Note that these categories relate to who challenged the decision before the Federal Court.

¹¹³ For a discussion of coding tax cases, see Alarie and Green (2014), *supra* note 89.

¹¹⁴ The difference in affirmation rate between pro-underdog and anti-underdog decisions was significant at the .01 level for CEAA decisions.

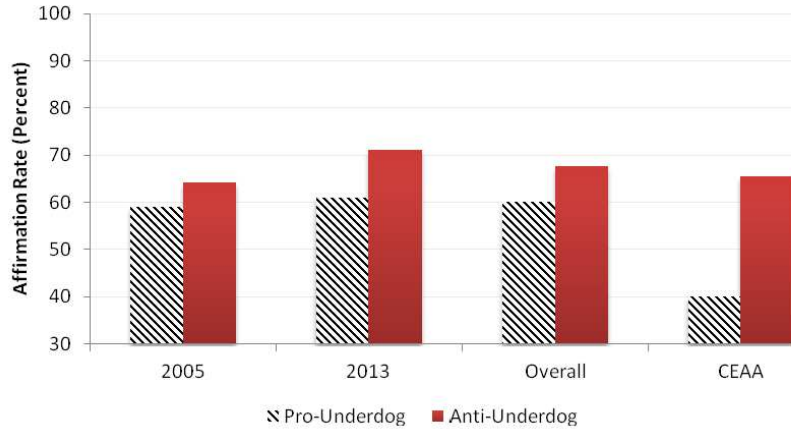


Figure 8: Rate at which the Federal Court affirmed challenged decisions, by nature of decision (Percent). Pro-underdog decisions are for individuals in immigration and refugee decisions, human rights decisions, labour decisions (along with the unions) and tax decisions in the broader Federal Court dataset and the environment in the CEEA data. The Court affirmed anti-underdog decisions at a higher rate than pro-underdog decisions for CEEA decisions but the difference was not statistically significant for the other Federal Court decisions.

As we saw from the review of US empirical studies at the beginning of this section, however, affirmation rates of decision may hide differences across judges with opposing policy preferences—that is, differences in affirmation rates for liberal-oriented and conservative-oriented judges are quite stark in the US context. Do these general affirmation rates hide such differences across judges in Canada as well? The identity of the judge may be important given changes in the composition of the Federal Court. As can be seen in Figure 9, at the beginning of our period in 2005, the Liberals had appointed almost 90% of the Federal Court judges. Since the Conservatives took power in 2006, there has been a steady increase in the number of judges appointed by a Conservative Prime Minister. By 2013 a little over 40% of the judges were appointed by a Conservative Prime Minister, reaching over 50% by 2015.

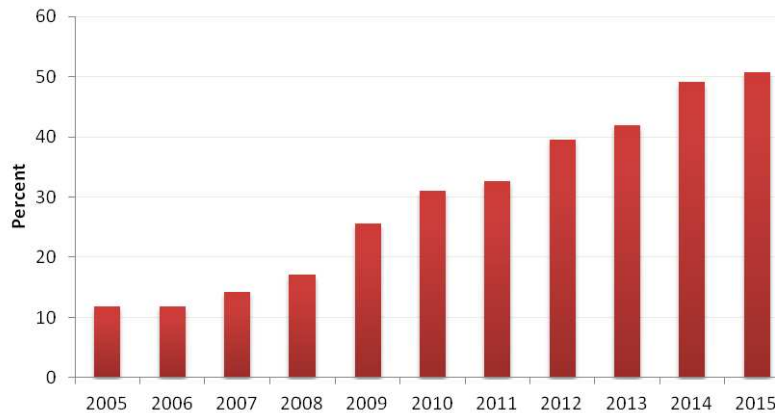


Figure 9: Percent of Federal Court judges appointed by Conservative Prime Ministers, 2005-2015. Source: Federal Court website, http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Bio. Not including Deputy Judges.

Has this change in composition affected how the Court resolves judicial reviews? As we can see in Figure 10, for all non-CEAA decisions the rate at which Conservative appointees affirmed decisions in both periods was almost 10 % higher rate than for Liberal appointees, although the difference was only significant at the 0.1 level. The increase in the overall affirmation rate between 2005 and 2013 in Figure 1 may then in part be due to an increase in Conservative appointees, though the low numbers mean any such implication is tentative. Interestingly, the opposite was true for CEAA decisions with Liberal appointees affirming CEAA decisions at a higher rate than Conservative appointees but the difference was not statistically significant.¹¹⁵

¹¹⁵ The recent increase in the number of Conservative-appointed judges on the Federal Court may be correlated with changes to the other indicator of the role played by the courts—the government win rate. In 2005 both Liberal and Conservative appointees found for the government at almost identical rates—a little over half the time. By 2013, however, Conservative appointees found for the government in about two-thirds of cases while Liberal appointees found for the government just over 40% of the time.

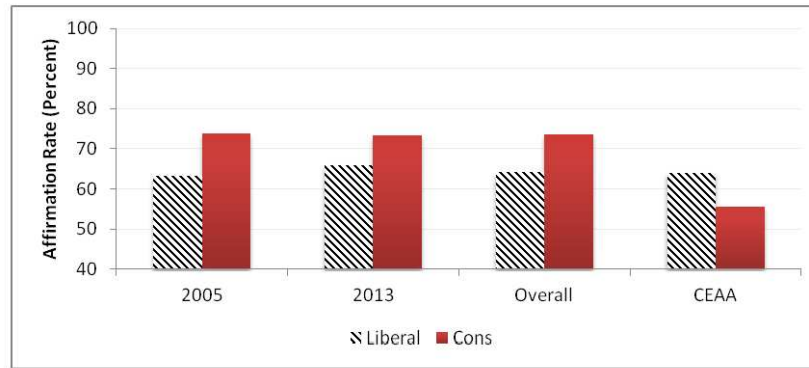


Figure 10: Rate at which the Federal Court affirmed challenged decisions of judges appointed by Liberal and Conservative Prime Ministers (Percent).

One possible explanation for the lack of a statistically significant difference in affirmation rates across Liberal and Conservative judges is that the overall affirmation rates hide differences in how judges vote that relate to their political preferences. As noted above, this “selective deference” theory is that conservative judges will affirm decisions that are essentially conservative at a higher rate than liberal decisions and conversely liberal judges will affirm liberal decisions at a higher rate than conservative decisions.¹¹⁶ For example, Austin et al (2004) found that the overall affirmation rate for liberal (pro-environment) decisions under National Environmental Policy Act (NEPA) in the US was higher than for conservative (pro-development) decisions (see Figure 11).¹¹⁷ However, they found that the Democratic appointee affirmation rate for liberal decisions was about twice that of Republican appointees with the opposite pattern for conservative decisions (Republican appointee affirmation rate almost twice that of Democratic appointees). One difference that may be important is that this study only examines decisions during a Republican presidency.

¹¹⁶ Revesz (1997), *supra* note 74 at 1728.

¹¹⁷ Austin et al (2004) (examining District Court decisions on challenges to NEPA decisions between 2001 and 2004).

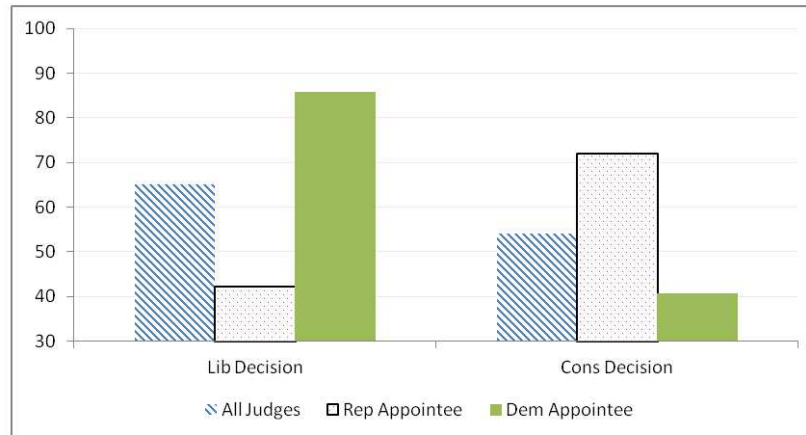


Figure 11: Rate at which the US District Court affirmed challenged decisions under the *National Environmental Policy Act*, by whether judges were appointed by Republican or Democratic Presidents, 2001–4 (Percent). Source: Austin et al (2004).

Does the tendency found in US courts for ideological voting in administrative law cases hold in the Federal Court of Canada? Table 3 examines the affirmation rates of Conservative versus Liberal appointed judges where the underlying decision favours or disfavors the underdog. These categories obviously do not line up clearly with political parties but may show voting tendencies by appointees of different parties given the change in the composition of the Court. Overall (that is, for both years and non-CEAA cases), Conservative appointees affirm both types of underlying decisions at a higher rate than Liberal appointees — with Conservative appointees affirming a little over 10% more of both types of cases. However, when we look at the two different years, an interesting switch happens in 2013 — when the Conservative government is in power and has appointed a high number of Federal Court judges. The Conservative appointees affirm the anti-underdog decisions at a higher rate than the Liberal appointees but this is switched for the pro-underdog decisions. The change in the composition of the Bench, and the change in government, then is correlated with changes in outcomes at the Court.

	2005		2013		Overall		CEAA	
Appointing PM	Pro-UD	Anti-UD	Pro-UD	Anti-UD	Pro-UD	Anti-UD	Pro-Env	Pro-Dev
Liberal	55.9	61.1	75	67.2	63	63.3	33.3	65.2
Conservative	90	83.3	69.7	74.2	74.4	74.4	50	57.1
Overall	63.6	64.3	71.7	71.1	68	67.7	40	63.3

Table 3: Rate at which the Federal Court affirmed challenged decisions, by type of decision (pro-underdog and anti-underdog) and whether judge is appointed by a Liberal or Conservative Prime Minister (Percent).

For the CEAA decisions, when the RA decisions are broken down as pro-environment and pro-development (based on whether the challenger was the proponent or an ENGO respectively), overall the Court affirmed the pro-development decisions at a higher rate than pro-environment. However, somewhat surprisingly, Liberal appointees affirm pro-environment decisions at a lower rate than Conservative appointees with the reverse for pro-development cases.

These findings should be viewed with caution. The number of cases overall is not large and so the results are not statistically significant and need to be expanded to more years, allowing greater understanding of trends over time and a basis for more detailed empirical analysis. However, the analysis does provide an indication that the Federal Court may decide reviews differently depending on the nature of the underlying decision. Part of the difference may be due to the types of challenges that are brought by individuals, NGOs and environmental groups as opposed to proponents. The former may systematically follow through with (and not settle) weaker claims if they have strong preferences against the particular development and wish to bring a claim even if it has a faint chance of success. Businesses and governments, on the other hand, may be more coldly rational about their chances of success, settling or dropping low probability cases.

In summary, the Federal Court does not appear swayed to a significant extent in our data by the substantive nature of the underlying decision except in CEAA cases where decisions in favour of proponents are affirmed at a much higher rate than those that are challenged by proponents. There is no statistically significant evidence that there is a difference in affirmation rates across judges appointed by different Prime Ministers, although the affirmations suggest that such differences may appear with a more extensive dataset.

V. POLICING THE BOUNDARIES

Environmental law in Canada has long been built on delegation of discretionary powers to make decisions — decisions about what species to protect, whether to issue permits for mines or factories, what substances can be emitted into the environment. Delegation of decision-making power is valuable

to the extent it allows those with expertise, time and information to make decisions. Determining who should exercise the delegated power may at times require balancing expertise and independence against various forms of accountability. We want some decisions to be made by politically accountable actors to ensure a democratic pedigree for the value choices underlying many environmental decisions. Delegation can be dangerous, however, where there are no effective checks on those exercising the discretion. They can follow their own view of the public good, make mistakes or, more malignly, seek to advance their own self-interest. Whether such delegation and discretion constitutes an “enormous systemic problem” depends on whether the benefits of such delegation can be fostered and the risks limited.

This paper looks at the courts as a source of control over and monitoring of such delegation. Judicial review is valuable in holding administrative decision-makers accountable for meeting legislative goals.¹¹⁸ The Supreme Court of Canada has shifted towards a much stronger emphasis on deference. This emphasis manifests in both a greater focus on reasonableness review in the context of review of questions of law and an apparent increased deference within the application of reasonableness review to either questions of law or discretion. As a result, the courts are likely to review most environmental law decisions by the executive on a reasonableness basis. This paper asks whether the courts are likely to be an effective monitor given these aspects of environmental law and administrative law.

Overall the court has tended to be very deferential to executive decision-makers. They affirmed decisions (that is, let decisions stand) over 60% of the time and, consistent with the signal in *Dunsmuir*, they affirmed decisions at a higher rate in 2013 than 2005. Moreover, the government has tended to win slightly more than half the time. While the actual nature of the check by the courts is complicated by the interaction of the affirmation rate and type of review with how the executive decides and whether parties challenge these decisions,¹¹⁹ the high affirmation rate points towards a difficulty in the ability of parties in challenging environmental decisions.

The high affirmation rate is correlated with the type of review. The courts tended to affirm discretionary decisions at a higher rate than questions of law (such as the interpretation of statutes) prior to *Dunsmuir*, though the affirmation rate of issues relating to statutory interpretation increased after *Dunsmuir*. Relatedly, the courts tended to affirm decisions at a higher rate when using the reasonableness standard of review. As noted above, environmental law is based heavily on discretionary powers and in general decisions by the executive in the environmental area are likely to be reviewed on a reasonableness basis, whether they are challenged on questions of law or discretion. Given these aspects of the

¹¹⁸ See Bankes, Mascher and Olszynski (2014), *supra* note 8, (noting the positive role judicial review has played in the implementation of SARA).

¹¹⁹ Green (2014), *supra* note 39.

overlap of environmental and administrative law, the data again suggests difficulty in challenging environmental decisions.

In terms of any substantive orientation of decisions, the Federal Court affirmed decisions at a higher rate where they are against the underdog, such as immigrants, refugees or human rights claimants but the differences were not statistically significant. Unlike in the US, differences in affirmation rates are not correlated with whether the judges were appointed by different parties, although the lack of support for such a correlation may in part be due to the relatively small dataset.

Overall, then, if we look at the role played by courts in actual judicial reviews, the courts have tended to not look like a tight monitor of government decisions, particularly given the characteristics of environmental decisions. If you look specifically at environmental as opposed to other regulatory decisions, the courts appear to take an even lighter hand. They affirmed environmental decisions at a higher rate than other decisions overall, and found for the government at an above average rate compared to other areas.

Finally, if we break out one specific type of environmental decision — those under CEAA — we see that the patterns are intensified. The affirmation rate is very high, particularly for discretionary decisions under CEAA. For our sample of cases, where the court adopted a reasonableness review, it affirmed over 90% of challenged decisions. Further, the affirmation rate for pro-underdog (pro-environment) decisions was much lower than even other pro-underdog decisions on average.

It is, of course difficult to determine causation in this type of study. The type of cases brought will be a function of the type of review undertaken by the court.¹²⁰ However, if we look at the manner in which courts have reacted to the cases brought before them, it does not look like the type of review is favourable to environmental law decisions — either in general in the sense of how the courts have approached judicial reviews or specifically in how they have dealt with review of environmental decisions. However, more work needs to be done to tease out the effect of the composition of the court on outcomes in Canada.

Delegation is central to environmental law — potentially both its strength and its weakness. As Elgie points out, the optimal solution is unlikely in most cases to be either complete discretion or no discretion.¹²¹ Some middle ground involving overlapping constraints is necessary. The recent changes to environmental law, though significant, may not have a large effect on the power of judicial review to the extent that discretion in environmental law and the push for deference in administrative law had already yielded little judicial oversight of government decisions. Greater understanding is needed of the connection between the incentives of parties to seek judicial review, the scope for action by decision-makers under various forms of statutes and the constraints on

¹²⁰ *Ibid.*

¹²¹ Elgie (2008), *supra* note 23.

voting (either political or otherwise) of judges under administrative law principles. This paper provides an initial attempt to point to how the court has used its powers of review and the concern that it has been (and given the changes to administrative law may continue to be) difficult to challenge decisions under environmental law.

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