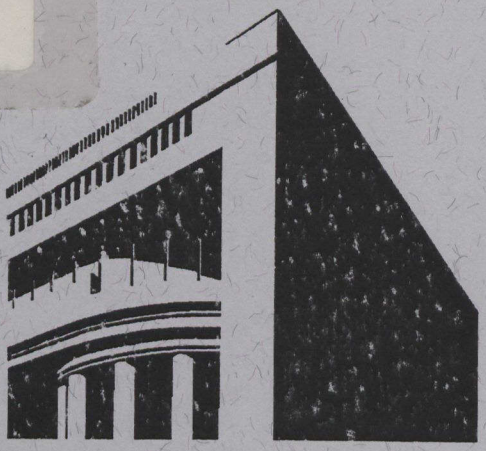

Canadian Studies Grant Programs

The Role of the Courts in Environmental Policy Making in Canada and the United States

Kenneth M. Holland
University of Memphis, Tennessee

Canadian Embassy/Ambassade du Canada
Washington, D.C.
1997

This manuscript is a product of the Canadian Studies Research Grant Program. The program promotes research in the social sciences, journalism, business, trade, environment, and law with a unique relevance to Canada, or in the context of the bilateral or North American relationship; and the social, cultural, political, and economic issues that impact on these relationships in the 1990s.

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The Role of the Courts in Environmental Policy Making in Canada and the United States

Kenneth M. Holland

The University of Memphis

kholland@cc.memphis.edu

The author wishes to thank the Canadian Embassy, Washington, DC, for a Canadian Studies Research Grant that made possible the research on which this paper is based.

THE ROLE OF THE COURTS IN ENVIRONMENTAL POLICY MAKING IN CANADA AND THE UNITED STATES

Canada and the United States are two of the world's most important democracies. They share many political features. Each polity places a high value on the principles of majority rule, individual rights, liberty, order and equality. By world standards, they are rich nations, with high standards of living. As highly developed industrial democracies, they face similar problems in striking a balance between economic growth, on the one hand, and protecting the environment, on the other. Each has adopted similar policies with regard to air, water, and ground pollution and conservation of natural resources. A glaring difference between them, however, is the role of the judiciary in the making and enforcing of environmental policies. Courts in Canada play a much less significant role in this policy field than do judges in the United States. Canadian policy making is marked, in general, by judicial deference to government on environmental issues.

Through case studies, this paper illustrates the different levels of judicial activity with regard to environmental issues and offers explanations for the varying roles of the courts in the two federations. The hypothesis is that the existence of the parliamentary system in Canada diminishes the capacity and the will of judges to challenge the government's environmental policies. By contrast, the presidential system characteristic of the United States provides structural incentives for the federal courts to resolve conflicts over the nature and direction of environmental policy. This hypothesis emphasizes institutional differences as the principal explanatory variables. This theoretical model, sometimes referred to as "new institutionalism" (see Weaver and Rockman 1993), stands in contrast to earlier psychological, sociological and economic theories which purported to account for differences in nations' political behavior by

reference to broad underlying forces such as political culture, class conflict and the distribution of power.

Courts influence environmental policy in two fundamental ways in Canada and the United States. First, they arbitrate the conflict between the federal and state/provincial governments over the allocation of environmental powers in the constitution. Judicial decisions which favor state or provincial claims tend to further industrial interests, while those that support federal power tend to further the agenda of those groups claiming to represent the public interest. Second, courts referee the conflicts between governments which have decided to support a particular project likely to have a substantial impact on the environment and all those opposed to it, which may include environmental advocacy organizations, native peoples, local residents and conservationists. Judges who tend to defer to administrators and governments will render more pro-business decisions than those who take an active role in examining independently the merits of particular projects. Judicial activism can be defined as the willingness of courts to adventure beyond the adjudication of legal conflicts to make social policies, affecting thereby many more people and interests than if they had confined themselves to the resolution of narrow disputes. The activism of a court, thus, can be measured by the degree of power that it exercises over citizens, legislatures and governments. We can construct a four-cell table describing the relationship between judicial activism and environmental decision making.

	JUDICIAL ACTIVISM	JUDICIAL RESTRAINT
FEDERAL CONFLICT	Conservative judiciary defends or expands state or provincial powers over the environment in conflicts with the federal government	Social democratic judiciary sustains federal power over the environment in conflicts with the state or provincial governments
DEVELOPMENT CONFLICT	Social democratic judiciary supports challenges from public interest groups to environmentally harmful projects	Conservative judiciary defers to government decision makers in conflict with public interest opponents

From the table it is clear that with regard to environmental disputes, both right- and left-wing judges engage in judicial activism when such a role would further the interests favored by their ideological preferences. The four-cell schematic is complicated, however, in Canada by the Québec issue. Progressive judges on the Supreme Court of Canada must always consider the reaction of Québec to any decision favoring federal power. Francophone judges from Québec will usually oppose expansions of federal power over the environment even if they are sympathetic to the concerns of the environmental lobby.

ENVIRONMENTAL POLICYMAKING IN CANADA

The Constitutional Allocation of Powers

Two variables closely associated with judicial power are the separation of powers and federalism (Holland 1991, 7-9). When a constitution divides governmental power among three branches (legislative, executive and judicial) it guarantees institutional conflict, as each

department strives to maximize its authority at the expense of its competitors. Likewise, if the basic document distributes power between two levels of government (provincial and federal), politics will be characterized by struggle between the center and the regions. These constitutional cleavages cry out for an institution to serve as referee to resolve the continuous disputes over power. The judiciary, accustomed to the impartial settlement of private and public conflicts, emerges as the most attractive of the institutional options. To understand the role of the courts in Canada in the environmental field, it is necessary first to grasp the way in which the Canadian constitution allocates the power to make environmental policy.

Environmental policy making at the end of the twentieth century is enormously complex. The environmental problems faced by Canadian law makers are as diverse as nuclear waste, extinction of plant and animal species, urban sprawl, acid rain, automobile emissions, solid waste disposal, deforestation and water pollution. The core of the Canadian Constitution, the British North America Act (the Constitution Act 1867), however, is a nineteenth century document. The courts, therefore, have had much difficulty sorting out which level of government is responsible for each of the environmental powers. The result has been a jurisprudence of compromise, which recognizes concurrent jurisdiction over most environmental matters. The Constitution only divides power between tiers of government, it does not separate the legislative and executive branches. Thus, one of the primary reasons for a relatively low level of judicial intervention in the environmental area in Canada is the lack of opportunity for the judiciary to umpire squabbles between parliament and prime minister. Under the Westminster model of parliamentary government enshrined in the BNA, the prime minister heads the government and leads the party with a majority of seats in the House of Commons, whose members observe strict party discipline. Canada is, however, a federation and as such has demanded that the federal courts

settle quarrels between Ottawa and the provinces.

Provincial Powers. Under section 92 of the BNA the provinces have jurisdiction over municipal affairs, property and civil rights, and matters of a local nature. Thus, environmental legislation in the nineteenth and most of the twentieth century tended to be provincial. Human and industrial wastes, for example, in Ontario were regulated until the 1950s by the Ontario Public Health Act, first enacted in 1884.

The provinces became increasingly active in regulating discharges into the air and water in the 1960s and 1970s (Lucas 1990, 170). The main approach in Canada toward punishing environmental wrongdoers has been through civil fines and judicial injunctions rather than criminal prosecutions. This pattern supported provincial initiatives because the BNA assigns the civil law to the provinces and the criminal law to the federal government. Ontario and Alberta in 1971 were the first provinces to establish a ministry for the environment. Ontario has been the most prolific environmental legislator. Among some of the most important Ontario statutes are the Air Pollution Control Act of 1967, the Waste Management Act of 1970, the Environmental Protection Act of 1971, the Water Resources Act of 1972, the Environmental Assessment Act of 1975, and the Bill of Environmental Rights of 1994. Some of the provinces have enacted single acts consolidating regulation of air, water and landfills (Vanderzwaag and Duncan 1992, 4).

The primary foundation for provincial power over the environment is section 92 (13) of the BNA--property and civil rights (Hogg 1992, 537). The federal government has been reluctant to intrude into these areas because of the sensitivity surrounding Québec. Québec opposes any intrusion by Ottawa on its regulation of private rights because its civil law is based on the Roman, or Civil, Law tradition rather than the English common law. Federal encroachment on property or civil rights can be characterized as an encroachment by English Canada on one of the institutions

which defines Québec's unique identity. At the same time that the federal government, for political reasons, has shied away from supplanting provincial environmental regulations affecting private persons, Ottawa's ability to employ other constitutional provisions to support an environmental regime has been stymied by the judiciary's narrow interpretation of its constitutional powers over trade and commerce. This narrow reading of the federal trade power is highly significant when one realizes that most of the environmental laws passed by the U. S. Congress have been under its constitutional power to regulate commerce among the states.

An alternative to the commerce power is the federal jurisdiction over the criminal law, which, by contrast, is primarily a state responsibility in the United States. Federal efforts to legislate on environmental matters using the penal law, however, have not fared well in the courts. The Judicial Committee of the Privy Council (JCPC) in The Margarine Reference (1951) and the Supreme Court's decision in Labatt Breweries v. Attorney-General of Canada (1980) invalidated federal criminal laws dealing with food and drug manufacturing on the grounds that they usurped provincial jurisdiction over public health. In Schneider v. The Queen (1982) the Supreme Court reaffirmed the broad jurisdiction of the provinces over public health.

The provinces obtained an important victory during the negotiations with Prime Minister Pierre Trudeau over patriation of the Canadian constitution. In exchange for the support of energy-rich Alberta and Québec for the main portion of Trudeau's constitutional plan, Trudeau inserted into the 1982 constitution act section 92A, which grants to the provinces extensive jurisdiction over the exploitation of natural resources, including forests, oil and hydro-electricity. Alberta and Québec subsequently launched large energy projects with the understanding that the federal government would not impose restrictions motivated by a desire to mitigate environmental damage caused by the projects. The provincial character of environmental protection was

underscored by the fact that the first environmental bill of rights was enacted by Ontario rather than Ottawa.

Federal Powers

The federal government first began expressing interest in environmental policy in the late 1960s. This newfound interest put Ottawa on a collision course with the provinces, who had already occupied the field with comprehensive and complex legislation. Ottawa could rely on two powers granted to the federal government in section 91 of the Constitution Act 1867: the power to regulate trade and commerce and the obligation to guarantee "peace, order, and good government." The courts, however, narrowly construed both heads of powers. The Canadian government, then, in the late 1960s was in a much weaker position than was the U. S. Congress which at that time launched an ambitious and comprehensive legislative scheme of environmental protection, founded on its power under Article I, section 8, to regulate commerce among the states. Its forays into the environmental field were challenged at every step by the provinces. The result was an informal understanding between Ottawa and the provincial premiers that the two levels of government would exercise concurrent jurisdiction over the environment and that conflicts would in general be resolved by intergovernmental negotiation and cooperation rather than by litigation.

Trade and Commerce. The federal environmental regime of the United States is built on Congress's power to regulate commerce. Because of judicial construction, the Canadian federal government has been forced to look for other constitutional foundations for its environmental activities. Beginning with the Judicial Committee of the Privy Council's decision in Citizens Insurance Co. V. Parsons (1881), Canadian courts have rejected the approach of the United States Supreme Court, which gave the widest possible meaning to Congress's power under Article I,

section 8, to regulate "commerce among the states." In the United States any activity, whether commercial in character or not, which affects interstate commerce falls under congressional authority. By sharp contrast, Canadian courts divide commerce into two exclusive categories--intraprovincial, which is exempt from federal regulation, and interprovincial and international, subject to federal control under section 91 (2). The provinces enact laws governing economic transactions occurring within the province primarily under their section 92 (13) jurisdiction over "property and civil rights." Thus, while the regulation of mining and manufacturing have been preempted by the federal government in the United States, these sectors of the economy fall within provincial jurisdiction in Canada. Thus, much of the responsibility for environmental policy making borne by Washington belongs to the ten provincial governments in Canada.

Criminal Law. Efforts by Ottawa to construct environmental rules using its jurisdiction over the criminal law have been unsuccessful. The policy analysis literature indicates that environmental policy makers have fundamentally four strategies from which to choose in their efforts to achieve clean air and water (Holland 1983). First, they can punish undesirable behavior through the criminal law. The costs, however, are substantial. The government must catch polluters, prosecute wrongdoers and prove guilt beyond a reasonable doubt. Scarce enforcement and judicial resources are consumed in the process. Judges, moreover, tend to be lenient on environmental offenders in sentencing in order to leave room in the prisons for violent criminals. Second, policy makers can attempt to root out the causes of environmental degradation by changing the attitudes and values of polluters. This rehabilitative strategy, however, is problematic because we do not really know how to reform offenders, as the disappointing story of Canadian and U. S. efforts to rehabilitate juvenile delinquents attests. A third strategy involves providing incentives for non-polluting behavior--the carrot rather than the stick. Governments

can provide subsidies or tax benefits for compliance with environmental laws. In the United States, for example, under federal legislation companies can purchase the right to pollute. Governmental agencies could procure goods and services from "green" vendors. Polluters could lose licenses and permits needed to do business. The fourth, or laissez-faire, approach is the easiest to implement, because it simply requires that government keeps its hands off polluters. Under this strategy, those injured by pollution, for example downstream victims, would file civil lawsuits against wrongdoers and ask for monetary damages or injunctions to stop the offensive behavior. The regulatory, or administrative, approach is optimal in the environmental field, but the courts have placed constitutional obstacles in front of the federal government, a fact that makes the punitive model more attractive than it would otherwise be. The Canadian Supreme Court held in Labatt Breweries v. Attorney-General Canada (1980), for example, that legislation authorizing extensive regulations involving federal monitoring and licensing does not qualify as criminal law and therefore lies outside Parliament's authority. The Supreme Court has allowed Ottawa, however, to discourage the consumption of products harmful to the environment by taxing such consumption and to encourage installation of anti-pollution devices by providing tax credits (Hogg 1992, 731).

Water Pollution. Section 91 (12) of the Constitutional Act 1867 grants to Ottawa power to regulate both saltwater and freshwater fisheries. Potentially, the federal government's obligation to protect fish habitat could be the basis for a general federal power to control water pollution. In 1980, however, in Fowler v. The Queen the Supreme Court made it clear that federal jurisdiction over the fisheries does not empower Ottawa to address the problem of water pollution in general.

The federal government has attempted to legislate regarding clean water under other heads of constitutional power, including navigation and shipping (s. 91[10]) and coastal waters beyond

provincial boundaries (s. 91[1A]). The courts have upheld such legislation when it is closely tied to the purpose of the constitutional grant.

Treaty-Making Power. The power of the federal government in Australia and the United States to develop a body of environmental law has been boosted significantly by the willingness of the courts to allow Canberra and Washington to pre-empt areas of state jurisdiction by signing international conventions, such as the World Heritage Convention, and binational accords, such as the Migratory Bird Treaty between the U. S. and Canada. The ruling by the Judicial Committee of the Privy Council in the Labour Conventions case (1937), however, foreclosed this expansion of federal environmental power in Canada. If the subject matter of a treaty, said the Privy Council, falls under the provinces' constitutional jurisdiction, then the federal government must request each of the ten provinces to enact the necessary implementing legislation. In practice, the federal government has been unable to use its treaty-making power to pre-empt the environmental field. The Canadian government, thus, works under a handicap in tackling environmental problems not suffered by other sovereign states. This disability is a matter of increasing concern as governments move more and more toward addressing pollution and other forms of environmental degradation in multilateral fora (Hogg 1992, 291-96).

Peace, Order and Good Government. Given the jurisprudence developed by the Judicial Committee of the Privy Council and continued by the Supreme Court of Canada since 1949, when appeals to the Privy Council were foreclosed, the most attractive constitutional foundation for a comprehensive federal environmental regime is section 91(1), Ottawa's power "to make laws for the peace, order and good government of Canada" in all areas not specifically delegated to the provinces in section 92. The Privy Council limited this power to emergencies. The Supreme Court, however, expanded the clause's meaning, giving the federal government the power to

legislate on all matters of "national concern." In practice, however, the Court has restricted the use of this power to areas of little concern to the provinces, such as aviation and the National Capital Region. In 1976 the Supreme Court struck down a federal wage and price control act passed in accordance with the national concern test on the grounds that it intruded on areas of provincial responsibility. It finally upheld the act as a piece of emergency legislation in the Anti-Inflation Reference Case (1976).

In an important decision, Regina v. Crown Zellerbach Canada (1988), the Supreme Court expanded the national concern test to include areas where the provinces were unable to legislate adequately. Although the provinces had traditionally regulated the discharge of waste from pulp and paper mills, the Court sustained the federal Ocean Dumping Control Act, reasoning that failure by the provinces adequately to protect coastal waters from dumping had led to a deterioration in marine waters, an area of environmental responsibility belonging to the Crown under the constitution. All three francophone justices dissented in Crown Zellerbach, concerned that the Court was construing the national concern test in such a way as to open the door for a vastly enlarged body of federal environmental legislation, which could only be enforced at the expense of Québec and the other provinces. Crown Zellerbach provided the constitutional justification for the Canadian Environmental Protection Act (CEPA) of 1988, a comprehensive scheme for the regulation of toxic wastes, which the federal government argues do not lend themselves to effective provincial control. Québec has continued to denounce the Court's judgment as indicating a lack of respect for provincial autonomy enshrined in the Constitution. Thus, in order to meet the national concern test under the peace, order and good government power, Ottawa must show first that the problem area is distinct, such as marine pollution or toxic waste, and second that provincial legislation is inadequate.

The Judicial Shift from Federalism to Environmentalism

Until recently the activism of the Judicial Committee of the Privy Council and the Supreme Court of Canada with regard to environmental policy was confined to protecting the prerogatives of the provinces. The practical effect of such a jurisprudence was to benefit polluting businesses since the provinces are much more dependent on the exploitation of natural resources such as forests, minerals, rivers and fossil fuels than is the federal government. The economies of Alberta and Québec, for example, rise or fall depending on the health respectively of the oil and hydroelectric industries. This jurisprudence has served well conservative interests in Canada. Tough environmental legislation depends on the ability of the federal government to expand its constitutional competence. Therefore one would expect a shift in the Supreme Court's doctrines to occur as the attitudes of the justices become more progressive. This is precisely what has transpired.

Access of Environmentalists to the Courts. Evidence of a new judicial activism favorable to federal responsibility for the environment appeared in 1987, when the Supreme Court ruled in Finlay v. Canada that persons who failed to meet the traditional requirements of standing to sue could nevertheless challenge administrative decisions. This liberalization of the threshold requirement opened the door to plaintiffs concerned about governmental decisions likely to damage the environment, such as licensing a hydroelectric dam, but who could not meet the traditional requirements to sue of specific, concrete, personal harm at the hands of the defendant. Finlay invited environmental non-governmental organizations (ENGOs) such as the Sierra Club to pursue a litigation strategy in the courts to influence environmental decisions. The Court was proclaiming that it would play a much more active role in arbitrating conflicts between developers and environmentalists, which in Canadian politics often means disputes between the provincial

and federal governments.

The Court's opportunity came in 1992 with its decision in Friends of the Oldman River Society v. Canada. Environmentalists challenged the government of Alberta's decision to construct a dam for irrigation purposes on the Oldman River. The Supreme Court ruled that large development projects that might have an adverse environmental impact are subject to a mandatory federal Environmental Assessment Review Process (EARP). The Court thereby gave to Ottawa a significant boost to its influence over developments previously thought to fall wholly within provincial jurisdiction. Understandably, the judgment produced an outcry from the provinces, especially Alberta and Québec. More surprisingly, the Court's activism led to a rebuff from Prime Minister Brian Mulroney and the House of Commons.

The Charter of Rights and Freedoms. Judicial activism in Canada is usually associated with the Supreme Court's broad interpretation of the individual rights guaranteed by the 1982 Charter of Rights and Freedoms (Constitution Act 1982) (Knopff and Morton 1992). Nothing in the Charter, however, specifically addresses protection for the environment. This lack of explicit language has not deterred environmental organizations from using the Charter to challenge undesirable policies (Morton and Knopff 1993). An environmental group in Halifax, for example, opposed construction of a large garbage incinerator on the grounds that the incinerator would degrade the quality of life in the Halifax area in violation of section 7 of the Charter of Rights (Globe and Mail 1993). Section 7 proclaims, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The Charter has encouraged the federal courts to impose new restrictions on provincial autonomy and invited plaintiffs who lack the traditional requirements of standing to challenge in court government policies at all levels. In other words, the Charter has led to a

qualitative rise in the level of judicial involvement in Canadian decision making in several policy areas including the environment. This high level of judicial involvement is strong support for a major expansion of federal jurisdiction over environmental protection. Whether Ottawa has the political will to pursue such an aggrandizement of its authority at the expense of the provinces is another matter altogether.

The Role of the Courts

Beginning in the late 1980s environmental politics changed in Canada--they became judicialized. Judicial decisions "created new opportunities for increasingly sophisticated environmental groups to use the court system to lobby governments on environmentally related economic developments" (Skogstad and Kopas 1992, 51). The courts filled a governmental void. Political parties, cabinets and parliaments showed little interest in the agenda of such groups (Gibbins and Maher 1993, 20-21). The Supreme Court accommodated the demands of ENGOs not only by relaxing the rules of standing but also by awarding lawyers' fees to them on the theory that they were in court representing the public interest. The environmental movement, thus, has contributed to institutional change in Canada, with the judiciary emerging as an opponent of the executive-dominated legislature, at both the provincial and federal levels. The ability of the courts in Canada to play such an independent and powerful role in the environmental field is circumscribed by two important differences from the United States: Canadian judges lack the broad remedial authority possessed by federal judges in the United States under their power to do equity and Canadian judges must face a hostile legislative-executive alliance alone while U. S. judges frequently can count on Congress as an ally in their confrontations with the administration over decisions with large environmental impact.

Some of the groups which have brought environmental challenges in the name of the

public are Greenpeace Canada, the Sierra Club of Western Canada, Friends of the Oldman River, the Canadian Wildlife Federation, the Ecology Action Centre and various native groups. The first successful challenges were to the Rafferty and Alameda Dams in Saskatchewan, the Oldman River Dam in Alberta, the Point Aconi coal-fired power generating station in Nova Scotia and the enlargement of the hydroelectric water reservoir on the Nechako River in British Columbia (the Kemano II Expansion Project) (Glenn 1992). The activism of the federal courts was revealed in its interpretation of the rules governing EARPs found in a "Guidelines Order" (SOR/84-467) issued by the federal Department of the Environment. If read literally, the Guidelines Order treated environmental assessment reviews as entirely discretionary (Hoberg 1993, 325). The Federal Court of Canada, however, in Canadian Wildlife Federation (1989) read the language loosely, finding assessment reviews by the federal government to be mandatory under the Guidelines Order. The court came directly into conflict with the Mulroney administration, which sought to avoid Trudeau-like confrontations with the provinces. The Prime Minister's policy was to delegate federal environmental review responsibilities to the provinces under the assumption that duplication of reviews was wasteful (Skogstad and Kopas 1992, 315). The Federal Court insisted that the federal government fulfill its responsibility by conducting its own reviews (Glenn 1992, 70-73).

This broad reading of the Guidelines Order represented significant activism on the part of the Federal Court of Canada and forced the federal government to conduct full-scale environmental assessments where it strongly preferred not to. The Court's ruling, moreover, meant that Ottawa would have to undertake an EARP in the case of every large-scale construction project in Canada. In a departure from the American model, however, the Federal Court refused to stay construction of these projects until the EARP had been completed. Because the report of

the Environmental Assessment Panel (EAP) established as part of the EARP was merely advisory, reasoned the Court, construction could continue while the panel conducted its assessment. Thus, the Oldman River Dam was completed before the panel issued its report. The only exception--not since repeated--was a short halt in the construction of the Rafferty Dam in Saskatchewan following a Superior Court ruling in 1989 (Glenn 1992, 34-35). The Kemano II expansion project in British Columbia was delayed pending further environmental impact assessment and ultimately canceled, but these were decisions made for political reasons by the government of British Columbia (Wilson 1993, A5; Howard 1995, A1) not in response to litigation filed with the Federal Court. What appears in theory to be judicial activism, then, actually turns out in practice to be more like judicial restraint.

Even this moderate level of judicial activism was too much for the federal government. Under the parliamentary system, executives are accustomed to wide discretion in the enforcement of laws and implementation of policies. Because the prime minister leads the party holding the majority of seats in the parliament and because the party exercises strict discipline over its members, the executive can expect the legislature to endorse whatever legislation it places before the body. The concept that either the parliament or the judiciary would confine the government's realm of choice is alien to the Westminster model. Thus, Prime Minister Mulroney's response to the Federal Court's decision in Canadian Wildlife Federation was to order the Department of the Environment to scrap its "guidelines" and to request Parliament to enact a law clearly stating that such environmental assessment reviews are discretionary. The Canadian Environmental Assessment Review Act (CEAA) (R.S.C., 1992, C.37) was enacted in 1992, effectively reversing the Federal Court's decision. Under the act, the Minister for the Environment can delegate federal assessment responsibilities to the provinces whenever he wishes. Whether the minister constitutes

an assessment panel is completely within his or her discretion. The law also makes clear that projects may proceed to construction and completion if the minister concludes that adverse environmental effects are justified. To the extent that Canadian environmental policy had been judicialized by the Federal Court, it had now been re-politicized.

More than the dynamics of the parliamentary system were at work here. Of equal importance was the reality of Canadian federalism. Mulroney wanted the discretion provided by the law in order to allow his government to conciliate the provinces, especially British Columbia, Alberta and Québec. The CEAA fit well into Mulroney's objective of bringing Québec back into the constitutional fold in contrast to Trudeau's decision to go ahead with patriation of the constitution in 1982 in spite of Québec's objection (Skogstad and Kopas 1992, 55). If Mulroney was to confront the provinces, he would choose the field of battle and would not allow the judges to select it for him. Mulroney was unable, however, to shield Québec from judicial intervention in its plan to develop the hydroelectric potential of its northern region.

The Role of the Courts in the Postponement of Great Whale

Québec elites regard harnessing the rivers flowing into James and Hudson Bays as critical to the future success of Québec's economy (Bourassa 1985). Not only would cheap hydroelectric power attract massive foreign investment in high-energy-consuming industries like aluminum but it could also be exported to the New England states and New York, earning billions of U. S. dollars in sales. Nationalists see it as the key to making separation from Canada feasible. This means that as far as Québec is concerned any environmental impact assessment of the Great Whale project must be a provincial rather than a federal one. The stakes in the role of the federal government in the environmental assessment of the Great Whale hydroelectric project, thus, were even higher than those in the British Columbia, Alberta, Saskatchewan and Nova Scotia

environmental disputes discussed above.

In the 1960s Québec's public electrical utility, Hydro-Québec, announced that it would develop the hydroelectric resources of northern Québec in three phases. The La Grande complex, to be completed in the 1970s, was to be followed by the Great Whale and Nottaway-Broadback-Rupert (NBR) projects. In spring 1972 the Crees and Inuit, the native peoples of northern Québec, mounted a legal campaign to halt the James Bay project. Hydro-Québec continued construction as the suit progressed. Hydro-Québec believed that it had acted reasonably and responsibly in drawing up its plan for the exploitation of the province's abundant hydroelectric resources. Hydro-Québec pointed out that the majority of the Québec people preferred hydroelectric dams over other energy sources. Also in 1972 the Québec National Assembly passed an Environmental Quality Act, but it exempted the James Bay projects from the requirement for environmental assessment reviews. In November 1973 a Québec Superior Court judge, to all parties' surprise, granted an injunction halting construction. A week later the Québec Court of Appeals suspended the injunction, saying that because so much money had already been invested in infrastructure for the project it was not in the general public interest to stop it. The Québec government, frightened by the unexpected intervention of the courts, sought to negotiate a land claims settlement with the Crees and Inuit. On November 11, 1975, the James Bay and Northern Québec Agreement was finalized. It was Québec's first accord with the Canadian government and the Aboriginal peoples. The Crees and the Inuit relinquished their rights to almost one million square kilometers of land, permitting, the government thought, the La Grande, Great Whale and NBR hydroelectric projects to go forward. The pact provided for construction of the first phase of the James Bay project to proceed without any environmental review. The agreement further excluded the social impact of the Great Whale and NBR projects as a question

in future environmental impact assessments (EIA).

The La Grande project was completed in 1985. In 1988 Québec Premier Robert Bourassa announced that construction of Great Whale would begin and be completed by 1998. In 1989 the Cree General Assembly proclaimed its opposition to future hydroelectric development affecting Cree territory. They claimed that they were under duress when they signed the James Bay and Northern Québec Agreement and that the Québec government had failed to implement the accord. In November 1992 the Federal Court of Canada disagreed, holding that the agreement was free and fair. This ruling was upheld by the Supreme Court of Canada in October 1993.

In 1989 the Crees filed a lawsuit demanding that the federal government participate in the review of the Great Whale under the terms of the James Bay Agreement. While this litigation made its way through the courts, in 1990 the Crees filed another lawsuit to prohibit Québec from dividing the review into two parts. In part one, the review panel would only examine the environmental impact of the roads Hydro-Québec had to build in order to gain access to the dam sites. After the roads were constructed, then the utility would submit its plans for the dams and reservoirs to environmental review. Their expectation was that once the infrastructure was built, no judge would be willing to destroy the value of such a large investment of ratepayers' money by refusing to authorize completion of the project. In October 1991, the Québec government and Hydro-Québec reached an out-of-court settlement with the Crees to conduct a single environmental review of Great Whale. A Québec Superior Court judge had heard testimony in the Cree's suit opposing a two-part review but had not yet rendered a decision.

In September 1991 the Federal Court of Canada ruled that the federal government must participate in the environmental review of Great Whale under the terms of the James Bay Agreement--a process Prime Minister Mulroney would rather have delegated to Québec. The

James Bay Agreement, unlike the EARP which played a prominent role in the Oldman River Dam controversy, gave the federal government the explicit right to reject a project on environmental grounds. Also the James Bay Accord required that construction of Great Whale and NBR await environmental approval.

At this time the Cree Indians joined forces with environmental groups in the United States to oppose Great Whale. U. S. environmental organizations, such as the Sierra Club and Natural Resources Defense Council, characterized the James Bay region as "one of the last virtually untouched wilderness areas of its size in this part of the world" (Williams 1993, 2). The combined reservoirs of the La Grande and Great Whale projects would be three-quarters the size of Lake Erie. Their reasons for opposing the project included unacceptable social as well as environmental impacts. The same groups said they would oppose NBR if Hydro-Québec ever determined to go ahead with it.

The Crees decided to supplement their political and public relations strategy aimed at persuading U. S. buyers of Québec power to cancel their contracts with a litigation strategy. They brought suit not only in the United States but also the World Court. In 1993, the Grand Council of the Cree, along with several U. S. citizens, public interest groups and two members of the U. S. Congress from New York, filed a lawsuit in U. S. federal court. The suit claims that the contract that the New York Power Authority--Hydro-Québec's biggest foreign customer--negotiated with Hydro-Québec required congressional authorization because it was between a U. S. state and a foreign government. The Sierra Club sued the New York Power Authority in state court, claiming that it had failed to conduct an environmental impact study on the proposed project (Williams 1993, 32). Environmentalists also sued the Vermont Public Service Board, arguing that the purchase of electricity from Hydro-Québec would adversely affect the environment in northern

Québec and the way of life of the Aboriginal people. The Vermont Supreme Court, in 1992, sustained the Board's right to make the contract (Valley News 1992).

In September 1994 Jacques Parizeau, leader of the separatist Partí Québecois (PQ), became premier as Bourassa's Liberals lost their majority in the provincial election. On November 16, 1994, the five environmental review committees struck in accordance with the terms of the James Bay Agreement released a highly critical joint report rejecting Hydro-Québec's environmental impact study and ending with the finding that Hydro-Québec would have to completely rewrite its report, which must include answers to 300 specific questions not adequately addressed in the utility's study. Two days later, Matthew Coon-Come, Grand Chief of the Crees, fiercely criticized Québec at the American Council for Québec Studies meeting in Washington, DC. Within hours, Premier Parizeau called together a press conference and announced the indefinite postponement of the Great Whale project. Parizeau said the undertaking had always been a vision of Bourassa and the Liberal Party of Québec, a vision not necessarily shared by the PQ. More decisive, however, was the fact that Parizeau was leading the campaign to persuade Quebeckers to vote for sovereignty in an upcoming referendum. Critical to the success of the referendum was the belief of the Québec people that the United States and the European Union would accept and welcome a sovereign Québec and allow the province to remain a member of such vital international bodies as the North American Free Trade area (NAFTA) and the World Trade Organization (WTO). The Crees and their environmental allies were simply generating too much unwelcome publicity in the United States and Europe. Also contributing to Parizeau's decision, reached without consulting the president of Hydro-Québec, was his perception that demand for electricity in the Northeastern American states would be far lower than the utility had forecast.

The decision of Québec to put on ice the Great Whale hydroelectric project was thus

similar to the decision of the British Columbia government to cancel the Kemano II project. Both were the objects of litigation filed by environmental opponents of the project but were canceled for political rather than legal reasons. The Cree had demonstrated, however, that the Québec Superior Court, the Federal Court of Canada and the Supreme Court of Canada could be used effectively to force the Québec government to take into account the interests of Aboriginal peoples in the pursuit of its energy policy.

The courts may play an even greater role if Great Whale is ever revived. The Federal Environment Minister, Sergio Marchi, in October 1996 announced that Prime Minister Jean Chrétien's Liberal government was preparing to table in parliament an Endangered Species Act. Québec has such a law but it does not allow judges to stop projects. If the federal law in its final form allows courts to be able to cancel or delay projects on the grounds that they threaten any of the 275 species of animals and plants considered at risk in Canada, it could become a powerful weapon in the hands of Canada's environmental public interest groups and native peoples. Given the doubts in Canada over the judges' power to issue injunctions stopping projects under construction and cabinet ministers' reluctance to submit to judicial interference in their exercise of their discretion, the passage of an endangered species statute including such language is unlikely. By contrast, the Endangered Species Act passed by the U. S. Congress does empower the judiciary to bring public works construction to a halt, a power federal judges have shown a willingness to exercise.

ENVIRONMENTAL POLICY MAKING IN THE UNITED STATES

The Constitutional Allocation of Powers

The Commerce Clause. The U. S. Supreme Court has played an active role in resolving conflicts between the federal and state governments over responsibility for environmental

protection. Since 1937, in sharp contrast with the jurisprudence of the Canadian courts, the consistent beneficiary of this activism has been Washington, not the state capitals. The foundation of federal power over the environment is the commerce clause of Article I, section 8, which grants to Congress the authority "to regulate Commerce with foreign Nations, and among the several States." The Supreme Court has broadly interpreted "commerce" to include all forms of intercourse, including navigation, and authorized Congress to regulate all activities, including manufacturing and labor relations, which affect interstate commerce (see Gibbons v. Ogden [1824] and Wickard v. Filburn [1942]). The result is that the category of intrastate commerce, immune from federal regulation and reserved to the states under the Tenth Amendment, has for all practical purposes disappeared. The Court, furthermore, has said that Congress has a responsibility to keep the channels of commerce free of moral pollution. Federal law, accordingly, punishes automobile theft, kidnaping, and racial discrimination in public accommodations, on the assumption that a crossing of state lines has likely occurred (see Heart of Atlanta Motel v. United States [1964]). It remains to be seen whether the Supreme Court's 1995 ruling in United States v. Lopez, striking down a federal law banning weapons in public schools, is a harbinger of a judicial effort to reduce the scope of Congress's commerce power vis-à-vis the states. The general attitude of the justices is that because the states are represented in the federal House of Representatives and Senate, they are well positioned to look after their own interests through the political process and do not need judicial protection.

The Supreme Court acknowledged Congress's power to enact environmental legislation under the commerce clause in Hodel v. Virginia Surface Mining and Reclamation Association (VSMRA) (1981). Congress had argued that state laws regulating surface mining were inadequate and that national standards were necessary to insure that states did not pass weak regulations in

order to gain a competitive advantage over other coal-producing states with stricter standards. The Congress has in fact enacted a comprehensive environmental regime, leaving the states with little independent authority. Some of the principal federal environmental statutes are the Clean Air Act (1963), Wilderness Act (1964), National Environmental Policy Act (1969), Coastal Zone Management Act (1972), Endangered Species Act (1973), National Forest Management Act (1976), Clean Water Act (1977) and Hazardous and Solid Waste Amendments (1984).

The Tenth Amendment. The Tenth Amendment declares "the powers not delegated to the United States by the Constitution . . . are reserved to the States." The amendment recognizes what is obvious from the body of the Constitution, namely, that the United States is a federation, with power divided between two tiers of government. Since Congress's authority over the environment is virtually plenary according to the Supreme Court, disputes have arisen over the role of the states in implementing the federal regime. The origin of this issue is Congress's habit of using its power to provide grants as a powerful incentive for the states to administer federal laws and its commerce power to mandate state implementation when it prefers to pass on the cost of implementation to state and local governments. The Supreme Court sustained the constitutionality of grant incentives to enlist the cooperation of the states in Department of Energy v. Ohio in 1992. The Court, however, held that Congress cannot compel state governments to administer federal laws regulating private action in Hodel v. VSMRA. According to the Court's judgment, if a state declined to enforce the steep slope provisions of the surface mining act the federal government would simply have to assume the full regulatory burden. The states' ability to refuse to cooperate with Washington in the administration of a federal program was implied in the federal principle, said the Court. The Court has held that there is no constitutional barrier to "unfunded federal mandates," even though congressional requirements, such as those regarding drinking water, often

impose millions of dollars of costs on cities. The municipalities must comply with the mandates under the Constitution's Article VI supremacy clause.

The Treaty Power. The Supreme Court in Missouri v. Holland (1919) held that the federal government could make treaties with regard to heads of power reserved to the states and that congressional legislation implementing such accords was valid even though it supplanted state laws on the subject. This result is in sharp contrast to rulings of the Canadian courts which prohibit the federal government from enacting such laws. The difference is due in part to the fact that while the U. S. Constitution enumerates the powers of the federal government and leaves all residual powers to the states, the Canadian Constitution lists the powers of the provinces, leaving the residual to Ottawa.

Private Property. There is one respect in which the Canadian Constitution is more favorable to federal environmental initiatives than is the Constitution of the United States. The Canadian Charter of Rights and Freedoms contains no guarantee for private property. The Fifth and Fourteenth Amendments of the U. S. Constitution, by contrast, protect property owners from being deprived of their possessions without "due process of law" and stipulate that any government taking of property must be for a public purpose and be accompanied by "just compensation." The federal courts have become increasingly concerned about local, state and federal environmental regulations that deprive owners of the full value of their property. Leading this crusade against regulatory excess has been Justice Antonin Scalia, the only current Supreme Court justice who has inspired the building of two "shrines" on the Internet's World Wide Web (see Nollan v. California Coastal Commission [1987] and http://pilot.msu.edu/user/schwenkl/scalia.htm). The burden of relaxing environmental regulations or of compensating victims of "regulatory takings," however, has fallen on state and local governments, not the federal government, the major environmental

actor in the United States.

Environmentalists vs. Developers

While controversy over Supreme Court decisions favoring federal preemption of the environmental field has subsided, disputation over judicial resolution of disputes between bureaucrats and environmentalists has grown white hot. The level of judicial activism in such conflicts is illustrated by the fact that the priorities of the chief rule making and enforcement body for the federal government, the Environmental Protection Agency (EPA), are largely set by the courts through judgments and consent decrees. The federal judiciary in effect has incorporated the regulatory agencies into the judicial hierarchy, with exercises of discretion by agency heads subject to review by the U. S. District Courts or Courts of Appeal. Judges have blocked or forestalled construction of hundreds of projects in the United States, resulting in abandoned public works or costly delays. This rise in judicial power has occurred in part because of the acquiescence of the political branches of government. Often the Congress and the President lack the will to make hard choices in the trade-off between development and conservation. Critics, thus, refer to the United States as a "government of judges."

Judicial activism on the environment was part of a larger sea change in the role of the courts in the review of agency discretion, referred to as the due process revolution of the 1970s. Courts, believing that many executive agencies, boards, and commissions had been "captured" by the economic interest they were designed to regulate, dramatically relaxed the rules governing standing to sue, making it possible for ENGOs to litigate in the capacity of private attorneys general, who file suit in order to safeguard the public interest. A Democratic Congress, often at odds with Republican presidents on environmental protection and other issues, acquiesced in this judicial-ENGO partnership by authorizing award of attorneys' fees to the public interest plaintiff.

Congress also encouraged environmental interest groups to achieve their goals through litigation by enacting "action-forcing" and "technology-forcing" legislation, severely limiting the discretion of administrators by imposing on them judicially enforceable standards and duties. In Canada, by contrast, the House of Commons has no incentive to encourage private challenges to government decisions or to enact legislation limiting the discretion of heads of executive departments since its leader, the prime minister, is the head of the government.

Since the 1970s, organizations like the Sierra Club and the Natural Resources Defense Council have been able to challenge private and public projects by simply asserting an esthetic, psychological or other immaterial interest shared with the general public. There is no need for the plaintiff to show direct, concrete or personal harm. Congress, moreover, has even enacted legislation, such as the Endangered Species Act, that explicitly grants standing to "any person" who believes the government is in violation of the statute. Citizen suits have become an important part of the enforcement mechanism serving environmental law. To provide substance in addition to procedure, the federal trial and appellate courts developed the injunction as the judicial remedy of choice, especially powerful when a large construction project is proposed or even under way. Public interest plaintiffs typically request the court to enjoin the project when the defendant has failed to file an environmental impact statement (EIS) or the EIS is inadequate.

Although the language in the National Environmental Protection Act (NEPA) as enacted by Congress in 1969 treated the EIS as discretionary, U. S. District Court Judge Skelly Wright in 1971 read the statute as mandating an EIS for any project requiring federal action, such as a license, permit or funding. Judge Wright's ruling in Environmental Defense Fund v. Ruckelshaus was thus analogous to the Federal Court of Canada's reading in Canadian Wildlife Federation of the Environment Department's Guidelines Orders as mandating federal environmental

assessments. Two critical differences in the cases were the Federal Court's refusal to issue injunctions to stop unreviewed projects and the willingness of Parliament to nullify the Court's interpretation by enacting clarifying legislation. The U. S. Congress by contrast was reluctant to rewrite NEPA to clarify its intention because Judge Wright had read the legislation in a way unfavorable to the executive and favorable to the legislature in the eyes of public opinion. Two case studies will illustrate the active role played by courts in the United States in the making of environmental policy and the resolution of environmental conflicts.

The Snail Darter And Northern Spotted Owl Cases

The Snail Darter. On the application of the Tennessee Valley Authority (TVA), an agency of the federal government responsible for supplying cheap electricity to the businesses and residents of the Tennessee Valley, Congress in the 1960s authorized construction of and provided appropriations for a dam and reservoir on the Little Tennessee River in eastern Tennessee. Construction commenced in 1967. In 1973 Congress enacted the Endangered Species Act, the same year in which a hitherto unknown fish, the snail darter, was discovered, whose only known habitat was the Little Tennessee River. Under the terms of the act, the Secretary of the Interior had no choice but to list the snail darter as an endangered species. Environmental organizations had a strong claim, then, when they went to federal court demanding an injunction to halt completion of the half-finished dam. The district judge exercised judicial restraint, concluding that it would be absurd to halt construction of a nearly complete $73 million dam of great potential benefit to the local inhabitants in order to save a three-inch perch of no known use to humans.

A three-judge panel of the U. S. Court of Appeals reversed the trial judge's cautious judgment, reminding him that the scope of the court's equity power was sufficiently wide to embrace an injunction against the dam's completion and that such a remedy was clearly mandated

by the Endangered Species Act. On appeal, the U. S. Supreme Court agreed. Chief Justice Warren Burger commented that it was not the role of the judge to weigh the costs and benefits of the dam in the face of clear legislative language. Although Chief Justice Burger effected deference toward Congress, his opinion in T. V. A. v. Hill (1978) was activist in two regards: it displayed no deference to the decisions of the TVA administrator who believed that the dam could be lawfully completed and it construed the judicial equity power as broad enough to impose millions of dollars in costs on taxpayers. It is this low level of judicial deference to exercises of administrative discretion and the broad scope of the equity power illustrated by this case that make courts in the United States much more important actors in the resolution of environmental disputes than their counterparts in Canada.

The victory of environmentalists in the judicial forum was short-lived, however. In September 1979 Congress, in a rebuff to the Supreme Court, passed a law exempting the dam from the strictures of the Endangered Species Act and ordering TVA to complete the project. The President's Council of Economic Advisors, opposed to the dam, urged President Jimmy Carter to veto the bill but to no avail. Public opinion polls revealed widespread support for completing the dam regardless of its effect on the small fish. The President, wanting to do nothing to jeopardize his legislative agenda or his 1980 reelection prospects, signed the bill, and the dam was finished in November 1979. The congressional override of T.V.A. v. Hill is similar to the Canadian Parliament's nullification of the Federal Court's decision in the Oldman River Dam case. In both instances, legislative action trumped judicial activism. The lesson of the snail darter episode is that, in the absence of a constitutional basis for protecting wildlife habitat, Congress can, with the acquiescence of the president and the support of public opinion, counter judicial activism in order to promote economic growth and development.

The Northern Spotted Owl. By contrast with the effort to block the Tellico Dam, in the 1980s and 1990s the opponents of logging federally owned old-growth forest in the Pacific Northwest were largely successful. The key difference was public opinion, a force much less favorable to congressional overrides of judicial protection for the northern spotted owl than for the snail darter.

In 1976 a master's thesis was published claiming that northern spotted owls were declining as a result of habitat loss (Easterbrook 1994, 22). In the same year, the U. S. Forest Service, an agency of the Department of Agriculture, legalized clear-cutting in national forests. The legal conflict began in 1987, when the U. S. Fish and Wildlife Service (FWS), a subdivision of the Department of the Interior, rejected a petition from a Massachusetts environmental group to list the northern spotted owl as an endangered species. On the refusal of the Interior secretary to overturn the FWS's decision, the Portland, Oregon, Audubon Society and other ENGOs requested a U. S. District Court to enjoin sales by the Federal Bureau of Land Management of about 500 million board feet of timber in Oregon in order to protect the bird's habitat. In 1988 the U. S. Ninth Circuit Court of Appeals granted the injunction, stimulating continuous litigation in which environmental groups attempted to stop timber sales from the public lands in the Pacific Northwest, home of the owl. Congress in the Endangered Species Act, the National Forest Management Act, NEPA and the Clean Water Act had authorized public interest groups to seek injunctions to protect the environment. Logging opponents made full use of the opportunities provided by these statutes. By 1989 injunctions had reduced federal timber sales to half their previous levels.

Following TVA's example in the snail darter controversy, the National Forest Products Association and other industry groups lobbied Congress for legislation to limit environmentalists'

ability to end government timber sales. Congress, in response, in 1989 passed a bill to lift most injunctions and block the courts from issuing new timber-cutting bans for a year. When the moratorium expired, however, U. S. District Court Judge William Dwyer in Seattle issued a temporary injunction barring timber sales in the national forests. U. S. District Judge Helen Frye in June 1992 banned old-growth timber sales on most of the Bureau of Land Management's Pacific Northwest land. Between 1991 and 1993, federal courts banned logging on millions of acres in 17 national forests and five Bureau of Land Management parcels in the three states--Washington, Oregon and California--constituting the owl's habitat.

Republican President George Bush opposed these efforts to stop logging in the ancient forests, and in May 1992 a cabinet-level committee appointed by the president proposed exempting the owl from the Endangered Species Act. The Democratic Congress, however, ignored the president's request. Public opinion in 1992 was on the owl's side. Thus, during his reelection campaign, President Bush's owl-bashing did him no good, and he lost both Washington and Oregon on his way to losing the election to Democrat Bill Clinton. Clinton, however, could not afford to alienate western senators and attempted to find a middle ground in the controversy. In October 1994 the Clinton administration reached an agreement with 12 environmental groups to allow logging in some Northwest forests, whose consent was predicated on the president's promise to veto any congressional bill exempting logging on public lands from the Endangered Species Act. ENGOs did not want the owl to suffer the same fate as the snail darter. Judge Dwyer accepted the compromise and lifted his injunction. The lesson here is that the courts had the final word on the government's logging policy.

CONCLUSION

Courts play a much more active role in environmental decision making in the United States

than in Canada. The explanation for this contrast lies in a number of features of the American and Canadian political systems. Canada and the United States share a number of institutional characteristics associated with judicial activism (Holland 1991). Both have a federal constitution, dividing powers between two tiers of government. Courts in both countries enjoy the power of judicial review--the authority to invalidate legislation that contravenes the constitution. Federal judges in both nations enjoy a high degree of independence from political pressure. The rules governing access to the courts in both jurisdictions are liberal, opening the courthouse door to groups claiming to represent the public interest. There are numerous such public interest advocacy groups in both Canada and the United States, and the courts are willing to award attorneys' fees to subsidize their litigation. Party competition marks both polities, a feature that guarantees that there will always be federal judges on the bench appointed by the opposition party--judges who have no partisan interest in supporting the government's policies and decisions. Both the Canadian and U. S. Constitutions contain a Bill of Rights enforceable in court against government, and the Supreme Courts in both countries have acquired a reputation for activism in the arenas of civil rights and civil liberties.

Institutional differences, however, explain the variation in the level of judicial activism in the environmental realm. The most important is Canada's adoption of the Westminster model of parliamentary government. Alliances between the legislature and the judiciary against the executive are simply not possible in a system where the government controls the parliament. Executives in parliamentary systems are accustomed to high degrees of discretion in the formulation and implementation of policy. Environmental laws are unlikely to be either action- or technology-enforcing. In the United States, not only is the Congress independent of the executive but frequently different political parties control the White House and the Capitol Building, a

situation guaranteed to produce legislative efforts to limit presidential discretion in environmental decision making. The second most powerful explanatory variable is the unique nature of Canadian federalism. The need to accommodate Québec nationalism means that the federal government has an incentive to delegate decisions affecting the environment to the provinces and to fight with the provinces on issues it considers more salient. Because many of the provinces are heavily dependent on a single resource industry, the practical effect of this federal abrogation is that environmental policy in Canada tends to be more pro-development than that in the United States. Third in the list are the differences in the remedies available to U. S. and Canadian courts. According to British and Canadian legal tradition, courts may not issue injunctions against the Crown. Canadian courts, thus, are reluctant to intervene in large construction projects for lack of a suitable remedy to award the plaintiff opposing the project. By contrast, the U. S. Supreme Court has expanded the concept of injunctive relief to the point where judicial remedies available typically match plaintiff demands in environmental cases. The fifth difference in this descending order is the varying attitudes of Canadian and American judges toward administrative decisions. Ministerial responsibility is a central principle of parliamentary government. Ministers are answerable to their parties and ultimately to the electorate for the performance of their departments. In order not to diminish the level of responsibility, Canadian judges tend to assume that ministers are acting in good faith and to defer to administrative judgment. Judges in the United States, by contrast, frequently assume that administrative agencies are under the influence of economic interest groups since as a result of the fragmented nature of the constitutional system bureaucrats often act independently of both the president and the Congress. These institutional differences are deep-rooted in the American and Canadian regimes and guarantee that environmental politics in Canada will remain less judicial than those south of the 49th parallel.

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