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Heather McLeod-Kilmurray\*

Proceeding With (Pre)Caution:  
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*In many cases of imminent environmental harm, a trial may take years. To prevent harm in the meantime, pre-trial injunctions are essential. The author highlights the important role of interlocutory injunctions in Canadian environmental litigation, uncovers the judicial assumptions and attitudes toward the environment which these decisions reveal, and proposes a precautionary approach to interpreting the interlocutory injunction test in environmental cases. She argues that prevailing judicial attitudes and presumptions in relation to environmental claims often negatively influence how the discretionary elements in procedural rules governing pre-trial injunctions are applied. Although there has been much analysis of principles such as the precautionary principle in substantive environmental law, the author argues that if substantive law is to achieve its intended goals, principles such as precaution must also be applied when interpreting procedural rules. In environmental litigation, ecological realities and environmental law principles should guide discretion, particularly in decisions which appear to be "merely procedural" yet have significant substantive effect.*

*Dans beaucoup de cas de dommages imminents à l'environnement, un procès risque de s'étirer pendant des années. Entre temps, pour empêcher les dommages, des injonctions préliminaires sont essentielles. L'auteure souligne le rôle important des injonctions interlocutoires dans les litiges en matière environnementale au Canada, met en évidence les postulats posés par les tribunaux et les attitudes de ces derniers concernant l'environnement tel que le tout est révélé par ces décisions; elle propose ensuite une approche basée sur le principe de précaution pour accorder une injonction interlocutoire dans les affaires concernant l'environnement. L'auteure allègue que les attitudes et les postulats des tribunaux face aux revendications en matière d'environnement ont souvent une influence négative sur l'application des éléments discrectionnaires des règles de procédure qui régissent les injonctions préliminaires. Malgré l'abondance d'analyses des principes, par exemple du principe de précaution en droit substantif de l'environnement, l'auteure allègue que si l'on veut que le droit substantif atteigne ses objectifs, les principes – notamment le principe de précaution – doivent aussi être appliqués au moment d'interpréter les règles de procédure. Dans les litiges en matière d'environnement, les réalités écologiques et les principes du droit de l'environnement doivent orienter l'exercice du pouvoir discrétionnaire, particulièrement dans les décisions qui, même si elles ne semblent être que « purement procédurales » ont néanmoins des effets réels importants.*

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### *Introduction*

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### *Introduction*

In many cases of imminent environmental harm, a trial on the issues may take months or years to be heard, let alone finally decided. The most essential mechanism available to prevent such harm is the pre-trial injunction. Preliminary or interlocutory injunctions are among the most important environmental procedures, and a key element of environmental enforcement. Yet prevailing judicial attitudes and presumptions in relation to environmental claims often negatively influence how the many discretionary elements in procedural rules are interpreted and applied. Although there has been much analysis of environmental law principles such as the Precautionary Principle in substantive environmental law, this paper argues that if substantive law is to achieve its intended goals, these principles must also be applied when interpreting procedural rules.<sup>1</sup>

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1. A condensed version of the main argument and case study covered in detail here appears in "Lowering Barriers to Judicial Enforcement: Civil Procedure and Environmental Ethics," forthcoming Nov. 2010 in the IUCN Academy of Environmental Law Research Series (Edward Elgar) [McLeod-Kilmurray, "Lowering Barriers"]. That paper is a summary of the general argument of my doctoral dissertation: *The Process of Judging the Environment: Civil Procedure, Environmental Ethics and their Effects on Environmental Law* (S.J.D. Thesis, University of Toronto Faculty of Law, 2007) [unpublished]. Previous publications discussing the substantive effects of procedure and the importance of judicial attitudes and environmental principles include "Hollick and Environmental Class Action: Putting the Substance into Class Action Procedure" (2002-03) 34 *Ottawa L. Rev.* 263 [McLeod-Kilmurray "Hollick"]; "Hoffman v. Monsanto: Courts, Class Actions, and Perceptions of the Problem of GM Drift" (2007) 27 *Bulletin of Science, Technology & Society* 188 [McLeod-Kilmurray "Hoffman"]; and "Stichting Greenpeace and Environmental Public Interest before the Community Judicature: Some lessons from the Federal Court of Canada" (1998) 1 *Cambridge Yb. of Eur. Legal Studies* 269 [McLeod-Kilmurray "Stichting"].

This analysis seeks to highlight the important role of interlocutory injunctions in Canadian environmental litigation, to uncover the judicial assumptions and attitudes toward the environment which these decisions reveal, and to propose a precautionary approach in the interlocutory injunction test for use in environmental cases. In environmental litigation, ecological realities and environmental law principles should guide discretion, particularly in decisions which appear to be “merely procedural” yet have significant substantive effect. The interpretation of procedural rules in the environmental context must be undertaken from within an environmental framework, which could include domestic and international environmental law principles, such as the precautionary principle. A precautionary approach would make courts more alert to the kinds of risks that environmental harm represents, and may encourage them to question prevailing assumptions when valuing competing interests in particular circumstances.

Apart from often being the deciding factor in many environmental cases, what makes interlocutory injunctions even more interesting is what they can reveal about judicial attitudes and approaches to environmental protection, the priority of environmental issues relative to competing interests, and the role of courts in helping to resolve environmental conflict.<sup>2</sup>

The case of *MacMillan Bloedel v. Mullin*<sup>3</sup> is the quintessential example<sup>4</sup> of the possible disparity in approaches, and how these reveal very distinct judicial attitudes to the environment and the interests with which it often competes. In *Mullin*, environmental and Aboriginal groups were disputing the clearcutting of old-growth forest in Clayoquot Sound.<sup>5</sup> The judge hearing the interlocutory injunction motion held that, since the claim to Aboriginal title had no chance of ultimate success and any

2. The closely related issue of undertakings to pay damages is crucial but beyond the scope of this paper.: see *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311 at para. 59 [*RJR Macdonald*]; and *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug FirstNation*, [2006] 4 C.N.L.R. 152 at paras. 113-124 (Ont. Sup. Ct. J.). Future research comparing the approach to environmental pre-trial injunctions in other institutions such as environmental tribunals, and in other jurisdictions such as the U.S., would be useful but has not been included here. For insights on the U.S. approach, see Stewart Elgie “Injunctions, Ancient Forests, and Irreparable Harm: A Comment on *Western Canada Wilderness Committee v. British Columbia*” (1991) 25 U.B.C.L.Rev. 387 [Elgie]; Claude Martin, “Interlocutory Injunctions and the Environment: Comparing the Law Between Quebec and the Other Provinces” (2004) 13 J.E.L.P. 359 at 395-97 [Martin].

3. *MacMillan Bloedel Ltd. v. Mullin*, [1985] 2 C.N.L.R. 26 (B.C.S.C.), rev’d [1985] 3 W.W.R. 577 (B.C.C.A.) [*Mullin*].

4. This is the example used in McLeod-Kilmurray, “Lowering Barriers,” *supra* note 1.

5. The interlocutory injunction test requires the applicant to show a serious issue to be tried, a risk of irreparable harm, and that the balance of convenience favours the injunction: *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504 (H.L.) [*Cyanamid*]. See Part II below.

harm to resources could be compensated by damages, there was no serious issue. Land claims should not be allowed to hamstring the public interest in "business as usual". This view led the court to approach the test with an emphasis on the need for finality, and the injunction was refused, meaning the trees could be cut before final resolution at trial.

The appeal court viewed this case as primarily about ensuring that the trial would be able to achieve justice. It focused on the complexity of Aboriginal rights and also on the irreplaceable nature of this globally unique resource. The court discussed not just the legal issues, but also analyzed the strength of the arguments on the economic issues, and openly took into account the very political nature of this dispute. The court therefore took a very context-specific approach to the injunctions test in this situation, saying that "in a case such as this", since the Aboriginal claims constituted a serious issue, it was essential to preserve the forest until the dispute could be resolved on the full merits. It recognized that if it failed to enjoin this logging,

[t]he forest that the Indians know and use will be permanently destroyed. ... the Island's symbolic value will be gone. The subject matter of the trial will have been destroyed before the rights are decided. ... The courts will not be able to do justice in the circumstances. That is the sort of result that the courts have attempted to prevent by granting injunctions.<sup>6</sup>

The stark contrast between these two approaches suggests that courts would benefit from having principles to structure their discretion in applying this procedural tool in environmental cases. Far from being "merely procedural," injunction decisions have a significant effect on the substantive law, and on the environment itself. To make pre-trial injunctions a powerful tool of precautionary decision-making, the test must be applied through the lens of an environmental law framework that includes the precautionary

6. *Mullin*, *supra* note 3 at paras. 70-71 (B.C.C.A.). While this case was decided in 1985, these issues remain highly relevant. Within Clayoquot Sound, there is recent renewal of interest in logging: in 2006, the B.C. government announced plans to allow logging again, even though Clayoquot Sounds has been a UNESCO Biosphere Reserve since 2000, online: <<http://www.clayoquotbiosphere.org/organization/history.php>>. See generally Friends of Clayoquot Sound, online: <<http://www.focs.ca/>>; and Greenpeace, online: <<http://www.greenpeace.org/canada/en/press/press-releases/clayoquot-not-saved>>. If there is renewed litigation over this sensitive area, a pre-trial injunction may again be the key.

principle.<sup>7</sup> This would not cause courts to always favour environmental interests, but would make them more alert to the special kinds of risks that environmental harm represents, and may encourage them to question prevailing assumptions. These include the idea that the government always represents the public interest, that all harms are commensurable and compensable with damages, and that development and economic gain should have priority over less tangible environmental values.

This paper has two principal sections. Part I briefly sets out the test for interlocutory injunctions, including how the test has been adapted in particular contexts, and establishes why interlocutory injunctions are important in environmental law. Part II then analyzes the various elements of the test, and how they are interpreted and applied in the environmental context. The paper concludes by arguing that environmental principles such as precaution will assist courts in understanding the competing positions of the parties, and in interpreting and applying the various branches of the interlocutory injunction test in a way that accurately reflects and enunciates the competing interests, how they are valued, and how they have been balanced in each case.

## I. *The test*

### 1. *Basic elements*

Section 101 of the *Ontario Courts of Justice Act* provides that “[i]n the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted ..., where it appears to a judge of the court to be just or convenient to do so.”<sup>8</sup> A similar rule exists in most common law Canadian jurisdictions.<sup>9</sup> Since this general rule provides limited guidance, most Canadian courts apply the three-part test for interlocutory injunctions from the *American Cyanamid*<sup>10</sup> case of the English House of Lords, as

7. Other scholars agree that judicial perceptions and values are important in injunction decisions. David Boyd has underlined the *Mullin* case as “an important turning point in judicial consideration of environmental values” which helped overcome the “obstacle faced by public interest litigants seeking injunctions in environmental cases,” namely “judicial reasoning that betrays a profound lack of ecological understanding.” David Boyd, “Seeing the Forest Through the Trees: A Case Comment on *Algonquin Wetlands League v. Northern Bruce Peninsula* and related cases” (2000), 38 C.E.L.R. 61 at 63.

8. R.S.O. 1990, c. C-43.

9. Sections 18.2 and 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and (revised) Rules 372-374 in Part 8 of the *Federal Courts Rules*, SOR/98-106 entitled “Preservation of Rights in Proceedings.” Stays in the Supreme Court of Canada are governed by s. 65.1 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and Rule 27 of the Rules of the Supreme Court of Canada, SOR/2002-156. The test for stays is generally the same as for interlocutory injunctions: see *RJR Macdonald*, *supra* note 2; *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 [*Metro Stores*].

10. *Cyanamid*, *supra* note 5.

adopted with some modification by the Supreme Court of Canada in cases such as *Metro Stores*<sup>11</sup> and *RJR MacDonald*.<sup>12</sup> The three essential factors are whether:

- (i) there is a serious question to be tried;
- (ii) the applicant will suffer irreparable harm if the injunction is refused;
- (iii) the balance of convenience favours an injunction.

In Quebec, the interlocutory injunction provision is article 752 of the *Code of Civil Procedure*.<sup>13</sup>

In addition to an injunction, which he may demand by a motion to institute proceedings, with or without other conclusions, a party may, at the commencement of or during a suit, obtain an interlocutory injunction. An interlocutory injunction may be granted when the applicant appears to be entitled to it and it is considered to be necessary in order to avoid serious or irreparable injury to him, or a factual or legal situation of such a nature as to render the final judgment ineffectual.<sup>14</sup>

The first two requirements resemble the *Cyanamid* test, but instead of balancing conveniences, the third branch focuses on preventing interlocutory decisions from having final effect. As we will see, this concern also permeates the common law caselaw. In addition, Lord Diplock in *Cyanamid* itself emphasized that there will often be "special factors to be taken into consideration in the particular circumstances of individual cases."<sup>15</sup> Indeed, legislation makes provision for altering the general test for injunctions in some contexts.

Ontario Rule 102 makes special provision for labour injunctions, due to the immediacy of labour disputes, their political history and the

11. *Metro Stores*, *supra* note 9.

12. *RJR-MacDonald*, *supra* note 2. Subsequent decisions have also included refinements and exceptions to the *Cyanamid* test, such as *Le conseil du crabe des neiges Inc. et al. v. Canada (Min. Fisheries and Oceans)* (1996), 116 F.T.R. 8 (T.D.), Richard J.

13. L.R.Q., C-25.

14. In *Imperial Oil Ltd. v. Quebec (Min. of Envir.)*, 2003 SCC 58 at para. 20, the Court indicated the injunction was an important part of the overall environmental protection scheme in Quebec under the *Environmental Quality Act*, R.S.Q., c. Q-2: "The Superior Court is given broad powers of injunction, to prevent or stop any act that might interfere with the fundamental right to the preservation of the quality of the environment" (s. 19.2 EQA).

15. *Cyanamid*, *supra* note 5 at 409.

power relations involved.<sup>16</sup> Roach<sup>17</sup> has argued that Aboriginal law is also special enough to require its own approach to interlocutory injunctions, due to the costs in time and money of Aboriginal litigation. Given the connection between Aboriginal rights and the physical environment ("land and resources"), "Aboriginal rights can often be quickly and irreparably damaged by development such as logging, mining and hydro-electric development."<sup>18</sup> It follows that harm to the environment itself must also merit special approaches to interlocutory relief. There is a unique role for the courts in Aboriginal law in supervising government power because of past abuses and continuing inequality of bargaining power.<sup>19</sup> The complexity and uncertainty of these cases can only be adequately dealt with at trial.<sup>20</sup> Again, the parallels with environmental law are clear.<sup>21</sup>

The importance of interlocutory injunctions in the environmental context is further evidenced by the Quebec *Environmental Quality Act*<sup>22</sup> which creates a substantive right to environmental quality, and the method provided to enforce this right is the injunction to prevent harm.<sup>23</sup>

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16. This is an extensive literature, including Felix Frankfurter & Nathan Greene, *The Labor Injunction* (New York: MacMillan, 1930). For a brief overview, see Kent Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora: Canada Law Book Inc., 1994) [*Constitutional Remedies*] and R. J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora: Canadian Law Book Inc., 1992) [Sharpe].

17. Kent Roach, "Remedies for Violations of Aboriginal Rights" (1992) 21 Man. L.J. 498 [Roach].

18. *Ibid* at 501.

19. *Ibid* at 500.

20. *Ibid* at 501. He also notes that since most Aboriginal rights cases involve s. 35 of the *Charter*, and its remedial purpose, the benefit of the doubt should be given to Aboriginal claimants. The nature of Aboriginal constitutional litigation affects the test: "monetary compensation or damages is the major remedial quest in private law litigation ... [b]y comparison, the focus on money seems almost out of place in constitutional litigation." Roach, *supra* note 17 at 506, citing H. Scott Fairley, "Private Law Remedial Principles and the Charter: Can the Old Dog Wag His New Tail" in J. Berryman, ed., *Remedies: Issues and Perspectives* (Toronto: Carswell, 1991) 313 at 326-27. See discussion of interlocutory injunctions in constitutional cases, *infra* note 119 and accompanying text.

21. Roach says the irreparable harm test should be interpreted in light of the fact that "Aboriginal interests in land should not be thought of as a commodity that readily can be compensated with damages," and he notes the "cumulative nature of environmental degradation," which should affect assessment of any given incident of harm. He suggests that "the assumption that damages can be used 'to restore the wilderness' strains common sense," emphasizing that compensation is not the same as protection and prevention. "In my view a liberal approach to granting interlocutory injunctions to stop actions which threaten Aboriginal interests is a manageable and purposive use of judicial power. ... Temporary injunctions to ensure that the scope and content of Aboriginal rights are not decided by the unilateral exercise of power are, in my view, both manageable and purposive." *Ibid.* at 506-07, 516-17.

22. *Supra* note 14.

23. See generally Robert L. Rivest & Marie-Andrée Thomas, "Le recours en injonction en vertu de la Loi sur la qualité de l'environnement" in *Développements récents en droit de l'environnement 1998* (vol. 108) (Cowansville, QC: Editions Yvon Blais, 1998) at 25.



19.1. Every person has a right to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided for by this Act and the regulations, orders, approvals and authorizations issued under any section of this Act ... 19.2. A judge of the Superior Court may grant an injunction to prohibit any act or operation which interferes or might interfere with the exercise of a right conferred by section 19.1.<sup>24</sup>

Two pieces of Australian environmental legislation also include the injunction, including the interim injunction, as a key enforcement tool.<sup>25</sup> These examples indicate that it is logical and necessary to combine litigation for environmental protection with the procedural tool best suited to the prevention of irreparable harm.<sup>26</sup>

## 2. *A framework of precaution*

Judges need principles to guide their discretion in interpreting rules of procedure<sup>27</sup>—what Sharpe calls a “focus for decision-making in interlocutory applications.”<sup>28</sup> In the environmental context, courts should interpret the interlocutory injunction test from within an environmental framework. This means two things. First, courts should approach the cases as primarily *environmental* cases, rather than simply procedural motions. This would lead them to look to environmental precedent, rather than to injunction precedents from areas of law with dissimilar contexts.

Secondly, this approach should lead courts to look to the leading principles and priorities of environmental law to structure their

24. Note that this right is carefully circumscribed by the words “to the extent provided for by this Act.” This statutory context is relevant in assessing caselaw under this provincial legislation. Martin notes that this section “is similar to the injunction provided for in the *Code of Civil Procedure*, and merely confirms its application to matters covered by the *Environmental Quality Act*,” *supra* note 2 at 378.

25. Jo Goodie & Gary Wickham, “Calculating ‘Public Interest’: Common Law and the Legal Governance of the Environment” (2002) 11 *Social & Legal Studies* 37 at 40: “At the federal level the World Heritage Properties Conservation Act 1983 (Cth) s. 14 [repealed in 1999, and replaced by parts of the *Environment Protection and Biodiversity Conservation Act* 1999] and the Ozone Protection Act 1989 (Cth) s. 56, both allow any person to initiate proceedings for an injunction to restrain a breach of their respective Acts.”

26. The Ontario *Environmental Bill of Rights*, 1993, S.O. c. 28 also contains a limited special provision regarding injunctions in section 92.

27. McLeod-Kilmurray *Hollick*, and McLeod-Kilmurray “Lowering Barriers,” *supra* note 1.

28. Sharpe, *supra* note 16 at §2.80.

discretion.<sup>29</sup> Substantive environmental law in Canada is guided by several environmental law principles. The *Canadian Environmental Protection Act, 1999*<sup>30</sup> imposes on the federal government the duty to “exercise its powers in a manner that *protects* the environment and human health, applies the *precautionary principle*... and promotes and reinforces enforceable pollution *prevention* approaches.” Since procedure is created to enhance the effectiveness of substantive law, procedural rules should also be interpreted through the lens of protection, precaution and prevention.

In particular, courts hearing requests for injunctive relief should consider the Precautionary Principle, found in many of the newer environmental statutes in Canada,<sup>31</sup> and recognized by the Supreme Court in *Spraytech*.<sup>32</sup> Precaution is part of the third generation of environmental laws which emphasize that environmental harm should be avoided, not rectified and

29. See also Australia's *Environmental Protection and Biodiversity Conservation Act, 1999*, Act No. 91 of 1999, s. 3A “Principles of Ecologically Sustainable Development,” cited in Chris Tollefson & Jamie Thornback, “Litigating the Precautionary Principle in Domestic Courts” (2008-2009) 19 J.E.L.P. 33 [Tollefson], which includes the precautionary principle, inter-generational equity, conservation of biodiversity and ecological integrity. I have made a similar argument for a “judicial environmental framework” that includes many of these principles, in McLeod-Kilmurray “Lowering Barriers” *supra* note 1. See also Jerry DeMarco, “The Supreme Court of Canada’s Recognition of Fundamental Environmental Values: What Could be Next in Canadian Environmental Law?” (2007) 17 J.E.L.P. 159.

30. S.C. 1999, c. 33, s. 2(1)(a) [emphasis added].

31. David VanderZwaag, Susanne Fuller & Ransom Myers, “Canada and the Precautionary Principle/Approach in Ocean and Coastal Management: Wading and Wandering in Tricky Currents” (2002-03) 34 Ottawa L. Rev. 117 at 121 [VanderZwaag et al.], refers to many of the instances in which the precautionary principle has been incorporated into Canadian law: in legislation, see *Canadian Environmental Protection Act, 1999*, *supra* note 30 at Preamble, s. 2, s. 6(1.1), and 76.1; *Oceans Act*, S.C. 1996, c. 31, Preamble and s. 30; *Canadian Environmental Assessment Act*, S.C. 1992, c. 37; *Species at Risk Act*, S.C. 2002, c. 29, Preamble and s. 38. In policy, see e.g. Canadian Council of Ministers of the Environment, *A Canada-Wide Accord on Environmental Harmonization* (Winnipeg: CCME Publications, 1998), online: <[http://www.ccme.ca/assets/pdf/accord\\_harmonization\\_e.pdf](http://www.ccme.ca/assets/pdf/accord_harmonization_e.pdf)>; which “recogniz[es] such principles as polluter pays, pollution prevention, public participation and Aboriginal rights, [and] expressly adopts the precautionary principle” (VanderZwaag et al. at 124); in jurisprudence see the cases highlighted in VanderZwaag. For a summary of precaution in Canadian law, policy and jurisprudence, see generally Julie Abouchar, “Implementation of the Precautionary Principle in Canada” in Timothy O’Riordan, James Cameron & Andrew Jordan, eds., *Reinterpreting the Precautionary Principle* (London: Cameron May, 2001). See also David VanderZwaag “The Precautionary Principle in Environmental Law and Policy: Elusive Rhetoric and First Embraces” (1998) 8 J.E.L.P. 355.

32. *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, 2001 SCC 40 at paras. 31-32, where the Court details the principle, its sources, domestic legislation in which it is incorporated, and academic and judicial references to it. See also Tollefson, *supra* note 29.

punished after its occurrence.<sup>33</sup> It is most often cited to Principle 15 of the 1992 Rio Declaration:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capability. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.<sup>34</sup>

The Principle is particularly relevant to pre-trial injunctions for three reasons. It is intended to apply in situations of uncertainty, i.e. where there is risk or doubt, and it is therefore especially relevant at the pre-trial stage, where the court is acting on an incomplete record and therefore dealing with at least one form of uncertainty. Secondly, it has procedural impacts, for example, on the burden and standard of proof, and it emphasizes citizen empowerment.<sup>35</sup> Finally, it challenges dominant ways of thinking: to change from a presumption that development or innovation are always good. It requires us to assess risk in explicit detail, and encourages erring on the side of caution to protect the environment. David VanderZwaag, a world expert on precaution, specifically argues that it should be part of “a

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33. In relation to the evolution of generations of environmental legislation, see Alistair R. Lucas, “Regulatory Legislation” in Elaine L. Hughes, Alastair R. Lucas & William A. Tilleman, eds., *Environmental Law and Policy*, 3d ed. (Toronto: Edmond Montgomery Publications Limited, 2003) at 163, 165 [HLT]. Very briefly, “[the] first generation of environmental statutes includes the basic air, water and land pollution statutes enacted by Canada, and by the provinces in the early 1970s,” while second generation statutes address “persistent toxic substances,” long-term and “intergenerational effects,” adaptability, the trans-border nature of environmental harm, and more flexible and innovative enforcement mechanisms. See also Alistair R. Lucas, “The New Environmental Law” in R. Watts & D. Brown, eds., *Canada, The State of the Federation: 1989* (Kingston: Queen’s Univ. Institute for Intergov. Affairs, 1990) at 168-71; and D. Paul Emond, “The Greening of Environmental Law” (1991) 36 McGill L. J. 742, who describes third generation statutes as “laws to promote sustainability or ‘sustainable development’,” including an emphasis on public participation, prevention and “consensual decision making.”

34. Principle 15, *Declaration on Environment and Development*, reprinted in 31 ILM 876 (1992) [*Rio Declaration*].

35. Tim O’Riordan, James Cameron & Andrew Jordan, “The Evolution of the Precautionary Principle” [O’Riordan et al.] in O’Riordan et al., *supra* note 31, 9 at 19-20: “the basic principles of the precautionary principle are: thoughtful action in advance of scientific proof[;] ... leaving ecological space[;]... care in management[;]...shifting the burden of proof[; and]...balancing the basis of proportionality.”

revised approach to injunctive relief.”<sup>36</sup> Claude Martin agrees: since “the requirements as to irreparable harm and the balance of convenience are difficult to meet in environmental interlocutory injunctions [...] a more liberal approach, inspired by the ideas behind the precautionary principle, should be favoured in respect to these requirements.”<sup>37</sup>

The pre-trial injunction is both preventive and precautionary in that it is a tool for preventing anticipated environmental harms.<sup>38</sup> If substantive environmental law is intended to prevent environmental harm, and requires the application of precaution, the procedures by which this law is applied and enforced must be preventive and precautionary too. How would this framework affect interpretation of the injunction test in the environmental context?

3. *The test in view of the special factors present in the environmental context*

Each element of the interlocutory injunction test itself has many sub-issues, depending upon the substantive context. In environmental litigation, I argue that there are four key themes relevant to interlocutory injunctions.

- (1) *Uncertainty*: The uncertainty encountered in all pre-trial litigation is exacerbated in environmental cases where many of the issues will involve complex scientific questions which may not be capable of certain resolution even after a full trial.
- (2) *Finality*: The interlocutory injunction decision is often the final one, because the trial will be irrelevant, since any order will be unable to remedy environmental harm.
- (3) *Nature of environmental harm*: When priceless natural heritage is permanently contaminated or destroyed, there is a strong argument that damages are not only inadequate, but also ethically inappropriate, since nothing can substitute or compensate for such harm.
- (4) *Interests affected*: Since preservation of property is the key feature in environmental cases, courts should go beyond a balancing between

36. *Ibid.* at 394. Elsewhere, he has made similar arguments: “The precautionary principle, while still evolving in its legal development, but suggesting the need to grant the benefit of doubt to environmental protection rather than high risk activities, may be the creative normative wedge to rethink common law doctrines such as nuisance and injunctive requirements,” in “The Concept and Principles of Sustainable Development: ‘Rio-formulating’ Common Law Doctrines and Environmental Laws” (1993) 13 Windsor Y.B. Access Just. 39 at 59. He also suggests this includes reversing burdens and changing standards: e.g. “[o]ne may also envision a change in the injunctive standard of proof from a ‘strong probability’ to a reasonable possibility” at 60.

37. Martin, *supra* note 2 at 364.

38. Christiaan Zwart, “Environmental Injunctions” (Paper presented to the Environment Agency, September 2006), published by 39 Street Essex Chambers, online: <[http://www.39essex.co.uk/docs/articles/CZ\\_Injunctions\\_140906.pdf](http://www.39essex.co.uk/docs/articles/CZ_Injunctions_140906.pdf)>.

the interests of both defendant and those of the plaintiff. The interests of the environment itself should be central to the analysis. Also, since environmental issues always affect the public interest, the public interest should always be considered as part of the environmental interlocutory injunction test.

These four themes will arise at various points in our discussion of the interlocutory injunction test. Before turning to the test itself, however, it is important to understand the broader implications of interlocutory injunctions on power in the environmental context.

#### 4. *Interlocutory injunctions and power*

Interlocutory injunctions are not merely procedural motions at the periphery of the main litigation. In many environmental cases, they *are* the litigation. They have doctrinal implications, but they also significantly affect the balance of power in environmental disputes.

Doctrinally, injunctions affect the substantive law. As Rendleman argues, "Judges ... enhance the protection accorded property and other interests by deciding that damages are an inadequate remedy."<sup>39</sup> Granting an injunction, even an interlocutory one, reveals the value placed on the protected interest: that it is important enough to prevent harm to it, rather than merely compensating for such harm. On a more practical level, an important role of injunctions is to alter the power relations in environmental disputes. By refusing to enjoin environmentally harmful activities, the court may be maintaining power where it lies, and refusing to level the playing field for all interests in the environmental debate.<sup>40</sup> By granting injunctions to protect the environment in the interim, courts can balance the negotiating power of the competing sides by allowing all voices to be heard, and giving them time to make the best case possible.

This is important, because power is often very unevenly distributed in cases involving environmental disputes. Amy Sinden<sup>41</sup> has argued:

Environmental disputes involve asymmetries of power ... On one side, [they] commonly involve an interest that is broadly shared among individuals, non-economic in character, and often of relatively minor consequence to each one. ... On the other side, the interests pitted against the set of diffuse public interests are of a very different character. First,

39. D. Rendleman, "The Inadequate Remedy at Law Prerequisite for an Injunction" (1981) 33 U. Fla. L. Rev. 346 at 350.

40. Although some of the larger and older environmental groups such as Greenpeace may have significant power, many environmental advocates are "out muscled," financially and politically, by competing interests.

41. Amy Sinden "In Defence of Absolutes: Combating the Politics of Power in Environmental Law" (2004-05) 90 Iowa L. Rev. 1405.

they are usually held by a much smaller set of actors. Second, they tend to be economic in character and have the potential to directly impact each individual actor to a far larger degree. And third, the actors are typically businesses and corporations, rather than individuals.<sup>42</sup>

This means environmental interests are harder to organize and have less clout than corporations who are wealthier and more influential politically: "As a result, environmental disputes almost always involve an asymmetry of power that weighs against environmental protection."<sup>43</sup>

This power imbalance is clearly demonstrated in interlocutory injunctions. Even though we are here concerned primarily with interlocutory injunctions seeking to protect environmental resources, it is useful to briefly compare the readiness with which the courts grant injunctions to quell environmental protest in cases of natural resource exploitation.<sup>44</sup> This contrast is a further indication of the judicial inclination to protect private property, as well as development goals (of both the private and public sectors), above other interests such as environmental protection.

The Clayoquot Sound clearcutting example discussed above highlights this other side of the issue of power in pre-trial injunction cases. MacMillan Bloedel obtained interlocutory injunctions to stop the protestors obstructing their logging operations on Vancouver Island between 1985 and 1996. In response to the 1993 provincial government's Clayoquot Land Use

42. *Ibid.* at 1436-37.

43. *Ibid.* at 1438-39. Speaking in the context of regulatory action, Sinden argues for absolute standards, and against the crude balancing of cost-benefit analysis. Absolute standards "replac[e] the usual utilitarian balancing of interests with a trumping approach [in which] a right operates as a blunt prophylactic rule that puts a heavy thumb on the scale in favour of the weaker interest. ... Under such an environmental trumping approach, environmental protection interests outweigh countervailing interests of economic cost, except in extraordinary circumstances." She refers to other scholars who agree this should also apply in the case of injunctions, specifically due to this power imbalance: *Ibid.* at 1484-85. Footnote 351 provides: "Cass Sunstein ... argues that in cases involving environmental harm, courts should reject the usual common law balancing-of-equities approach to injunctive relief and the presumption in favor of damages and instead adopt a presumption favoring injunctive relief. This is because '[i]n the environmental arena ... there is a severe collective action problem, and environmental harms that are trivial in the individual case might be collectively disastrous.'" Sinden herself uses the example that the strong standards in the U.S. *Endangered Species Act* led to many "injunctions under it ... against politically powerful and influential industries," at 1493. The cases are listed in her footnote 384.

44. E.g. *Ridge Landfill Corporation Ltd. v. Jacobs et al.* (1981), 10 C.E.L.R. 125 (S.C. Ont.), *Siska Indian Band v. B.C. (Min. Forests)*, [1999] B.C.J. No. 2354, among many others.

Decision,<sup>45</sup> thousands of protestors blocked MacMillan Bloedel logging trucks in defiance of the injunction. Nine hundred were arrested and eight hundred and sixty convicted of criminal<sup>46</sup> contempt, with most serving jail sentences.<sup>47</sup> The multiple trials and sentence hearings became known as the "Clayoquot mass trials."<sup>48</sup>

While a full discussion of the courts' use of criminal contempt in such situations is beyond the scope of this paper, what is interesting is the degree to which environmental issues were almost completely excised from these injunction decisions. Julia Lawn<sup>49</sup> points out that the issue was reduced to maintaining respect for the courts while the environmental substance of the disputes became irrelevant. The Supreme Court defined the case as a battle of private property and contractual rights against "the right to express public dissent,"<sup>50</sup> without mention of the environmental resources at stake. The courts' perception of the paramountcy of private property rights and the court's role in law enforcement carried the day. In coming to its decision, the court apparently failed to appreciate that the competing interest was actually the public interest in protection of

45. B.C. government, April 13, 1993. "Weeks before the provincial government announced its April 1993 decision to allow logging in 74 percent of the Clayoquot's ancient forest, [it] invested \$50 million into the company, becoming the largest shareholder," in Ron MacIsaac & Anne Champagne, eds., *Clayoquot Mass Trials: Defending the Rainforest* (Gabriola Island, B.C.: New Society Publishers, 1994) at 14. Ingram notes that this coloured the perception of the public as to the appropriateness of the courts enforcing these government tree licences and of the provincial attorney general being asked by the courts to proceed with these contempt cases on a criminal basis. Gordon Brent Ingram, "The Ecology of a Conflict" in T. Berman et al., eds., *Clayoquot & Dissent* (Vancouver: Ronsdale, 1994) 9 at 11.

46. When the injunctions were ignored, they began to be enforced by criminal contempt. The B.C. attorney general had a policy (see *MacMillan Bloedel v. Simpson*, [1996] 2 S.C.R. 1048, 22 C.E.L.R. (N.S.) 1) of not interfering with the public protests by means of arresting people under the *Criminal Code*. MacMillan Bloedel therefore asked that the proceedings be pursued as criminal rather than civil contempt. The Court specifically asked the attorney general of B.C. to undertake management of these cases, and the penalties included fines as well as prison sentences.

47. See e.g., *MacMillan Bloedel v. Brown* (1994), 92 B.C.L.R. (2d) 1 (B.C.C.A.), among many others.

48. See MacIsaac and Champagne, *supra* note 45 and Berman et al., *supra* note 45. In 1985, the trial court in *Mullin*, *supra* note 3, which refused the interlocutory injunction to stop the logging, also granted an injunction to stop the protests. A similar result obtained in *McLeod Lake Indian Band v. British Columbia*, [1989] 4 C.N.L.R. 83 (B.C.S.C.).

49. Julia E. Lawn, "The John Doe Injunction in Mass Protest Cases" (1998) 56 U. T. Fac. Law Rev. 101.

50. *Supra* note 46 at 10.

property, and the shared interest in environmental resources, particularly when such resources are globally unique and irreplaceable.<sup>51</sup>

Had the courts approached this from within a precautionary framework, it may have led them to be more specific in characterizing the content of the protest, its purposes, and whether it was in the public interest.<sup>52</sup> It might also have caused the courts to cease enforcing the equitable injunction remedy given that after several years, MacMillan Bloedel had not proceeded with the trial on the merits.<sup>53</sup> The Court's conclusion that it was a fair balancing of the competing interests to allow protest to continue, but only without interfering with private property rights, ignored the emptiness of rights such as freedom of expression in the environmental context when the right to protest excludes the right to actually prevent permanent and irreparable harm to globally unique resources. The Supreme Court did not mention

51. A contrasting approach can be found in *MacMillan Bloedel Ltd. v. Western Canadian Wilderness Committee* (1988), 4 C.E.L.R. (N.S.) 110 (B.C.S.C.) where the court refused to enjoin the defendant public interest group from "building a hiking trail" through the area where MacMillan Bloedel held a Tree Farm Licence, since the licence did not entitle the company to exclusive possession of all the land within the licence area, and therefore no serious issue was raised. It also held the balance of convenience favoured the environmental advocates, because "*I have no doubt* that monetary damages would adequately compensate the plaintiff Company" [emphasis added]. The judge pointed out that what MacMillan Bloedel really feared was that the trail "will encourage sufficient support for their cause to persuade the Minister to cancel that portion of Tree Farm Licence Number 44," and he held that if this did occur, "the plaintiff presumably would be bound to look to the Crown and not to individual citizens for such relief as may be available."

52. The court cited other protest cases, such as against abortion clinics, *Ontario (A.G.) v. Dieleman* (1994), 20 O.R. (3d) 229 (Gen. Div.). The strong moral and emotion context of these issues cause some to argue that they are best resolved politically. Yet courts have been granted the injunctive power, and it is a vital step in long-term disputes. Courts *will* either interfere or not interfere, and the point is that refusing an injunction is just as "activist" as granting one. Rather than claiming to remain neutral by upholding the government's policy decisions, the courts must look at the practical effect that their decisions will have on ongoing disputes, and this requires looking at the competing interests in the substantive context, particularly any effects that will be irreparable.

53. Despite noting that "MacMillan Bloedel has not brought the main action on for trial. Its counsel did not suggest that it ever would," the Supreme Court held: "MacMillan Bloedel was entitled to claim against them such relief as the law allows. Although it contented itself with obtaining interim injunctions, MacMillan Bloedel could have proceeded to trial to obtain permanent injunctions and damages against them. The fact that they chose not to pursue the fullest remedy available is not a basis for denying it any other relief allowed by law." MacMillan Bloedel, *supra* note 46 at paras. 9, 16-17. Yet those sympathetic to the protesters have argued that "[t]he company was using the injunction as a means of avoiding the difficulties of a civil trial, a trial in which it would have had to defend its logging practices. Hence, for the courts to extend and re-extend the original injunction meant that they were aiding MacMillan Bloedel to circumvent the appropriate legal process. ... In effect, the courts were creating a private criminal law for MacMillan Bloedel. ... Not only that, but the use of an injunction creates a situation which pits the judiciary against its citizens instead of the Plaintiff against the Defendant." Ronald B. Hatch, "The Clayoquot Show Trials" in Berman et al., *supra* note 45, 105 at 137. Also, interlocutory injunctions are equitable remedies, and MacMillan Bloedel could have been argued not to have clean hands. See MacIsaac et al., *supra* note 45 at 70-71, listing 23 convictions against the company for violations of various environmental laws. In addition, if the trial is never brought, the injunctions become *de facto* permanent injunctions, without benefit of trial.



the final effect doctrine, and framed its decision so as to provide a general precedent for protest cases and for proxy orders a.k.a. Jane and John Doe orders,<sup>54</sup> which are abstracted from the realities of the environmental context.<sup>55</sup>

This trend has largely continued into the very recent caselaw,<sup>56</sup> with few exceptions.<sup>57</sup> The Eagleridge Bluffs coalition posted a letter<sup>58</sup> for supporters to sign when interlocutory injunctions were granted to stop protests of the Sea to Sky Highway for the 2010 Olympics. It highlighted the group's concerns and what they felt was a misapplication of the interlocutory injunction test:

I am deeply concerned over the continued use of civil injunctions... by the Courts of British Columbia as a means of upholding the financial rights of private corporations in land disputes, while stifling public concern

54. Joe and Jane Doe orders are court "orders against unidentified persons not named in the action or named only in proxy as 'Jane Doe' and 'John Doe'": *MacMillan Bloedel*, *supra* note 46 at para. 1.

55. This approach of divorcing the issue from its context was seen with greater clarity in *Slocan Forest Products Ltd. v. Valhalla Wilderness Society* (1998), 28 C.E.L.R. (N.S.) 88 at paras. 22-23 (B.C.S.C.): "The balancing of convenience that was under consideration... is not one between the plaintiff as one lawful resource user and Mr. Anderson as another lawful resource user in conflict... It was a balancing of convenience between a plaintiff with the legal right to construct, use and maintain a public road ... and harvest timber on one hand, and a crowd of persons who resorted to illegal use of a blockade to impede that legal right, on the other. The virtue of this cause and the objective correctness of their values are all completely irrelevant because the rule of law in our democracy requires that rights are established and adjudicated by due process, not by force." This was recently followed in *Red Chris Development v. Quock*, 2006 BCSC 1472.

56. Interlocutory injunctions against environmental protesters have been granted in many recent cases. In *Hamilton v. Loucks* (2003), 232 D.L.R. (4th) 362 (Ont. Sup. Ct. J.); *John Voortman & Assoc. Ltd. v. Haudenosaunee Confederacy Chiefs Council*, [2009] O.J. No. 1350 (Sup. Ct. J.); *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation* (2008), 165 A.C.W.S. (3d) 155 (Ont. Sup. Ct. J.) (uranium exploration on disputed Aboriginal land); *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* (2007), 29 C.E.L.R. (3d) 460 (Ont. Sup. Ct. J.) (test drilling on claimed traditional lands without appropriate consultation); *Eagleridge Bluffs & Wetlands Preservation Society v. B.C. (Ministry of Transportation)*, 2006 BCSC 815 and related actions (protesters interfering with construction of Sea to Sky Highway in preparation for the Vancouver Olympics).

57. Interlocutory injunctions against environmental protestors have also been refused in a few cases. In *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* (2006), 272 D.L.R. (4th) 727 (Ont. Sup. Ct. J.) by the Aboriginal plaintiffs to enjoin the test drilling on their property, and also by the company to enjoin the protests. Justice G.P. Smith who later permitted the drilling and enjoined the protests, held at this earlier stage of this case that the evidence showed the Aboriginal plaintiffs would suffer irreparable harm if the mining proceeded before adequate consultation and that the balance of convenience favoured the preservation of the land pending trial. The Court cited Sonia Lawrence & Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar Rev. 253 at 275: "[w]ith respect to cases involving a breach of the Crown's duty to consult, however, judicial reluctance to grant interlocutory injunctions creates a perverse incentive on the Crown to engage in ineffective consultations with a First Nation." See also *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* (2006), 277 D.L.R. (4th) 274 (Ont. C.A.).

58. Eagleridge Bluffs Coalition, letter to the B.C. Justice Review Task Force, the premier and the provincial Attorney General.

over the irreparable harm being done to the environment at the hand of our government. BC is one of the few jurisdictions where injunctions are used routinely to control public protest over government sanctioned environmental destruction. ...The Supreme Court of BC has recognized many times over that injunctions are powerful tools that should only be used as a last resort when other statutory remedies have failed. Why then does injunctive relief continue to be granted as a first line of defence against protesters when statutory measures have NOT been attempted and public safety is NOT threatened? And why does 'irreparable harm' only pertain to the potential financial loss of a corporation and not to the imminent destruction of irreplaceable ecosystems?<sup>59</sup>

Yet this is not the only approach available to the courts. In *MacMillan Bloedel v Brown*, Mr. Justice Lambert in dissent outlined the developments in the multi-year protest against clearcutting.<sup>60</sup> He recognized that the goal of the protesters was not to discredit the courts, but was politically directed at the Clayoquot Sound Land Use Decision.<sup>61</sup> He drew out the question of what role the courts are playing when they uphold government policy:

[I]t is important to ask to what extent the authority of the courts may be thought to be depreciated by these acts of protest in an overall context where ... the courts find themselves the instruments for upholding the Clayoquot Sound Land Use Decision which, according to the Provincial Ombudsman, was made without consulting the Nuuchah-nulth peoples whose constitutionally protected aboriginal rights may be deeply affected by the Decision and who may themselves have been denied the protection of the rule of law as it relates to administrative fairness.<sup>62</sup>

These disputes and injunction decisions show how injunctions significantly affect power relations in environmental disputes. They also highlight how often the courts do not even appear to turn their minds to the environmental context of these decisions.

Having highlighted the importance of understanding the relationships of power and the underlying presumptions in the environmental context, the following Part will examine in more detail the various elements of the test for an interlocutory injunction, using particular cases as examples of the variety of approaches in environmental disputes. They will demonstrate the underlying ethics dominating these decisions, and how a precautionary framework may have altered the approach to this procedural tool.

59. It is important to note that these protesters, as the letter clarifies, felt that the courts should stay out of these issues and "[i]t is the duty of the government, not the courts, to find an acceptable balance between economic growth and environmental sustainability."

60. *MacMillan Bloedel v. Brown*, *supra* note 47 at para 102.

61. *Ibid.* at para. 126.

62. *Ibid.* at para. 127.

## II. *Analyzing the elements of the test*

### 1. *Serious issue*

The first aspect of the test requires the court to determine whether there is a serious issue to be tried. This is not the main barrier to environmental advocates, as the threshold is quite low.<sup>63</sup> However, there are several interesting aspects to this first branch of the test, which make its analysis rewarding. Firstly, the manner in which a judge selects and defines what the main issue *is* tends to determine the outcome of the injunction decision and, more relevant for our purposes, it is particularly revealing of the court's attitudes and priorities. *Mullin*<sup>64</sup> again provides a good example. The trial judge in *Mullin* perceived the dispute to be about whether Aboriginal land claims should be allowed to hold up the forestry industry and the provincial economy indefinitely. Resolved that this should be prevented, he focused on those aspects of the injunction test that would permit him to refuse this interim remedy, namely the purported lack of a *prima facie* case. The Court of Appeal focused on the complexity of the issues, and what could not be remedied at trial—harm to the unique ancient growth forests. It therefore focused on the irreparable harm branch of the test, and the final effect test. Thus, how the court defines the issue depends on judicial perceptions, and directly influences the application of the test. Yet even within this fairly straightforward branch of the test, there remain some points of contention.

Although a serious issue is the standard test in most environmental litigation,<sup>65</sup> the question still arises as to whether the higher threshold of

63. See *RJR MacDonald*, *supra* note 2 at para. 44.

64. *Mullin*, *supra* note 3.

65. The test is alternately phrased as "serious question" or "serious issue": *Mullin*, *supra* note 3; *Kitkatla Bank v. British Columbia (Minister of Forests)*, [1998] B.C.J. No. 2667 (B.C.S.C.); *Friends of Point Pleasant Park v. Canada (A.G.)* (2000), 38 C.E.L.R. (N.S.) 45 (F.C.T.D.); *Cape Breton Landowners v. Stora Kopparbergs Bergslags Aktiebolag* (1982), 11 C.E.L.R. 141 (interlocutory injunction) [*Palmer*]; *Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans)* (1998), 234 N.R. 96 (F.C.A.) (stay decision). See final decision in overall case at (1999), 31 C.E.L.R. (N.S.) 239 (F.C.A.); *Township of Essa v. Atomic Energy Control Board, et al.* and *Township of Tosorontio v. Atomic Energy Control Board et al.* (1981), 10 C.E.L.R. 142 (F.C.T.D.) at 145 [*Tosorontio v. Atomic*]; *Township of Tosorontio v. Scarborough* (1981), 10 C.E.L.R. 146 (F.C.A.) at 147; *Waste Not Wanted Inc. v. The Queen in Right of Canada, The Minister of Energy Mines and Resources and Atomic Energy of Canada Limited* (1984), 13 C.E.L.R. 100 at 103 [*Waste not Wanted*]; "fair question": *MacMillan Bloedel v. WCWC*, [1988] B.C.J. No. 2510 (B.C.S.C.); *Wheatley v. Ellis*, [1944] 3 W.W.R. 462 (B.C.C.A.); *Attorney General of British Columbia v. Wale et al.*, [1987] 2 C.N.L.R. 36, [*Wale*], *aff'd* [1991] 1 S.C.R. 62; *Friends of Stanley Park v. Vancouver (City) Board of Parks and Recreation* (2000), 10 M.P.L.R. (3d) 25 (B.C.S.C.); "substantial issue": *Ridge Landfill Corp. Ltd. v. Jacobs* (1981), 10 C.E.L.R. 125 (Ont. S.C.); "arguable case" *Northwood Inc. v. B.C. (Forest Practices Board)* (1999), 32 C.E.L.R. (N.S.) 167 (B.C.C.A.) (equate serious issue with an arguable case).

a *prima facie* case should be required. Prior to *Cyanamid*, the basic test required the plaintiff first to demonstrate a *prima facie* case. This was a very high hurdle and a practice was evolving to use this pre-trial hearing as a quick and less expensive test of the merits, which frequently led to settlement.<sup>66</sup> This changed in *Cyanamid*, a patent case involving a new type of surgical sutures, whose complex scientific facts made the likely outcome particularly difficult to predict. The Court lowered the first branch of the test to merely require evidence of a serious question, i.e., one that was not frivolous or vexatious.

Sharpe sets out six exceptions to the current “serious question” test.<sup>67</sup> It is often held that the higher *prima facie* test is more appropriate where:

- 1) it cannot be determined where the balance of convenience lies;
- 2) the facts are not in dispute;
- 3) the case turns on a pure question of law;
- 4) particular substantive issues are involved, such as defamation;
- 5) the injunction is sought against a public entity; or
- 6) the rights of the parties are finally determined on the interlocutory motion.

Of these, the last two are particularly relevant to the environmental situation.<sup>68</sup> First, however, it is useful to address the overarching issue of scientific complexity, because this was the primary driving force for lowering the threshold in *Cyanamid*. Does the context of environmental law also justify a lower threshold, due to the usual scientific complexity of the issues involved?

66. See generally Sharpe *supra* note 16, and John Leubsdorf, “The Standard for Preliminary Injunctions” (1978) 91 Harv. Law Rev. 525 [Leubsdorf].

67. Sharpe, *supra* note 16 at paras. 2.300 to 2.380.

68. The first situation is not an exception, since it elaborates the *Cyanamid* test itself, which states that if having considered all factors including irreparable harm and balance of convenience, the risk to both sides is equal, the court can then look to the *relative* strength of the parties’ cases, but this should only be influential where one side is clearly stronger. The second two exceptions are based on the reduced risk of error where the facts are not in dispute or the issue is a question of law—the motions judge is then as well placed as the trial court to decide. The fourth exception is again not an exception, and is often because some element of the logic of the interlocutory injunction is lacking: for instance, Sharpe, *supra* note 16 indicates that the *prima facie* test applies in trade mark cases, or cases where the injunction seeks to compel medical procedures, because the injunction will have final effect, at para. 2.356. In patent cases, where the defendant undertakes to account, damages must be an adequate remedy since they can be repaired by means of the accounting, *ibid*. In cases enforcing negative covenants, in *Canada (A.G.) v. Saskatchewan Water Corp. et al.* (1991), 5 C.E.L.R. (N.S.) 252 (Sask. Q.B.), rev’d [1992] 4 W.W.R. 712 (Sask. C.A.), addt’l reasons [1993] 7 W.W.R. 1 (Sask. C.A.) [*Sask. Water Corp.*], the strength of the plaintiff’s case was held to be the main issue, and if the case is very strong, irreparable harm and balance of convenience are much less relevant.

One of the decisive elements in *Cyanamid* was the scientific complexity of the patent issue. This led Lord Diplock to emphasize the dangers of reaching conclusions on the merits at the interlocutory stage, and led the court to create the new lower threshold test.<sup>69</sup> Scientific complexity is central in many environmental cases, yet is treated differently by various courts.

Some courts take the view that uncertainty means there is no proof of irreparable harm, so no interim injunction should issue.<sup>70</sup> Others find that the uncertainty should not prevent a decision on the interlocutory injunction, and move on to other factors in the test.<sup>71</sup> Another approach is to say that where there is uncertainty, it is best to maintain the *status quo* until trial, although, as we will see below in discussing the balance of convenience, much depends on how the *status quo* is defined.<sup>72</sup> Where government is involved, some courts defer to its view of the science,<sup>73</sup> although some consider the plaintiff's scientific evidence and prefer it.<sup>74</sup> Finally, some try to resolve the uncertainty where they feel this is necessary, such as when the decision will have final effect.

A precautionary approach would lead courts to find that where there is uncertainty, it is best to err on the side of environmental protection until it is proved that the proposed course of action will not cause harm.<sup>75</sup> (It is important to note that this can mean granting or refusing the injunction, depending on the facts.) There are cases demonstrating this precautionary approach. *Palmer*,<sup>76</sup> where a government-licensed forest company was enjoined from aerially spraying pesticide until objections by local residents and Aboriginal people could be heard, clearly supports this notion.<sup>77</sup> Although the motions judge lamented that scientifically complex issues are not for courts to finally determine, he held that courts retain a limited but important institutional role in such cases. He reversed the burden, enjoining the spraying until those using the pesticides could prove they

69. *Cyanamid*, *supra* note 5 at 509-510.

70. *Edwards v. Canada (Minister of Agriculture)* (1992), 8 C.E.L.R. (N.S.) 81 (F.C.T.D.) and *Canadian Parks and Wilderness Society v. Superintendent of Banff National Park and Sunshine Village Corporation* (1993), 23 Admin. L.R. (2d) 6 (F.C.T.D.) [CPAWS].

71. *Village of Kannata Valley et al. v. Kannata Highlands Ltd.* (1983), 13 C.E.L.R. 1 (Sask. Q.B.) [*Village of Kannata*].

72. *Palmer*, *supra* note 65; *Tosorontio v. Atomic*, *supra* note 65; *Waste Not Wanted*, *supra* note 65.

73. *Edwards*, *supra* note 70; CPAWS, *supra* note 70.

74. *Friends of Point Pleasant Park*, *supra* note 65.

75. See *Bolton et al. v. Forest Pest Management Institute, et al.* (1985), 14 C.E.L.R. 63 (B.C.C.A.) [*Bolton*], and *Palmer*, *supra* note 65.

76. *Palmer*, *supra* note 65.

77. Although this case predates the popularity of precaution as an environmental law principle and does not explicitly use the term.

were safe.<sup>78</sup> Thus, scientific complexity militates in favour of precaution, and in favour of the lower serious question threshold in environmental cases, as it did in *Cyanamid*. Should environmental cases involving the Sharpe factors of final effect or public entities revert to the higher *prima facie* test?

Another situation where courts often require the higher threshold of a *prima facie* case is where the interlocutory injunction decision will have final effect. The logic is that since there will be no further litigation, the matter is in essence no longer interlocutory,<sup>79</sup> so the merits should govern.<sup>80</sup> Yet the final effect doctrine provides a compelling example of the centrality of substantive context in evaluating procedural tests. While in many cases granting an injunction will have final effect, in the environmental context, most injunctions will only have final effect if the environment is *not* protected.<sup>81</sup> By contrast, where the competing interest is logging or development, the defendant's interests will simply be delayed. Due to the risks of deciding the merits at the interlocutory stage, and the complexity of environmental decisions, this is exactly the kind of situation in which a precautionary approach is called for. Most of these cases should not be decided until the full merits have been heard at trial, and the resources should be protected until then. Indeed, one of the central elements of the interlocutory injunction test in the *Code de Procédure Civile* of Quebec is ensuring that the final judgment in the case can be effective.<sup>82</sup>

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78. See Lynda Collins, "Strange Bedfellows? The Precautionary Principle and Toxic Tort: A Tort Paradigm for the 21st Century" (2005) 35 *Envtl. L. Rep.* 10361: "Because tort traditionally allocates the burden of proof to the person seeking to change the status quo, James M. Olson asserts that tort should redefine the status quo from an ecological perspective. Thus, rather than viewing the status quo as a state of human conduct, e.g., the discharge of airborne contaminants, the status quo should be defined as an unpolluted or less-polluted environment, e.g., clean air. Since it is the toxic defendant who seeks to change, or has already changed, the status quo, the burden should be on her to prove that the change is or was justified," citing James M. Olson, "Shifting the Burden of Proof: How the Common Law Can Safeguard Nature and Promote an Earth Ethic" (1990) 20 *Envtl. Law* 891 at 894 [Olson].

79. Sharpe, *supra* note 16 at 2.340, 2.350 and 2.380.

80. Lord Diplock himself created this exception in *N.W.L. Ltd. v. Woods*, [1979] 3 All E.R. 614 (H.L.), saying that where the interlocutory injunction is likely to have final effect "because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense" (at 626), the court should assess the strength of the plaintiff's case as "a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than another." See also W. Sofronoff, "Interlocutory Injunction Having Final Effect" (1987) 61 *Aust. L.J.* 341 at 347, citing Eveleigh L.J. in *Cayne v. Global Natural Resources Plc.*, [1984] 1 All E.R. 225; P. Carlson, in "Granting an Interlocutory Injunction: What is the Test?" (1982) 12 *Man. L. J.* 109; and Leubsdorf *supra* note 66 at 545-6, 557, 565.

81. *Elgie*, *supra* note 2, agrees that where an interlocutory injunction *fails* to protect an environmental resource, it will always have final effect.

82. *Supra* note 13.

In cases where the environment *has* been protected at the interlocutory stage, the courts emphasize the “final effect” factor. For example, in the *Palmer* pesticide case, the fact that refusing the injunction would have final effect was “the determining consideration”<sup>83</sup> in granting it. As in *Mullin*,<sup>84</sup> the court in *Baker Lake* also emphasized finality: “The minerals, if there, will remain; the caribou, presently there, may not.”<sup>85</sup>

The argument becomes even clearer by examining of cases applying the final effect test incorrectly. In litigation over the Rafferty Alameda dam, the federal government sought to enjoin continued provincial development of the dam until the federal Environmental Assessment Board had reported on the project. The court held that where interlocutory injunctions have final effect, the threshold is raised from a serious question to a *prima facie* case:

it seems clear that if no interlocutory injunction is granted and no other legal or other impediment arises which might interfere with the construction of the Project, then the Project will be substantially completed by the fall of 1991. It seems obvious that upon substantial completion of the Project, there would no longer be any purpose in holding a trial. Consequently, the refusal of an interlocutory injunction in this case would, in my view, have the practical effect of putting an end to the action. It is, therefore, my view that the plaintiff must meet the *prima facie* test.<sup>86</sup>

However here, the federal government as plaintiff was seeking an interlocutory injunction which would stop construction and would therefore *preserve* the purpose of holding a trial. If anybody should have had to show a *prima facie* case, it was the defendants who wanted to put an end to the action by asking the court to refuse the interlocutory injunction. Final effect is therefore not a reason to raise the burden on those seeking to protect the environment. Should the burden be raised when the respondent is a public entity?

Courts often defer to governmental activity, particularly in fields such as environmental law that are seen as polycentric, policy-based, resource-allocation decisions which the legislature and executive are institutionally better equipped to deal with.<sup>87</sup> Further, the assumption that the government

83. *Palmer*, *supra* note 65 at para. 20.

84. *Mullin*, *supra* note 3 at paras. 69-70.

85. *Baker Lake v. Canada (Minister DIAND)*, [1979] 1 F.C. 487 at para. 11 (T.D.).

86. *Saskatchewan Water Corp.*, *supra* note 68 at 271-72.

87. See H. McLeod-Kilmurray “Placing and Displacing Science: Science and the Gates of Judicial Power in Environmental Cases” (2009) U. Ottawa Law & Tech. J. (forthcoming); Lynda M. Collins, “Tort, Democracy and Environmental Governance: The Case of Non-Enforcement” (2007) Tort L. Rev. 107.

represents the public interest is influential,<sup>88</sup> including in environmental cases.<sup>89</sup> For example, the courts have often said that “[w]hen a public authority is prevented from exercising its statutory powers, it can be said that the public interest, of which that authority is the guardian, suffers irreparable harm.”<sup>90</sup> However, many environmental plaintiffs claim to be representing the public interest, frequently against the government, such as when government funds and licences projects that can negatively impact the environment. It cannot be *presumed* to be the sole voice of the environmental public interest, if such a single public interest exists.

There are conflicting approaches to this issue in the jurisprudence. Some courts defer to the government, while others carefully state and consider the competing public interests in the case.<sup>91</sup> My argument is that determining, rather than assuming, where the public interest lies is the better approach, and that the presence of a public entity alone should not justify a higher threshold question for the opposing party. Further, as Sinden<sup>92</sup> and others have argued, environmental public interest litigants are often small local groups lacking the expertise and financial resources

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88. John N. Ahern argues in “Interlocutory Injunctions in Administrative Law: What is the Test?” (1992) 5 Can. J. Admin. L. & Prac. 1 at 27-30, 48, that “[w]here an interlocutory injunction is sought *against* a public authority, the public authority is deemed to act lawfully until the applicant proves otherwise. The granting of an interlocutory injunction in these circumstances is rebuttably presumed to result in irreparable harm to the public interest” (at 48). He also states that “[t]he fact that alleged irreparable harm is not measurable in money damages has also been weighed in the balance of convenience. ... [T]his factor will generally favour the public authority because the authority often represents the interests of a large segment of the general public. Thus, harm to such a large group, whether it be incurred by granting or denying an injunction, is likely to be unquantifiable” (at 49). Does this suggest that where a non-government party such as an ENGO represents the public interest, it should also benefit from such an assumption? Does it mean that in class actions, irreparable harm should be presumed because of the numbers involved?

89. See e.g., *Edwards and CPAWS*, *supra* note 70.

90. *Canada (Attorney General) v. Fishing Vessel Owners' Assn. (British Columbia)*, [1985] 1 F.C. 791 (C.A.), as recently cited in *North of Smokey Fisherman's Assn. v. Canada (Attorney General)*, 2003 FCT 33 at paras. 22-23, where the court found the evidence on long-term fish stock health “speculative,” and held the importance of not interfering with government action was paramount, even though the plaintiffs argued that “if the injunction is not granted, success on the judicial review will be hollow if the offshore fleet has already fished its quota. This may push stocks beyond the point where recovery is not likely and the short-term interests of the offshore fleet will have been realized at the long-term expense of the ecosystem, the fish stocks and other sectors of the fishing industry. If, on the other hand, the injunction is granted and the 2003 stock status reports prove NOSFA wrong, the offshore fleet will merely be delayed in catching its quota.”

91. See e.g., *Bolton*, *supra* note 75.

92. *Supra* note 41.



to battle government or large developers.<sup>93</sup> These plaintiffs particularly should not have to meet the higher *prima facie* case burden at this early stage of litigation.

In summary, a precautionary approach would lead the courts to presume that the test to be applied at the first stage of the injunctions test in environmental cases is the lower threshold of a serious issue. However, the serious issue/*prima facie* case debate reveals how the courts see the issues and upon which party they place the greater burden. It also reveals whether they apply the various factors with the finesse that a contextual approach demands. Similar questions arise in relation to the next branch of the test: irreparable harm.

## 2. Irreparable harm

The second branch of the interlocutory injunction test is the irreparable harm factor. This is the heart of the interlocutory injunction test in environmental cases. Where the harm being risked cannot be repaired, precaution is essential. There are four issues to be discussed in relation to this factor: (i) the definition of the term "irreparable"; (ii) applying this test when the subject matter of litigation is property; (iii) degrees of irreparability, and (iv) whose irreparable harm is to be considered.

### Definition

The meaning of "irreparable" is different at the interlocutory and trial stages. The only relevant irreparable harm at the interlocutory stage is harm that cannot be remedied by the final outcome of the trial, whether these are damages or a permanent injunction:<sup>94</sup>

'Irreparable' refers to the *nature* of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect

93. *Angus et al. v. Canada* (1990), 4 C.E.L.R. (N.S.) 274 (F.C.T.D.); *Algonquin Wildlands League v. Ontario (Minister of Natural Resources)* (1996), 21 C.E.L.R. (N.S.) 102 (Ont. Div. Ct.); *Bolton*, *supra* note 75; *Caddy Lake Cottagers Assn. v. Florence-Nora Access Road Inc.* (1998), 26 C.E.L.R. (N.S.) 322 (Man. C.A.); *Canada (A.G.) v. Saskatchewan Water Corporation et al.* (1990), 5 C.E.L.R. (N.S.) 252 (Sask. Q.B.); *Canada (A.G.) v. Saskatchewan Water Corporation*, [1992] 4 W.W.R. 712 (Sask. C.A.); *Canada (A.G.) v. Saskatchewan Water Corporation*, [1993] 7 W.W.R. 1 (Sask. C.A.); *CPAWS*, *supra* note 70; *Edwards*, *supra* note 70; *Friends of Point Pleasant*, *supra* note 65; *Friends of the West Country*, *supra* note 65; *Int'l Fund for Animal Welfare*, *supra* note 60; *Mullin*, *supra* note 2; *WCWC, Palmer, and Ridge Landfill*, *supra* note 65; *Red Mountain Residents and Property Owners Assoc. v. British Columbia (Ministry of Forests, British Columbia Forest Service, Arrow Forest District)* (2000), 35 C.E.L.R. (N.S.) 127 (B.C.S.C.); *Tosorontio v. Atomic and Waste Not Wanted*, *supra* note 66; *Village of Kannata*, *supra* note 71.

94. Douglas Laycock, *The Death of the Irreparable Injury Rule* (New York: Oxford University Press, 1991) at 113; Sharpe, *supra* note 16 at 2.390; Paul Perell, "The Interlocutory Injunction and Irreparable Harm" (1989) 68 Can. Bar Rev. 538 at 548 [Perell].

damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision ... or where a *permanent loss of natural resources* will be the result where a challenged activity is not enjoined.<sup>95</sup>

It is significant that in the very task of defining irreparable harm in a case involving the *Charter* right to freedom of commercial expression, the Court turned to the environment as a prime example. Laycock cites environmental law as one of the substantive areas "where all injury is irreparable."<sup>96</sup> Environmental harm cannot be fully quantified financially. Even if trees can be replanted or lakes cleaned, the environments are never truly or fully restored, and therefore most environmental harm is permanent and irreparable.<sup>97</sup> As we have seen, Roach identifies several aspects of environmental resources that make damages inadequate: they are not simply commodities; environmental harm is cumulative; restoration is often impossible; and the destruction of resources should not be "decided by the unilateral exercise of power."<sup>98</sup>

Perell indicates that the role of irreparable harm in the interlocutory injunction test is to determine which of all available remedies is the best: "[i]rreparable harm simply means that in a particular context an equitable remedy is better than damages. Indeed, damages remain a viable alternative remedy in all cases."<sup>99</sup> Perell argues that favouring damages itself reveals a definite judicial philosophy: "substitutional relief ... manifests a faith in the philosophy of free enterprise and the marketplace as the place for a remedy."<sup>100</sup> Rendleman suggests that the meaning of irreparable harm is not limited to the inadequacy of damages. "Inadequacy of damages"

95. *RJR MacDonald*, *supra* note 2 at para. 59, citing *Mullin*, *supra* note 3 [emphasis added]. As noted below, *RJR MacDonald* and *Metro* have been criticized as general interlocutory injunction precedents because they are constitutional cases involving challenges to legislation and therefore by definition damages are inadequate and harm is irreparable in that context. See D.A. Crerar, "The Death of the Irreparable Injury Rule in Canada" (1998) 36 *Alta. Law Rev.* 957 and Ahern, *supra* note 88, among others. I argue that in environmental cases, a similar presumption should be made that damages are inadequate and harm irreparable.

96. Laycock, *supra* note 94 at 116.

97. Elgie, *supra* note 2 makes the argument that ecosystems are difficult to rebalance, and that environmental goods such as old growth forests are irreplaceable. Elgie also notes that the American caselaw often finds environmental harm to be irreparable; see Elgie *ibid.* at 396-98.

98. Roach, *supra* note 17. He makes some of these statements in reference to Aboriginal interests in land, but I argue that they are also appropriate to environmental resources themselves.

99. Perell, *supra* note 95 at 544. John Melvin Paterson, *A Treatise on the Law and Practice of Injunctions* 6<sup>th</sup> ed. (Holmes Beach, FL.: Wm. W. Gaunt & Sons, Inc., 1981) at 17-18 [Paterson] also defines irreparable harm: "[i]f the act complained of threatens to destroy the subject matter in question, the case may come within the principle, even though the damages may be capable of being accurately measured."

100. Perell, *supra* note 94 at 542.

means that damages are “less efficient, speedy and practical” than equitable relief, while “irreparable harm” means harm that “cannot be measured, compensated, restored or repaired.”<sup>101</sup> Some courts and authors emphasize that whether or not it is possible to compensate the harm with damages, it is not appropriate to do so.<sup>102</sup> Others have used the term “irremediable” in contrast to “irreparable,” to emphasize the uniqueness and permanence of environmental loss. Given the range of meanings, it is important that courts enunciate clearly the sense in which the harm is deemed to be irreparable, or precisely why it is found to be non-compensable by damages. Lack of clarity can confuse the issues, as we will see below.

*An argument in favour of maintaining the irreparable harm test as a separate branch*

Some have argued that the interlocutory injunction test should be a two-pronged test, with the irreparable harm consideration simply one factor in the balance of convenience test, as in the leading B.C. case of *Wale*.<sup>103</sup> However, I argue that in the environmental context, irreparable harm must be a separate branch of the test. It is often argued that the essential effect of *Cyanamid* was to put most of the emphasis on the balance of convenience test, in that once a serious question has been shown, the analysis moves on to the balance of convenience.<sup>104</sup> However, *Cyanamid* provides that it is *only* “where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance

101. D. Rendleman, *supra* note 39 at 346. Others suggest that there are several meanings of “irreparable” and that its meaning changes in different contexts: Sharpe, *supra* note 16 at 2.390-2.460; Leubsdorf, *supra* note 66 at 551. Sofronoff, *supra* note 80 at 346, suggests that “there is a distinction between the ability to quantify damages in this context and the capacity of such damages *really* to substitute for the loss of a right to engage in conduct; to substitute for it in a worthwhile way.”

102. See also Bolton, *supra* note 75. Perell, *supra* note 94 has pointed out that even life itself is not irreparable in the sense that its loss is often compensated through damages in personal injury cases. However, his argument is only true when referring to situations when the life has already been lost. If there was an interlocutory decision that could prevent this loss, a court would find this harm to be irreparable and prevent it: see Crerar, *supra* note 95 at 983. Obviously in cases where environmental harm has already occurred before the case comes before the court, the court must then consider how the harm can best be compensated or undone, if at all. In the case of serious environmental harm, as in the case of human health or life, any damage award remains inappropriate and in no way actually compensates for the loss, but is merely the best tool currently available to attempt compensation, and deterrence of future harm. However, the observation of Perell that it is *possible* to give damages as a remedy for any kind of harm highlights the fact that the *choice* of appropriate remedy is a statement by the court of the kind of value a particular thing has in the priorities of society.

103. *Supra* note 65.

104. This is the approach of many B.C. courts, following *Wale*, *supra* note 65. See also Crerar, *supra* note 95.

of convenience arises.”<sup>105</sup> This suggests that it is irreparability which is the main factor: if the plaintiff shows a threat of irreparable harm to the environment, there should be a presumption that an injunction will be granted, unless the defendant also risks irreparable harm.<sup>106</sup> Only if both interests risk *irreparable* harm should the court move on to the balance of convenience.

Separating the irreparable harm test is important in environmental cases because environmental interlocutory injunctions are often refused because at the balance of convenience stage, the courts balance extensive but *reparable* harm to the competing interest(s) against *irreparable* harm to the environment. The Clayoquot protest injunction is once again illustrative. In extending the injunction against the protestors,<sup>107</sup> the analysis of the entire interlocutory injunction test is limited to a single paragraph:

Here there is a fair question raised by the plaintiff [logging company] to the rights it alleges; irreparable harm could occur to it if it is prevented from carrying on its permitted activities. ... As McLachlin J.A., noted at p. 345 of *Wale*: “The fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case.”<sup>108</sup>

This is hardly an exhaustive analysis of irreparable harm to both sides or of the economic, social, political and environmental realities of the situation. It is a decision stating that private property trumps all other interests. This conclusion also rests on shaky ground. First, it is in direct contradiction to the findings of the B.C. Court of Appeal in *Mullin* that clearcutting old growth forests would cause irreparable harm. Secondly, it failed to make the distinction between harm which could be remedied by damages,

105. It is interesting to note that in *Cyanamid*, Lord Diplock on the facts of that case decided that there was a serious issue, and that the patent judge and Court of Appeal should have therefore considered the balance of convenience. He deferred to the patent judge’s expertise and found no reason to interfere with his view that the balance of convenience favoured the injunction. However, no discussion of the adequacy of damages or irreparable harm was undertaken, and all of the loss threatened to either side was financial or involved market share. *Cyanamid*, *supra* note 5 at 511-12.

106. Martin *supra* note 2 at 399 agrees: “Under a more precautionary analysis, the courts should first assume that the balance of convenient favours the protection of the environment. To some extent, a court should consider that it has a duty to protect and uphold what the Supreme Court has qualified as a fundamental value. Any reasonable evidence of harm should shift the burden of evidence to the party suspected of injuring an ecosystem to demonstrate that the harm would indeed be reversible, if the interlocutory injunction was denied. Moreover, purely financial or economic considerations should not be advanced as a justification to tilt the balance of convenient in favour of a respondent. Additionally, authorities should not enjoy any advantage of presumption that their decisions are made in the public interest, when these decisions entail a degree of environmental disruption.”

107. *MacMillan Bloedel Ltd. v. Simpson* (1993), 106 D.L.R. (4<sup>th</sup>) 540 (B.C.C.A.).

108. *Ibid.* at 567.

and harm which could not. The Court in *Mullin* held that a company as large as MacMillan Bloedel would not face bankruptcy or financial harm severe enough to make it even arguably irreparable. Without this risk of irreparable harm, the injunction against the protestors stood on even less firm ground, and it may not have been enforced with such vigour if the financial delay to MacMillan Bloedel had been determined to be serious but reparable, rather than triggering the interlocutory injunction by a finding of irreparable harm.<sup>109</sup> This is why it is important to consider only harms that are irreparable at the second stage of the test. Serious but reparable harms can be factored in at the balance of convenience stage.

### *Irreparable harm and environmental ethics*

Another interesting aspect of the irreparable harm test is that forces a re-examination of underlying values and priorities, in law and in society. This factor allows us to question a frequently encountered presumption that all interests are commensurable. This presumption stems in part from the fact that, as environmental philosophers have argued, most Western thinking since the Industrial Revolution has favoured the instrumental value of things over their intrinsic value, largely because intrinsic value is difficult to identify and calculate. “[W]hen a measurable instrumental value (such as profit) conflicts with intangible and elusive intrinsic value (such as the beauty of a wilderness), the instrumental value too often wins by default.”<sup>110</sup> Environmental principles such as precaution, and an awareness of ecological realities, would assist courts in reassessing the various values at odds in litigation. While the goal is not always to favour environmental preservation, the purpose is to ensure that traditional views automatically favouring profit or development do not prevent the varied

109. Findings that economic harms are irreparable continue to be found in the most recent environmental caselaw. For example, in *Hupacasath First Nation v. British Columbia*, [2005] 2 C.N.L.R. 138 (B.C.S.C.) at paras. 69-70, the Court held that “[t]here is clear potential for business disruption and damages flowing from a failure of the transaction to close. However, the petitioners have given no undertaking as to damages. The petitioners have raised concerns with respect to their ability to exercise their Aboriginal rights and title to protect the environment and their sacred sites and to have effective consultation under the new regime and with new owners. However, this harm is at this stage potential only.” The decision in *Canadian Sablefish Assn. v. Canada (Minister of Fisheries & Oceans)*, 2004 FC 983 is a mere five paragraphs in length. The opening sentences are: “Aquaculture is an important industry in British Columbia. It sometimes... raises environmental concerns in some quarters.” At paragraph 3 and 4 the court held that there was no evidence of harm, since “information currently available is not adequate to assess the potential impact of sablefish aquaculture,” however “irreparable harm could well be suffered by the commercial respondents to this application and indeed by other hatcheries and fish farms” and therefore it was not necessary move to the balance of convenience—the injunction was refused with costs.

110. Joseph R. Des Jardins, *Environmental Ethics*, 2d ed. (Belmont, CA: Wadsworth Publishing Company, 1997) at 130.

and more subtle values of environmental protection from at least being fully weighed in the balance.

Where environmental harm is limited in space or time, courts have found this compensable by damages.<sup>111</sup> Yet courts have taken a more preventative and precautionary approaching in finding that other kinds of environmental harm are irreparable: for example, such as harm that is permanent or related to unique natural resources.<sup>112</sup> Again, environmental principles could help to reduce these inconsistencies of approach. Further, rulings of irreparability are difficult to obtain due to the burden of proof, and the precautionary principle is particularly helpful for this.

*Reversing the burden of proving irreparable harm*

The burden on those seeking an injunction to prove that the harm alleged is irreparable is heavy, yet courts wrestle with shifting it. The Precautionary Principle is widely recognized to include reversing the burden of proof,<sup>113</sup> yet its application has varied in injunction cases. Some courts require clear proof of harm.<sup>114</sup> Yet for others, a showing of a risk of harm, or the possibility that damages will be inadequate,<sup>115</sup> is enough. Occasionally, the burden has been placed on the defendant to convince the court that the risk of harm should not be prevented pending trial.<sup>116</sup> This precautionary approach is appropriate in the context of environmental harm.<sup>117</sup> David VanderZwaag argues further that precaution could induce a change not only in the burden, but also in the standard, of proof in injunction decisions:

The precautionary principle, while still evolving in its legal development, but suggesting the need to grant the benefit of doubt to environmental protection rather than high risk activities, may be the creative normative wedge to rethink common law doctrines such as nuisance *and injunctive requirements*. Something less than a serious health risk, for example, reasonable medical or ecological concern, might be considered to amount to a nuisance. The burden of proof regarding a reasonable concern might be shifted from plaintiffs to defendants who would have to show the lack

111. See *River Road (Residents of) v. Fundy Region Solid Waste Commission* (1997), 26 C.E.L.R. (N.S.) 82 (N.B.Q.B.) (amount of landfill leachate that would escape before trial limited).

112. See e.g., the cases of *Palmer* (pesticides), *Baker Lake* (interference with caribou life cycles) and *Mullin* (longing old-growth trees), *supra* notes 3 and 86.

113. See Charmian Barton, "The Status of the Precautionary Principle in Australia: Its Emergence in Legislation and as a Common Law Doctrine" (1998) 22 Harv. Env. L. Rev. 509. See also Jamie Benidickson et al. "Practicing Precaution and Adaptive Management: Legal, Institutional and Procedural Dimensions of Scientific Uncertainty" (SSHRC and Law Commission of Canada, June 2005), online: <[http://www.ie.uottawa.ca/English/Reports/JBPP\\_Final\\_Report.pdf](http://www.ie.uottawa.ca/English/Reports/JBPP_Final_Report.pdf)> at F-18.

114. See *Edwards and Banff*, *supra* note 70.

115. *Wale*, *supra* note 65.

116. See *Palmer*, *supra* note 65 and *Bolton*, *supra* note 75.

117. See *Olson*, *supra* note 78.

of a reasonable medical or ecological concern before being allowed to undertake industrial or development activities. One may also envision a change in the *injunctive standard of proof* from a strong probability to something less, such as a reasonable possibility.<sup>118</sup>

This precautionary idea of preserving the environmental resources in cases of doubt is also supported by an older and more entrenched approach to interlocutory injunctions in the case of interference with land, as we see next.

#### *Preserving the property*

There is also a line of analysis that focuses not on irreparable harm to the plaintiff, or even to the defendant, but on irreparable harm to the subject matter of the litigation, particularly when that subject matter consists of property. This is often cited to *Wheatley v. Ellis*,<sup>119</sup> a case preceding *Cyanamid* by some thirty years, which states that where the plaintiff has shown a serious issue and "can satisfy the Court that the property should be preserved in its present actual condition until the question can be disposed of," an injunction should issue, even without consideration of irreparable harm to the parties or to the balance of convenience.<sup>120</sup> In *Kerr on Injunctions*,<sup>121</sup> one of the first sections in the text is entitled "The Protection of Legal Rights to Property Pending Litigation," which claims that "[t]he protection of legal rights to property from irreparable or at least from serious damage pending the trial of the legal right was part of the original and proper office of the Court of Chancery."<sup>122</sup> The essence of this jurisdiction is as follows:

In exercising the jurisdiction the Court does not pretend to determine the legal rights to property, but merely keeps the property in its actual condition until the legal title can be established. The Court interferes on the assumption that the party who seeks its interference has the legal right which he asserts, but needs the aid of the Court for the protection of the property in question until the legal right can be ascertained.<sup>123</sup>

118. D. VanderZwaag, *Canada and Marine Environmental Protection: Charting a Legal Course Towards Sustainable Development* (London: Kluwer Law International, 1995) at 407-08 [emphasis added].

119. *Supra* note 65.

120. Sometimes this is also called preserving the *status quo*, which *Cyanamid* said should be a consideration but only where the harm to both parties is evenly balanced and other factors are needed to determine whether to issue the injunction. See also s. 752 of the Quebec *Code of Civil Procedure*, *supra* note 13, and discussion of the *status quo*, *supra* note 110 and accompanying text.

121. *Paterson*, *supra* note 99, cited in *Wheatley v. Ellis*, *supra* note 65.

122. *Paterson*, *supra* note 99 at 15.

123. *Ibid.*

The central problem this approach seeks to avoid is the situation where courts can no longer do justice in the final decision, as would be the case if the subject matter of the litigation were gone. This is the same broad principle that justifies Anton Piller orders,<sup>124</sup> and other pre-trial property-protecting measures, and is the approach in the general Quebec interlocutory injunction test.

This approach was taken in *Wheatley*, a logging dispute as to which of two private parties had the right to the profits of the logging, i.e. not involving environmental protection concerns. Yet in the environmental decision in *Mullin*, the Court said that the test “in a case such as this” was that set out in *Wheatley*, and concluded that the land had to be preserved until trial. The approach was clarified in *Wale*, which stated that “[t]he question of preservation of property, as *Wheatley* and *MacMillan Bloedel* [*v. Mullin*] illustrate, has repeatedly been treated as one of irreparable harm justifying an injunction. It is obvious that if the property which is the subject of litigation is altered pending trial, damages may not offer complete compensation.”<sup>125</sup>

This logic has been followed by courts when protecting property ownership. As highlighted above when discussing anti-protest injunctions, the courts have very recently confirmed the importance of preserving property from interference by environmental protesters. In *Hamilton (City) v. Loucks*<sup>126</sup> the court enjoined Aboriginal protests against construction of an expressway, holding that where there is a threat to property rights, the owner should get an injunction, without the court having to consider irreparable harm or the balance of convenience:

Regarding the interference with property rights, Justice Robert J. Sharpe in his book entitled *Injunctions and Specific Performance*, looseleaf edition, at paragraph 4.610 wrote, ‘..., the rules that generally apply to injunctions do not always apply in cases such as this. The balance of convenience and other matters may have to take second place to the sacrosanctity of property rights in matters of trespass. ... Where the plaintiff complains of an interference with property rights, injunctive relief is strongly favoured. This is especially so in the case of direct infringement in the nature of trespass...Where property rights are concerned, it is almost that damages are presumed inadequate and an injunction to restrain continuation of the wrong is the usual remedy.’ Therefore, in my view if there is a serious question to be tried regarding interference with the plaintiff’s property rights, then an injunction will

124. See generally Sharpe, *supra* note 16 at paragraph 2.1100-2.1300 and sources cited therein, and see his Chapter 4 on “Injunctions to Protect Property.”

125. *Wale*, *supra* note 65.

126. (2003), 232 D.L.R. (4<sup>th</sup>) 362 (Ont. Sup. Ct. J.).



be the usual remedy.<sup>127</sup>

Yet, as these very protest cases show, this approach of protecting the property *itself* has not been followed.<sup>128</sup> Yet a precautionary approach to environmental protection indicates that protecting the property or subject matter of the litigation from threats of serious or irreparable harm should be front and centre in all environmental disputes, because environmental harm is harm to property. Where there is doubt, there should be a presumption that the property itself should be protected until trial, and the burden should shift to those wanting to harm it. There is enough precedent to ground such a presumption,<sup>129</sup> yet it should remain rebuttable, because of the reality that there are variations in kinds and degree of environmental harm, an issue to which we now turn.

### *Degrees of irreparability*

Clearly, there are many kinds of environmental resources, and different kinds and degrees of environmental harm. Clear-cutting old growth forests for financial gain might be distinguishable qualitatively and quantitatively

127. *Ibid.* at paras. 25-27. Justice Henderson explicitly adopted the *Loucks* reasons in his subsequent judgment in *John Voortman & Associates Ltd. v. Haudenosaunee Confederacy Chiefs Council*, [2009] O.J. No. 1350 to enjoin Aboriginal protesters from interfering with construction of a subdivision.

128. It is interesting that in *Wale*, *supra* note 65, the B.C. government was challenging aboriginal by-laws governing fishing on a reserve, and the majority held that the trial judge had not erred in refusing a stay of the regulations. The majority assumed that the government's efforts to protect fish stocks were in the public interest, without considering whether the aboriginal management of fish provided more or less protection of the resource. The dissent held that the injunction was undesirable as this was a political issue and judicial interference would prevent a satisfactory political answer from being developed. The case also reveals two definitions of the *status quo*—the majority found that the *status quo* was to let the provincial government continue to do its job, while the minority found the *status quo* in allowing existing aboriginal by-laws to continue until proven unlawful.

129. *Mullin*, *supra* note 3 (logging old-growth forests on land subject to Aboriginal land claims); *Tosorontio*, *supra* note 65 (risk of exposure to nuclear radiation); *Kannata*, *supra* note 71; *Caddy Lake*, *supra* note 76 ("damages will not compensate for a destroyed forest") *Palmer*, *supra* note 65 and *Bolton*, *supra* note 75 (pesticide cases); *Kitkatla*, *supra* note 65 ("plaintiffs could be deprived of something which is priceless," at trial). Of course, there are many which have found that it is not: *Mullin* motions judge; *WCWC v. A.G. (B.C.)*, *supra* note 66 (damage to old growth forests not irreparable); *Red Mountain Residents*, *supra* note 93; *Canadian Parks and Wilderness Society (CPAWS) v. Banff National Park Superintendent et al.*; *Sunshine Village Corp. v. Canada (Minister of Canadian Heritage) et al.* (1996), 202 N.R. 132 (F.C.A.); aff'g [1995] 1 F.C. 420 (T.D.); application for leave to appeal to S.C.C. dismissed [1996] S.C.C.A. No. 498. and *Edwards* (harm from insecticides vs. harm from beetles), *supra* note 70; *Siska Indian Band v. B.C. (Minister of Forests)* (1998), 28 C.E.L.R. (N.S.) 188 (B.C.S.C.), [1999] B.C.J. No. 2354 (B.C.S.C.) (harm from logging road reparable by damages; financial harm to small company greater than to large company: delay in logging irreparable harm to small family business). In other cases, the court does try to balance reparable and irreparable harms: e.g., the Rafferty-Alameda dam case, *supra* note 86 (at trial, financial harm to the defendants outweighed the "remote" possibility of unmitigable environmental harm). Similarly, see *Kitkatla*, *supra* note 65 (interim injunction pending appeal—aboriginal plaintiffs unlikely to win on merits—harm to loggers outweighs unlikely harm to aboriginal plaintiffs).

from removing a few trees to enlarge a road to enhance the safety of drivers and pedestrians – the distinction between *Mullin* and *Friends of Stanley Park*,<sup>130</sup> where public safety on the roads in Stanley Park outweighed the very limited interference with the environment that road enlargement represented. This is consistent with the general injunction context. Laycock argues that there are *degrees* of irreparability in the injunctive relief analysis:

Harms vary over a range of irreparability, and this range is partly independent of their variation over a range of severity and over a range of likelihoods. Stated in terms of adequacy, the remedy at final judgment may be slightly adequate... seriously inadequate, nearly worthless, or something in between. Implicitly, the degree of irreparability is a separate variable in the balancing test for preliminary injunctions.<sup>131</sup>

Yet he notes that injunctions are also more precise tools than generally perceived. The court can include “a range of possible conditions and a range of bond requirements” to reduce the risk of harm to both sides. Ideally, courts will analyze as closely as possible the true harm and its irreparability, and their capacity to do this should increase as their environmental awareness increases. But if they are reluctant to do this fine-tuning, the presumption that environmental harm is irreparable should remain the guiding principle.

*Whose irreparable harm?*

The irreparable harm test should not limit itself to consideration of the interests of the two parties. In environmental cases, irreparable harm to the public interest should always be considered. Legislation or public authorities are presumed to protect the public interest, but as discussed above, since there may be competing public interests, and since government sometimes represents the interests of its own agenda or of powerful lobby groups. In two pesticide cases, the court held that there were public interests competing with the position of the government. In *Bolton*,<sup>132</sup> these included the public interest in the forest industry and in a healthy environment. In *Friends of Point Pleasant Park*,<sup>133</sup> a public interest group opposed plans by local authorities to cut down trees in the park suspected of being “infected with the spruce bark beetle.”<sup>134</sup> The court granted the interlocutory injunction, but recognized the conflict between

130. *Friends of Stanley Park*, *supra* note 65.

131. Laycock, *supra* note 94 at 121.

132. *Supra* note 75.

133. *Supra* note 65.

134. *Ibid.* at 47.

the public interest in protecting trees and the public interest in allowing the government to prevent harmful infestations.<sup>135</sup> My argument is that courts should always inquire as to what the public interest(s) in the environment are, who is representing them, and whether they would be irreparably harmed by refusing an injunction.

Apart from the public interest, an environmental framework would also lead the courts to consider whether irreparable harm might be caused to the environment *itself* as a valued entity, worthy of independent protection, as argued by scholars such as Christopher Stone in "Should Trees Have Standing?"<sup>136</sup> and by many in the environmental movement, such as the deep ecologists.<sup>137</sup> This is particularly warranted in interlocutory injunction decisions, precisely because it is the environment itself which is not reparable, and which needs to be preserved until the final outcome of the dispute can be decided.

I emphasize that the courts should be active in seeking out the various irreparable harms that could occur in each case, whether the parties have raised them all or not. The dangers of not doing so are illustrated

135. *Ibid.* at 59: "In the present case, the applicants representing public interest [sic] will be greatly inconvenienced if the injunction is not granted and the trees are cut down but the judicial review application is ultimately successful. There would be a finding that the Notice to Dispose was invalid, but the trees would already be gone." While this case was difficult in that the competing public interests were *both* environmental interests, the court refused to presume that the government represented the only public interest. The court looked to the facts and balanced the risks. It is possible that the Court was less inclined to defer to the government in this case because a similar plan to cut down the trees due to the beetles ten years earlier had been cancelled when a members of the public, some of whom were involved in this case, undertook their own research and found that the suspected beetle was not present.

136. Christopher D. Stone, "Should Trees Have Standing?-Towards Legal Rights for Natural Objects" (1972) 45 So. Cal. L. Rev. 450.

137. Represented primarily by Arne Naess, see his works "The Shallow and the Deep, Long Range Ecology Movements: A Summary" (1973) 16 Inquiry 95, and *Ecology, Community and Lifestyle* trans. David Rothenberg (Cambridge: Cambridge University Press, 1989) and other works cited in Clare Palmer, "An Overview of Environmental Ethics" in Andrew Light & Holmes Rolston III, eds., *Environmental Ethics: An Anthology* (Malden, MA: Blackwell Publishing, 2003) at 29-30 and in Joseph R. DesJardins, *Environmental Ethics: An Introduction to Environmental Philosophy*, 2d ed. (Belmont, CA: Wadsworth Publishing Company, 1997) at c. 10, this school of thought encourages people to become more aware of their connectedness to nature, and to overcome the false dichotomy between humans and nature, which would lead to living with greater respect for other parts of nature. It is based on biocentric equality, the intrinsic value of nature, holism and self-realization (Palmer, *supra* note 65 at 30; Karin Mickelson and W. Rees, "The Environment: Ecological and Ethical Dimensions" in HLT, *supra* note 33 at 24-26). It tends to focus on local responses, communalism, democracy and a reduction in consumerism, and relying less on reason and more on feelings or connectedness. It is unlikely judges will be quick to adopt a deep ecology approach, yet it demonstrates just how deeply humans should question prevailing legal ethics and structures.

in cases such as *Yellow Quill*<sup>138</sup> and *Tsay Keh Dene*,<sup>139</sup> where plaintiffs claimed damages, and the court took this to be proof that the harm was not irreparable. The court should have assessed whether the harm was truly irreparable, and tried to protect the environment as well as, or even above, the interests of the immediate parties. This is why threats of irreparable harm not only to the parties, but also to the public interest and the environment itself, should be considered in all environmental cases, particularly at the interlocutory stage. If a risk of irreparable harm is found, the next step is to assess the balance of convenience.

### 3. *Balance of convenience*

The balance of convenience test can be distinguished from the irreparable harm test as follows:

The second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm, that is harm not susceptible or difficult to be compensated in damages. ... The third test, called the balance of convenience and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.<sup>140</sup>

After citing this description of the balance of convenience test, the Court in *RJR MacDonald* also included a reminder of the *Cyanamid* case:

The factors which must be considered in assessing the 'balance of convenience' are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that: 'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relevant weight to be attached to them. These will vary from case to case.' He added, at p. 409, that 'there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.'<sup>141</sup>

The balance of convenience branch is perhaps the most discretionary element of the test, as it expressly requires courts to balance competing

138. *Yellow Quill First Nation v. Sask (Min. Env. & Resource Mgmt)* (1999), 32 C.E.L.R. (N.S.) 132 (Sask. Q.B.).

139. *Tsay Keh Dene Band v. B.C. (Min. Envir., Lands & Parks)* (1997), 24 C.E.L.R. (N.S.) 66 (B.C.S.C.).

140. *Metro Stores*, *supra* note 9 at 334.

141. *RJR MacDonald*, *supra* note 2 at 406-7.

interests on the basis of limited information and argument. Again, due to the uncertainty involved, a precautionary approach is warranted.

### *Status quo*

One guideline that courts use to assist in balancing competing interests is the *status quo*. *Cyanamid* provides that "where everything else is equal 'it is a counsel of prudence to ... preserve the *status quo*'."<sup>142</sup> The Supreme Court and many commentators have found the *status quo* test to be "of limited value," due to the vagueness of the term, both with regard to when the *status quo* should be determined, and whether it is in fact possible to maintain the *status quo*.

In *Metropolitan Stores*, the Trial Division usefully clarified the confusion that can arise when using the term, particularly when its precise operation on the facts is not specified. "The employer argues that the granting of a stay will maintain the *status quo* between the parties until the constitutional challenge has been dealt with. I cannot accept that argument. The entire notion of maintaining a *status quo* in these circumstances is fanciful," given that unionization was new and weak in the relevant industry.<sup>143</sup> *RJR Macdonald* provided that the *status quo* test is "of limited value in private law cases" and generally "has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the Charter is to provide individuals with a tool to challenge the existing order of things or *status quo*."<sup>144</sup> This notion of litigation as a form of protest against "business as usual" is central to many environmental cases, and once again the Clayoquot case is illustrative.

142. *Ibid.* at 410.

143. *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers* (1985), 22 C.C.R. 156 at para. 5 (Man. Q.B.). While the Supreme Court did not directly address the *status quo* issue, it did agree with the findings of the trial judge and decided that legislation should be allowed to operate until it has been proven unconstitutional.

144. *RJR MacDonald*, *supra* note 2 at 410.

Sharpe agrees that the *status quo* test “adds little or nothing to the analysis and, in fact, may produce a possible source of confusion.”<sup>145</sup> Yet this suggests that the test could be useful if its meaning were clearly understood and stated. Perell distinguishes two meanings of *status quo*, arguing that while not helpful where used “in the sense of keeping the parties in their places”, the test can be illuminating where it is used to mean “preserving the court’s ability to be fair to both sides”.<sup>146</sup> This has also been phrased as follows: “The concept *status quo* lacks sufficient stability to provide a satisfactory foundation for judicial reasoning. The better course is to consider directly how best to preserve *or create* a state of affairs in which effective relief can be awarded to *either party* at the conclusion of the trial.”<sup>147</sup> (emphasis added) This clarification that the court should either preserve *or create* a situation that preserves the court’s ability to do justice responds to Leubsdorf’s point that the test is not helpful because a “court interferes just as much when it orders the *status quo* preserved as when it changes it,”<sup>148</sup> and is another aspect of the final effect test.

In the environmental caselaw, the *status quo* has been interpreted in starkly contrasting ways: either to mean that further harm to the environment should be prevented, or on the contrary that the current development or interference with the environment should continue until proven wrongful. The latter include cases such as *Banff* where the court held that “the *status quo* would be better maintained by declining to interfere with the completion of the current cutting programme ... In this situation, it seems to me that the *status quo* is represented by the orderly development plan

145. Sharpe, *supra* note 16 at paras. 2.550-570. Indeed, its undefined use can be dangerous if it masks the true reasons for decision: is the court using the term as a catch phrase when it is choosing not to interfere because it does not know what to do, or is it avoiding the risk of causing harm itself and preferring to allow existing harm to continue? *CBC v. CKPG Television*, [1992] 3 W.W.R. 279 at 286 (B.C.C.A.), a case involving breach of a television broadcasting agreement, sets out a much more detailed analysis of the *status quo*: “there are at least three separate aspects to the consideration of the *status quo*. I think that all three are conceptually important but that their respective importance to the assessment of the balance of convenience in any particular case will vary with the circumstances. The first aspect involves a consideration of which party took the step which first brought about the alteration in their relationship which led to an alleged actionable breach of the rights of one of the parties; the second aspect involves a consideration of which party took the action which is said to be an actionable breach of the rights of the other party; and the third aspect involves a consideration of the nature of the conduct which is said to be wrongful and which is being carried on at the time that the application for the interim injunction is brought.” Unfortunately the case does not elaborate on this as the decision turned on the serious question test. In addition, though it focuses exclusively on the behaviour of the parties, rather than what is often more useful in environmental cases, i.e. preserving the disputed property and resources, it is useful in determining the relevant *status quo*.

146. Perell, *supra* note 94 at 548.

147. “Injunctions: Developments in the Law” (1965) 78 Harv. L. Rev. 994 at 1058.

148. Leubsdorf, *supra* note 66 at 546. See also Ahern, *supra* note 88 at 49: “the concept adds nothing to the legal analysis of the relevant issues.”

which has been elaborated over the last 15 years."<sup>149</sup> Other courts use the *status quo* to justify taking no action, so that any risk imposed on either party is not a result of court action, but of the pre-existing situation, which is simply continued until trial.

I argue that in the special circumstances of environmental interlocutory injunctions, the emphasis should not be on preserving the *status quo*, but on preserving the environmental resource itself. The irreparable harm stage should be central in environmental cases and if there is a serious risk of irreparable harm to the environment, there should be a presumption in favour of preserving the property until trial unless there is clear evidence that competing interests are also irreparable. As Olson<sup>150</sup> argues, a pristine or less damaged environment should be considered the *status quo*. This is the most ecologically literate interpretation of *status quo* and the only one that truly values environmental interests.<sup>151</sup>

#### *A public law approach*

Another difficulty in applying the balance of convenience test is one of the core problems with the environmental jurisprudence generally. This is that environmental litigation tends to still be treated as private law, and thus the balancing of interests is assessed within that framework. Yet some recognize environmental law as at least a special kind of private law:

I do not mean to imply that all private disputes are reducible to this model. There are, for example, occasions on which injunctions are sought to prevent harm to cultural and aesthetic values, or to preserve a 'way of life' as in many environmental disputes.<sup>152</sup> However, it is precisely in such circumstances that the difficulties in balancing the respective degrees of harm to the parties' interests multiplies, because these interests are non-comparable. The question before the court is not which party stands to suffer the greater harm, but rather *what interests deserve protection and how are those interests to be valued*.<sup>153</sup> [emphasis added]

149. CPAWS, *supra* note 70 at 17.

150. *Supra* note 78.

151. I am indebted to Prof. Lynda Collins for this suggestion.

152. Citing *Mullin*, *supra* note 3 and *Ominayak et al. v. Norcen Energy Resources Limited et al.*, [1983] 2 C.N.L.R. 99 (Alta. Q.B.); [1983] 3 C.N.L.R. 83 (Alta. Q.B.); [1984] 4 C.N.L.R. 27 (Alta. Q.B.); [1984] 4 C.N.L.R. 34 (Alta. Q.B.); [1985] 1 S.C.R. xi.

153. J. Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy" in Jeffrey Berryman, ed., *Remedies: Issues and Perspectives* (Toronto, Carswell: 1991) 271 at 306 [Cassels]. He also argues that the distinction between private and public law is blurred, as they display many similarities and differences.

Favouring jobs over trees is not just a judicial balancing of competing interests.<sup>154</sup> It is a social, political, economic and philosophical choice, and the choices that our courts make not only reflect our current values, but can either reinforce or challenge them. Each interlocutory injunction decisions is a small stone in the way we build the society we aspire to live in. The place of environmental protection in our social priorities is reflected—or enhanced or reduced—by these crucial decisions, and courts should be aware of this and make it explicit in their analysis and reasons. Although courts are not representative in the same way that legislatures are, they do reflect and shape the values and beliefs that our society upholds by the very existence and operation of these institutions.

This is why the approach to injunctions in public law is instructive. The two leading cases on interlocutory injunctions in Canada both involve challenges to the constitutionality of legislation. *Metro Stores* involved a challenge to Manitoba legislation which allowed the Labour Board to impose a first collective agreement where negotiation failed. The trial division refused to stay<sup>155</sup> the Board's decision to impose an agreement, the Court of Appeal granted a stay, and the Supreme Court reinstated the trial decision, allowing the Labour Board's decision to operate until the legislation was proven to breach the *Charter*. *RJR Macdonald*<sup>156</sup> also involved an application for a stay, in that case of the implementation of regulations under the *Tobacco Products Control Act*<sup>157</sup> until their constitutional validity was finally determined.

154. "[There is] a ... popular conception that the environment is one among many priorities. ... We are naïve if we assume that the environment is one choice among others. Instead, it is time that we paid heed to the fact that the environment constitutes the very sustenance of all life. 'The environment' is the inescapable condition of the possibility of the emergence of other sectoral priorities." Ingrid Lemman Stefanovic, *Safeguarding Our Common Future: Rethinking Sustainable Development* (Albany, NY: State University of New York Press, 2000) at 42.

155. *Metro Stores*, *supra* note 9 at 332, 334. The Supreme Court held that "A stay of proceedings and an interlocutory injunction are remedies of the same nature." However, stays differ from preliminary decisions in that "[t]he facts are not in dispute" and the arguments have been fully made by all parties, so that the decision is interlocutory or preliminary only in the sense that a final decision has not been reached in the sense of exhausting all appeals. See also Leubsdorf, *supra* note 66 at n. 162.

156. *Supra* note 2.

157. R.S.C. 1985, c. 14 (4th Supp.)



In *RJR Macdonald*, the court held that constitutional law cases are different<sup>158</sup> because of (i) “the importance of the interests”<sup>159</sup>; (ii) the fact that “the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant’s claim”; and (iii) the fact that constitutional cases involve the public interest,<sup>160</sup> or are polycentric.<sup>161</sup> These factors which the Court isolates as requiring a special approach to stays or injunctions in constitutional law are very similar to those in environmental litigation.

This rationale for why the approach to interlocutory injunctions would be different in private and public law contexts is set out in further detail by Cassels. Private law has traditionally<sup>162</sup> been characterized by balancing harm between two parties, whose injuries will generally

158. *RJR MacDonald*, *supra* note 2 at para. 47. It made these distinctions in the context of assessing whether the standard should be raised above a “serious issue” where an injunction is sought after decision has been made at trial, since some argue there can be no serious issue if the merits have already been determined at least once. The court assessed several arguments, but concluded that “[w]hether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in Charter cases.” Yet I would argue that these factors are not limited to injunctions pending appeal.

159. *RJR MacDonald*, *supra* note 2 at para. 48. This case also involved an issue of public health: it held that tobacco legislation is a “public welfare initiativ[e]” (at para. 83), and was for “the common good.” It lists the Regulatory Impact Analysis Statement and preamble to the tobacco regulations in question to demonstrate “the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking” (at para. 93), which clearly outweigh financial harm, even significant financial harm, to the tobacco companies and smokers themselves.

160. A similar approach was taken in *Metro Stores*, *supra* note 9 at 332-34, which said that the “complex factual and legal issues,” the “limited evidence available in an interlocutory proceeding” and the consideration of the public interest in the balance of convenience test made the lower threshold of a serious question the applicable test in *Charter* cases. Kent Roach agrees, stating, *supra* note 17 at para. 7.80 that “The more lenient serious question test is the appropriate test when the applicant alleges a violation of constitutional rights. Constitutional rights are *important* enough that courts should err on the side of considering claims that they need protection from irreparable harm. Some *Charter* violations will be *difficult to prove before a trial* with pleadings, discovery and the hearing of oral evidence. ... The applicant should receive the benefit of the doubt on the merits, especially given that he or she will still have to demonstrate the danger of irreparable harm and that the balance of convenience favours granting the injunction are central in most environmental litigation, which suggests the same benefit should be extended to those seeking to prevent harm to the environment” [emphasis added]. Roach also supports the idea that in *Charter* cases, irreparable harm should be presumed, due to the nature of the interests: at para. 7.240.

161. *RJR MacDonald*, *supra* note 2, mentions polycentricity at 406. See generally Roach, *supra* note 17 c. 7; Sharpe, *supra* note 16, and Cassels, *supra* note 153 at 271, among others in the extensive literature on constitutional remedies.

162. Cassels, *supra* note 153, notes that these oversimplifications are grounds for caution. The assumptions on which the private law model is based are “highly problematic. ... The private law balancing model is given the appearance of rationality by excluding arguments about the public interest and denying the ‘political’ nature of the law. The problem that I have sought to highlight is that once we reject the assumptions—as we must in *Charter* litigation—there remains no way ‘rationally’ to balance the interests at stake.” Cassels, *supra* note 153 at 309.

be compensable in damages. Balancing the risks to both sides is easier because “the litigation is bipolar,” and because the harms to the parties are “commensurable; that is capable of comparison by the same standard,” which is generally financial.<sup>163</sup> In Charter litigation (and I would argue this extends to public law more generally), the perception is that harm is more frequently irreparable because the interests are not solely financial (“[i]t is not possible to quantify or repair harm to the ‘public interest’”) and “there are no well-developed principles of liability or compensation for ‘constitutional wrongs’.” The dispute is not bipolar, but includes the interests of third parties and the public. In addition, “[t]he interests and values at stake in *Charter* litigation ... are not comparable by a common standard and therefore not easily weighed against one another.” Again, this equally is true in the environmental law context: the harm is not solely financial, and cannot easily be compared to economic harm. The disputes affect the interests of all those dependent on the environment, which is the public as a whole (including future generations). In environmental law, the well-developed principles of liability or compensation may in some cases be adequate to satisfy the private parties but are generally inadequate to protect the environment itself.<sup>164</sup> This is why environmental law can be said to always contain at least some public law aspects, which the Supreme Court has determined require a special approach to interlocutory injunctions,<sup>165</sup> and why environmental interlocutory injunctions should be applied with these differences in mind, particularly at the very open-ended balance of convenience stage.

163. *Ibid.* at 297-8.

164. The fact that damages are “not the primary remedy in Charter cases” and the “uncertain state of the law regarding the award of damages for a Charter breach,” led the Supreme Court in *RJR Macdonald*, *supra* note 11 at 406, to suggest that “it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore ... it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.” See also Cassels, *supra* note 153 at 300-01. I argue that this is the process that should be followed in environmental litigation: presume irreparable harm, presume an injunction will be granted *unless* there is competing irreparable harm, including to the public interest.

165. “Environmental law is one of the better examples of public law. In so far as environmental law is true environmental law (as opposed to property law or resource allocation law) its aim is to protect public rights. The protection of the environment, either in order that all society may benefit from environmental quality (an anthropocentric approach) or for its own sake (an ecocentric approach), is based clearly around benefits to society as a whole or a philosophical view about the relationship between people and the natural environment. They are clearly creating and regulating public—as opposed to private—rights.” David Mossop, “Citizen Suits: Tools for Improving Compliance with Environmental Laws” (1993) 18 *Alternative Law J.* 266 at 267.

168. Jaye Ellis, "The Straddling Stocks Agreement and the Precautionary Principle as Interpretive Device and Rule of Law" (2001) 32 *Ocean Devel. & Internat'l Law* 289 at 291, 305. See also Hélène Trudeau, "Du droit international au droit interne: l'émergence du principe de précaution en droit de l'environnement" (2003) 28 *Queen's L.J.* 455. "We think that adherence to the principle of precaution should translate as taking into account, as most often preponderant, the protection of the environment, in the face of interests that are strictly economic, without excluding the possibility that these might prevail in certain cases if the circumstances justify it. In our view, the paradigm change that the precautionary principle should ideally create is to ensure, even in situations of risk that are uncertain in the scientific realm, that the environmental interest be systematically taken into account by decision-makers instead of systematically ignored. In the realm of the management of uncertain risks, it is thus more a question of putting the economic dimension back into perspective than of excluding it" (author's translation).

focus for interpreting and applying this tool in the environmental context, and this results in significant danger to the environment. A precautionary framework is necessary to improve the interpretation and application of this "procedural" tool.

A precautionary approach does not seek to prevent the exercise of discretion by courts in identifying, valuing and balancing competing interests. As stated in the discussion on irreparable harm, there are degrees of irreparability, and where a competing interest is not solely financial and would risk irreparable harm, the court may decide in its favour. For example, the courts may decide that public safety is more important than environmental preservation in a particular case, particularly where the environmental resource is not rare or endangered.<sup>169</sup> The point is that courts must clearly identify and enunciate the competing interests, including the environmental claims, and how and why they are balancing them in this way at this stage of the litigation.

Recent approaches to environmental problems operate on the premise that to stop the serious and increasing problem of environmental degradation, society needs not just to tinker with existing approaches, but to take on entirely new ways of thinking about problems and priorities.<sup>170</sup> The current global environmental challenge calls for wholesale behavioural and philosophical changes, including within the judiciary. The environment is a unique and special sphere, and should be approached as such. Courts can be leaders in social change and public education, by looking at environmental problems as particular kinds of issues which warrant their own tailored approaches. This paper has shown that an environmental framework, including the precautionary principle, can and should guide the interpretation and application of procedural rules such as those governing interlocutory injunctions, thus enhancing the effectiveness of substantive environmental law.

In interlocutory injunctions, the courts must take the precautionary approach, enunciate the competing values, presume that environmental harm is irreparable and that failing to protect the environment pending trial will be a decision of final effect. They should err on the side of environmental protection unless the competing interests have been clearly shown to be also irreparable and to be at least, if not more, important than the environment. While environmental law principles should not lead the court always to favour environmental interests, this framework is

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169. *Friends of Stanley Park*, *supra* note 65.

170. Olson, *supra* note 78 at 891 calls for "a radical restructuring of the law's conceptualization of human responsibility."

necessary to counter existing presumptions in favour of development and deference to government, which remain strong and pervasive. This will lead to greater enunciation, consideration and evaluation of environmental values and the interests which compete against them. Only then can the power of interlocutory injunctions operate fairly and effectively in the environmental context.