Environmental Courts – Models and Proposal for Ireland[1]

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ENVIRONMENTAL COURTS – MODELS AND PROPOSAL FOR IRELAND

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Introduction

Solving the environmental crisis is not just about science, or government, it is also about law. Law is the embodiment of the rules by which people decide a society should run- who should do what, who can do what, and what should not be done. Like all rules, deciding what they are is not enough- there has to be enforcement. Any parent who has pinned the household rules of good behaviour onto the fridge knows that the rules are only as good as the reward and punishment- and the parent who enforces them.

In our legal system, enforcement is through the courts.[2] If rules are breached, and caution and appeal to conform do not work, the court proceedings are issued. The complaint is heard, a judge adjudicates, and a sanction is imposed. This can be under the criminal laws, or a civil monetary penalty, or an order to prohibit the conduct which breaches the rules.

The environmental crisis of the late 20th century has led societies to decide on many new rules on what can and cannot be done with nature, habitats, flora and fauna and the world around humans. These have been adopted in environmental laws worldwide, including in Ireland. And yet the environmental rules in Ireland are still routinely breached. Rivers are still polluted, hedges are cut out of season, trees are cut down, insect and bird numbers are dwindling.

The focus has therefore turned onto the enforcement of environmental laws. Is our current court system fit for purpose?

As leading writers have noted,[3] the adjudication of the breaches of environmental laws and rights- the subject matter of this paper - creates particularly acute challenges. Because of the inherent nature of environmental issues, court adjudicators are often required to address normative conflicts, make predictive decisions about the future as opposed to fact-finding in relation to the past, allocate risk-burdens, and make decisions about issues with many variables. Environmental protection rules impact on a wide range of parties.[4] The issues transcend traditional bi-party litigation. Courts may have to adjudicate on decisions which arose after a participatory and consultative processes, such as planning permission, within the confined structure of judicial review, when the real issue is a dispute between economic development and environmental protection. In adjudicating on breaches of environmental rules, Courts may have to draw upon and adapt a mix of substantive public and private law doctrine, give legal meaning to vaguely defined ecological concepts, and decide between disputed scientific evidence.

Our court system has not been designed to adjudicate on rules of environmental protection. There is often a lack of expertise. The procedural rules for bringing a case to court for breach are often too restrictive, in particular as regards standing. Awards made, are often too low to

[2] Robinson, N, " The Nature of Courts' in *Courts and the Environment* Voight, C and Makuch Z. (Edward Elgar:2018)
[3] Ceri Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' (2017) *Legal Studies* Volume 37 Number 3 pp. 391-417
[4] Warnock, at p391

deter the rule breach in the future. The system is too slow to prevent imminent damage, it is too costly for the ordinary citizen, the range of remedies are too limited and only punish past breaches.

Forty years ago, the Government of New South Wales in Australia decided that a new approach was needed, and established the Land and Environment Court. It has been widely seen as one of the best models worldwide.[5] A landmark study 'Greening Justice' was written by G and K Pring in 2009[6]. It recognised that while governments, including Ireland, signed up to the Rio Declaration at the first Earth Summit, whose Principle 10 recognizes that effective access to judicial and administrative proceedings, including redress and remedy, are needed to successfully handle environmental issues, that Governments have done less well in offering new means to resolve environmental disputes, justly and effectively. Pring and Pring engaged in a two year worldwide study, from which they learned that where adjudicating institutions are effective, they provide greater accountability for decisions on environmental matters and a pathway to reconciling competing interests necessary for achieving sustainable development.[7] Their volume *Greening Justice: Creating and Improving Environmental Courts and Tribunals* set out the results of their study, so as to help all those involved in creating or improving environmental courts and tribunals.

In 2016 The United Nations Environment Programme saw the need for sound governance and enforcement of the environmental rule of law as crucial to delivering the 2030 Agenda for Sustainable Development and the Paris Agreement on Climate Change and therefore commissioned the same Pring and Pring to produce a Guide to Environmental Courts and Tribunals to assist legislators in adopting environmental courts in their respective countries.[8] By that time there were over 1,200 environmental courts and tribunals operating worldwide. Robinson states that environmental courts or tribunals are to be found now in over one third of all UN member states.[9]

The time has now come for Ireland to take its place among the countries of the world and create a specialised environmental court. While there are some tentative moves in this direction- the Programme for Government adopted by the coalition elected in 2020 provides for an environmental division of the High Court- there has yet to be any thorough examination of what best practice in Ireland for an environmental court or tribunal would be.

The purpose of this paper is to look at some of the best practice worldwide and consider it in an Irish context, and to present a model for an environmental court suitable for Ireland. Such a court must be more than a fast-track planning court accessible only to the well-resourced. An environmental court which can truly enforce the environmental rules of our society must have an open door to environmental justice.

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[5] Robinson, N, " The Nature of Courts' in *Courts and the Environment* Voight, C and Makuch Z. (Edward Elgar:2018), at page 30.

[6] Pring G and Pring C, Greening Justice: Creating and Improving Environmental Courts and Tribunals.(2009: The Access Initiative of the World Resources Institute)

[7] Pring, G and C, Greening Justice, foreword.

[8] Pring G and Pring C, 'Environmental Courts and Tribunals: A Guide for Policy Makers' (2016) Global Environment Outcomes LLC (GEO) and University of Denver Environmental Court and Tribunal available at https://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf

[9] Robinson, N, " The Nature of Courts' in *Courts and the Environment* Voight, C and Makuch Z. (Edward Elgar:2018), at page 4.

Part I Environmental Courts and Tribunals in Ireland- What is the problem

1. Definition of a court

The most authoritative definition of what constitutes a court or tribunal in the Irish legal system is contained in the Supreme Court decision of *Zalewski v. An Adjudication Officer and the Workplace Relations Commission, Ireland and the Attorney General*[10]. In that case the Supreme Court considered a constitutional challenge to the adjudication of employment law disputes by the Workplace Relations Commission, a body established by statute. The Plaintiff argued that the adjudication amounted to the administration of justice outside the courts, contrary to Article 34 of the Constitution[11]. The challenge was not successful, as the majority held that the WRC was saved by Article 37, which allows for the exercise of limited powers and functions of a judicial nature by a body or persons authorised by law.[12] In the course of the judgement the Supreme Court considered the ambit of Article 34 and Article 37[13]. Relying on the majority in Zalewski, the administration of justice under Article 34 therefore means adjudication on a dispute about legal rights or a violation of law, its resolution, and determination. The resolution of the dispute must not be dependent upon the agreement of the parties but must be capable of enforcement in cases of refusal of the losing party to comply.[14] However, the majority in that case also viewed and affirmed the constitutionality of a tribunal or commission which exercises limited powers and functions of a judicial nature.

The Nature of Environmental Adjudication means that it can be an ill fit with the doctrine of Separation of Powers. Environmental problems are very messy and thus not easily solved. Normative conflicts also arise , particularly where it is proposed to restrict public resources to the use of private entities, or to prevent use of private property. While the doctrine of Separation of Powers is a Good frame for setting limits for legal institutions in general, the fame Struggles to do so in the context of environmental adjudication. Dogmatic adherence may become a straitjacket on the ECT and undermine it entirely. [15]

Fortunately, the Constitution in Ireland seems to provide a way out of any requirement for dogmatic rigour, by providing a constitutional basis for the exercise of judicial functions outside the courts, albeit where the powers and functions must be limited.

To avoid putting an ECT in Ireland in a dogmatic straitjacket, it is important to be clear that what is suggested by this Task Force is an environmental court or tribunal (ECT), engaging in activities governed by both Article 34 and Article 37, or perhaps a combination of both. The protection of the environment, as will be discussed in this paper, needs a broad approach to the administration of justice and to access to justice. It is not feasible from a resource basis to have Article 34 Courts adjudicate at first instance on every minor matter of dispute. Also,

[10] [2021] IESC 24.
[11] ARTICLE 34(1) Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and save in such special and limited cases as may be prescribed by law, shall be administered in public.
[12] The Supreme Court did however find that certain procedures of the WRC were not compatible with the constitution, such as the conduct of hearings in private.
[13] ARTICLE 37 (1) Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.
[14] *Zalewski*, O'Donnell CJ at par 94.
[15] [15] Ceri Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' (2017) 373 *Legal Studies* pp. 398

environmental adjudicators may need to exercise broader powers of resolution of disputes which takes into account what is advisable or desirable in the future for the good of the environment and for future generations, even though these parties are not represented before an ECT. In other words, conciliation, arbitration, and collective solutions may be required. O'Donnell CJ noted in *Zalewski* that such practices were required in the field of industrial relations. These functions are still performed today by the Labour Court, in addition to its determination of individual legal rights and obligations.

2. Problems with current court system

Many courts worldwide currently suffer from the following inadequacies when it comes to adjudicating on environmental disputes. The following problems were identified in the major worldwide study conducted by the Pring and Pring, since endorsed by the UNEP[16].

> *"1. Judges who do not understand or have not been trained in international and national environmental laws, who do not have the expertise to make decisions based on analysis of constantly changing, complex, uncertain scientific and technical information, and who may prefer not to be accountable for balancing the social, economic and environmental impacts of a proposed development, or who may not be able to make truly just and fair decisions*
>
> *2. General court dockets that are overwhelmed by a large number of other cases resulting in lengthy delays and a denial of justice*
>
> *3. High costs for litigants in court fees, attorney fees, expert witness fees, security bonds and appeals*
>
> *4. Inability to prioritize cases that impact the environment*
>
> *5. Insufficient remedies to resolve the environmental issues*
>
> *6. A win-lose approach to decision-making versus a win-win, problem-solving approach that can promote long range sustainability*."

Writers have gone so far as to say that Traditional Courts are the wrong bodies to deal with environmental adjudication, citing the fact that the approach to evidence is heavily conscribed, and that such courts are unhelpful with an evaluative/predictive role[17]

There is no need for a detailed study of the Irish court system to identify that many of the inadequacies set out above are present in the Irish court system.

Enforcement of environmental law is dispersed at present, with the following adjudication on breaches of environmental law and environmental disputes at first tier by the Commission for Regulation of Utilities (regulation of water and energy), An Bord Pleanála (appeals of grant of planning permission), District and Circuit Courts (criminal prosecutions), High Court (judicial review and rights-based disputes), Circuit or High Court (claims for damages for environmental damage). There are also very many other bodies which regulate environmental issues, and

[16] Pring G and Pring C, 'Environmental Courts and Tribunals: A Guide for Policy Makers' (2016: Global Environment Outcomes LLC (GEO) and University of Denver) Page IX
[17] Ceri Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' (2017) 37.3 *Legal Studies* pp. 406-7

make decisions on the grant of licenses, planning permission, integrated pollution prevention and control permits and so on. While these are not the concern of this paper, which is confined to bodies which solely adjudicate on disputes about legal rights or the violation of law, their existence adds to the lack of transparency and fragmentation of environmental matters.

Systems can change however and do change.

The legal system which operates in Ireland is based on the English common law system which replaced the indigenous system of Brehon law following the colonization of Ireland. Adjudicative systems arose to encompass bi-party litigation, determine legal rights between parties, or between parties and the state, provide compensation for past wrongs or enforce the public peace. Parliamentary legislation was overlaid in areas where there was a deficiency in the common law.

The legal system adapted as society adapted. For example, crimes against private citizens were historically privately investigated and prosecuted- paid state police forces are a comparatively recent development. Companies and corporations are also relatively recent innovations, resulting from a convenient legal device developed from around 1897 to give inanimate companies and bodies 'legal personality'. In addition, there was a change in the bodies which engaged in the adjudication of disputes. O'Donnell CJ. In his comprehensive review of the development of administrative tribunals in the common law world notes that

> "*The Industrial Revolution led to a significant increase in the role of the state and a demand for adjudication and resolution by bodies other than courts. In some cases, this was driven by the simple desire to have bodies with expertise in specific areas, as was the case in relation to issues such as the developing law of taxation or the rapid expansion of the railway system, which gave rise to novel and complex disputes thought to require particular expertise. In other cases, perhaps most notably in the field of industrial relations, there was a desire for resolution by bodies other than courts (which, particularly in the late 19th and early 20th centuries, were perceived as hostile to employees, trade unions, and collective action) and a preference for a system of low-cost, relatively informal non-judicial dispute resolution*."[18]

The dispute adjudication and law enforcement systems in the common law world developed when the environment was not in crisis. Where they are no longer adequate, law and legal systems can and must change to adapt to current environmental needs.

3. Advantages of Environmental Courts and Tribunals (ECT)

The growing adoption worldwide of specialist environmental court and tribunals was reviewed in *Greening Justice*[19], one of the most important studies of its kind. The study describes the widespread adoption of these courts as '*one of the most dramatic changes in environmental law and institutions in the 21st century*'. The explosion, according to the study,

> '*is being driven by the development of new international and national environmental laws and principles, by recognition of the linkage between human rights and*

[18] *Zalewski* at para 38

[19] *Greening Justice: Creating and Improving Environmental Courts and Tribunals*, which was published by The Access Initiative of the World Resources Institute; full text available atwww.law.du.edu/documents/ect-study/greening-justice-book.pdf accessed 26 February 2018.

environmental protection, by the threat of climate change, and by public dissatisfaction with the existing general judicial forums'.

Several advantages of ECT's are cited in the study, and these advantages can be seen generally in the studies and writing worldwide.[20]

First, ECT's can provide remedies more directly applied to the inherent nature of an environmental breach or dispute, by engaging in new forms of problem solving and restorative justice. Brian J Preston, Chief Judge of the Land and Environment Court in New South Wales Australia, and one of the world's leading experts on the development of Environmental Courts and Tribunals (ECT), states also that "*Successful ECTs are better able to address the pressing, pervasive, and pernicious environmental problems that confront society (such as climate change and loss of biodiversity)"* [21] ECT's can engage in the necessary long-term focus required for solutions to the loss of environment and habitat redressing climate change.[22]

Second, an ECT can assist to reduce the cost of justice both for the state and for the litigator. It is inefficient and resource intensive to ask judges in Courts to judge at first instance every minor matter or dispute. Also, for the litigant the first tier administrative wing of an ECT can adopt procedures which provide relatively low cost, efficient quasi-judicial enforcement, thus improving access to justice[23]

Third, an ECT building up a body of expertise. Courts need recourse to a principles and robust environmental jurisprudence to develop and give legal meaning to the fundamental principles of environmental law, such as the precautionary principle, the polluter pays principle, as well as the meaning of human rights in the context of environmental harm. [24]A dedicated court which builds up a body of expertise leads to better decisions and more respect for the decisions made. Warnock argues that where environmental laws/values are skeletal, an ECT with specialist knowledge can flesh it out. She notes that the NSW Land and Environment Court widened the meaning of law beyond positivist state law by recognising indigenous customary law in appropriate cases, thereby drawing upon an expanded range of 'legal' principles.[25]

Fourth, an ECT can be given powers, governing structures, and procedural rules specifically to solve the problems which limit access to justice, such as narrow rules of standing, lack of class and multiparty actions, and rules on costs. Broadened standing is one of the important features of an ECT, in the view of writers.[26]

Fifth, an accessible ECT provides a forum for resolution of societal environmental disputes in a quicker and more direct manner, thus assisting environmentalists, but also developers and business. It is notable that if access to justice is limited, courts are denied their capacity

[20] Voigt, C and Makuch, Z., *Courts and the Environment* (2018:Edward Elgar Publishing): Smith, Don C., "*Environmental courts and tribunals: changing environmental and natural resources law around the globe*." Journal of Energy and Natural Resources Law (Vol 36, 2012, Issue 2).
[21] Smith, Don C., "*Environmental courts and tribunals: changing environmental and natural resources law around the globe*." Journal of Energy and Natural Resources Law (Vol 36, 2012, Issue 2).
[22] Robinson, page 23.
[23] As required by Principle 10 of the Rio Declaration and the Aarhus Convention.
[24] Preston, B., Martin, P., and Kennedy A., "Bridging the gap between aspiration and outcomes: the role of the Court in ensuring ecologically sustainable development." In Voigt et al, at page 42-45.
[25] Ceri Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' (2017) 37.3 *Legal Studies* pp. 398
[26] Ceri Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' (2017) 37.3 *Legal Studies* pp. 398

adjudicate on grievances. Without recourse to justice, grievances fester, and can lead to societal disputes, [27] as is evidence by the Shell to Sea controversy in Ireland of recent years. An accessible ECT with broad rules of standing to accommodate all interested parties will reduce the possibility that unresolved minor or local disputes will lead to delay in permissible development through lengthy judicial review challenges, which are limited in any event to the decision-making process, rather than the real issues in controversy between the parties.

Sixth, ECTs can provide authority to the environmental legislation through standard and expert judicial enforcement and interpretation'.[28] Courts need to build up a sustained capacity to deal with disputes on sustainable development, protection of habitats, and climate change. [29]

Seventh, and ECT can provide for Alternative Dispute Resolution (ADR) as an adjunct to its adjudicative role. ADR allows many different paths to justice[30]. Resolving complex environmental issues and achieving sustainable development often requires a multi-faceted approach that goes beyond traditional legalistic decision-making and may include use of mediation and other forms of alternative dispute resolution or the participation of a broad group of stakeholders in collaborative decision-making.[31]

Eight, an ECT would have the power to engage in forward thinking resolutions, not just punitive remedies, the development of non-traditional remedies, and/or creative sentencing. Judges placed in an ECT with a mandate to view themselves as "problem solvers" could look beyond the narrow application right-or-wrong determination and come up with creative options for future short- and long-term outcomes for the parties and for the environment. As Preston J writes "*An ECT is better positioned than an ordinary court or tribunal to develop innovative remedies and holistic solutions to environmental problems*." Warnock writes that ECT's are Dynamic Adjudicatory Forums and lauds ECT's as innovative and dynamic, with the power to create novel practices, procedures, and remedies that respond more accurately to the challenges of environmental dispute resolution.

Ninth, ECT's have been adopted with the power to sit with scientific experts, or obtain reports for scientific experts, thus overcoming the burden placed on legal adjudicators to decide on complex scientific issues which can come before the courts as part of an environmental dispute.

The advantages set out above are not exhaustive but set out a broad-brush sketch of the advantages of an ECT, to provide a basis for the argument for the adoption of an ECT in Ireland. The practice in other jurisdictions will now be examined.

Part II Models in Other Jurisdictions and Best Practice

1. New South Wales, Australia

The Land and Environment Court of New South Wales is the first specialist environmental superior court in the world. It was established on 1 September 1980 by the *Land and Environment Court Act 1979* (the Court Act). The Court's jurisdiction includes merits review,

[27] Robinson, at page 4.
[28] Smith, see above.
[29] Robinson, page 23.
[30] Ceri Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' (2017) 37.3 *Legal Studies* pp. 399
[31] Preston

judicial review, civil enforcement, criminal prosecution, criminal appeals and civil claims about planning, environmental, land, mining and other legislation.

The Court's purpose is to safeguard and maintain:

- The rule of law
- Equality of all before the law
- Access to justice
- Fairness, impartiality and independence in decision making
- Processes that are consistently transparent, timely and certain
- Accountability in its conduct and its use of public resources
- The highest standards of competency and personal integrity of its judges, commissioners, and support staff.

There was a desire to create a specialised 'one stop shop' for environmental, planning and land matters.

Jurisdiction

The Land and Environment Court is a specialist court, part of the NSW court system, and has equal standing with the Supreme Court of NSW. It was established by legislation and can only deal with matters listed as being within its jurisdiction. Said jurisdiction is divided into 8 different classes, depending on the type of case, and different procedures apply to each class. There are two forms of appeal, merits appeals and judicial review. Listed below are the 8 different classes with the Court.

Classes within the Court

- Class 1 – Merits appeals
- Class 2 – Local government and miscellaneous appeals and applications (including disputes under the Trees (Disputes between Neighbours) Act 2006 (NSW)
- Class 3 – Land tenure, valuation, rating and compensation matters
- Class 4 – Civil enforcement and judicial review
- Class 5 – Summary enforcement (criminal matters)
- Class 6 – Appeals from convictions relating to environmental offences (criminal matters)
- Class 7 – Other appeals relating to environmental offences
- Class 8 – Mining matters.[32]

Both Judges and Commissioners hear cases in the Land and Environment Court, depending on the nature of the case. Either a Judge or a Commissioner can hear Class 1, 2, 3 and 8 matters, whereas only a Judge can hear Class 4, 5, 6 and 7 matters.

[32] https://www.edo.org.au/publication/land-and-environment-court-in-nsw/

As noted above, there are two forms or appeal, merits appeals and judicial review. Appeals to the NSW Court of Criminal Appeal are in relation to proceedings in Classes 5, 6 or 7 of the Land and Environment Court's jurisdiction. Appeals from the Local Court of New South Wales to the Land and Environment Court are with respect to an environmental offence under the *Crimes (Appeal and Review) Act 2001* and are in Classes 6 and 7 of the Land and Environment Court's jurisdiction.Proceedings can be transferred between the Supreme Court and the Land and Environment Court. In civil proceedings, there is capacity for either the Supreme Court or the Land and Environment Court to transfer proceedings to the other court if it is more appropriate for the proceedings to be heard by the other court (see s 149B of the Civil Procedure Act 2005). For proceedings in Classes 5-7, the Supreme Court also has the power to transfer any proceedings commenced or purporting to have been commenced in the Supreme Court to the Land and Environment Court if the Supreme Court is of the opinion that the proceedings could or should have been commenced in the Land and Environment Court (s 72 of the Court Act). The Land and Environment Court can sit in a number of locations including hearings on the site of the property in dispute, Local Court courthouses and in the Land and Environment Court building in Sydney.

Judges and commissioners

- It has six law judges, 22 science-technical commissioners, and a registrar with far-reaching administrative and quasi-judicial powers[33]. Judges have the same rank, title, status and precedence as the Judges of the Supreme Court of New South Wales. Judges preside over all Class 3 (Aboriginal land claims) matters, most Class 3 (land tenure and compensation) matters, Class 4, 5, 6 and 7 matters, and can hear matters in all other Classes of the Court's jurisdiction. Suitably qualified people may be appointed as commissioners of the Court. The qualifications and experience required for a commissioner are specified in s 12 of the *Court Act* and include the areas of:
- Administration of local government or town planning
- Town, country or environmental planning
- Environmental science, protection of the environment or environmental assessment
- Land valuation
- Architecture, engineering, surveying or building construction
- Management of natural resources or Crown Lands
- Urban design or heritage
- Land rights for Aboriginal people or disputes involving Aboriginal people
- Law.

People may be appointed as full-time or part-time commissioners for a term of seven years. An individual may also be appointed as an acting commissioner for a term of up to 12 months. Acting commissioners are called upon on a casual basis to exercise the functions of a commissioner as the need arises. The primary function of Commissioners is to adjudicate, conciliate or mediate merits review appeals in Classes 1, 2, and 3 of the Court's jurisdiction. On occasion the Chief Judge may direct that a Commissioner sit with a judge, or that two or more commissioners sit together to hear Class 1, 2 and 3 matters. A commissioner who is an Australian lawyer may also hear and determine proceedings in Class 8 of the Court's jurisdiction (when they are called a Commissioner for Mining).

[33] https://leap.unep.org/node/49

Appeals can be made against decisions of the Land and Environment Court. Only a person who is a party to the proceedings may appeal. The appeal is to be commenced within 28 days after the date on which the decision or order was given. To lodge an appeal or commence a case in the Court, one will first need to pay a filing fee. The amount of the fee will vary depending on the type of case you are filing and whether the case is being commenced by an individual or a corporation. Generally, the registrar may postpone fees until the finalisation of your case if you have a grant of legal aid or pro bono legal assistance. A waiver or a postponement might also be granted if you are dependent on social security payments and lack sufficient income and capital either to pay a fee or to obtain credit on reasonable terms or are otherwise indebted to an extent that you are incapable of obtaining credit on reasonable terms.

If the Land and Environment Court gives a judgment or makes an order, parties are obliged to comply with the judgment or order. Where the order is to take some specified action, and to do so within a specified period of time, parties are obliged to take the action within the time. Failure to comply with a judgment or order of the Court may have criminal and civil consequences for the person in default. It is up to the parties to take enforcement action. It is not the Court's role to take action on behalf of the parties. The types of action you might be able to take to enforce a judgment are:

- Enforcement under Pt 40 Div 2 of the *Uniform Civil Procedure Rules 2005*
- Debt recovery through other courts
- Contempt proceedings

If the judgment or order requires a company to do an act within a specified time and the company fails to do the act within the required time, the judgment or order may be enforced by committal (imprisonment) of any officer of the corporation or sequestration of the property of any officer of the corporation or both: Part 40 r 40.6(1) and (2) of the *Uniform Civil Procedure Rules 2005*. If the Court orders payment of compensation or payment of costs associated with carrying out an order, the order can be enforced by action for recovery of the debt in the Local Court (civil claims jurisdiction) or District Court, depending on the amount of the debt.[34]

Pearlman, [35] writing about the Land and Environment Court in New South Wales, note that while environmental law in Australia had traditionally arisen out of administrative law inherited from the British system (particularly in the areas of planning and local government law) it has in more recent times been influenced by the American model in terms of environmental impact assessment. He states that New South Wales model, however, is not simply a hybrid of both the British and American models. "*Rather, it is a unique system which has been inspired by external sources, but ultimately it has been engineered to meet the specifications of its domestic jurisdiction."* When the Land and Environment Court was established, it was unique in Australia. The states of Queensland and South Australia have now followed by establishing specialist environmental courts, but what sets the Land and

[34] All of the above info found on https://www.lec.nsw.gov.au/lec/decisions-and-heard-matters/enforcement.html
[35] Pearlman, M.L "The Land And Environment Court Of New South Wales A Model For Environmental Protection" http://dx.doi.org.ucd.idm.oclc.org/10.1023/A:1005251101945

Environment Court apart from its state equivalents is its exclusive jurisdiction. In New South Wales, the Land and Environment Court had and still has exclusive jurisdiction in all matters of environmental and planning law, and it is the only court in this State (except the appellate court) which may administer all forms of legal redress in those fields, including judicial review, civil enforcement, equitable orders and remedies, and summary criminal prosecutions. It has ranking and status equivalent to the Supreme Court in the hierarchy of courts in New South Wales. In all states of Australia, except New South Wales, Queensland and South Australia, environmental proceedings are somewhat fragmented.

2. Planning and Environment Court of Queensland

The Planning and Environment Court is recognised as an exemplary environment court by the United Nations Environment Program (UNEP).

The Planning and Environment Court (P and E Court) hears matters relating to:

- Planning and development
- Environmental protection
- Coastal protection and management
- Fisheries
- Marine parks
- Nature conservation
- Heritage
- Transport infrastructure
- Vegetation management.

The types of proceedings brought in the P and E Court, and the time limits for starting them, depends on the relevant legislation.

For example, the court may hear the following proceedings under the *Planning Act 2016*:

- Appeals against decisions on development applications
- Appeals about infrastructure charges
- Appeals against decisions on compensation claims
- Appeals from decisions of the Development Tribunal
- Applications for enforcement orders, to remedy or restrain the commission of a development offence
- Applications for declarations

- Contempt proceedings.

Legal representation is not necessary to bring a matter to the P and E Court. A party may appear personally or be represented by a lawyer or an agent who isn't a lawyer. The P and E Court can hear matters outside these major centres depending on the nature of the case. Wherever possible, the court ensures that local residents are able to observe the proceedings that affect their community. If necessary, the court conducts at least part of the hearing in a courtroom (or other suitable premises) near the disputed land or building. The vast majority of disputes in the P and E Court (the court encourages alternative dispute resolution and provides this service free of charge) are resolved, or at least narrowed, by agreement before any final hearing. Parties are usually required to have a dispute resolution plan to help resolve issues before trial. The plans usually include:

- Case management conferences and 'without prejudice' meetings between the parties
- Meeting of expert witnesses (without parties or their representatives)
- 'Without prejudice' meetings chaired by the ADR Registrar.

Queensland Government legislation regulates whether a person has the right to appeal a decision to, or seek a ruling from, the Planning and Environment Court (P and E Court), as well as the process you need to follow.

Costs:

Usually, parties must pay their own costs in Planning and Environment Court proceedings.

A party's costs will include:

- Fees charged by a lawyer you may engage
- Fees charged by any expert witnesses you engage to give evidence on your behalf
- Filing and other court fees
- Any other expenses you incur.

The court may award costs against a party in certain situations, including:

- When a party fails to comply with a directions order without a good reason
- In a procedural default
- When a party acts frivolously or vexatiously.

3. India

Background to the National Green Tribunal

India, a Common Law jurisdiction, is a country caught in a struggle between development and sustainability[36]. It is remarkable then that it has become recognised internationally as a progressive environmental jurisdiction despite this tension. The present Indian Constitution as originally drafted contained little in the way of significant and effective environmental protection, dominated as it then was by business and property rights[37]. Environmental law without the Constitution was little better, given the gulf that existed between the law and its actual enforcement[38]. Indeed, environmental justice in India was in dire straits and would still be so were it not for the continuous intervention of the Indian Supreme Court[39].

From the 1980's on, the Indian Supreme Court developed a substantial body of environmental constitutional law to protect public health from environmental damage[40]. In particular, the expansion of the Right to Life to include a Right to a Clean Environment stands out as the Right to Life was interpreted to go beyond mere physical existence and extend to a guarantee of a certain quality of life[41]. Other constitutional amendments enabled Indian judges to delve deeper into environmental law such as Articles 48(A) and 51(A), which require the State and Citizen respectively to commit to the protection of the environment[42].

The Supreme Court went further still in the 1990's, declaring in a case that "*issues of environment must and shall receive the highest attention from this Court*"[43] and indeed they did, spurring further innovation. For example, in *Vellore Citizens' Welfare Forum* the Supreme Court created a special burden of proof limited to environmental cases through considered application of the 'Precautionary Principle'[44]. Now in environmental cases the burden as to "*the absence of injurious effect of the actions proposed, is placed on those who want to change the status quo*"[45], meaning the polluter or the developer must prove that their proposed project or plan is harmless if they want to go ahead with it.

Despite their willingness to tackle environmental law's problems and indeed their success in doing so, the Indian Judiciary has recognized that they were not entirely suited to the task. Environmental problems are by their nature extremely complicated and have become increasingly transnational in nature[46]. Judges ill-informed on a topic are ill suited to adjudicate upon it and the Indian Judiciary has often found it difficult to keep pace with scientific

[36] Raghav Sharma, 'Green Courts in India: Strengthening Environmental Governance' (2008) 4.1 *Law, Environment, and Development Journal* 52, 52.
[37] Sharma, 'Green Courts in India: Strengthening Environmental Governance' 52-3.
[38] Domenico Amirante, 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India' (2012) 29.2 *Pace Environmental Law Review* 441, 442.
[39] Sharma, 'Green Courts in India: Strengthening Environmental Governance' 71.
[40] Sharma, 'Green Courts in India: Strengthening Environmental Governance' 53.
[41] Gitanjali Nain Gill, 'The National Green Tribunal of India: A Sustainable Future through the Principles of International Environmental Law' (2014) 16.3 *Environmental Law Review* 183, 194.
[42] Amirante, 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India' 454.
[43] *Tarun Bharat Sangh, Alwar v Union of India*, Supreme Court of India, Judgement of 11 October 1991, 1992 Supp (2) SCC 448 as found in Sharma, 'Green Courts in India: Strengthening Environmental Governance' 53.
[44] *Vellore Citizen's Welfare Forum v Union of India*, Supreme Court of India, Judgement of 28 August 1996, (1996) 5 SCC 647 as found in Sharma, 'Green Courts in India: Strengthening Environmental Governance' 54.
[45] Sharma, 'Green Courts in India: Strengthening Environmental Governance' 54.
[46] Gitanjali Nain Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' (2016) 5.1 *Transnational Environmental Law* 175, 176.

development[47]. Thus, the calls for experts in environmental cases and the perception that their involvement in these cases will result in better results for the environment[48]. It is no surprise then that the Supreme Court requested the creation of an Environmental Court or Tribunal (ECT)[49].

The Law Commission of India lent further weight to the Judiciary's request as it recommended the establishment of an ECT in its 186th Report, based upon a review of the technical and scientific problems that arise in these cases[50]. These calls eventually culminated in the National Green Tribunal (NGT) in 2010. The NGT too has acquired a national and international reputation based upon progressive and innovative decisions whose consequences are felt far outside the Court[51]. Indeed, it may very well be largely responsible, in conjunction with the Supreme Court, for India's reputation as a progressive and innovative environmental jurisdiction. Indeed, Pring has commented that the NGT is "*incorporating a number of best practices... and has become a major arbiter of some of the most pivotal environmental battles in India*"[52].

National Green Tribunal

The NGT is a federal judicial body and was created by the National Green Tribunal Act 2010 (2010 Act), which sets out its constitution, powers, and limits. Its mission is the "the effective and expeditious disposal of cases relating to environmental protection and conservation of forest and other natural resources"[53]. Thus, the NGT takes an eco-centric, rather than anthropocentric, approach[54]. This is further exemplified in the environmental dispute litigation that occurs in the NGT, as it is not simply adversarial. Instead, the NGT's approach is quasi-adversarial, quasi-investigative, quasi-inquisitorial, and quasi-collaborative so as to ensure all parties are fully involved in the process and can stand on equal footing[55].

The NGT enjoys three distinct levels of jurisdiction under the 2010 Act, civil, appellate, and special[56]. The civil jurisdiction deals with all cases where substantial questions relating to the environment, including the enforcement of legal rights which relate to the environment, are involved and cases which arise out of the implementation of the legislation listed in Schedule I of the 2010 Act[57]. Schedule 1 lists a number of environmental statutes. The NGT has thus far been content to remain within this jurisdiction. Its appellate jurisdiction determines questions of law and fact arising from orders and decisions passed by authorities under the Schedule 1 enactments[58]. It is however more limited than the civil jurisdiction as it is only available where

[47] Raghuveer Nath and Armin Rosencranz, 'India: Determining Environmental Compensation in India: Lessons from a Comparative Perspective' (2019) 49.4/5 *Environmental Policy and Law* 246, 246.
[48] Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 176.
[49] Amirante, 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India' 467.
[50] Law Commission of India, 186th Report on the Proposal to Constitute Environment Courts (2003) as found in Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 185.
[51] Gitanjali Nain Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?'(2020) 7 *Asian Journal of Law and Society* 85, 86.
[52] Pring and Pring (2016) as found in Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 86.
[53] Amirante, 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India' 461.
[54] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 102.
[55] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 102.
[56] Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 186.
[57] Section 14(1) National Green Tribunal Act, 2010.
[58] Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 187.

the appellant has exhausted all other appeal forums available, which were listed in the Act under which the order was made[59].

Finally, under its special jurisdiction the NGT is empowered to order relief and compensation for victims of pollution and other forms of environmental damage arising under the enactments and to order the restitution of damaged property and environment[60]. The NGT has no criminal jurisdiction and at most can recommend punishments for crimes committed under environmental legislation[61].

The NGT is also able to fast track cases and is ostensibly able to decide cases within 6 months of the application or appeal[62] though reality often differs. Its decisions are not subject to Judicial Review, but they may be appealed to the Supreme Court[63]. The Supreme Court also stands above it, coordinating and supervising it along with all other inferior Courts in the Indian judicial system. Thus, the Indian Supreme Court has moved from exclusively acting as an adjudicator, to acting wholeheartedly as a policy maker, and now operates as a superior administrator[64].

The NGT is an open Court, and its decisions are often subject to public scrutiny. The NGT can issue directions to governments and these range in scale from directions to government authorities found deficient in their performance of statutory obligations to widespread bans upon environmentally damaging activities like sand mining[65]. The NGT is not bound by government orders though the government controls its budget[66]. The NGT may order up to three years' imprisonment and can also impose fines for non-compliance with any order issued and these fines may reach up to 10 crore rupees for individuals and up to 25 crore rupees for companies[67].

The NGT operates from five main benches, located in Delhi, Bhopal, Pune, Kolkata, and Chenna[68]. It also has circuit benches to grant better access to poor or tribal populations in remote areas of the country[69]. Indigent and illiterate litigants have been encouraged to speak in their vernacular language, particularly at the regional benches, which are ostensibly more accessible to them[70].

The NGT is bound to follow and employ internationally recognised environmental principles such as Sustainable Development, the Precautionary Principle and the "Polluter Pays' Principle

[59] Gill, 'The National Green Tribunal of India: A Sustainable Future…' 188.
[60] Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 187.
[61] Sridhar Rengarajan, Dhivya Palaniyappan, Purjava Ramachandran, Ramesh Ramachandran, 'National Green Tribunal of India - An Observation from Environmental Judgements' (2018) 25 *Environmental Science and Pollution Research* 11313, 11314.
[62] Section 18(3) National Green Tribunal Act, 2010.
[63] Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 183.
[64] Michael Rackernmann, 'Review: Environmental Justice in India - The National Green Tribunal' (2020) 45.4 *Denver Journal of International Law and Policy* 471, 472.
[65] Sudha Shrotria, 'Environmental Justice: Is the National Green Tribunal of India Effective?' (2015) 17.3 *Environmental Law Review* 167, 175.
[66] Shrotria, 'Environmental Justice: Is the National Green Tribunal of India Effective?' 173.
[67] Shrotria, 'Environmental Justice: Is the National Green Tribunal of India Effective?' 173.
[68] Rengarajan, Palaniyappan, Ramachandran, and Ramachandran, 'National Green Tribunal of India - An Observation from Environmental Judgements' 11313.
[69] Rengarajan, Palaniyappan, Ramachandran, and Ramachandran, 'National Green Tribunal of India - An Observation from Environmental Judgements' 11314.
[70] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 102.

while issuing an order, decision or award and does so rigorously[71]. Indeed, their application by the NGT has formed a significant part of the country's famed environmental jurisprudence. The Precautionary Principle in particular stands out as noted above with regard to the *Vellore Citizens* case. The Doctrine of Public Trust has also been influential as it has enjoined the Indian State to act as a trustee over the country's natural resources so that all may benefit from them[72]. Taken together with the Principle of Intergenerational Equity which has been absorbed into the doctrine, it means that these resources must also be preserved for future generations[73].

There are three additional facets of the NGT and how it has conducted itself in the ten years it has operated which warrant particular attention. These are the NGT's approach to standing, the role of experts within it and their effect upon judgements, and the NGT's progressive and expansionist approach.

The Supreme Court in India liberalised the traditional rules of standing in environmental matters through the development of Public Interest Litigation(PIL)[74]. PIL can be filed by citizens to address violations of statutory mandates by the executive and private parties or situations where gaps in the law remain[75]. Article 39A of the Indian constitution mandates that the Indian State secure a legal system, which is both socially inclusive and equally accessible to all people. The Supreme Court used this recognition of the rights of the poor, deprived, and illiterate to create PIL[76].

The rules of standing before the NGT are as wide as those before the Supreme Court itself as not only can a person directly affected by the issue come before it but also representative bodies and other organisations. Under the NGT Act, an 'aggrieved person' has the right to approach the NGT under its original and appellate jurisdictions[77]. The concept of the 'aggrieved person' has been interpreted by the NGT to mean a either a person directly affected by an issue or a person who has neither any direct nor any personal interest in invoking the provisions of the 2010 Act who can show the NGT that the matter affects the environment[78].

In *Jan Chetna*, it was decided that any person, regardless of whether they are resident of a specific area or have actually been aggrieved, can approach the tribunal[79]. Naturally those more distant to the issue undergo greater scrutiny but fortunately the legitimacy of their interest is bolstered by the recognition that environmental damage often has far reaching consequences. This interpretation is reinforced by the aforementioned constitutional mandate of Article 51A(g) which makes the protection and improvement of the natural environment a fundamental duty of every citizen[80]. Standing was further widened in *Betty C. Alvares*, as the concept of 'person' was interpreted to include non-national citizens[81]. This incredibly wide standing

[71] Shrotria, 'Environmental Justice: Is the National Green Tribunal of India Effective?' 172.
[72] Shrotria, 'Environmental Justice: Is the National Green Tribunal of India Effective?' 183.
[73] Gitanjali Nain Gill, 'The National Green Tribunal of India: A Sustainable Future through the Principles of International Environmental Law' (2014) 16.3 *Environmental Law Review* 183, 192.
[74] Amirante, 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India' 459.
[75] Sharma, 'Green Courts in India: Strengthening Environmental Governance' 57.
[76] Sharma, 'Green Courts in India: Strengthening Environmental Governance'58.
[77] Gill, 'The National Green Tribunal of India: A Sustainable Future…' 201.
[78] Shrotria, 'Environmental Justice: Is the National Green Tribunal of India Effective?' 180.
[79] *Jan Chetna v Ministry of Environment and Forests*, Judgement dated 9 February 2012 as found in Gill, 'The National Green Tribunal of India: A Sustainable Future…' 201.
[80] Gill, 'The National Green Tribunal of India: A Sustainable Future…' 201.
[81] *Betty C. Alvares v State of Goa*, Judgement dated 14 February 2014 as found in Gill, 'The National Green Tribunal of India: A Sustainable Future…201.

enables the NGT to allow any person to bring a matter before it in the public interest and is one of its most desirable features.

As noted above, environmental problems are incredibly complex and necessitate the presence of experts in Courts. Experts lend themselves not only to the strength and efficacy of the adjudication process but also to its credibility[82]. To get the best of experts however, one must be careful as to how they are utilised in the adjudication process. Often in an adversarial setting a party will present scientific facts such that they seem to support their side alone[83]. This is only natural but before an ill-informed Court, this may create the impression that that party has presented them with the whole picture. Indeed, it has been noted that Courts may be particularly vulnerable where one financially powerful party can call forth a parade of experts[84]. All too often this financially powerful party is the developer who wishes to change the environment and thus potentially damage it. This is made worse as often this parade of experts uses the ideal of scientific objectivity to mask the intent with which they give their opinions[85]. Thus, the need for ECT's and Courts in general to be sceptical of any claim to objectivity.

The NGT's members are appointed independently and judges and technical experts alike staff the NGT, meaning that its jurisprudence encompasses both legal doctrines and scientific knowledge[86]. There is 1 chairperson who must be a judge, 10-20 other judges, and 10-20 technical experts on the NGT and all must meet extensive qualification requirements[87]. Non-judicial experts include engineers and scientists with expertise in environmental sciences, environmental engineering, and industrial and urban environmental management to name but a few fields of expertise[88].

The presence of scientific experts on the NGT itself effectively produces an equality of arms amongst the parties as the more financially dominant party can no longer call forth their own parade of experts to walk over the other party in what is commonly public interest litigation[89]. In addition, the Chairperson may call in experts on a case-by-case basis[90]. The true benefit of expert inclusion in the decision making process, however, is that together judges and experts can look for the best available solution to the problem before them rather than limit themselves to traditional legal remedies which are often not up to the task[91]. Indeed, experts commonly employ constructive interpretation to broaden the scope of rules and regulations if the activity endangers public health and the environment[92]. This is in the name of the public, rather than the private, interest and in this way and others the NGT creates policies based in science, which it will often assist regulatory agencies in implementing[93].

[82] Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 181.
[83] Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 179.
[84] Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 180.
[85] Amirante, 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India' 466-7.
[86] Gitanjali Nain Gill, 'The National Green Tribunal, India: Decision Making, Scientific Expertise, and Uncertainty' (2017) 29.3 Environmental Law and Management 82, 87
[87] Amirante, 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India' 463.
[88] Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 188.
[89] Amirante, 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India' 467.
[90] Section 4(2) National Green Tribunal Act, 2010.
[91] Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 178.
[92] Gill, 'The National Green Tribunal, India: Decision Making, Scientific Expertise, and Uncertainty' 84.
[93] Gill, 'The National Green Tribunal, India: Decision Making, Scientific Expertise, and Uncertainty' 87.

Environmental scholars have noted that judicial activism is essential as it compensates for the limited efficacy of political leadership and administrative authorities[94]. The NGT in its work and tendency to go beyond traditional legal dispute adjudication and create environmental policies is a testament to this fact. Indeed, the NGT's most important innovation is its readiness to offer structural planning and policies rooted in science that respond creatively to frail, ineffectual, or even non-existent regulations[95].

The NGT has the power to issue directions to state authorities lax in their duties to enforce environmental regulations as mentioned above and has shown no hesitation in doing so, consistently and publicly rebuking them by virtue of the open nature of its proceedings. The NGT has identified the Ministry of the Environment and Forests (MoEF), and related regulatory agencies, as demonstrating indifference, negligence or acting *Ultra Vires* in the exercise of their responsibilities[96]. In particular, the MoEF is frequently censured by the NGT for its failures to observe its own procedural rules, particularly with regard to licensing[97]. Indeed, in *Sudeip Shrivastava*, the NGT audaciously criticised the Minister of State for Environment and Forest and the MoEF for acting arbitrarily and ignoring relevant material issues in their appraisal of the environmental problem[98].

The NGT's progressive nature is such that it has gone so far as to expand its own powers in its efforts to realise its mission. It has claimed for itself a Judicial Review jurisdiction, which it was not explicitly conferred in the 2010 Act[99] though bolder still was its claiming the ability to enact *Suo Motu* proceedings for environmental cases[100]. The NGT was envisioned by its statutory creators to act on foot of an aggrieved person filing a motion[101]. In *Suo Motu* proceedings however, the NGT acts of its own volition in the absence of any party filing a motion.[102] The NGT also tends to make massive orders, which intrude significantly upon the executive[103]such as the aforementioned ban on sand mining.

Problems with the NGT

Despite its progressive nature and its innovations however the NGT is far from a flawless organisation. ECT's have been noted for their potential for tunnel vision and capture by interest groups[104] while many members of the general public still find it challenging to access the NGT due to its formal procedures and the high fees of lawyers[105]. Its efficacy is also limited by its lack of criminal jurisdiction. Its most egregious issues however have been evident for its very inception as the NGT began woefully underfunded and its staff poorly looked after.

Scholars have claimed that the judiciary's independence forms part of the fundamental structure of the Constitution[106]. Independence too is crucial to the NGT, as it needs to be able

[94] Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 178.
[95] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 110.
[96] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?', 111.
[97] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 111.
[98] *Sudeip Shrivastava v. State of Chhattisgarh*, Judgement, 24 March 2014 as found in Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 111.
[99] Rackemann, 'Review: Environmental Justice in India- The National Green Tribunal' 473.
[100] Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 197.
[101] Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 197.
[102] Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 197.
[103] Rackemann, 'Review: Environmental Justice in India- The National Green Tribunal' 473.
[104] Sharma, 'Green Courts in India: Strengthening Environmental Governance' 57.
[105] Shrotria, 'Environmental Justice: Is the National Green Tribunal of India Effective?'187.
[106] Sharma, 'Green Courts in India: Strengthening Environmental Governance' 66.

to adjudicate free from political interests[107]. It is unfortunate then that the NGT is not quite so independent as it may initially seem. Nor can it afford to be, as it does not exist within a vacuum.

As noted above the government controls the NGT's budget and it has been severely underfunded. Indeed, at its beginnings judges reported having to cover the costs of their own travel and the Bhopal bench began in the basement of a building[108]. India remains a country caught between development and sustainability and as of late there has been significant tension between the Right to Develop and the Right to Environment[109]. Presently environmental regulations are being diluted to promote ease of doing business and economic development[110].

The NGT has been steadfast in trying to protect the environment, but it can only work with the laws that are in force despite its progressive nature. This is to say nothing of the effects this steadfastness is having upon its longevity. ECT's too eager to fight the good fight, though they earn public and even international admiration, may find that they have undermined and alienated too many national stakeholders, legislative supporters, and other agencies to continue fighting[111]. They burn themselves out and their bridges with them. Though the failure of agencies to follow due process has been a consistent cause for persons to go to the NGT to hold them accountable for their failures[112], their public condemnation has been a major source of enmity from these agencies. Common accusations levied against the NGT include being called 'unrealistic' in its orders, 'power-hungry'[113], and a threat to the Separation of Powers[114].

The MoEF is perhaps the most drastic example of an alienated body. Gitanjali Nain Gill, Professor of Environmental Law at Northumbria Law School, has written extensively on the NGT and has characterised the MoEF as "apathetic, unresponsive, and dysfunctional"[115]. Indeed, it is plagued with structural inertia and indifference such that it was quite reluctant to provide the appropriate financial and structural support for the NGT[116].

Apathy however has grown into contempt as the MoEF have now repeatedly gone to the superior Courts in efforts to reign in the NGT. It has approached the Supreme Court, claiming that the NGT has exceeded its jurisdiction such that it has become an embarrassment to the government[117]. In particular, a challenge was brought against the NGT by the MoEF in the Madras High Court for its adopted power of taking *Suo Motu* proceedings. The Court issued an order restraining the NGT Chennai bench from initiating such proceedings and further issued an order that the NGT should not initiate *Suo Motu* proceedings[118]. The NGT has argued that as it is empowered to evolve its own procedure, it may take *Suo Motu* cognisance of an environmental issue[119]. If such significant powers were intended however, they would have been conferred explicitly in the statute. The NGT's claim to a Judicial Review jurisdiction too may have brought further trouble on its head. This territorial expansion may have come at the

[107] Sharma, 'Green Courts in India: Strengthening Environmental Governance' 68.
[108] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 106-7.
[109] Sharma, 'Green Courts in India: Strengthening Environmental Governance' 55.
[110] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 115.
[111] Rackemann, 'Review: Environmental Justice in India- The National Green Tribunal' 474.
[112] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 113.
[113] Shrotria, 'Environmental Justice: Is the National Green Tribunal of India Effective?' 186.
[114] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 87.
[115] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 107.
[116] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 107.
[117] Shrotria, 'Environmental Justice: Is the National Green Tribunal of India Effective?' 175.
[118] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 108.
[119] Shrotria, 'Environmental Justice: Is the National Green Tribunal of India Effective?' 181.

potential cost of alienating the High Courts that previously and exclusively enjoyed the exercise of these powers and who may regard it as a usurpation of their duty[120].

In 2014 the MoEF attempted to render the NGT utterly ineffective via a High-Level Committee, which sought to review several acts and their implementation. Though it had no authority to review the 2010 Act it still made recommendations, which would have crippled it though fortunately it was rejected[121].

The Finance Act 2017, which would have given the central government vast powers over matters like appointment, term of office, salaries and allowances, registration, removal, and other terms and conditions of service of the chairpersons and members of the NGT. These powers were challenged in the Supreme Court by a former environment minister whose case fortunately resulted in a stay order in 2018 for those sections of the 2017 Act, which would have granted the powers in question[122].

The most recent threat faced by the NGT is no less grave than those mentioned prior as it seems that the central government wants to cripple NGT utterly. They have continuously failed to appoint parties to fill in the NGT's vacancies, essentially killing it through inaction[123] and potentially rendering the NGT casualty "of its own success"[124].

4. New Zealand

Background to Environment Court of New Zealand

New Zealand, a Common Law jurisdiction, is a country that has long been on the cutting edge of environmental management due to its focus upon sustainability, a focus incarnate in the Resource Management Act, 1991 (RMA)[125]. Indeed, it was the first country to base its environmental management system on the concept, though this task was neither "effortless nor foretold"[126]. New Zealand is both a small and highly developed nation and counts itself among the most urbanised countries in the world. Its environmental challenges reflect this as both air pollution and loss of biodiversity plagued the country[127].

It is unfortunate then that prior to the RMA coming into force, New Zealand's environmental management system was dominated by the central government industriously promoting economic growth and developing the country's infrastructure while simultaneously significant emphasis was put upon private property rights[128].

This is not to say there was no environmental regulation whatsoever. Indeed, by the 1980's a number of environmental statutes were in effect. The issue was that these statutes were generally *ad hoc* responses to crises as they arose[129], and so were not envisaged and deliberately

[120] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 108.
[121] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 116-7.
[122] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 118-9.
[123] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 118.
[124] Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' 121.
[125] Bret C. Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' (2002) 29.1 *Ecology Law Quarterly* pp. 1, 2-3.
[126] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 6.
[127] J. Michael Angstadt, 'Securing Access to Justice Through Environmental Courts and Tribunals: A Case in Diversity' (2016) 17.3 *Vermont Journal of Environmental Law* pp. 345, 355-6.
[128] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 7.
[129] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 8.

designed as part of a larger environmental management framework. Indeed, Sir Geoffrey Palmer, former Minister for the Environment, Prime Minister of New Zealand, and architect of the RMA, dubbed them an "uncoordinated, unintegrated hotch-potch of laws[130]". Simultaneously global attention was drawn to the international scale of the environmental crisis. 1987's Brundtland Commission was one of the products of this attention and its response was to advocate for sustainability as the keystone concept, which should underlie all environmental policy going forward[131].

It was at this time, despite mass deregulation, growing reliance on market mechanisms, and the transferal of central government powers to local authorities that New Zealand heeded the writing on the wall and took the radically sensible step of heeding the Brundtland Commission and "embracing sustainability as the core principle of its environmental and environmental and natural resources law and policy"[132]. This embrace eventuated in the aforementioned RMA, which sought to "promote the sustainable management of natural and physical resources" and in doing so, adopted a wide conception of resource management, acknowledging "social, economic, and cultural well-being" while highlighting the need to keep in mind "the reasonably foreseeable needs of future generations"[133].

Noted to be a radical departure from traditional methods of environmental decision making[134], the RMA is considered one of the most advanced models of environmental legislation in the world[135]. The RMA established New Zealand's Environment Court[136] (EC), a critical institution in New Zealand's pursuit of sustainable management of the environment as it determines whether activities and policies affecting the environment meet New Zealand's standard of sustainability[137]. The EC too acts as a role model, albeit one for the development of Environmental Courts and Tribunals (ECT's) around the world[138]. The EC hears disputes concerning resource management, generally environmental planning or town planning disputes[139] and works among other quasi-independent regulatory bodies, which possess investigatory, regulatory, and adjudicatory functions[140].

A point to keep in mind going forward is that the Environmental Courts or Tribunals (ECTs) are considered the children of both the law and of politics[141] and play an important role in environmental governance. Plainly put, in the process of enforcing environmental law, ECT's cannot help but become political as they help "to create, to express, and to realise… public

[130] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 8.
[131] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 9.
[132] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 3.
[133] Angstadt, 'Securing Access to Justice Through Environmental Courts and Tribunals: A Case in Diversity' 356.
[134] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 3.
[135] Stephen Higgs, 'Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court' (2007) 37.1 *Environmental Law* pp. 61, 67.
[136] Angstadt, 'Securing Access to Justice Through Environmental Courts and Tribunals: A Case in Diversity' 356.
[137] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court', 3-4.
[138] Ceri Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' (2017) 37.3 *Legal Studies* pp. 391, 400.
[139] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 400.
[140] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 407.
[141] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 407.

purposes[142]". With that in mind this report can turn to the actual structure and operation of the New Zealand Environment Court.

The Environment Court of New Zealand

The Environment Court is an appellate national court[143] and replaced the Planning Tribunal, which preceded it and was by its enacting statute granted authority over "virtually every important mechanism for environmental management"[144]. The EC's decisions are binding[145] and most of its work revolves around the RMA[146], principally the appeals that arise from resource consent applications and the contents of regional and district plans[147].

Briefly, resource consents are permits issued by the appropriate local authority to allow an entity to engage in an activity that would otherwise violate either the RMA or a corresponding planning document[148]. There are five types and they are land use consents, subdivision consents, coastal permits, water permits, and discharge permits[149]. These permits provide local environmental managers with the opportunity to consider the environmental issues that may accompany the proposed resource use[150] and so modify or deny the use should they deem it unsustainable. The general public may participate in these matters though this depends on whether the applications themselves are processed on a notified or non-notified basis. Notified resource consent applications are open for public input while non-notified applications are not subject to public submissions, resulting in the decision being made by the authority sans public participation in the latter case. Though they are meant to be far less common, it is estimated that local authorities go through 95% of resource consent applications on a non-notified basis[151].

It should be mentioned that the decision of a local authority not to notify the public can be the subject of judicial review in the High Court[152]. Once the local authority has made their decision, applicants or persons who have made submissions during the resource consent process can appeal their decision to the EC. Once the EC has heard evidence from both parties it will then make its determination and either confirm, amend or reject the local authority's decision[153].

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[142] E Fisher *Risk Regulation and Administrative Constitutionalism* (Oxford: Hart, 2007), 30 citing B Cook, *Bureaucracy and Self Government: Reconsidering the Role of Public Administration in American Government* (Baltimore, MD: Johns Hopkins University Press, 1996), 16 as found in Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 414.
[143] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[144] Angstadt, 'Securing Access to Justice Through Environmental Courts and Tribunals: A Case in Diversity' 356.
[145] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 4.
[146] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[147] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[148] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[149] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 23.
[150] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court', 22.
[151] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 24.
[152] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[153] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 31.

As for regional and district plans or policy statements, once the local authority has prepared a proposed plan or policy statement or made changes to either document, the public may make submissions as to change or document. These too are conducted on a notified or non-notified basis. The local authority will consider any submissions made before reaching its decision, which may be appealed to the EC who will then decide upon the appeal[154] in a public hearing. The EC will then either confirm the local authority's decision or instruct them to modify or remove the challenged provision or insert a new one provision and said local authority must comply[155]. This review is limited to the specific provisions of a plan or policy statement challenged in the aforementioned submission which grounds the appeal[156]. The EC's decisions may be appealed themselves, but only upon a point of law[157].

The EC conducts its reviews on a *De Novo* basis, meaning that they are considered afresh and the court makes its decision based on the actual evidence presented before it by the parties rather than the local authority's decision-making process[158]. The EC can hear witnesses and issue *subpoenas* for its hearings[159] and the decision itself is usually made in writing and forwarded to all parties and the EC's tries to make it within three months of the final submission being made[160].

The court conducts these hearings while keeping in mind its duty to avoid, remedy, or mitigate any detrimental environmental impact and also the overarching duty to promote sustainable management of the environment[161]. These duties reflect that the court when conducting reviews is attempting to make predictive decisions about the future and potential impacts upon the environment rather than engaging in the fact-finding missions typical of Common Law courts[162]. Indeed, it enjoys a great degree of discretion in this regard so long as it stays within the confines of the RMA[163].

Thus it is easy to see how the EC has stepped beyond being a mere adjudicator and into the realm of sustainable environmental management as it indirectly becomes the primary decision maker[164]. It is not however all-powerful as it should be noted that it can only affect those resource consent decisions which come before it just as it can only affect the provisions of a policy statement or plan object to and not the plan itself[165].

The EC is further empowered to make policy declarations[166]. These declarations are made as the existence of any function, power, right or duty to clarify matters. These may also be used to determine whether certain acts by government entities have violated the general duty to

[154] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[155] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 30-1.
[156] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 30.
[157] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[158] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 33.
[159] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 34.
[160] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[161] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 34.
[162] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 392.
[163] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 34.
[164] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 34-5.
[165] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 35.
[166] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/

avoid, remedy, or limit the damage to the environment. These however are made only at the EC's discretion. Though the EC has proven reluctant to do so about more abstract statements, it is willing to do so on uncontested issues when public interest warrants judicial interpretation[167]. The procedure is often used strategically by litigants, eliminating disputes early on in the process and hopefully preventing the needless cost[168].

Any person may generally apply for a declaration and also for an Enforcement Order[169]. These orders can prevent actions against RMA provisions, regulations, rules in plans and resource consents, prevent actions that are likely to have a negative impact on the environment, require a person to act to ensure compliance with RMA provisions and instruments or to avoid, remedy, or limit environmental damage caused by or on behalf of that person, and compensate other parties for costs incurred in avoiding, remedying, or limiting the effects caused by a person's failure to comply with one of a number of instruments[170]. This too is at the EC's discretion though the burden of proof lies with the applicant and the court gives the defendant the benefit of the doubt[171]. In addition the Court can determine appeals on public works or projects, and abatement notices[172].

With the majority of its functions discussed, it would be worthwhile to discuss standing in relation to the Environment Court. The RMA, as part of its mission to improve the management of the environment, aimed to strip away standing requirements, which would act as a barrier blocking access for people to the EC[173]. Section 274 of the RMA sets down the classes of people, which may come before the EC for an environmental claim[174]. Any person who has participated in a government proceeding relating to planning instruments or resource consents and has made a submission has a right of appeal to the EC as noted above, even without proof of injury[175]. Even those who have failed to make a submission may still participate in an EC action enacted by another party if they have an "an interest in the proceedings greater than the public generally"[176]. Any person can seek a Declaration or enforcement order as noted above and also any person can request the EC to initiate proceedings when an alleged criminal offence under the RMA has occurred[177]. Finally, certain government officials may bring suits to the EC as a matter of right[178].

Beyond the broad standing conferred by the RMA, the EC have also given it considerable thought as to best enable access to justice and indeed standing has not yet proven to be a significant bar to litigation[179]. In addition, the EC has repeatedly interpreted the RMA in a very flexible fashion as to favour granting standing. The EC has proven willing to evaluate the

[167] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court', 28-9.
[168] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 29-30.
[169] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 29 & 31.
[170] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 31.
[171] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 32.
[172] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[173] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court', 17-8.
[174] Angstadt, 'Securing Access to Justice Through Environmental Courts and Tribunals: A Case in Diversity' 360-1.
[175] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 18.
[176] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 18.
[177] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 18.
[178] Angstadt, 'Securing Access to Justice Through Environmental Courts and Tribunals: A Case in Diversity' 361.
[179] Angstadt, 'Securing Access to Justice Through Environmental Courts and Tribunals: A Case in Diversity' 362.

merits of a claim when a party has dubious standing and in those rare cases where a party lacks standing, the Court will seek other parties with better standing to act in their stead as to enable the litigation to continue[180].

The EC is composed of two separate classes of adjudicator, Environmental Judges and Environmental Commissioners, to ensure that the court possesses a mix of legal and environmental knowledge and experience in the matters that come before it[181]. Environmental Judges are generally former barristers or judges[182] and have joint appointments as either District or Maori Land Court judges and hold life tenure[183]. Environmental Commissioners meanwhile have expertise in areas like engineering, environmental science, and planning among others and they hold their office for a five year term[184]. The current Environmental Commissioners include engineers, ecologists, and scientists[185]. Both are appointed by New Zealand's Governor-General[186].

The EC sits in court houses across the country but there are Environmental Judges permanently located in Wellington, Auckland, and Christchurch. Judges will travel from these registries to other areas to hear matters as is needed and will generally attempt to hear them as close to site of the dispute as they can[187]. For some types of cases heard by the EC only a single judge is required, for appeals relating to plans and resource consents however, the Court is usually composed of one Environment Judge and two Environment Commissioners[188].

The EC, in addition to the services listed above provides a mediation service where appropriate to encourage parties to settle their dispute out of court and at no extra cost[189]. This service is facilitated by Commissioners who are not only experienced in mediation but also trained in Alternative Dispute Resolution (ADR). Indeed, experience in ADR is one of the factors that determines a person's eligibility as a Commissioner[190]. ADR includes mediation, conciliation, or other designed to facilitate the resolution of matters before or during the hearing[191].

The RMA's provision for ADR arose from legislators acknowledging that Common Law court's characteristic adversarial process was often unsuited to addressing environmental disputes[192]. Mediation is generally the sole method of ADR employed by the EC[193]. In

[180] Angstadt, 'Securing Access to Justice Through Environmental Courts and Tribunals: A Case in Diversity' 362.
[181] Angstadt, 'Securing Access to Justice Through Environmental Courts and Tribunals: A Case in Diversity' 357.
[182] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[183] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 32.
[184] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 33.
[185] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[186] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 32-3.
[187] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[188] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[189] Higgs, 'Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court' 63.
[190] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[191] Higgs, 'Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court' 77.
[192] Higgs, 'Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court' 77.
[193] Higgs, 'Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court' 77.

mediation, Commissioners help the parties involved reach a satisfying compromise and settle the matter themselves instead of waiting for a judge to make their decision[194].

Environmental Judges assess all appeals when lodged and save in exceptional circumstances, will refer the appeal to a Commissioner and then the EC will notify the parties involved and attempt to arrange mediation[195]. In their capacity as mediators, Commissioners operate in sort of a hybrid role between traditional mediators who promote a neutral and constructive negotiation process and judges who focus more on the actual substantive outcome of the process[196].

Mediation is conducted at no extra cost as the settlements reached through this process often end up saving the Court both time and resources that would otherwise be spent on a full hearing. Parties can avail of private mediators but rarely do so, given the inconvenience and the expertise in the RMA Commissioners are perceived to possess[197]. While awaiting mediation, parties may also place their cases on hold or continue their preparation by their choice or a judge's direction[198]. A point to note is that these mediations are conducted on a tight timetable. Commissioners aimed to include mediation in a single session and only conduct more than three in exceptional circumstances[199].

Finally, something must be said with regard to the EC and how costs are dealt with. The EC was granted broad discretion by the RMA[200] when it came to costs as it can order any party before it to pay any other party the costs and expenses, or at least a portion of them, incurred by that party[201]. These costs include attorneys' fees, expert witness fees, and travel expenses for witnesses and attorneys and can become quite substantial[202]. This is another way in which the EC differs from civil courts as costs do not follow the event by default and so successful parties are not automatically awarded costs[203]. Indeed, it has been argued that the EC with its discretion has used costs to regulate proceedings and punish unreasonable litigation behaviour[204]. Typically, the EC will reserve costs or set a timetable for applications for costs to be made and costs incurred before the local authority's whose decision which promoted the appeal or in court-facilitated mediation cannot be claimed[205].

Problems of the Environment Court of New Zealand

As one of the oldest ECT's in the world[206], there is much to be learned from not only the creation and operation of New Zealand's Environment Court but also from its problems. One

[194] Higgs, 'Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court' 63.
[195] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[196] Higgs, 'Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court' 64.
[197] Higgs, 'Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court' 78-9.
[198] Higgs, 'Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court' 79.
[199] Higgs, 'Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court' 80.
[200] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 58.
[201] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[202] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 58.
[203] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[204] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 60
[205] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/
[206] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 401.

is that critics claim that it suffers from losing the generalist perspective enjoyed by the general courts due to its specialised nature[207] though this is a common critique for specialised courts.

There have also been Criticisms of the Legal Nature of the Court. The New Zealand ECT is not a typical one. It Hears disputes which concern resource management (environmental/ town planning). It Attempts to make predictive decisions rather than go on fact finding missions 400

It adopts a Precautionary approach. Its creativity/responsiveness has caused tension 401. Critics have argued that it Should be faster and cheaper. Others have stated that it should not determine values/policy/political questions.[208]

An issue specific to the EC is that it has become a concern that the outcomes of mediation reflect not the public interest but the interest of those of the parties involved in the dispute[209]and that rather than being the neutral affair envisaged, is in fact pro-development[210] and thus in the private, rather than public, interest. The presence of Environmental Commissioners in mediation goes some way to alleviating this concern as they can be said to bring the public interest into mediation as they conduct them[211].

Other, more practical and political issues face the EC of late as well. In recent years, a chief priority of the New Zealand government's policy agenda has been to 'simplify and streamline' environmental adjudication processes to make them quicker and cheaper. To this effect, over 19 reports have been produced or commissioned on this topic in the last decade by the government on how best to do so. For example, in recent amendments to the RMA, which commenced with the Resource Management (Simplifying and Streamlining) Amendment Act. 2009[212] the statutory presumption in favour of public notification for resource-consent applications was removed, which impacts on the public's ability to make submissions and participate in New Zealand's environmental management[213].

Writers have complained that there is a perception that the developers are favoured, as they are the ones who profit from this change, receiving faster decisions and with less public oversight[214], which are consequently less likely to be challenged.

Another change inhibiting the public's access to environmental management is an increase in the NZ's Court fees, as filings fees rose from $511.11 to $600 in September 2018[215].

A final problem faced by New Zealand's Environment Court is one endemic to ECT's and thus it warrants a more thorough examination as it is tied to an ECT's greatest strength, its innovative nature. As noted above, the RMA, and consequently the court it created, were a radical departure from what came before and naturally the court is a hugely innovative body as

[207] Angstadt, 'Securing Access to Justice Through Environmental Courts and Tribunals: A Case in Diversity' 350.
[208] The criticisms are listed at Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' at pp 400-401
[209] Higgs, 'Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court' 84-5.
[210] Higgs, 'Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court' 85.
[211] Higgs, 'Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court' 103.
[212] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 409.
[213] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 409-10.
[214] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 409-10.
[215] Website for the Environment Court of New Zealand - Date Accessed: 14th August 2021. https://www.environmentcourt.govt.nz/

many ECT's are. The issue with this however is that innovative bodies, while being a welcome breath of fresh air, are hugely transgressive against the norms already in place. Indeed, New Zealand's own Law Commission has noted that such adjudicatory bodies "do not always sit well" in Common Law countries[216].

The EC is no exception as over time its creativeness and responsives, both of which are prized qualities for an ECT, have created significant tension. This tension has been such that the tone of the national discussion regarding the EC has become a harsher and more exacting debate[217]. Some have argued that as a court, the EC should not be able to determine values, policy, or possess legislative powers such as amending local authorities' resource management planning documents, or be permitted to decide upon 'political questions'[218]. Indeed, a government technical advisory group has expressed concerns regarding the court's power to both amend plans and to determine applications for resource use against the framework those plans put into place. Indeed, it said that one "constitutional grounds alone" [219]there was good reason to abolish these powers and the enthusiasm of even its earliest champions has waned in the face of questions as to its constitutional place in New Zealand[220]. These concerns as to the body' powers are only exacerbated by its influence as the court's substantive merits decisions can seriously affect New Zealand's economic and environmental well-being.

The Court's authority however is widely accepted and the fact that it is a statutory body whose powers were deliberately envisaged and granted by parliament lends it greater democratic legitimacy[221]. As mentioned above, ECT's are by their very nature bodies born of the law and of politics. Indeed, the EC can, as Warnock notes, be seen as bridging the arbitrary divide between politics and the law to operate as a part of environmental governance in a positive and meaningful sense, facilitating and enforcing social policy[222].

This discomfort with the extent of the EC's powers and their intrusion into the spheres of legislation and politics is due in no small part to the Theory of the Separation of Powers, whose purpose is the avoidance of tyranny. As the name suggests, it achieves this by separating the great powers of government, the legislative, the executive, and the judiciary so that no one department is too powerful[223]. ECT's however only become problematic under this theory when it is strictly applied. Furthermore, the theory is often contested and dismissed as a relic. Even if this were not the case, the fact remains that it is ill suited to environmental adjudication due to the inherent nature of environmental disputes[224]. As Fisher has noted:

> "*Environmental problems are inherently messy and thus not easily managed by engineered solutions. The non-linear processes of ecosystems, the unpredictability of human behaviour and the problems of scientific uncertainty all make the process of assessing environmental harm an intricate and often intractable business*"[225].

[216] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 399.
[217] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals', 401.
[218] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 401.
[219] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 401.
[220] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 408.
[221] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 401-2.
[222] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 408.
[223] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 411.
[224] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 412.
[225] E Fisher 'Unpacking the Toolbox: Or Why the Public/Private Divide is Important in EC Environmental Law' in J B Auby and M Freedland (eds) *The Public Law/Private Law Divide: Une Entente Assez Cordiale* (Paris:

This complexity is only exacerbated by the prospective perspective taken by the EC in its review of planning or permitting decisions as there may be scientific uncertainty and the Court may have to evaluate risks involved[226]. Given the nature of the disputes that come before the EC and the decisions it makes like restricting access to public resources or preventing individuals from using their own property as they wish[227], it is little wonder then that a New Zealand's Chief Justice observed that environmental law is "always a flash point. It is always politically contentious[228]". Both policy and planning instruments however are living documents that must be tested in real life and adjusted accordingly. Thus there must be a mechanism in place that can make these adjustments[229].

ECT's play a deliberate, and indeed valuable, role in environmental governance[230]. It is disheartening then that despite the importance of this role and the fact that it was intentionally conferred upon the EC by New Zealand's parliament, there existed and may yet exist a marked reluctance on the part of the judiciary to take on and utilise these powers of environmental governance[231]. Indeed, it may be said that the Separation of Powers, ingrained as it is in the minds of the judiciary, has become a straitjacket, undermining the Court's ability to effectively discharge its mission of ensuring sustainable management of the environment[232].

5. Vermont, USA

Uniform Environmental Law Enforcement Act 1989:

Legislative Issue:

The Uniform Environmental Law Enforcement Act 1989 ("Act 98") was established to improve the enforcement of environmental law in Vermont.[233] The Act has four main objectives:

1) To enhance the administrative enforcement by the Secretary and the Natural Resources Board (NRB);
2) To enhance civil enforcement in Superior Court;
3) the creation of a dedicated Environmental Division within the judiciary; and
4) The standardization of the environmental enforcement process to help assure fair and consistent enforcement of Vermont's environmental laws and rules.[234]

Legal Authority:

LGDJ Diffuseur 2004), 240 as found in Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 412.
[226] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 412.
[227] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 413.
[228] S Elias, 'Righting environmental justice' (The Salmon Lecture, Auckland, 25 July 2013) as found in Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 413.
[229] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 414.
[230] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 414.
[231] Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' 6.
[232] Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' 416.
[233] US Department of Environmental Conservation, Environmental Compliance Division, '2015 Report to the Legislature Regarding Act 98 (1989) Uniform Environmental Enforcement Act' (16 February 2016), 1.
[234] ibid, 1.

The Environmental Division of the Vermont Superior Court is the main authority concerning environmental issues in Vermont.

Laws that govern the running of the Environmental Division:

- V.S.A. Title 4, Chapter 27;
- V.S.A. Title 10, Chapter 201.

A Note on Costs:

In terms of costs, The environmental division offers a free legal clinic in collaboration with the Vermont Bar Association Pro Bono/Low Bono Program. The lawyers who staff the clinic have knowledge and experience in environmental law and land use issues.[235]

V.S.A. Title 4, Chapter 27:

This piece of legislation sets out how Vermont's Environmental Division of the Superior Court functions. Section 1001(a) states that two judges will sit alone on the Environmental Division. These judges will be authorised to hear cases concerning environmental law, along with other matters that come before Vermont's Superior Court.[236] The law stipulates that a judge of the Environmental Division must be an attorney admitted to practice before the Vermont Supreme Court.[237] An Environmental Judge shall be nominated, appointed, confirmed, paid, and retained, and shall receive all benefits in the manner of a Superior Judge.[238] An Environmental Judge can be appointed to this position for a term of 6 years.[239]

Evidentiary proceedings in the Environmental Division are to be held in the county where all or a portion of the land subject to the appeal is located, or where the violation is alleged to have occurred.[240] Hearings may be held in another county where the parties agree to another location; so long as the Environmental Judge offers expeditious evidentiary hearings so that no such proceedings are moved to another county to obtain an earlier hearing.[241] Unless otherwise ordered by the court, all non-evidentiary hearings may be conducted by telephone or video conferencing using an audio or video record.[242] If a party objects to a telephone hearing, the court may require a personal appearance for good cause.[243]

The Vermont Supreme Court has the power to create rules and develop procedures consistent with this legislation to govern the operation of the Environmental Division and proceedings in it.[244] However, the Vermont Supreme Court must ensure that any new rules provide for:

1) Expeditious proceedings that give due consideration to the needs of pro se litigants;
2) The ability of the judge to hold pretrial conferences by telephone;

[235] Vermont Judiciary, Environmental Division <https://www.vermontjudiciary.org/environmental> Accessed 19th July 2021.
[236] 4 V.S.A., Ch. 27, s 1001(b).
[237] 4 V.S.A., Ch. 27, s 1001(c).
[238] 4 V.S.A., Ch. 27, s 1001(c).
[239] 4 V.S.A., Ch. 27, s 1001(d).
[240] 4 V.S.A., Ch. 27, s 1001(e).
[241] 4 V.S.A., Ch. 27, s 1001(e).
[242] 4 V.S.A., Ch. 27, s 1001(e).
[243] 4 V.S.A., Ch. 27, s 1001(e).
[244] 4 V.S.A., Ch. 27, s 1001(g).

3) The use of scheduling orders under the Vermont Rules of Civil Procedure in order to limit discovery to that which is necessary for a full and fair determination of the proceeding; and
4) The appropriate use of site visits by the presiding judge to assist the court in rendering a decision.[245]

Conduct of Hearings:

Section 1002 of this Act expressly requires that hearings before the Environmental Division shall be conducted in an impartial manner subject to rules of the Supreme Court providing for a summary, expedited proceeding.

Evidence:

Section 1003(a) states that irrelevant, immaterial, or unduly repetitious evidence shall be excluded. However, evidence not admissible under the Rules of Evidence may be admitted if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.[246] Section 1003(b) authorises Environmental Judges to take judicial notice of cognizable facts, and of generally recognized technical or scientific facts within the agency's specialized knowledge.

Access to Information:

Section 1004(a) states that each party shall provide all other parties with all written statements and information in the possession, custody, or control of the party relative to the violation, including any technical studies, tests and reports, maps, architectural and engineering plans and specifications, drawings, graphs, charts, photographs, and other data compilations from which information can be obtained, the names and addresses of the party's witnesses, and any other information which the Environmental Division deems necessary, in its sole discretion, to a fair and full determination of the proceeding. Section 1004(b) asserts that no other discovery or depositions, written interrogatories or requests to admit shall be permitted except that which is necessary for a full and fair determination of the proceeding.

V.S.A. Title 10, Chapter 201:

This piece of legislation concerns administrative environmental law enforcement. Section 8001 of the legislation states that Vermont's Secretary of Natural Resources and the Natural Resources Board will be empowered to:

1) Enhance the protection of environmental and human health afforded by existing laws;

2) Prevent the unfair economic advantage obtained by persons who operate in violation of environmental laws;

3) Provide for more even-handed enforcement of environmental laws;

[245] 4 V.S.A., Ch. 27, s 1001(g).
[246] 4 V.S.A., Ch. 27, s 1003(a).

4) Foster greater compliance with environmental laws;

5) Deter repeated violation of environmental laws; and

6) Establish a fair and consistent system for assessing administrative penalties.

Enforcement Authority Of The Secretary And The Board:

Section 8003(a) stipulates that the Secretary may take action under this chapter to enforce the listed statutes and rules, permits, assurances, or orders implementing the listed statutes. The statutes cover almost all environmental matters from air and water quality, biodiversity protection to reduction of greenhouse gases and collection and disposal of heavy metals.[247] Section 8003(b) authorises the Secretary of Natural Resources and the Natural Resources Board to initiate criminal or civil proceedings where an offence has been committed under this Act. Section 8003(d) states that the Secretary of Agriculture, Food and Markets may take action under this chapter to enforce the agricultural water quality requirements of rules adopted under, and permits and certifications issued under 6 V.S.A. chapter 215.

Enforcement:

Section 8004 of this legislation states that the Secretary of Natural Resources shall bring enforcement proceedings where the Board of Natural Resources requests that they do so. Both the Secretary and the Board must develop procedures for the cooperative enforcement of this Act.

Investigations; Inspections; Affidavit of Compliance:

Section 8005(a) states that an investigator may perform routine inspections to determine if this environmental legislation is being complied with.[248] Investigators may initiate an investigation where they discover that an activity is being conducted that could amount to a violation.[249] A District or Superior Court can issue an access order where permission to investigate or inspect is refused.[250]

A Superior Court Judge shall issue an access order when access has been refused and the investigator, by affidavit, describes the property to be examined and identifies:

a) A provision of a permit that authorizes the inspection; or

b) The property as being scheduled for inspection in accordance with a neutral inspection program adopted by the Secretary or the Natural Resources Board; or

c) Facts providing reasonable grounds to believe that a violation exists and that an examination of the specifically described property will be of material aid in determining the existence of the violation.[251]

[247] 10 V.S.A., Ch. 201, s 8003(a)(1)-(31).
[248] 10 V.S.A., Ch. 201, s 8005(a)(1).
[249] 10 V.S.A., Ch. 201, s 8005(a)(2).
[250] 10 V.S.A., Ch. 201, s 8005(a)(4).
[251] 10 V.S.A., Ch. 201, s 8005(b)(1).

A Superior Court shall issue an order requiring compliance with an information request submitted pursuant to section 6615c of this title when:

a) The person served with the request fails to respond to the request in the time frame identified by the Secretary;

b) The Secretary submits, by affidavit, facts providing reasonable grounds that a release or threatened release has taken place; and

c) The information will be of material aid in responding to the release or threatened release.[252]

At any time, the Secretary, the Natural Resources Board, or a District Commission[253] may require a permittee to file an affidavit under oath or affirmation that a development or activity of the permittee is in compliance with an assurance of discontinuance or order issued under this chapter, or a permit issued under a statute identified under subsection 8003(a) of this title, or under a rule enforceable under authority set forth under a statute identified under subsection 8003(a) of this title.[254] Failure to file an affidavit within the period prescribed by the Secretary, Natural Resources Board, or District Commission or the material misrepresentation of fact in the affidavit shall be a violation and shall also constitute grounds for revocation of the permit to which the affidavit requirement, assurance of discontinuance, or order under this chapter applies.[255]

Warning- Notice of Alleged Violation:

Section 8006(a) stipulates that the Secretary of Natural Resources may issue a written warning where a violation of this act is likely to occur. Where the Secretary determines that a violation exists, they can create a written notice of the alleged violation.[256]

Assurances of Discontinuance- Alternative to Judicial/Administrative Proceedings:

The Secretary or the Natural Resources Board may accept an assurance of discontinuance of a violation as an alternative to administrative or judicial proceedings.[257] An assurance of discontinuance must include the following to be valid:

1) A statement of the facts that provide the basis for claiming the violation exists and a description of the alleged violation determined by the Secretary or the Natural Resources Board; and

2) An agreement by the respondent to perform specific actions to prevent, abate, or alleviate environmental problems caused by the violation, or to restore the environment to its condition before the violation, including financial responsibility for such actions.[258]

[252] 10 V.S.A., Ch. 201, s 8005(b)(2).
[253] For more on District Commissions, see 10 V.S.A. Ch. 151.
[254] 10 V.S.A., Ch. 201, s 8005(c).
[255] 10 V.S.A., Ch. 201, s 8005(c).
[256] 10 V.S.A., Ch. 201, s 8006(b).
[257] 10 V.S.A., Ch. 201, s 8007(a).
[258] ibid.

Assurances of discontinuance can also include prevention, abatement, alleviation, or restoration schedules, and a contribution towards other projects related to the violation, that will enhance the natural resources of the affected area, or to their use and enjoyment.[259] Contributions are not permissible where the project primarily benefits the respondent, such as:

(i) Contributions required by law that are reasonably associated with the respondent's usual course of business; or

(ii) Where the respondent has planned, budgeted for, initiated, or completed prior to or during the current enforcement action.[260]

(iii) For a violation that does not affect the natural environment or cause any environmental harm, contribution toward public educational projects, to improve public awareness and compliance with statutes specified in this Act.[261]

When an assurance of discontinuance is signed by the Environmental Division, the assurance shall become a judicial order.[262] Upon motion by the Attorney General made within 14 days after the date the assurance is signed by the Division and upon a finding that the order is insufficient to carry out the purposes of this chapter, the Division shall vacate the order.[263] If the respondent complies with an assurance of discontinuance signed by the Division, the respondent shall not be liable for additional civil or criminal penalties with respect to the facts set forth in the assurance of discontinuance.[264]

Administrative Orders:

Section 8008(a) states that the Secretary may issue an administrative order when the Secretary determines that a violation exists. When the Board determines that a violation of chapter 151 of this title exists, the Board may issue an administrative order with respect to the violation.[265]

An administrative order to discontinue a violation under this Act must contain:

1) A statement of the facts that provide the basis for claiming the violation exists;

2) Identification of the applicable statute, rule, permit, assurance, or order;

3) A statement that the respondent has a right to a hearing under section 8012 of this title, and a description of the procedures for requesting a hearing;

4) A statement that the order is effective on receipt unless stayed on request for a hearing filed within 15 days;

5) If applicable, a directive that the respondent take actions necessary to achieve compliance, to abate potential or existing environmental or health hazards, and to restore the environment to the condition existing before the violation; and

[259] 10 V.S.A., Ch. 201, s 8007(b).
[260] 10 V.S.A., Ch. 201, s 8007(b)(2)(C).
[261] 10 V.S.A., Ch. 201, s 8007(b)(3).
[262] 10 V.S.A., Ch. 201, s 8007(c).
[263] ibid.
[264] 10 V.S.A., Ch. 201, s 8007(d).
[265] 10 V.S.A., Ch. 201, s 8008(a).

6) A statement that unless the respondent requests a hearing under this section, the order becomes a judicial order when filed with and signed by the Environmental Division.

Additionally, an administrative order may contain a 'stop work' order, a stay of the effective date or processing of a permit, and a proposed penalty or penalty structure.

The Environmental Division of the Superior Court must sign the administrative order in the event that the order is properly served on the respondent, the respondent does not request an oral hearing, or otherwise meets the requirements of this Chapter.[266] When an administrative order is signed by an Environmental Judge, it becomes a judicial order.[267]

Emergency Administrative Orders:

Section 8009(a) states that the Secretary of Natural Resources, or the Board of Natural Resources may issue an emergency administrative order where:

a) A violation presents an immediate threat of substantial harm to the environment or an immediate threat to the public health; or

b) An activity will or is likely to result in a violation that presents an immediate threat of substantial harm to the environment or an immediate threat to the public health; or

c) An activity requiring a permit has been commenced and is continuing without a permit.

Section 8009(b) stipulates that emergency administrative orders may be issued only where:

1) The order has been presented to the Environmental Division;

2) All reasonable efforts have been made to notify the respondent of the presentation of the order to the Environmental Division; and

3) The Environmental Division has found that the agency issuing the order has made a sufficient showing that grounds for issuance of the order exist.

The emergency administrative notice will become effective upon the actual notice of the respondent.[268] The respondent can request a hearing before the Environmental Division of the Superior Court where an emergency order is issued.[269] The emergency administrative notice will be dissolved where it has been established on insufficient grounds.[270] An appeal to the Supreme Court by the Secretary or the Board shall stay the dissolution of an emergency order; an appeal to the Supreme Court by the respondent shall not stay operation of an emergency order.[271]

Administrative Penalties:

[266] 10 V.S.A., Ch. 201, s 8008(d)(1).
[267] 10 V.S.A., Ch. 201, s 8008(d)(2).
[268] 10 V.S.A., Ch. 201, s 8009(c).
[269] 10 V.S.A., Ch. 201, s 8009(d).
[270] 10 V.S.A. Ch. 201, s. 8009(e).
[271] 10 V.S.A. Ch. 201, s. 8009(f).

Section 8010(a) of the Act states that administrative penalties may be included with an administrative order. Section 8010(b) stipulates that the Secretary must consider the following in charging a penalty:

1) The degree of actual or potential impact on public health, safety, welfare, and the environment resulting from the violation;

2) The presence of mitigating circumstances, including unreasonable delay by the Secretary in seeking enforcement;

3) Whether the respondent knew or had reason to know the violation existed;

4) The respondent's record of compliance;

5) The deterrent effect of the penalty;

6) The State's actual costs of enforcement; and

7) The length of time the violation has existed.[272]

The cost of the penalty cannot exceed $42,500.00 for each violation.[273] Additionally, the Secretary may assess a penalty of not more than $17,000.00 for each day the violation continues.[274] The maximum amount of penalty charged to a respondent shall not exceed $170,000.00.[275] The Secretary may also recapture economic benefit resulting from a violation up to the $170,000.00 maximum allowed.[276] The application of a penalty prevents a respondent from being liable for any other administrative or civil penalty for the same violation.[277]

Requests for Hearings:

Section 8012 sets out the process by which requests for hearings are handled. A respondent or the Attorney General may request a hearing on an order issued by the Secretary. Notice of a request for hearing shall be filed with the Environmental Division and the Secretary.[278] Upon receipt of the notice, the Secretary shall forward a copy of the order to the Environmental Division.[279]

Requests for Hearings- Power of the Environmental Division:

Section 8012(b) asserts that the Environmental Division of the Superior Courts has the jurisdiction to:

1) Determine whether a violation has occurred. An order shall be reversed when it is determined that a violation has not occurred.

[272] 10 V.S.A. Ch. 201, s. 8010(b)(1)-(8).
[273] 10 V.S.A. Ch. 201, s. 8010(c)(1).
[274] ibid.
[275] ibid.
[276] 10 V.S.A. Ch. 201, s. 8010(c)(2).
[277] 10 V.S.A. Ch. 201, s. 8010(d).
[278] 10 V.S.A. Ch. 201, s. 8012(a).
[279] 10 V.S.A. Ch. 201, s. 8012(a).

2) Affirm or vacate and remand to the Secretary an order issued under subdivision 8008(b)(5) of this title. The Environmental Division shall vacate and remand an order under this subdivision when a violation is found to exist but the procedure contained in the order is insufficient to carry out the purposes of this chapter.

3) Affirm, modify, or reverse any provision of any order issued by the Secretary except those identified by subdivision (2) of this subsection. In deciding whether to affirm or reverse a stop work order under this subdivision, the Environmental Division shall consider the economic effect of the order on individuals other than the respondent.

4) Review and determine anew the amount of a penalty by applying the criteria set forth in subsections 8010(b) and (c) of this title.

5) Affirm, modify, or dissolve an emergency order.[280]

The hearing shall be held before the Environmental Division within 30 days of receipt by the Division of the notice, unless continued for good cause. The Environmental Division shall issue a written decision within 20 days of the conclusion of the hearing, and no later than 60 days from the request for hearing, unless the hearing process is extended for good cause.[281]

The Environmental Division's judgement will be sent to the parties by certified post, and must contain the following information:

1) A statement of conclusion as to whether a violation exists and findings of facts in support of the conclusion;

2) Identification of the applicable statute, rule, permit, assurance, or order;

3) The order to be imposed or penalty to be assessed, or both, if a violation is determined to exist;

4) A statement that the respondent, the Secretary, and the Attorney General have a right to appeal the decision, and a description of the procedures for requesting an appeal; and

5) A warning that the decision will become final if no appeal is requested within 10 days of the date the decision is received.

Conduct of Hearings/Appeals:

Section 8013(a) states that the agency issuing the order shall have the burden of proof. Parties may be represented by counsel in hearings before the Environmental Division. The Agency of Natural Resources or the Board each may represent itself. A party may conduct cross-examination required for a full and true disclosure of the facts.[282] Section 8013(c) states that an appeal from a decision of the Environmental Division may be taken by the Secretary, the Board, or the respondent to the Supreme Court. The Attorney General also may appeal if the Attorney General has appeared as a party. An appeal by a respondent or the Attorney General

[280] 10 V.S.A. Ch. 201, s. 8012(b).
[281] 10 V.S.A. Ch. 201, s. 8012(c).
[282] 10 V.S.A. Ch. 201, s. 8013(b).

to the Supreme Court shall not stay an order, but shall stay payment of a penalty. A respondent may petition the Supreme Court for a stay of an order.[283]

Enforcement of final orders; Collection actions:

Section 8014(a) states that the Secretary may seek enforcement of a final administrative order, final orders pursuant to an assurance of discontinuance, or civil citations pursuant to section 8019 of this title, or a landfill extension order in the Civil, Criminal, or Environmental Division of the Superior Court. Where a penalty is not paid by a respondent, the Secretary can bring a collection action in any Civil or Criminal Division of the Superior Court.[284] Additionally, where a respondent fails to pay an assessed penalty or fails to pay a contribution as part of an Assurance of Discontinuance within the prescribed time period, the Secretary or the Natural Resources Board shall stay the effective date or the processing of any pending permit application or renewal application in which the respondent is involved until payment in full of all outstanding penalties has been received.[285] When a municipality fails to pay an assessed penalty or fails to pay a contribution as part of an Assurance of Discontinuance[286] [OBJ][287][288]

Statute of Limitations:

Notwithstanding any other provision of law, actions brought under this chapter or chapter 211 of this title shall be commenced within the later of:

1) Six years from the date the violation is or reasonably should have been discovered; or
2) Six years from the date a continuing violation ceases.

Rulemaking:

Section 8016 states that the Secretary, in consultation with the Natural Resources Board, shall adopt rules defining classes of violations and an appropriate range of administrative penalties to be assessed for each class of violation. The classes of violation and range of penalties shall take into account the degree of potential impact on public health, safety, and welfare and the environment resulting from the violation. No administrative penalty may be assessed as part of an administrative order pursuant to this chapter until applicable rules and procedures have been adopted.

Requests for hearings on landfill closure extension orders:

Section 8018(b) states that the Environmental Division has the power to determine whether the Secretary's decision concerning landfill closure extension orders is in conformance with the provisions of sections 8008a and 6605e of this title. The Environmental judge may affirm, modify, or reverse the Secretary's decision and any provision of any order issued by the Secretary under sections 8008a and 6605e of this title. A hearing about landfill closure extension orders shall be held before the Environmental Division within 30 days of receipt by

[283] 10 V.S.A. Ch. 201, s. 8013(d).
[284] 10 V.S.A. Ch. 201, s. 8014(b).
[285] 10 V.S.A. Ch. 201, s. 8014(b).
[286] Ibid.
[288] Ibid.

the Division of the notice, unless continued for good cause. The Environmental Division shall issue a written decision within 20 days of the conclusion of the hearing, and no later than 60 days from the request for hearing, unless the hearing process is extended for good cause.[289] Section 8018(e) stipulates that the Environmental Division may grant party status to an interested person in a hearing under this section.

As used in this section, "interested person" means a person who demonstrates that the interest of the person is not adequately represented by any other party and who has:

1) An ownership, leasehold, or contractual interest in real property affected by the order; or

2) An interest in the outcome of the proceeding that is distinct from the interest of the public-at-large because of the person's place of residence, place of employment, or place of business.[290]

Section 8019- *Civil Citations*.

§ 8020. *Public participation in enforcement:*

Section 80209(a) states that an "aggrieved person" means a person who alleges an injury to a particularized interest protected by a statute listed under subsection 8003(a) of this section, and the alleged injury is attributable to a violation addressed by an assurance of discontinuance, administrative order, emergency order, or civil citation issued under this chapter. An organization or association is an aggrieved person under this section when one or more of its members would be an aggrieved person in his or her own right, the interests at stake are germane to the purposes of the organization or association, and neither the claim asserted nor the relief requested by the organization or association requires participation of the individual member.

Section 8020(b) stipulates that prior to issuing an administrative order, assurance of discontinuance, or civil citation under this chapter and sending it to the Environmental Division, the Secretary or the Board shall post a draft copy of the administrative order, assurance of discontinuance, or civil citation for public notice and written comment for 30 days. At the conclusion of the 30-day notice and written comment period, the Secretary or the Board shall evaluate the proposed action pursuant to the written comments received. After the evaluation of the written comments, the Secretary or the Board may withdraw an administrative order, assurance of discontinuance, or civil citation. At the conclusion of the 30-day notice period, if no comments have been received, the Secretary or the Board shall file the draft as a final administrative order, assurance of discontinuance, or civil citation with the Environmental Division, and the Environmental Division may review and approve as an order of the court the administrative order, assurance of discontinuance, or civil citation as set out elsewhere in this chapter. When the Secretary or Board issues a final administrative order, assurance of discontinuance, or civil citation, it shall be sent to the Environmental Division along with any written comments received during the 30-day comment period. Concurrent with filing with the Environmental Division, the Secretary or Board shall post the final proposed action for public notice for 14 days.

[289] 10 V.S.A. Ch. 201, s. 8018(c).
[290] 10 V.S.A. Ch. 201, s. 8018(f).

Section 8020(c) states that if a comment was received on the draft document, the Environmental Division shall hold the administrative order, assurance of discontinuance, or civil citation for 14 days from the date of filing to allow any person who has filed written comments under subsection (b), who is not satisfied with the final action of the Agency or the Board, and who meets the definition of "aggrieved person" under subsection (a) of this section to file a motion for permissive intervention pursuant to the procedure in Rule 24(c) of the Vermont Rules of Civil Procedure.[291]

Section 8020(d) asserts that if no comment was filed on the draft document or if, at the conclusion of the 14-day period, no motion to intervene has been filed, the Environmental Division in its discretion, with or without a hearing, shall issue an order to affirm, vacate, or remand the administrative order, assurance of discontinuance, or civil citation.

Section 8020(e) states that in order for a person to intervene permissively in an administrative order, assurance of discontinuance, or civil citation, the person shall have filed written comments with the Agency or Board setting out the specific objection to the proposed action during the 30-day comment period required under subsection (b) of this section.

Section 8030(f) states that a motion for permissive intervention shall clearly state the basis for the claim that the administrative order, assurance of discontinuance, or civil citation is insufficient to carry out the purposes of this chapter. A hearing may be held on the motion for permissive intervention in the discretion of the Environmental Division. When the Environmental Division determines that a motion to intervene fails to meet the requirements for permissive intervention, the court shall deny the motion.

Section 8020(g)- Emergency administrative order:

When the Secretary issues an emergency administrative order, the prefiling public notice and comment provisions contained in this section shall not apply. The Environmental Division, without comment or hearing, shall act on the emergency administrative order as required by section 8009 of this title and may issue its own order. The Secretary shall publish the emergency administrative order concurrent with filing it with the Environmental Division. A person shall have 14 days from the date the emergency administrative order is filed to file a motion for permissive intervention. A motion to intervene shall not stay an emergency administrative order.

Section 8020(h)- Standard of review on motion to intervene:

The Environmental Division shall evaluate a motion from an aggrieved person for permissive intervention in light of Rule 24(b)(1) of the Vermont Rules of Civil Procedure. When the Environmental Division permits an aggrieved person to intervene, it shall be for the sole purpose of establishing that the terms of an administrative order, emergency administrative order, assurance of discontinuance, or civil citation are insufficient to carry out the purposes of this chapter. The intervenor shall have the burden of proof by a preponderance of the evidence that the administrative order, emergency administrative order, assurance of discontinuance, or civil citation is insufficient to carry out the purposes of this chapter. A hearing may be held on the claim that the administrative order, emergency administrative order, assurance of discontinuance, or civil citation is insufficient to carry out the purposes of this chapter at the

[291] Subsection (c) is similar to Planning and Development Act 2000 a person has to have been involved with the issue at first instance to have standing, and to fit definition of “aggrieved person”

discretion of the Environmental Division. The Environmental Division, upon finding that the proposed action is insufficient to carry out the purposes of this chapter, shall inform the parties in writing and shall include the basis of its decision and shall vacate the proposed action.

Section 8020(i)- Authority of Secretary or Board to object:

The Secretary or Board shall not oppose any motion filed for permissive intervention. When the Environmental Division permits a person to intervene, the Secretary, the Board, or the respondent may oppose the intervenor's claim that the proposed action is insufficient to carry out the purposes of this chapter.

Section 8020(j)- Response to citizen citations:

The Secretary shall investigate all citizen complaints of a violation of a federally authorized or delegated program and shall respond to known complainants in writing.

§ 8021- Cost recovery:

(a) In addition to any existing authority, the Secretary, in issuing an administrative order, emergency order, or assurance of discontinuance under this chapter, may recover monies expended from a special fund for a clean-up related to an environmental violation, provided that such recovered monies not exceed $20,000.00.

(b) When monies are recovered under this section, they shall be deposited into the special fund from which they were expended.

Washington (State):

Environmental Land Use and Hearings Office (ELUHO):[292]

This office was established in 2010 by the Washington State Legislature by means of Section 43.21B.005 of Chapter 43.21B of Title 43 of the Revised Code of Washington (RCW). The Purpose of ELUHO is to house and provide support to three independent quasi-judicial Boards:

1) Pollution Control Hearings Board (PCHB);
2) Shorelines Hearings Board (SHB);
3) Growth Management Hearings Board (GMHB).

Each Board, while funded and managed within ELUHO's administrative umbrella, operates in line with separate statutory authorities and hears appeals and decides cases within its separate areas of expertise and jurisdiction. The Boards are not affiliated with any other state government, regulatory agency, or local unit of government. All Board members are salaried employees of the state.

Pollution Control Hearings Board (PCHB):

Created in 1970, the PCHB hears and decides appeals from state and local governmental agencies on a wide variety of environmental permits or penalty orders. (RCW 43.21B.110).

[292] https://www.eluho.wa.gov/content/23.

The PCHB has three members, appointed by the governor, and confirmed by the State Senate for staggered six-year terms. One of the three must be an attorney.[293]

Shorelines Hearings Board (SHB):

Established in 1971 the SHB hears and decides appeals of shoreline building and construction permits, or penalty orders issued by local or state governmental agencies. (RCW 90.58.170). The SHB consists of the three PCHB members, plus one representative each from the Department of Natural Resources, Counties and Cities.[294]

Growth Management Hearings Board (GMHB):

Created in 1990, the GMHB hears and decides appeals of city or county decisions on comprehensive land use plans and development regulations or shoreline management plans. (RCW 36.70A.250) The GMHB has five members appointed by the governor for staggered six-year terms. The Board is comprised of a mix of attorneys and former county or city elected officials and represent three regions of the state; the Eastern Washington Region, the Central Puget Sound Region, and the Western Washington Region.[295] The Growth Management Hearings Board assists local governments and the State of Washington in managing growth by providing a pathway for appeals arising from the Growth Management Act (Chapter 36.70A RCW).[296]

[293] https://www.eluho.wa.gov/content/23.
[294] https://www.eluho.wa.gov/content/23.
[295] https://www.eluho.wa.gov/content/23.
[296] https://www.eluho.wa.gov/content/10.

Regional Court/Administrative Bodies	Vermont Environmental Division of the Superior Courts	Washington Environmental Land Use and Hearings Office (ELUHO)
Jurisdiction	This ECT was established under the Uniform Environmental Law Enforcement Act 1989. It is the main authority concerning environmental issues in Vermont. Its purpose is to enhance administrative decisions made by the Secretary and the Natural Resources Board (NRB), and to enhance civil enforcement in the Superior Courts. V.S.A. Title 4, Chapter 27 and V.S.A. Title 10, Chapter 201 are the two pieces of legislation that set out the regulations for the ECT.	An administrative body that houses and provides support for three independent Quasi-Judicial Bodies: 1) Pollution Control Hearings Board (PCHB); 2) Shorelines Hearings Board (SHB); 3) Growth Management Hearings Board (GMHB). The PCHB hears and decides appeals from state and local governmental agencies on a wide variety of environmental permits or penalty orders. The SHB hears and decides appeals of shoreline building and construction permits, or penalty orders issued by local or state governmental agencies. The GMHB hears and decides appeals of city or county decisions on comprehensive land use plans and development regulations or shoreline management plans.

Type of Body (Administrative/Judicial)	Judicial	Administrative
Use of Experts	Two judges will sit alone on the Environmental Division for a term of 6 years. These judges will be authorised to hear cases concerning environmental law, along with other matters that come before Vermont's Superior Court. The law stipulates that a judge of the Environmental Division must be an attorney admitted to practice before the Vermont Supreme Court. In regards to expert knowledge as evidence in proceedings, Environmental Judges are authorised to take judicial notice of cognizable facts, and of generally recognized technical or scientific facts within the agency's specialized knowledge.	The PCHB has three members, appointed by the governor, and confirmed by the State Senate for staggered six-year terms. One of the three must be an attorney. The SHB consists of the three PCHB members, plus one representative each from the Department of Natural Resources, Counties and Cities The GMHB has five members appointed by the governor for staggered six-year terms. The Board is comprised of a mix of attorneys and former county or city elected officials and represent three regions of the state; the Eastern Washington Region, the Central Puget Sound Region, and the Western Washington Region.
Stage (First/Appellate)	This ECT can hear first instance judicial challenges by means of Judicial Review, or can hear appellate challenges concerning civil matters from the lower courts in Vermont.	The PCHB, The SHB, and the GMHB all hear appellate challenges of administrative decisions made concerning each of their jurisdictions.

Appeal	Parties may appeal decisions made by this ECT to the Supreme Court of Vermont, by filing a notice of appeal within 30 days of the ECT's decision.	A party to a PCHB or SHB decision may file a petition for reconsideration within 10 calendar days after the "date of mailing" of the final decision to the parties. Appeals will be heard in the Superior Courts. A GMHB decision may be appealed to the Superior Courts on Judicial Review. The aggrieved party must appeal the decision within 30 days of the issuance of the final Board order being appealed.
Federal/Regional	Vermont	Washington State
Use of Alternative Dispute Resolution (ADR) (Any/Preferred/Mandatory)	The Secretary or the Natural Resources Board may accept an assurance of discontinuance of a violation as an alternative to administrative or judicial proceedings. An assurance of discontinuance must include the following to be valid: 1) A statement of the facts that provide the basis for claiming the violation exists and a description of the alleged violation determined by the Secretary or the Natural Resources Board; and 2) An agreement by the respondent to perform specific actions to prevent, abate, or alleviate environmental	Both parties can agree to avail of the ECT's mediation program instead of pursuing litigation through the ECT's quasi-judicial system.

	problems caused by the violation, or to restore the environment to its condition before the violation, including financial responsibility for such actions. When an assurance of discontinuance is signed by the Environmental Division, the assurance shall become a judicial order. Monies are paid alongside assurances of discontinuance to help mitigate the damage caused, or as donations to charities to raise awareness against environmental damage.	
Relief	To grant or deny an appeal of civil or administrative decisions.	The PCHB, the SHB, and the GMHB may all either grant or deny appeals of administrative decisions that concern their jurisdictions.
Urgent Relief (Preventative Orders/Injunctions)	The ECT can authorise the issuance of an emergency administrative order made by the Secretary of Natural Resources, or the Board of Natural Resources. These orders can be made where: a) A violation presents an immediate threat of	A person appealing a Department of Natural Resources approval, or any operator, timber owner, or forest landowner appealing a stop work order, may request a temporary suspension or discontinuance of the department's decision. The Appellant must file a motion, supported by affidavit, setting out specific facts supporting a temporary suspension or

	substantial harm to the environment or an immediate threat to the public health; or b) An activity will or is likely to result in a violation that presents an immediate threat of substantial harm to the environment or an immediate threat to the public health; or c) An activity requiring a permit has been commenced and is continuing without a permit.	discontinuance. Upon receipt of the motion, the presiding officer will schedule a hearing and serve notice of the hearing on all parties. In emergency situations, a temporary suspension or discontinuance may be granted by the presiding ELUHO officer without a hearing, only if it clearly appears from specific facts shown by affidavit that immediate and irreparable injury, loss, or damage will result to the moving party before any adverse party can be heard in opposition.
Sanctions	This ECT is authorised to review and redetermine the amount of a penalty by applying the criteria set out in subsections 8010(b) and (c) of V.S.A. Title 10, Chapter 201. A penalty seems to be either punitive and/or compensatory pending on the factors in each case. The factors to be determined are: 1) The degree of actual or potential impact on public health, safety, welfare, and the environment resulting from the violation; 2) The presence of mitigating circumstances,	N/A.

	including unreasonable delay by the Secretary in seeking enforcement; 3) Whether the respondent knew or had reason to know that the violation existed; 4) The respondent's record of compliance; 5) [Repealed]; 6) The deterrent effect of the penalty; 7) The State's actual costs of enforcement; 8) The length of time that the violation existed. The maximum penalty that can be charged per violation is $42,500.00. If the violation is ongoing, the Secretary may charge up to $17,000 per day that the violation continues. The maximum penalty cannot exceed $170,000.	
Costs- Filing Fees	Filing in the Environmental Division costs $295.00 (32 V.S.A. § 1431(b)(1) (2015)).[297]	There is no fee to file an appeal with the PCHB or SHB. There is no cost or fee to file a petition for review with the GMHB.
Costs- Legal Representation	This ECT offers a free legal clinic in collaboration	Parties may represent themselves in an appeal to

[297] Vermont Judiciary, Fees <https://www.vermontjudiciary.org/fees> Accessed 19th July 2021.

	with the Vermont Bar Association Pro Bono/Low Bono Program.	the PCHB or the SHB. There is information on the bodies websites on how parties are to conduct themselves, participate in discovery, and file documents where they choose to represent themselves. A person or an organization is not required to be an attorney or be represented by an attorney to file a PFR or appear before the GMHB as a party. "*Pro Se* Petitioners" (parties representing themselves or citizen-group associates before the Board) may represent themselves before the GMHB.
Types of Decision (Binding/Recommendations)	Binding Decisions	Binding Decisions.

6. Philippines- Procedural Rules

The Philippines, a mixed Common and Civil Law jurisdiction[298], stands out among other legal jurisdictions not only for its hybrid nature but also for the numerous innovations which mark its environmental jurisprudence. It would be prudent however to first provide some legal context for these innovations.

The Constitution of the Philippines has within it a right to a healthy environment and the Supreme Court in the Philippines has characterised this right as so basic that it "need not even be written in the Constitution for [it is] assumed to exist from the inception of humankind"[299]. Taking this attitude among the superior Courts into account and the perception that the Philippines is one of the countries whose environment is most degraded[300], it is little wonder that many innovations have arisen in its environmental jurisprudence. Two cases come to mind which illustrate this and both pertain to standing, a key obstacle to effective environmental enforcement around the world. The first, *Oposa v Factoran* 1993, saw the Supreme Court

[298] Elizabeth Barrett Ristroph, 'The Role of Philippine Courts in Establishing the Environmental Rule of Law' (2012) 42.9 *Environmental Law Reporter News and Analysis* pp. 10866, 10874.
[299] Ristroph, 'The Role of Philippine Courts in Establishing the Environmental Rule of Law' 10871.
[300] Hon. Hilario G Davide Jr. and Sara Vinson, 'Green Courts Initiative in the Philippines' (2010) 3.1 *Journal of Court Innovation* 123, 123.

recognised representative standing on behalf of unborn generations for environmental cases[301]. The second *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay* 2008, saw representative standing granted to the people of Manila Bay on behalf of cetacean species such as dolphins and whales[302]. The innovations of the Philippine's environmental jurisprudence extend beyond mere standing and the most important of these are the Green Courts Initiative, the Philippines Judicial Academy and the Rules of Procedure for Environmental Cases.

Green Courts Initiative

In January 2008, the Administrative Order Re: Designation of Special Courts to Hear, Try and Decide Environmental Cases was issued[303]. It designated 117 total courts around the Philippines to act as Environmental Courts which would hear cases involving violations of legislation aimed at protecting the nation's environment and natural resources[304]. Included with this order was a non-exhaustive list of environmental laws over which these newly Green Courts had jurisdiction. As of 2016 all 117 courts, some 84 Regional Trial Courts, 7 Metropolitan Trial Courts, and 26 Municipal Trial Courts[305], were still in operation though their caseload seems to be declining[306]. These designated courts still operate as general courts, dealing with civil and criminal cases but also function as the only courts in which environmental cases may be filed and any environmental case wrongly filed in another court must be transferred to them[307]. These designated courts, according to Rules of Procedure for Environmental Cases, must be by staffed by so-called 'green judges' who possess not only an understanding of environmental law but also of environmental philosophy[308]. Naturally this requires training and thus the value of the Philippine Judicial Academy.

A final note with regard to these Green Courts is that per Rule 2, Section 12 of the Rules of Procedure for Environmental Cases, citizen suits permit deferring the payment of filing and legal fees until after their judgement is rendered[309]. Costs are recoverable but generally damages are not recoverable save where a Court order requires a defendant to pay for restoration.

Philippine Judicial Academy

The Philippine Judicial Academy (PJA) is the education sector of the Supreme Court and was created by Republic Act No. 8557[310]. Distinct from the Supreme Court but still a part of it, the

[301] *Minors Oposa v Factoran*, GR No. 101083, 224 SCRA 792 July 30th 1993 as found in Ristroph, 'The Role of Philippine Courts in Establishing the Environmental Rule of Law' 10878.
[302] *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay* G.R. No. 171947-48, 574 SCRA 661 December 18th 2008, as found in Gregorio Rafael P Bueta, 'Environmental Jurisprudence from the Philippines: Are Climate Litigation Cases Just Around the Corner?' Fri 21st June 2019 *International Union for Conservation of Nature* (Online resource) - Dated Accessed 7th September 2021.
[303] Davide Jr. and Vinson, 'Green Courts Initiative in the Philippines' 123-4.
[304] Davide Jr. and Vinson, 'Green Courts Initiative in the Philippines' 124.
[305] Davide Jr. and Vinson, 'Green Courts Initiative in the Philippines' 124.
[306] George Pring and Catherine Pring, 'Environmental Courts and Tribunals: A Guide for Policy Makers' (2016) *Global Environment Outcomes LLC (GEO) and University of Denver Environmental Court and Tribunals Study* 29.
[307] Pring and Pring, 'Environmental Courts and Tribunals: A Guide for Policy Makers' 29.
[308] Amado S Tolentino Jr and Ana Maria E Tolentino 'Philippines: Environmental Law and Justice - Developments and Reforms' (2011) 41.3 *Environmental Policy and Law* pp. 152, 163.
[309] Rule 2, Section 12 of The Rules of Procedure for Environmental Cases: Annotation to the Rules of Procedure for Environmental Cases.
[310] Davide Jr. and Vinson, 'Green Courts Initiative in the Philippines' 124.

PJA is a training school for justices, judges, court personnel lawyers and aspirants to judicial posts[311]. The PJA's mission is to develop judicial competence and instil a proactive attitude towards the pursuit of judicial excellence. To that end the PJA conducts seminars, workshops, and training programs on various topics such as orientation programs for new judges[312]. This includes various specialised environmental law training programs in order to ensure the efficacy of the adjudication and management of environmental cases. The training also acts as a means of keeping judges updated on environmental law and rules. The PJA does more than just train judges however, as it holds conventions and conferences, conducts surveys on the needs of judges, and forms Focus Groups such as the one which assesses the application of the Rules of Procedure for Environmental Cases[313].

The Rules of Procedure for Environmental Cases

The Rules of Procedure for Environmental Cases were created in 2010 to provide a simplified, speedy, and inexpensive procedure for the enforcement of environmental rights and duties in the Philippines[314]. The Rules contain both general matters which improve the Green Court's functionality as a font of environmental justice and also specific innovations to render that justice more effective. The first general improvement is set down in Rule 4, Section 5, which provides that designated Green Courts shall prioritise the adjudication of environmental cases over their general caseload[315] so as to better facilitate swift disposal of environmental cases. Rule 20 adopts the Precautionary Principle which acts as a means for the Courts to bridge the gap between evidence and injury in cases where a causal link between human activity and environmental effect cannot be established with scientific certainty[316]. It operates to shift the Burden of Proof to proponents of an activity to show that it will not harm the environment[317].

The Rules also provide for the Pre-Trial Alternate Dispute Resolution. Rule 3, Section 3 sets out that at the start pre-trial conference, if the parties have not settled, the Court shall make a mandatory referral for mediation for the parties or their counsel, if authorised by their clients[318]. Rule 3, Section 5, enables a judge to issue a Consent Decree, approving a settlement agreement between parties[319], thus reducing the Court's caseload.

As it is often the case that violations of environmental law do not result in an immediate injury to a party, so called victimless offences, Rule 9, Section 3 is particularly useful. It provides for the appointment of a Special Prosecutor in criminal cases where there is no private offended party to better the enforcement of such laws[320]. The remaining Rules are the most significant and thus will be discussed in far greater detail. They govern Standing, Strategic Lawsuits

[311] Website of the Philippine Judicial Academy - Dated Accessed 12th September 2021. https://philja.judiciary.gov.ph/index.php
[312] Website of the Philippine Judicial Academy. Dated Accessed 12th September 2021. https://philja.judiciary.gov.ph/index.php
[313] Website of the Philippine Judicial Academy. Dated Accessed 12th September 2021. https://philja.judiciary.gov.ph/index.php
[314] Rule 1, Section 3(b) of The Rules of Procedure for Environmental Cases.
[315] Rule 4, Section 5 of The Rules of Procedure for Environmental Cases.
[316] Rule 20, Section 1 of The Rules of Procedure for Environmental Cases.
[317] 'Margin of Safety in all Decision-Making' paragraph under Rule 20, Section 1 of The Rules of Procedure for Environmental Cases.
[318] Rule 3, Section 3 of The Rules of Procedure for Environmental Cases.
[319] Rule 3, Section 5 of The Rules of Procedure for Environmental Cases.
[320] Rule 9, Section 3 of The Rules of Procedure for Environmental Cases.

Against Public Participation (SLAPP) Suits, Temporary Protection Orders, Writ of Continuing Mandamus and the Writ of Kalikasan.

The Rules dealing with Standing are significant not only for the fact that Standing is one of the key factors inhibiting Access to Justice but also for the extent to which the Rules liberalise it. Rule 2, Section 4, enables the "real party in interest, including the government and juridical entities authorized by law" to file a civil action regarding the enforcement or violation of any environmental law.[321] This is significant in that it grants citizens and non-citizens alike standing so long as they can show direct and personal injury[322]. Rule 2, Section 5, takes the *Oposa* case and gives it statutory footing as it states that any "Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws"[323]. Though unavailable to non-nationals, this citizen suit is still an incredibly liberal example of representative standing. It is noted in the Annotations to the Rules of Procedure for Environmental Cases that this "collapses the traditional rule on personal and direct interest, on the principle that humans are stewards of nature"[324].

Strategic Lawsuits Against Public Participation (SLAPP) are suits filed to harass, pressure or prevent any person from enforcing environmental laws or protecting or asserting environmental rights[325]. Rule 6, Section 2 enables a person who has a SLAPP filed against them to allege that the suit filed is indeed a SLAPP suit as a defence against it[326]. The hearing for a SLAPP defence is summary in nature per Rule 6, Section 3 and these hearings are prioritised per Rule 6, Section 4[327]. Per Rule 19, Section 1, in criminal cases the accused can file a motion to dismiss the criminal action as a SLAPP rather than motion to quash[328].

In the Philippines there are Environmental Protection Orders (EPO's), which enable the Court to issue an order directing any party to act or refrain from action so as to protect, preserve, or rehabilitate the environment[329]. Rule 2, Section 8 provides an additional complementary form of relief called the Temporary Environmental Protection Orders (TEPO's). These are issued by judges in EPO applications where the issue is one of "extreme urgency and the applicant will suffer grave injustice and irreparable injury"[330] on an *Ex Parte* basis. As the name suggests, they are issued only on a short-term basis and the Court must monitor the act or acts which are the subject matter of the order and may lift them at any time as the circumstances warrant[331]. Per Rule 5, Section 3, the Court can convert a TEPO to a permanent EPO or a Writ of Continuing Mandamus[332].

The Rules provide for two special remedies, the Writ of Continuing Mandamus and the Writ

[321] Rule 2, Section 4 of The Rules of Procedure for Environmental Cases.
[322] 'Real Party in Interest' paragraph under Rule 2, Section 4 of The Rules of Procedure for Environmental Cases.
[323] Rule 2, Section 5 of The Rules of Procedure for Environmental Cases.
[324] 'Citizens Suit' paragraph under Rule 2, Section 5 of The Rules of Procedure for Environmental Cases.
[325] Rule 6, Section 1 of The Rules of Procedure for Environmental Cases.
[326] Rules 6, Section 2 of The Rules of Procedure for Environmental Cases.
[327] Rule 6, Section 3 and 'Prioritisation on the Hearing and Resolution of a SLAPP Defense' paragraph under Rule 6 Section 4 of The Rules of Procedure for Environmental Cases.
[328] 'SLAPP as Criminal Cases; motion to dismiss' under Rule 19, Section 1 of The Rules of Procedure for Environmental Cases.
[329] Rule 1, Section 4(d) of The Rules of Procedure for Environmental Cases.
[330] Rule 2 Section 8 of The Rules of Procedure for Environmental Cases.
[331] Rule 2 Section 8 of The Rules of Procedure for Environmental Cases.
[332] Rule 5, Section 3 of The Rules of Procedure for Environmental Cases.

of Kalikasan (Nature). Both are civil remedies in environmental actions. Rule 8 deals with the Writ of Continuing Mandamus, which is available when a government agency, or entity unlawfully neglects to perform a duty which relates to either the enforcement or the violation of an environmental law, regulation, or right therein and where the no there is "no other plain, speedy, or adequate remedy"[333]. Upon the aggrieved person's petition, the Court may issue the Writ to command the respondent to perform their duty, be it in an act or series of acts, until the judgment is satisfied and to pay damages sustained by the applicant due to malicious neglect to perform their duties[334]. In addition the subject of the writ must submit reports on their progress periodically, thus enabling the Court to monitor compliance, either on its own or by an appropriate agent[335]. The Court may also issue a TEPO for the preservation of the rights of the parties pending the proceedings[336]. This Writ has actually been adopted in different countries such as Australia, India, the USA, and Pakistan[337].

Rule 7 governs the Writ of *Kalikasan*, the other unique judicial remedy. It is available to natural or juridical persons, entities authorised by law, people's organisations, NGO's, and any public interest group accredited by or registered with any government agency[338]. It is a remedy on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission of a public official or employee, or private individual or entity, involving "environmental damage of such magnitude as to prejudice life, health, or property of inhabitants in two or more cities or provinces"[339]. It is immediate in nature and Rule 7, Section 15 lists its specific remedies though the list is non-exhaustive. Remedies listed include directing the respondent public official, government agency, private person or entity to protect, preserve, rehabilitate or restore the environment and directing them to permanently cease and desist from committing acts or neglecting the performance of a duty in violation of environmental laws resulting in environmental destruction or damage among others[340]. Rule 7, Section 11, provides that the Court may call for a preliminary conference to simplify issues and address other matters before the actual hearing[341]. The Writ can be filed with the Court of Appeal or Supreme Court for no fee and per Rule 7, Section 12, the Writ can even be used for discovery purposes[342].

Problems

There are however issues that plague the Philippines despite the progress and innovations made. There are of course issues in procuring evidence and crafting effective remedies, despite the availability of powerful civil remedies such as the Writs of *Kalikasan* and Continuing Mandamus. Corruption too is an issue hampering effective enforcement and commonly causes controversy in the Philippines[343]. The greatest obstacle however faced in the Philippines is the lack of adequate enforcement. Newspapers in the Philippines commonly report upon public and private failures to comply with environmental law, the most damaging being a sheer lack

[333] Rule 8, Section 1 of The Rules of Procedure for Environmental Cases.
[334] Rule 8, Section 1 of The Rules of Procedure for Environmental Cases.
[335] Rule 8, Section 7 of The Rules of Procedure for Environmental Cases.
[336] Rule 8, Section 5 of The Rules of Procedure for Environmental Cases.
[337] Bueta, 'Environmental Jurisprudence from the Philippines: Are Climate Litigation Cases Just Around the Corner?' Accessed 7th September 2021.
[338] Rule 7, Section 1 of The Rules of Procedure for Environmental Cases.
[339] Rule 7, Section 1 of The Rules of Procedure for Environmental Cases.
[340] Rule 7, Section 15 of The Rules of Procedure for Environmental Cases.
[341] Rule 7, Section 11 of The Rules of Procedure for Environmental Cases.
[342] Rule 7, Section 12 of The Rules of Procedure for Environmental Cases.
[343] Ristroph, 'The Role of Philippine Courts in Establishing the Environmental Rule of Law' 10885.

of administrative and judicial capacity[344]. Indeed, the Courts are simply unequipped to handle all the executive and legislative work needed to address the country's environmental problems. That being said, there is some hope in the fact that where the Rules are properly understood and employed, environmental cases are dealt with faster and more in favour of the pro-environment litigant[345].

7. Canada

Jurisdiction – Canada

Background

Canada, a Common Law jurisdiction, is a federal state under its constitution, composed of several provinces. Power is divided along federal and provincial lines[346] and consequently, so too is responsibility for the environment dealt with at both the federal and provincial level. The Canadian federal government has power over matters like fisheries and shipping while also retaining residual power over matters of general concern like the environment[347]. Provincial governments too have powers, which are eminently important in the environmental context. Authority for provincial public lands, the use of natural resources, local works or developments all lies with the provincial governments[348]. Indeed, Harbell has noted that provinces are in fact the "most important environmental regulators in Canada…" [349] though "…they are limited by overriding federal authority in certain areas and geographic restrictions"[350]. Reflecting this is the abundance of provincial ECT's in Canada as nigh every province possesses at least one ECT and some possess much more. Another ECT operates at the federal level, though it is among the most limited in its jurisdiction.

In this study of Canada's ECT's, a number of common factors arose. They are generally administrative bodies and quasi-judicial in nature. Their jurisdictions are exclusively civil with no ECT examined in this study possessing anything in the way of a criminal jurisdiction. Their jurisdictions also tend to be limited to decisions made under certain acts like the Alberta Environmental Appeals Board, planning projects or development and environmental impact assessments like the Mackenzie Valley Review Board in the Northwest Territories, the extraction of natural resources and their proper use, which are rather abundant in Canada, like the Oil and Gas Appeal Tribunal in British Columbia, or confined to certain industries such as the Forest Appeals Commission in British Columbia.

Generally, ECT's in Canada can vary, affirm, or revoke decisions appealed to them. Some ECT's are actually able to order damages or make costs orders though such powers are not particularly common. Others are quite involved in resolving disputes between interested parties. The Surface Rights Board of British Columbia for example exclusively focuses on resolving disputes between companies and private landowners whose lands those companies require access to for the detection and extraction of subsurface resources such as oil[351]. Some

[344] Ristroph, 'The Role of Philippine Courts in Establishing the Environmental Rule of Law' 10885.
[345] Ristroph, 'The Role of Philippine Courts in Establishing the Environmental Rule of Law' 10886.
[346] Roger Cotton and John S Zimmer, 'Canadian Environmental Law: An Overview' (1992) 18 *Canada-United States Law Journal* 63, 63.
[347] James W Harbell, 'Canada Tackles Environmental Problems' (2002) 12:2 Business Law Today 37, 37-8.
[348] Harbell, 'Canada Tackles Environmental Problems' 38.
[349] Harbell, 'Canada Tackles Environmental Problems' 38.
[350] Harbell, 'Canada Tackles Environmental Problems' 38.
[351] Website for the Surface Rights Board of British Columbia – Date Accessed: 6th August 2021. http://www.surfacerightsboard.bc.ca/

however are effectively powerless as the most they can do is investigate issues and inform the public and advise Ministers.

The Bureau d'Audiences Publique sur l'Environment of Quebec is one such ECT though the power of its influence must be noted. Experts are generally involved in the deliberation or investigative efforts of these bodies and indeed the Boards and Panels in these ECTs are themselves composed of experts like foresters or scientists. Generally Canadian ECTs' decisions themselves are generally subject to Judicial Review. One distinct feature of Canadian ECTs is the integration of Alternative Dispute Resolution (ADR) in their operations. ADR has been noted for its capacity to help save time and money, to better meet the interests of the parties, to produce better outcomes, and ensure better compliance with any agreement reached[352]. Indeed, among some Canadian ECT members there is a shared consensus that ADR processes surpass formal hearings in efficiency and can save all involved considerable time and money[353]. The Ontario Land Tribunal (OLT) for example engages in Case Management Conferences prior to a hearing. These meetings serve to help identify issues, establish uncontested evidence, and discuss the possibility of Alternative Dispute Resolution[354].

The most common method by far is mediation, which is practiced in, encouraged by, and even facilitated in ECT's across Canada. In mediation, both parties to an appeal come together in a private and somewhat less formal setting to discuss the issues at the heart of an appeal to see if the issue can be resolved without the direct involvement of the ECT. There is also a single federal ECT, the Environmental Protection Tribunal Canada (EPTC), which reviews Administrative Monetary Penalties, and the Compliance Orders issued by the enforcement officers of Environment and Climate Change Canada, (ECCC) the Canadian federal government's department for the Environment. Interestingly, the ECCC keeps a record of corporations convicted of environmental offences[355].

A final point to note is the perhaps novel idea of Intervener Funding, which the short-lived *Intervenour Funding Project Act*, R.S.O. 1990, c. I.13 attempted to enact. This statute enabled a person, an intervenor, to apply to the Board, either the Ontario Energy Board or the Environmental Assessment Board[356], for Intervenor Funding[357]. Put simply, Intervenor Funding enables an intervenor to object to a project that they otherwise could not afford to object to, as it requires one of the project's proponents to fund the intervenor's objection. A panel is established to consider the application, considering the applicant's eligibility for the funding, the amount of funding required, and other factors[358]. This panel also determines the funding proponent(s)[359], who may object to being designated as such[360]. Any decision on Intervenor Funding could only be appealed with regard to a matter of law[361].

[352] Matthew Taylor, Patrick Field, Lawrence Susskind, and William Tilleman, 'Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices' (1999) 22.2 *Dalhousie Law Journal* 51, 55.
[353] Taylor, Field, Susskind, and Tilleman, 'Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices' 63.
[354] Website for the Ontario Land Tribunal - Date Accessed: 12th August 2021. https://olt.gov.on.ca/
[355] Website for Environment and Climate Change Canada - Date Accessed: 14th August 2021. https://www.canada.ca/en/environment-climate-change.html
[356] Section 1 Intervenour Funding Project Act, R.S.O. 1990, c. I.13.
[357] Section 3(1) Intervenour Funding Project Act, R.S.O. 1990, c. I.13
[358] Section 7 Intervenour Funding Project Act, R.S.O. 1990, c. I.13.
[359] Section 6 (1) Intervenour Funding Project Act, R.S.O. 1990, c. I.13.
[360] Section 6(3) Intervenour Funding Project Act, R.S.O. 1990, c. I.13.
[361] Section 13 Intervenour Funding Project Act, R.S.O. 1990, c. I.13.

The Natural Resource Conservation Board of Alberta too makes use of intervener funding. This ECT determines whether a proposed natural resource project requires an Environmental Impact Assessment and if it is in the public interest. Upon application, an intervener in this process can apply for funding to better participate in the ECT's process so as to better allow access to Justice[362]. Given the sheer volume of ECT's in Canada, this report shall not contain a summary of each ECT in Canada and their operation. Instead it shall contain a representative selection of the ECT's active in Canada's provinces and along with the aforementioned EPTC.

Alberta

Environmental Appeals Board

The Environmental Appeals Board is an independent administrative agency and can be considered a quasi-judicial body[363]. It operates at first instance and hears appeals based on certain decisions, including Water Licences, Approvals, Enforcement Orders, and Environmental Protections Orders. The Board retains final say for certain decisions and for others merely makes recommendations to the Minister of Environment and Parks who has the final say. There was mass public participation in its creation and various statutes govern its jurisdiction such as the Environmental Protection and Enhancement Act and the Water Act. The Board uses mediation to resolve disputes where possible, encourages its use as the primary method of appeal resolution, and educates parties as part of the mediation process. It can enact mediation on request or upon its own initiative. The Board is composed of scientists, lawyers, and professional mediators and it has the power to retain experts and compel persons and evidence. Its decisions are subject to Judicial Review to ensure compliance with the legislation and parties may make applications for an award of costs but such awards remain at the Court's discretion.

Natural Resources Conservation Board (NRCB)

The Natural Resources Conservation Board is a quasi-judicial regulatory agency, which operates at the first instance and reviews major Natural Resource projects and the regulation of Confined Feeding Operations[364]. The NRCB determines whether proposed natural resource projects require an Environmental Impact Assessment and if they are in the public interest, considering social, environmental, and economic effects. There is a two-stage review process in which the Board meets to discuss the merits of the request and decide whether to deny review or hold a hearing, be it public or written.

The NCRB also coordinates mediation and can award intervenor funding to allow interveners to participate fully in project reviews where otherwise it would not have been possible for them to do so, though an application must be made first and their need for funding must be assessed. The applicant and directly affected parties can, with leave of the Court of Appeal, apply to the Court of Appeal to appeal a decision issued by the NRCB, following a Board review of an approval officer decision. This appeal however may only address questions of law or jurisdiction. Judicial Review is also available against enforcement orders.

[362] Website for the Natural Resources Conservation Board of Alberta – Date Accessed: 5th August 2021. https://www.nrcb.ca/
[363] Website for the Environmental Appeals Board of Alberta – Date Accessed: 5th August 2021. http://www.eab.gov.ab.ca/
[364] Website for the Natural Resources Conservation Board of Alberta – Date Accessed: 5th August 2021. https://www.nrcb.ca/

British Columbia

Environmental Appeals Board/Forest Appeals Commission/Oil and Gas Appeal Tribunal

The Environmental Appeals Board is an independent administrative agency, which hears appeals from certain decisions made by government officials related to environmental issues[365]. Its appeals process is public. It operates at the first instance and can confirm, vary or rescind the decision being appealed or make a decision the original decision-maker could have made, provided that it is reasonable. The Board's preferred method of dispute resolution however is mediation and indeed it will encourage and facilitate mediation upon request and with the consent of all involved. The Board actually reviews notices of appeals for any potential of Alternative Dispute Resolution to make mediation more readily available. The Board is jointly administered with the Forest Appeals Commission and the Oil and Gas Appeal Tribunal to limit costs and so all three share the same members who themselves are experts, including lawyers, biologists, engineers, and foresters. The Board is not accountable to the government for any quasi-judicial decision but its decisions can be reviewed by the Court or Cabinet or overseen by a Minister. The Board's decision can be appealed within 60 days to the SC of British Columbia for Judicial Review.

Forest Practices Board

The Forest Practices Board is a watchdog body, which conducts audits/investigations and issues public reports on compliance with BC forest practices compliance[366]. The FPB cannot issue penalties, merely issue recommendations. It does however have standing to appeal certain decisions made by government officials under the *Forest and Range Practices Act* and *Wildfire Act*, either on its own initiative or upon public request, to the Forest Appeals Commission. These decisions include determinations of noncompliance, penalties, or approval approvals of plans for forestry or range operations.

Surface Rights Board

The Surface Rights Board is an independent administrative agency, which resolves disputes between landowners and companies that require access to private land for subsurface resources[367]. It operates at the first stage and its members are appointed by the provincial government's cabinet. The SRB facilitates and prefers mediation as a means of dispute resolution between parties. Mediation is conducted privately and any position adopted by a party in mediation may not be used against them in subsequent arbitration proceedings, should the mediation fail. Landowners are normally entitled to receive costs for preparing for and attending mediation proceedings. The SRB conducts arbitration between companies and landowners and may find with either side. Beyond access disputes, the SRB also handles rent renegotiations. In cases where the SRB finds that the company had no right of entry to the land, it may determine that compensation is due to the landowner as well as fix the amount of compensation due. It can also order damages where there has been damage to or loss of land due to the company's activity. It can also make cost orders against any party, either on its initiative or upon request. In exceptional circumstances, the SRB may order a party to pay its

[365] Website for the Environmental Appeals Board of British Columbia – Date Accessed: 6th August 2021. http://www.eab.gov.bc.ca/index.htm
[366] Website for the Forest Practices Board of British Columbia – Date Accessed: 6th August 2021. https://www.bcfpb.ca/
[367] Website for the Surface Rights Board of British Columbia – Date Accessed: 6th August 2021. http://www.surfacerightsboard.bc.ca/

own costs. Its decisions are binding though subject to appeal to the Court of Appeal with said Court's leave and Judicial Review by the British Columbian Supreme Court.

Manitoba

Clean Environment Commission

The Clean Environment Commission is an administrative governmental agency which aims to provide for public participation in environmental protection[368]. Thus, its efficacy is very much linked to an engaged public. The CEC conducts investigations and hearings and prepares reports for the Minister. The Minister is under no legal obligation to adhere to these reports but must give the reasons for any deviations from them. It also provides mediation services to parties in an environmental management dispute at the Minister's request and its members are experts such as civil engineers, managers, politicians, consultants, and conservationists.

Nova Scotia

Nova Scotia Environment

Nova Scotia Environment is the provincial government department dealing with the environment[369]. Its enforcement conservation officers conduct investigations and respond to calls to the public. NSE also provides subject matter expertise and support. It is also the body to which the Environmental Assessment Review Panel and Environmental Trust Advisory Board answers.

Northwest Territories

Mackenzie Valley Review Board

The Mackenzie Valley Review Board is an independent co-managed administrative tribunal, which is responsible for the environmental impact assessment process for land development and management in the Mackenzie Valley[370]. It operates at the first stage. The MVRB is unique in that its enacting legislation's purpose was to give the aboriginal people of the Mackenzie valley a greater say in its resource development and management. Though the MVRB is nominally independent, it is funded by the federal government, which may call into question its independence.

Ontario

Ontario Land Tribunal

The Ontario Land Tribunal is a recently established independent administrative quasi-judicial tribunal, which replaced the ELTO in June 2021 and it consists of lawyers, planners and mediators[371]. It amalgamates the Local Planning Appeal Tribunal, Environmental Review Tribunal, Board of Negotiation, Conservation Review Board and the Mining and Lands

[368] Website for the Clean Environment Commission of Manitoba – Date Accessed: 7th August 2021 http://www.cecmanitoba.ca/cecm/
[369] Website for Nova Scotia Environment– Date Accessed: 9th August 2021. https://novascotia.ca/nse/

[370] Website for the Mackenzie Valley Review Board of the Northwest Territories– Date Accessed: 9th August 2021. https://reviewboard.ca/
[371] Website for the Ontario Land Tribunal – Date Accessed: 12th August 2021. https://olt.gov.on.ca/

Tribunal. The OLT adjudicates or mediates on appeals and matters related to land use planning, environmental and natural features and heritage protection, land valuation, land compensation, municipal finance and related matters. In addition, the OLT also deals with mining and land disputes as well as planning appeals and it operates at the first stage.

Appeals to the OLT on the environmental matters generally relate to decisions made by the Director of the Ministry of the Environment, Conservation and Parks and the OLT also holds hearings on whether to grant leave to appeal certain decisions. The OLT may also direct parties to a proceeding to participate in a Case Management Conference (CMC) prior to the hearing so as to identify issues in the hearing, establish agreed upon evidence, and to discuss possible ADR such as mediation. Mediations are entirely private affairs and which may be requested at no fee. Any party to a mediation need not have representatives but they may be present.

As for heritage matters, a pre-hearing process and mediation is used to attempt to settle. In the absence of settlement, mediators may make non-binding recommendations and parties may also reconvene if there remain unresolved issues that prevent settlement. Also, the OLT will make a recommendation to a municipal council or Minister who has the final say. Parties can still appeal for arbitration post mediation. Only certain appeals filed under certain statutes are charged to the OLT and appeal fees range from $400-$1,100. The decisions of the OLT may be appealed to the Divisional Court with said Court's leave but only on a question of law.

Saskatchewan

Surface Rights Board of Arbitration

The Surface Rights Board of Arbitration is a last resort arbitration board where landowners or occupiers and oil and gas operators cannot agree to private land access and/or compensation[372]. Its hearings operate at the first stage and include entry rights, damage claims, and rent review among other things. In addition, the SRBA can award an owner or occupant reasonable costs and expenses related to the hearing though this is limited to right of entry and compensation hearings. The SRBA also facilitates mediation. The SRBA's orders, decisions, and determinations can be appealed to the Court of Appeal with said Court's leave on questions of law or jurisdictions. Despite this, the SRBA is a weak body due to its unclear degree of independence and it is subject to lobbying by public and private industry bodies.

Quebec

Bureau d'Audiences Publiques sur l'Environment

The Bureau d'Audiences Publiques sur l'Environment is an independent administrative advisory body which informs the republic, investigates issues, and advises the relevant Minister[1][373]. The Bureau is influential but has no real power of its own to authorise or refuse projects as the final say lies with the Minister though it can facilitate mediation.

Federal

[372] Website for the Surface Rights Board of Arbitration of Saskatchewan – Date Accessed: 13th August 2021. https://www.saskatchewan.ca/government/government-structure/boards-commissions-and-agencies/surface-rights-board-of-arbitration

[373] Website for the Bureau d'Audiences Publiques sur l'Environment (Office of Public Hearings on the Environment) of Quebec – Date Accessed: 13th August 2021.https://www.bape.gouv.qc.ca/fr/

Environment and Climate Change Canada

The Environment and Climate Change Canada (ECCC) is the Canadian government department tasked with dealing with the environment[374]. Its responsibilities include Weather, Climate and Hazards, Energy, Natural Resources (Forestry, Water…), Agriculture and the Environment, Fisheries, Wildlife, Plants, and Species, Pollution and Waste Management, and Environmental Conservation and Protection. The ECCC has a website which contains vast and easily comprehensible swathes of information under each of these topics, and is designed with the goal of informing the public and enabling their participation at the forefront. The website also lists the laws which govern a particular area such as those of forestry and furthermore it is also noted in places where jurisdiction lies. To take again the example of forestry, jurisdiction lies at the provincial and territorial level.

As noted above an immense amount of information is available on this website and this includes reports upon weather monitoring hazards. The website also provides maps of protected areas such as marine protected areas along with a database of sites contaminated by pollution. One section of note is the Environmental Conservation and Protection which contains information on the Federal Sustainable Development strategy and provides a forum for engaged citizens to submit their feedback on the strategy. There is also an Environmental Offenders Registry, which contains information on the convictions of corporations under certain federal environmental laws.

Environmental Protection Tribunal Canada

The Environmental Protection Tribunal Canada (EPTC) is a quasi-judicial agency that operates at the federal level and carries out review hearings of Administrative Monetary Penalties (AMPs) and Compliance Orders issued by Environment and Climate Change Canada (ECCC) enforcement officers[375]. The EPTC is composed of expert adjudicators known as Review Officers. For AMPs, Review Officers can review not only the amount of the fine but also whether the alleged violation actually occurred. Compliance Orders are issued to prevent violations, stop on-going violations, and require that violations be corrected. Review Officers have the power to confirm, cancel, and amend these Compliance Orders and may also suspend, add, and delete terms and conditions. The Tribunal will arrange pre-hearing conferences so as to clarify issues, establish a timetable, and how to handle confidential information and expert witnesses. The EPTC also provides for mediation though interestingly settlement is not seen as the sole goal by EPTC, though it is the preferred one. The EPTC notes that an alternative view often taken is that mediation may be entered with the hope to reduce, clarify, and simplify the issues to be heard at the actual hearing itself. Naturally, no reference to information disclosed during mediation may be made during the hearing save with the parties' consent.

A point to note with regard to the review of Compliance Orders is that the request for Review does not suspend the Compliance Order's operation though the Review Officer handling the case does have the discretion to put a stay on the order until the review is complete. An applicant may file for a review to be stayed, during the process of which the ECCC may file a counter affidavit about why it must stay in place. An interim stay may also be applied for pending the decision on the actual stay application.

[374] Website for Environment and Climate Change Canada - Date Accessed: 14th August 2021.https://www.canada.ca/en/environment-climate-change.html
[375] Website for the Environmental Protection Tribunal Canada – Date Accessed: 14th August 2021. https://eptc-tpec.gc.ca/en/index.html

The Tribunal's decision as to an ADM is final and binding and is not subject to appeal by any Court save Judicial Review under the Federal Courts Act. Compliance Orders differ in that the Minister and applicant may appeal the decision of the Review Officer to the Federal Court Trial Division.

Problems

Canada's ECTs are all administrative organisations, though some are quasi-judicial, and so all possess a strictly civil jurisdiction and thus are precluded from considering any criminal environmental matter. Their remedies too are limited as often Canadian ECTs can only determine whether to uphold, amend, or rescind decisions and many lack the power to impose sanctions or anything in the way of injunctive relief. Costs too are an issue. Some have fees as high as $1,100 and this. taken into account with likely lawyer fees can render them prohibitively expensive.

ECT's in Canada are, for the most part, very limited bodies and can do little outside of their small jurisdiction with regard to other environmental issues. The Saskatchewan Surface Rights Board of Arbitration for example has no jurisdiction to hear matters regarding forestry though such issues may arise within the province. On the other hand, it should be noted that in some provinces there has been an effort to unite disparate ECTs to create an ECTs which can act as 'one stop shop' for environmental issues. The OLT comes to mind. Once five separate ECTs, the OLT came into being in 2021 with the Ontario Land Tribunal Act 2021. It should also be noted that some ECTs like the BAPE, despite their potential influence have such little power in and of themselves that their classification as ECTs must be called into question.

Canadian ECT's

Body	Environmental Appeals Board (Alberta)	Natural Resources Conservation Board (Alberta)	Environmental Appeals Board (British Columbia)	Forest Appeals Commission (British Columbia)
Jurisdiction	Hears appeals from certain decisions made under the Environmental Protection and Enhancement Act, the Water Act, and the Climate Change and Emissions Management Act.	Conducts Quasi-Judicial reviews for proposed major natural resource projects under the *Natural Resources Conservation Board Act*. Regulates Confined Feeding Operations and hears appeals under the *Agricultural*	Hears appeals from certain decisions made under the Environmental *Management Act, Greenhouse Gas Industrial Reporting and Control Act, Greenhouse Gas Reduction (Renewable and Low Carbon Fuels*	Hears appeals from certain decisions made under the *Forest Act, Forest and Range Practices Act, Private Managed Forest Land Act, Range Act, Wildfire Act,* and *Government Organization Act*.

	These decisions include Water licences, Approvals, Enforcement orders, Environmental Protections Orders…	*Operation Practices Act*.	*Requirements) Act*, *Integrated Pest Management Act*, *Mines Act*, *Water Sustainability Act*, *Water Users' Communities Act*, and *Wildlife Act*.	
Independence	Independent	Independent	Independent	Independent
Type of Body (Administrative/ Judicial)	Administrative Quasi-Judicial	Quasi-Judicial Regulatory	Administrative Quasi-Judicial	Administrative Quasi-Judicial
Use of Experts (Judges/Advisors)	Yes Experts are retained by the Board to give their expertise during hearings.	Members of the Board seem to include experts, positions including Director of Science and Technology and Environmental Technical Specialist.	The Board's members include lawyers, biologists, engineers, and foresters.	The Board's members include lawyers, biologists, engineers, and foresters.
Stage (First Instance Challenge/ Appellate)	First instance.	First instance.	First instance.	First instance.
Appeal	Judicial Review	Court of Appeal on Question of Law/ Jurisdiction with their leave. Judicial Review for enforcement orders and grandfathering determinations at Court of Queen's Bench	Judicial Review by the SC of British Columbia	Judicial Review by the SC of British Columbia
Federal/Regional	Alberta	Alberta	British Columbia	British Columbia

Use of ADR (Any/Preferred/ Mandatory	Prefers mediation	Coordinates mediation	Yes, review for ADR potential (mediation)	Yes, review for ADR potential (mediation)
Relief	Grant or deny appeal.	Approve or reject the project. Grant or deny appeal.	Grant or deny appeal. Vary decisions	Grant or deny appeal.
Urgent Relief (Preventative Orders/ Injunctions)	It can decide upon Enforcement Orders and Environmental Protection Orders	N/A	N/A	N/A
Sanctions	N/A	N/A	N/A	N/A
Costs	Parties can make an application for costs at the Court's discretion	The Board can award intervener funding to allow interveners to participate fully in project reviews.	Unclear	Costs may be ordered.
Types of Decision (Binding/ Recommendations)	Generally makes recommendations but has final say in some matters.	Binding but can be appealed.	Binding but can be appealed	Binding but can be appealed
Body	Forest Practices Board (British Columbia)	Oil and Gas Commission (British Columbia)	Oil and Gas Appeal Tribunal (British Columbia)	Farm Industry Review Board (British Columbia)
Jurisdiction	Watchdog group. It conducts audits, investigates, and publishes reports on compliance. The Board itself can appeal decisions made by government officials under the	The Commission regulates Oil and Gas activities, grants or denies permits to companies trying to enter these areas, and ostensibly protects the environment.	The Tribunals hears appeals of the Oil and Gas Commission's decisions. These decisions include certain orders, administrative penalties,	The Board has complaints and appeals under The Natural Products Marketing (BC) Act, The Farm Practices Protection (Right to Farm) Act, The Prevention of

	Forest and Range Practices Act and *Wildfire Act*, either on its own or upon public request. These decisions include determinations of noncompliance, penalties, or approval approvals of plans for forestry or range operations.	It also commissions audits and investigations.	permits, declarations…	Cruelty to Animals Act, and The Administrative Tribunals Act. The Board also conducts farm practice studies.
Independence	Independent	Independent	Independent	Independent
Type of Body (Administrative/ Judicial)	Watchdog	Regulatory and administrative body.	Administrative Quasi-Judicial	Administrative
Use of Experts	Its members include foresters, forestry consultants, and natural resource managers.	It is unclear at what stage experts become involved in the process but they are likely employed as part of any audits or investigations.	The Board's members include lawyers, biologists, engineers, and foresters.	Experts may be used at hearings by the parties involved.
Stage (First/Appellate)	N/A	N/A	First stage.	First stage
Appeal	N/A	N/A	Judicial Review by the SC of British Columbia	Judicial Review by the SC of British Columbia
Federal/Regional	British Columbia	British Columbia	British Columbia	British Columbia
Use of ADR (Any/Preferred/ Mandatory	N/A	N/A	Yes, review for ADR potential (mediation)	Promotes mediation

Relief	N/A	Order corrective works Shut down non-compliant activity.	Grant or deny the appeal.	Grant or deny the appeal. Investigate or act on the appeal.
Urgent Relief (Preventative Orders/ Injunctions)	N/A	N/A	N/A	N/A.
Sanctions	N/A	N/A	Administrative penalties.	N/A
Costs	N/A	N/A Body that deals primarily with companies rather than citizens.	The Tribunal can make an order for costs.	The filing fee for Animal Custody Appeals is $100 and the Board may make cost decisions. Farm Practice Complaints must be accompanied with a $100 payment.
Types of Decision (Binding/ Recommendations)	Recommendations	Binding	Binding	Decisions are final and conclusive
Body	Surface Rights Board (British Columbia)	Clean Environment Commission (Manitoba)	Nova Scotia Environment (Nova Scotia)	Mackenzie Valley Review Board (Northwest Territories)
Jurisdiction	Resolves disputes between landowners and companies that require access to private land for subsurface resources	Provides for public participation in environmental protection	This is the provincial government department which deals with environmental issues like air quality,	Co-management board responsible for conducting environmental impact assessment process for land

	Refers to the Oil and Gas Commission as is appropriate.	Conducts hearings and prepares reports for the Minister Conducts investigations.	compliance enforcement, land, and water. Conducts investigations and responds to public complaints.	development and management in the Mackenzie Valley.
Independence	Independent	Government	Government	Independent
Type of Body (Administrative/ Judicial)	Administrative	Administrative	Administrative	Administrative
Use of Experts	The Board accepts expert evidence but it must be submitted by the parties as the Board does not seek expert evidence out. Experts may also be cross-examined on their evidence by opposing parties.	Members include engineers, farmers, electrical technologists, habitat conservationists	It is unclear but reasonable to presume that this provincial government department makes use of experts while drawing up its policies.	It is unclear from the website but it is likely experts are consulted during the Environment Impact Assessment process. It is more likely that experts are consulted at the Environment Impact Review stage given that it is conducted more thoroughly.
Stage (First/Appellate)	First	N/A	N/A	First
Appeal	Judicial Review by the SC of British Columbia Appeal to Court of Appeal with	N/A	N/A	N/A

	said Court's leave.			
Federal/Regional	British Columbia	Manitoba	Nova Scotia	Northwest Territories
Use of ADR (Any/Preferred/ Mandatory	The Board facilitates mediation and then moves onto arbitration should that fail.	Provides mediation	N/A	N/A
Relief	Finds that the company does or does not have a right of entry and determines compensation, if any is necessary. Damages in circumstances where there has been loss or damage to the land due to company activity. Rent renegotiation.	N/A	N/A	N/A
Urgent Relief (Preventative Orders/ Injunctions)	N/A	N/A	N/A	N/A
Sanctions	N/A	N/A	N/A	N/A
Costs	The Board has the discretion to make a costs order, either on its own initiative or upon request.	N/A	N/A	
Types of Decision (Binding/	Binding	Makes non-binding recommendations to the Minister	N/A	The Board either finds no issue and allows the proposed

Recommendations)				development to go to the permit/licensing stage, or requires that it undergo further assessment. From there the Board recommends to the Minister either that the development be rejected entirely, go to the permit/ licensing stage, or go to the permit/ licensing stage provided that mitigating measures are imposed.
Body	Ontario Land Tribunal (Ontario)	Surface Rights Board of Arbitration (Saskatchewan)	Bureau d'Audiences Publiques sure l'Environment (Quebec)	Environmental Protection Tribunal Canada (Federal)
Jurisdiction	It hears/decides appeals and matters related to land use planning, environmental and natural features and heritage protection, land valuation, land compensation, municipal finance, and related matters.	It is a last resort Board when landowners/ occupants and oil/gas/potash operators cannot reach an agreement for private land access/ compensation. Its hearings relate to entry rights, damage claims, compensation, reclamation of abandoned land	It advises Minister responsible for the Environment on governmental decisions It informs and consults the public and investigates issues prior to inform these recommendations	Carries out review hearings of Administrative Monetary Penalties (AMPs) and Compliance Orders issued by Environment and Climate Change Canada (ECCC) enforcement officers.

		sights and rent reviews.		
Independence	Independent	Independent (Unclear from the website but it is a government adjacent body that deals with private, public, and commercial entities).	Independent	Governmental/Non-independent
Type of Body (Administrative/ Judicial)	Administrative Quasi-Judicial	Administrative Quasi-Judicial	Governmental	Governmental Quasi-judicial
Use of Experts	The website is currently unfinished, and so there is limited information but presumably expert evidence can be submitted prior to any hearing.	Its members include land surveyors, farmers, and lawyers.	Its members include biologists, scientists, lawyers, environmental consultants, and toxicologists.	Uses expert witnesses
Stage (First/Appellate)	First	First	N/A	First
Appeal	Decisions may be appealed to the Divisional Court with said Court's leave, but only on a question of law.	The Board's orders/decisions/determinations can be appealed by those affected within 30 days to the Court of Appeal, with the leave of a Court of Appeal judge on a question of law/jurisdiction.	N/A	N/A
Federal/Regional	Ontario	Saskatchewan	Quebec	Canada (Federal)
Use of ADR (Any/Preferred/ Mandatory	Prefers mediation Arbitration	Arbitration	Facilitates mediation	Pre-hearing conferences Mediation

Relief	Grants or denies any appeal Compensation for land appropriation.	Compensation. Reclamation and restoration of well Restore acts of operator damage valued at less than $1,000.	N/A	Review Officers can review whether the violation warranting the AMP actually occurred and if the fine is correct. Thus they can uphold the AMP, cancel it, or modify the amount removed. Review Officers can confirm or cancel Compliance Orders. They can also amend, suspend or delete terms/conditions of the Compliance Order. Compliance Orders are not automatically suspended upon review though Review Officers do have the discretion to suspend them.
Urgent Relief (Preventative Orders/ Injunctions)	N/A	N/A	N/A	N/A
Sanctions	N/A	N/A	N/A	N/A

Costs	Appeals ($400-$1,100)	The Board can award to an owner/occupant reasonable costs and expenses incurred relating to the hearing. They may only be awarded during right of entry/compensation hearings.	N/A	No information is available as to costs.
Types of Decision (Binding/ Recommendations)	Binding.	Binding.	It makes recommendations but the final decision lies with the Minister responsible for the Environment.	Decisions on ADM's are final, binding and may not be appealed save by Judicial Review Decisions on Compliance Orders are binding but may be appealed to the Federal Court – Trial Division.

8. UK United Kingdom: England and Wales

In Britain, state-sponsored adjudication began as a mode of administration.[376] The ordinary Courts were merely one tool in the adjudication box and the one last used, as they could not adequately respond to socially reforming legislation or the wider public interest. Robson who states that:

> *"the failure of the judicature to endow the general public with an enforceable interest in matters where a regard for the social good is of the first moment that led to the development of the administrative tribunals*" [377]

I May 2000, the Lord Chancellor of the UK appointed Sir Andrew Leggatt to carry out a review of the tribunal system. This was the driving force behind Leggatt's recommendation that all tribunals should be brought together into a unified Tribunals Service. The Tribunals, Courts and Enforcement Act 2007 provided the legal basis for reshaping the tribunal system, and implementing most of the recommendations of the Leggatt Report. As part of this system, an environmental chamber was established.

Legal Authority:

[376] Warnock, at page 405
[377] As Quoted in Warnock, at page 406

The Environmental Chamber of the First-Tier Tribunal ("Environmental Chamber") is the main authority concerning environmental issues in England and Wales. The Environmental Chamber was founded in 2010 as a part of a new Tribunal System for England and Wales.[378] This Tribunal System comprises of seven chambers in total, which are collectively known as General Regulatory Chamber.[379] Consequently, this means that the environment is merely one category of dispute that the First Tier Tribunal may consider.

The Senior President of Tribunals oversees both the First-Tier Tribunal and the Upper Tribunal; the tribunal system's appellate body. It should be noted that the Senior President of Tribunals is an independent position from the Executive and the Chief Justices.[380]

The Environmental Chamber is authorised to address appeals against fines or notices for environmental offences in a civil capacity.[381] Decisions of the following bodies may be brought before the Environmental Chamber:

- Environment Agency;
- Natural England;
- Marine Management Organisation;
- National Measurement Office;
- Local flood authorities;
- Department for Environment, Food and Rural Affairs;
- Department for Business, Energy and Industrial Strategy;
- Department of Enterprise, Trade and Investment;
- The Health and Safety Executive;
- Welsh ministers;
- Local authorities in England and Wales.[382]

Legislation:

The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("The 2009 Rules") set out how the Environmental Chamber is conducted. Additionally, The Environmental Civil Sanctions (England) Order 2010 and The Environmental Civil Sanctions (Wales) Order 2010 stipulate the costs that litigants may face in the Environmental Chamber regarding legal representation and filing fees. These orders also set out the forms of relief available through the Environmental Chamber. These pieces of legislation will now be assessed to convey how the Environmental Chamber operates.

Type of Body:

[378] For discussion see Macrory, R., *Consistency and Effectiveness-Strengthening the New Environment Tribunal* (Center for Law and the Environment University College London 2011), 8.
[379] HM Courts and Tribunals Service, First-tier Tribunal (General Regulatory Chamber) <https://www.gov.uk/courts-tribunals/first-tier-tribunal-general-regulatory-chamber> [Accessed 20 September 2021].
[380] HM Courts and Tribunals Judiciary, 'Senior President of Tribunals' <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/tribunals/senior-president-tribunals/> [Accessed 23rd September 2021].
[381] HM Courts and Tribunals Service, First-tier Tribunal (General Regulatory Chamber) <https://www.gov.uk/courts-tribunals/first-tier-tribunal-general-regulatory-chamber> [Accessed 20 September 2021].
[382] ibid.

The Environmental Chamber is established as being quasi-judicial in nature. This is set out in Section 4(1) of the 2009 Rules, which states that "Tribunal staff may carry out functions of a judicial nature permitted or required to be done by the Tribunal".

Use of Experts:

According to the Institute of Paralegals, one of the following criteria must be met in order to be eligible to sit as a judge of the First-Tier Tribunal:

1) The candidate satisfies the judicial-appointment eligibility condition on a 5-year basis;
2) The candidate is an advocate or solicitor in Scotland of at least 5 years' standing;
3) The candidate is a barrister or solicitor in Northern Ireland of at least 5 years' standing;
4) In the opinion of the Senior President of Tribunals, the candidate has gained experience in law which makes the person as suitable for appointment as if he or she had met one of the criteria above.[383]

Therefore, the judiciary that preside over the Environmental Chamber must have the requisite legal qualifications and experience to determine the legal disputes before the tribunal.

Stage of Deliberation (First/Appellate/etc.):

As stated above, the Environmental Chamber address appeals against fines or notices for environmental offences from bodies such as the Environment Agency, and local English and Welsh authorities.[384]

Appeal:

Section 4(3) of the 2009 Rules states that within 14 days after the date that the Tribunal sends notice of a decision made by a member of staff under paragraph (1) to a party, that party may apply in writing to the Tribunal for that decision to be considered afresh by a judge. Therefore, where a litigant attains permission to appeal a decision of the Environmental Tribunal, they may appeal to the Upper Tribunal. The Upper Tribunal consists of High Court Judges and other specialist judges appointed by the Queen.[385] Appeals of decisions of the Upper Tribunal may be brought before the Court of Appeal in England and Wales.[386]

Use of Alternative Dispute Resolution (ADR):

Section 3 of the 2009 Rules state that the Tribunal should make the effort to inform the parties of any ADR available pending on the circumstances of the case. However, Section 3(2) states that arbitration as authorised under the Arbitration Act 1996 is not applicable for cases before the First Tier Tribunal (General Regulatory Chamber). Therefore, these sections of the 2009 Rules indicate that mediation will be the only form of ADR available in cases before the Environmental Chamber where applicable.

[383] The Institute of Paralegals, 'Become a Judge', <https://theiop.org/become-a-judge/> [Accessed 21st September 2021].
[384] HM Courts and Tribunals Service, First-tier Tribunal (General Regulatory Chamber) <https://www.gov.uk/courts-tribunals/first-tier-tribunal-general-regulatory-chamber> [Accessed 20 September 2021].
[385] HM Courts and Tribunals Service, *Appealing to the Administrative Appeals Chamber of the Upper Tribunal* (UT11 Notes, 2015), 3.
[386] ibid, 12.

Forms of Relief:

Section 3 of the Environmental Civil Sanctions (England) Order 2010 states that there are four schedules which indicate the relief that will be awarded for different offences:

1) Schedule 1 makes provision for fixed monetary penalties;
2) Schedule 2 states that fixed monetary penalties may be pursued, along with compliance notices and third party undertakings;
3) Schedule 3 makes provision for stop notices;
4) Schedule 4 makes provision for enforcement undertakings.

These forms of relief are also available in Wales through The Environmental Civil Sanctions (Wales) Order 2010.

Section 5(1) of both 2010 Orders states that a regulator may not serve a notice of intent relating to a fixed monetary penalty if a variable monetary penalty has been imposed or a compliance notice, restoration notice or stop notice has been served on that person relating to the same act or omission. Additionally, Section 5(2) states that a regulator may not serve a notice of intent relating to a variable monetary penalty, compliance notice or restoration notice, or serve a stop notice, on any person if, in relation to the same act or omission—

a) a fixed monetary penalty has been imposed on that person; or

b) that person has discharged liability for a fixed monetary penalty following service of a notice of intent to impose that penalty.

Therefore, fixed monetary penalties can only be imposed in very limited circumstances. However, Section 7(1) states that a non-compliance monetary penalty may be applied where a person fails to comply with a compliance notice, a restoration notice or a third party undertaking; regardless of whether a variable monetary penalty is already imposed against that person.

Sanctions:

Section 10 of the 2009 Rules state that the Environmental Chamber is authorised to implement a punitive charge against parties who unreasonably bring, defend or conduct proceedings.

Costs-Filing Fees:

Section 8 of the Environmental Civil Sanctions (England) Order 2010 states that a regulator may serve a notice ("an enforcement cost recovery notice") on a person on whom a variable monetary penalty notice, compliance notice, restoration notice or stop notice has been served requiring that person to pay the costs incurred by the regulator in relation to the imposition of that notice up to the time of its imposition. This section is also enshrined in Section 8 of the Environmental Civil Sanctions (Wales) Order 2010.

Costs-Legal Representation:

Section 11 of the 2009 Rules state that a party may appoint a representative (whether legally qualified or not) to represent that party in the proceedings. Therefore, costs for legal representation may be avoided in pursuing an appeal before this ECT.

England and Wales ECT Table	
Regional Court/Administrative Bodies	First Tier Tribunal (General Regulatory Chamber (Environment))
Jurisdiction	This ECT deals with appeals against fines or notices for an environmental offences in a civil capacity. Appeals of decisions from the following environmental bodies may be brought before this ECT: - Environment Agency - Natural England - Marine Management Organisation - National Measurement Office - Local flood authorities - Department for Environment, Food and Rural Affairs - Department for Business, Energy and Industrial Strategy - Department of Enterprise, Trade and Investment - The Health and Safety Executive - Welsh ministers - Local authorities in England and Wales
Type of Body (Administrative/Judicial)	Quasi-judicial- Section 4(1) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 state that Tribunal staff may carry out functions of a judicial nature permitted or required to be done by the Tribunal.
Use of Experts	In order to sit as a member of this ECT, a candidate must meet one of the following criteria: 1) They satisfy the judicial-appointment eligibility condition on a 5-year basis; 2) They are an advocate or solicitor in Scotland of at least 5 years' standing; 3) They are a barrister or solicitor in Northern Ireland of at least 5 years' standing; 4) In the opinion of the Senior President of Tribunals, they have the necessary experience in law that makes the person suitable for the appointment as if they met one of the above criteria.
Stage (First/Appellate)	This ECT deals with appeals of administrative decisions and its own decision may be appealed on judicial review after this ECT makes a ruling.

Appeal	Section 4(3) of the 2009 Rules states that within 14 days after the date that the Tribunal sends notice of a decision made by a member of staff under paragraph (1) to a party, that party may apply in writing to the Tribunal for that decision to be considered afresh by a judge. Appeals can be made to the Upper Tribunal, which in turn can be made to the Court of Appeal.
Federal/Regional	England, Wales, and Northern Ireland. ** Scotland (a separate jurisdiction) is considering establishing an ECT.[387]
Use of Alternative Dispute Resolution (ADR) (Any/Preferred/Mandatory)	Section 3 of the 2009 Rules state that the Tribunal should make the effort to inform the parties of any ADR available pending on the circumstances of the case. However, Section 3(2) states that arbitration as authorised under the Arbitration Act 1996 is not applicable for cases before the First Tier Tribunal (General Regulatory Chamber).
Relief	Section 3 of The Environmental Civil Sanctions (England) Order 2010 states that there are 4 schedules which indicate the relief that will be awarded for different offences: - Schedule 1 makes provision for fixed monetary penalties - Schedule 2 states that fixed monetary penalties may be pursued, along with compliance notices, restoration notices and third party undertakings. - Schedule 3 makes a provision for stop notices. - Schedule 4 makes provision for enforcement undertakings. These forms of relief are also available in Wales through The Environmental Civil Sanctions (Wales) Order 2010.
Urgent Relief (Preventative Orders/Injunctions)	N/A
Sanctions	Section 10 of the 2009 Rules state that this ECT is authorised to implement a punitive charge against parties who unreasonably bring, defend or conduct proceedings;

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**Note- Appeals of decisions of the Upper Court may be appealed in Scotland to the Court of Session and may be appealed in Northern Ireland to the Court of Appeal.

Costs- Filing Fees	Section 8 of the Environmental Civil Sanctions (England) Order 2010 states that a regulator may serve a notice ("an enforcement cost recovery notice") on a person on whom a variable monetary penalty notice, compliance notice, restoration notice or stop notice has been served requiring that person to pay the costs incurred by the regulator in relation to the imposition of that notice up to the time of its imposition. This is also enshrined in Section 8 of the Environmental Civil Sanctions (Wales) Order 2010.
Costs- Legal Representation	Section 11 of the 2009 Rules state that a party may appoint a representative (whether legally qualified or not) to represent that party in the proceedings. Therefore, costs for legal representation may be avoided in pursuing an appeal before this ECT.
Types of Decision (Binding/Recommendations)	Binding decisions.

Part III Characteristics of Successful Environmental Courts-

1. Reconceptualising Specialist ECTs

Specialist Environment Courts and Tribunals in the Literature have encompassed a number of different types of bodies. Warnock provides a useful Taxonomy[388]. Many ECT's have a comprehensive jurisdiction. They combine civil powers (deciding ex post facto compensatory disputes) and a criminal jurisdiction with administrative review. An increasing number have the ability to make or review substantive decisions concerning proposed projects, on their merits rather than just on points of law. Some bodies listed in the literature as ECT's in fact perform the role of primary decision makers, permitting or licensing activities. Environmental harm is controlled by limiting or regulate access to and the rate of exploitation of natural resources. Some ECT's act as appellate bodies that conduct substantive merits review (i.e., having the power to retake the original merits decision in various ways) or undertake *de novo* appeals.

From the research above, and from studies by leading commentators, establishing an ECT requires certain decisions to be made.

[388] Ceri Warnock, 'Reconceptualising Specialist Environmental Court and Tribunals' (2017) *Legal Studies* Volume 37 Number 3 pp. 391-417

2. Characteristics of Successful Environmental Courts

A successful ECT is defined in this paper as one closely linked with, and mostly aimed at, increased access to environmental justice. The ECT is a forum which has as its objective the provision of a body for resolving environmental disputes, which has sufficiently wide jurisdiction to consider as many environmental disputes as possible which arise in a jurisdiction, and thereby to resolve them through the ECT rather than through societal unrest or civil disobedience. A successful ECT must also be one which has legitimacy for its decision, and therefore one in which all sectors of society have confidence in its decisions.

It cannot be forgotten that by its very nature as Lord Woolf once remarked: '[t]he primary focus of environmental law is not on the protection of private rights but on the protection of the environment for the public in general.' The legislature, by enacting legislation which places a limit on the use of land by a private party, does so for a greater societal good. The court system must be empowered to achieve this fundamental purpose, rather than to view environmental law disputes as bi-partisan issues divorced from their societal context and value.

A study[389] commissioned by the Department of Environment, Transport and the Regions in the UK identified 12 basic building blocks or design decisions in relation to the type of court or tribunal to be adopted. It adopted the categories identified by the Pring and Pring, arising out of its worldwide study of existing environmental courts and tribunals at various levels. These design decisions are as follows:

1. Type of forum (whether to choose a judicial court or administrative tribunal and at what level of independence).

2. Legal jurisdiction (over what substantive laws, policies, and principles will the court or tribunal be given authority).

3. Decisional level, trial (first-instance), intermediate, appeal , and/or final review to the highest Court level or Supreme Court, and should its power(s) be civil, criminal, or administrative.

4. Geographic area.

5. Case volume (will the jurisdiction make the workload appropriate or too low or too high).

6. Standing (what qualifications will be required of parties to bring an action in the ECT or otherwise participate in a case).

7. Costs (what are the expenses for parties from the time of first making a complaint to a final decision and what are the mechanisms to reduce those costs).

8. Access to scientific and technical expertise (how will the ECT manage to get adequate, unbiased input on the increasingly complex scientific-technical issues in environmental cases).

[389]Malcolm Grant, *Environmental Court Project: Final Report* (Report to the Department of Environment, Transport and the Regions UK : 2000)

9. Can Alternative Dispute Resolution be incorporated?

10. Judges and decision makers; they should be competent judges with relevant qualifications and training, who have tenure, and an appropriate salary. All are needed for quality decision-makers.

11. Case management (what process mechanisms will permit ECTs to move cases through the decision-making process more efficiently and effectively and less expensively).

12. Enforcement tools and remedies (what powers will be needed to make the ECT's decisions effective, from mediated agreements to injunctions to criminal fines and incarceration, and all the creative alternatives in between)[390].

Preston, writing in the Journal of Environmental Law in 2014[391], built on his practical experience as Chief Judge of the Land and Environmental Court of New South Wales, as well as his extensive research and study, set out an exhaustive and comprehensive discussion of the characteristics of successful environmental courts and tribunals. We now turn to a discussion of these characteristics.

First, an ECT must have a wide jurisdiction. Preston notes that many of the successful ECTs enjoy a more comprehensive jurisdiction than those which struggle to be accepted. He credits the success of environmental courts in Sweden to the presence of two characteristics. First, the Swedish ECTs are granted a comprehensive civil and administrative jurisdiction and a range of enforcement powers by Sweden's Environmental Codes, thus giving them a substantial caseload.17 Although Preston does not state so explicitly, it would seem that a substantial caseload allows for the development of expertise, leading to quality decisions. Secondly, and this would seem to be go along with the first characteristic, the Swedish ECTs have been viewed as highly credible institutions that 'are fully accepted' by both industry groups [392] He continues

> "*The status and authority of a more successful ECT are often enhanced through the presence of judges who are environmentally literate, or alternatively who may be trained to be so literate, and who can contribute to the development of environmental jurisprudence. Such expertise maintains public trust and confidence in the ECT as the forum for resolving environmental disputes. The ability of an ECT to develop environmental jurisprudence is, in turn, dependent upon it being presented with opportunities to do so*"[393]

Second, the adjudicators must be independent and impartial and have long term tenure and security. Where an ECT is independent, it increases confidence and legitimacy of the decisions. The independence of adjudicators is clearly of central importance in Ireland, as determined by the Supreme Court in *Zalewski*. The tenure of adjudicators in administrative tribunals is clearly

[390] Pring G and Pring C, Greening Justice: Creating and Improving Environmental Courts and Tribunals.(2009: The Access Initiative of the World Resources Institute) Chapter 3

[391] Preston, B, "Characteristics Of Successful Environmental Courts And Tribunals' (2014) 26 *Journal of Environmental Law* 365-393

[392] Preston, B, "Characteristics Of Successful Environmental Courts And Tribunals' (2014) 26 *Journal of Environmental Law* at p 368

[393] Preston, B, "Characteristics Of Successful Environmental Courts And Tribunals' (2014) 26 *Journal of Environmental Law* 365-393

an important factor in securing independence, as is recognised by the Supreme Court in Zalewski. Internationally, security of tenure has been recognised as of high importance. Preston writes

> "*The independence and impartiality of ECT members may also be undermined in circumstances where those members are appointed for short-term periods without long-term security of tenure. upon expiration of his or her term*" [394]

Third, successful ECT's should have a comprehensive and centralised jurisdiction. This is on the basis that "*There are also economic efficiencies, including lower transaction costs, for users and public resources in having a 'one-stop shop'*. Paul Stein, a former judge of the Land and Environment Court of NSW, referred to by Preston was of the view that that having an integrated, wide-ranging jurisdiction

> "*decreases multiple proceedings arising out of the same environmental dispute; reduces costs and delays and may lead to cheaper project development and prices for consumers; greater convenience, efficiency and effectiveness in development control decisions; a greater degree of certainty in development projects; a single combined jurisdiction is administratively cheaper than multiple separate tribunals; litigation will often be reduced with consequent savings to the community*" [395]

Fourth, judges and members should be knowledgeable and competent with relevant qualifications and training. This is facilitated by the specialisation of judges and adjudicators. Environmental expertise promotes litigation efficiency, reduces the cost of proceedings, and provides uniform decision making.[396] Specialist adjudicatory bodies are not unusual in Ireland, one can point to the Tax Commissioners, applying tax legislation and adjudicating on taxation disputes and to the Scope section of the Department of Social Welfare, where Inspector's judge on insurability of employment, applying legal tests as to employment status, as well as the Workplace Relations Commission and the Labour Court, which specialise in adjudication in employment and equality law complaints.

Fifth, an ECT must operate as what Preston has termed 'a multi-door courthouse.", that is a the ECT must provide that a complaint can be resolved by adjudication by a judge, but also by mediation, arbitration, conciliation and forms of neutral evaluation by an administrator or expert Environmental Rights Commissioner. Experts on ECT's have found that they have most success in resolving environmental law complaints when they have a good degree of flexibility in the judgment options and resolution methods.[397]

Preston describes the practice of The Land and Environmental Court of New South Wales as operating as the aforementioned multi-door courthouse, because it assesses the forum and dispute resolution mechanism at time of filing of the initial complaint. It offers, for example, a variety of ADR processes, both in-house and externally to parties. The Court screens, diagnoses

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[394] Preston, B, "Characteristics Of Successful Environmental Courts And Tribunals' (2014) 26 *Journal of Environmental Law* 365-393

[395] Preston, B, "Characteristics Of Successful Environmental Courts And Tribunals' (2014) 26 *Journal of Environmental Law* at pp 396.

[396] Guidone, R., ad Jonas, H., " A review of environmental courts and tribunals for CSO's and the judiciary." in Voigt, C and Makuch, Z., *Courts and the Environment* (2018:Edward Elgar Publishing) at p383.

[397] Guidone, R., ad Jonas, H., " A review of environmental courts and tribunals for CSO's and the judiciary." in Voigt, C and Makuch, Z., *Courts and the Environment* (2018:Edward Elgar Publishing) at p383. Preston, Pring and Pring

and refers matters to the appropriate dispute resolution process, not only in consultation with the parties, but also by its own motion.

The Planning and Environment Court of Queensland, Australia is cited as another notable example of an ECT offering ADR processes. He notes that the Queensland Court has specifically appointed an ADR Registrar who is a former senior practitioner in the planning and environmental law field.

> *"The ADR Registrar is responsible for conducting mediations, case management conferences, chairing without prejudice meetings and meetings between experts appearing for the parties to a dispute. ADR is not used simply as a last resort, prior to trial, in the absence of an agreement otherwise reached through consent of the parties. Rather, the ADR Registrar is involved at an early stage in the dispute resolution process and assists the parties to identify and narrow the issues in dispute and works towards their resolution in a collaborative, problem-solving manner. This program has been a great success, with approximately 60–70% of all cases filed with the Court being settled through the help of the ADR"*[398]

Sixth, the ECT must provide access to scientific and technical expertise. The nature of environmental disputes is that they can often involve complex scientific evidence in deciding on issues of causation, damages, and likely environmental harm if development is approved. The lack of expertise for adjudicators causes problems.

> "*One of the most significant barriers to enhanced environmental litigation is the lack of decision maker expertise both in terms of the interpretation of national and international law and the technical scientific jargon at the heart of most cases. ECT's provide a forum in which adjudicators have a background in environmental law and essential scientific principles*."[399]

Where these is access to proper expertise, or, indeed where expertise is gained through specialisation over time, less time is wasted on putting before the Court the background and building blocks of the complex evidence presented in hearings. The system of non-specialist courts relying on experts briefed by litigants can cause difficulties where parties rely on opposing experts. On other occasions, where there is inequality of arms between parties to a dispute, there may be inequality or absence of experts for one view or another. Studies have found that ECT's which sit with an expert on the panel, or perhaps have access to a panel of experts to give independent advice, are of great assistance to making a quality decision. Access to expertise can be by way of joint expert reports, or by internal experts.

The addition of experts to a specialist tribunal is common in Ireland in many areas, such as the Labour Court, which has a three-person panel, composed of a lawyer, a business and union representation. Other tribunals such as mental health tribunal, and fitness to practice boards, also avail of court appointed experts to assist with technical knowledge.

Seventh, the ECT should facilitate access to justice. Access to environmental justice is recognised as both a human right and also, as a right in international environmental law. Principle 10 of the Rio Declaration as well as the Aarhus Convention accord a central

[398] Preston, B, "Characteristics Of Successful Environmental Courts And Tribunals' (2014) 26 *Journal of Environmental Law* at pp 381
[399] Guidone, R., ad Jonas, H., " A review of environmental courts and tribunals for CSO's and the judiciary." in Voigt, C and Makuch, Z., *Courts and the Environment* (2018:Edward Elgar Publishing) at p384

importance to access to justice in achieving the goal of environmental protection. There is a moral principle at play here. The destruction of the environment has reached such a level that the existence of future generations is in threat, or at best severely compromised. Present generations have a moral duty, and in many jurisdictions a legal obligation, to refrain from damaging the environment to the greatest extent possible. Legal adjudication of rights and obligations has a key role. Courts and tribunals in adjudicating on rights and obligations exercise significant power to either assist or hamper environmental protection. Shutting out societal parties from the court system because of restrictive rules of standing or court procedure or excessive costs, does not facilitate access to justice for those parties.

An ECT facilitate access to justice both by its substantive decisions, which allow access to environmental information, participation in environmental decision making, and adequate rights of public notification but also in its practice and procedures. Access is provided through expansive rules of rules of practice and procedure, such as rules on standing and access and costs. Innovative rules can also facilitate public interest litigation and class and group actions. One of the best examples of rules of procedure can be seen in the Philippines, when in 2010, the Supreme Court of the Philippines also adopted 'Rules of Procedure for Environmental Cases'. These are discussed earlier in this paper.

Eighth, the ECT achieves just, quick and cheap resolution of disputes. It is a truism that the delay of justice is a denial of justice. Preston writes that "*Delay is particularly pernicious for environmental public interest litigation and dispute resolution*". The purpose of much environmental litigation is to prevent or mitigate harm to the environment. Delay in the final determination of the proceedings defers making of an order preventing or mitigating that environmental harm.[400]

> "*The Court order may come too late—the harm may have already occurred and be irreversible. The heritage building may have been demolished, the old growth forest clear felled or the wetland drained or filled."*[401]

ECTs need to deal promptly with interlocutory applications and rebut attempts to adjourn or delay the final hearing and disposal of the proceedings. Further, for developers, delay in the courts of a project which may ultimately be permitted causes loss of time and money and may even lead a developer to abandon the project. Speed and cost effectiveness of adjudication is in the interests of all parties. Environmental litigation, therefore, needs to be heard and determined in a timely manner.

Delay can be reduced by efficient case management. This one of the advantages of the multi-door courthouse, as such policies can employ differential case management to deal discriminatingly with different types of cases.

Ninth, the ECT must be responsive and relevant to the pressing, pervasive and pernicious environmental problems that confront society (such as climate change and loss of biodiversity) as they require innovative and creative solutions.[402]Successful courts have had relevant solutions for example, in relation to climate change. They have also engaged in remedies which have been supported by the litigants, such as restorative justice which are in touch with what

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401 Preston, B, "Characteristics Of Successful Environmental Courts And Tribunals' (2014) 26 *Journal of Environmental Law*

402 Preston, B, "Characteristics Of Successful Environmental Courts And Tribunals' (2014) 26 *Journal of Environmental Law*, at p387.

people want. Preston notes, for example, that one of the key issues for society is addressing climate change, and that to make decisions which accord to the needs of society, Courts need to move beyond the primary function of resolving disputes between private individuals. This is because,

> *"The goals of climate change litigation include indirect effects beyond the parties to the litigation and beyond the litigation's specific claims. Even unsuccessful cases can focus public attention on a particular issue through media exposure and may reveal weaknesses in the law that require reform. One way in which the NSWLEC has remained relevant and influential has been through its decisions in climate change litigation matters."*[403]

Tenth, the ECT should develop environmental jurisprudence. An ECT which develops environmental jurisprudence is likely to assist society with understanding the meaning and scope of the legislation enacted, thus assisting lawyers to advise clients, NGO's and developers. Also, with a well-developed environmental jurisprudence, decisions are of better quality, and therefore have greater credibility and legitimacy. Also, once environmental jurisprudence is mature and developed, the burden on courts and therefore on the legal system as well as delays caused by the litigation of uncertain legal meaning, is reduced.

Eleventh, it must have an underlying ethos and mission. Writers note that many of the ECTs located throughout the world that have enjoyed greater success have a clear sense of direction with respect to the role they play in the broader schema of environmental governance. This characteristic returns to the purpose of environmental law, which is enacted to restrict otherwise untrammelled use of private property or public resources. The Habitats Directive, the Wildlife Act 1976, the legislation prohibiting water pollution, aim to protect these resources by restricting private behaviour. To have the confidence of its respective society, an ECT needs to be able to take the purpose of the legislation into account, and an underlying ethos or mission can assist in this endeavour. This clear sense of direction can be encapsulated in the form of a statement of purpose, mission statement or charter, as with the NSW Land and Environment Court, or, through a law which sets out overarching principles and purposes to govern the interpretation of the statutes to which it applies. This latter approach is what is envisaged in the Model Code drafted by the Task Force.

Twelfth, the ECT must be flexible, innovative and provide a value-adding function. Here, the value added follows on from the development of an environmental jurisprudence. The decision in a particular case has a ripple effect through society, clarifying legislation and practice. The ECT can add value to governmental decisions by achieving certainty of law. Specialised knowledgeable judges and adjudicators, with a sufficient jurisdiction to allow the consideration of all relevant environmental legal disputes, possess a regulatory value to society.[404]

In summary, therefore, we can say, having reviewed the practice in other jurisdictions, as well as leading practitioners and experts, that a successful ECT should have the following characteristics:

1. A wide and comprehensive jurisdiction.

[403] Preston, B, "Characteristics Of Successful Environmental Courts And Tribunals' (2014) 26 *Journal of Environmental Law*, at p387.
[404] Preston, B, "Characteristics Of Successful Environmental Courts And Tribunals' (2014) 26 *Journal of Environmental Law*, at p390.

2. It should have broad rules of standing, facilitating access to justice.

3. The judges or adjudicators appointed should be independent and have security of tenure.

4. The adjudicators in the ECT should be composed not only of judges but also of mediators and conciliators.

5. The adjudicators should be able to build expertise through specialisation and also have access to technical scientific expertise in decision making.

6. It must have a capacity to engage in alternative dispute resolution, including mediation, conciliation and arbitration of a dispute.

7. It can be either an administrative tribunal or judicial body, or a combination of both.

8. There should be a limitation on costs.

9. It should provide for just, quick and cheap resolution of disputes

We now turn to the model proposed for Ireland.

Part IV Model proposed for Ireland

Constitutional Framework and Three Possible Models

In a paper given in 2015,[405] the former Chief Justice, Mr Frank Clarke S.C. noted that there were many ways in which an "environmental court" might be configured. However, broadly speaking, in the absence of a constitutional amendment it is considered that there are three possible models. The first is to provide for a discrete environmental law court with a unified jurisdiction in relation to environmental law matters functioning as a division of the existing courts system. The second is to establish a new court or courts of local and limited jurisdiction to deal with environmental matters only. The third is to legislate for the creation of an entirely new administrative tribunal along the lines of a body such as the Workplace Relations Commission, with a full appeal to an appropriate appellate court and at least some scope to appeal from that appellate court to the High Court.

The main advantage of the first model, which involves the creation of an environmental court within the existing courts' structure, is that it is the easiest to implement. It would require some legislation, similar to Part 3 of the Judicial Separation and Family Law Reform Act 1989 which established the family law courts. However, many of less systematic changes could be governed by new court rules and/or practice directions which could be amended with relative ease to meet the particular needs of the court. In particular, new rules or practice directions could be introduced to allow officers such as the Master of the High Court and the Circuit County Registrar to operate specific case management procedures tailored to the needs of environment-related disputes.

[405] "*A Possible Environmental Court – The Constitutional and Legal Parameters*", Mr. Justice Frank Clarke, School of Law, University College Cork conference on the theme "*Environmental Courts, Enforcement, Judicial Review & Appeals: Exploring the Options for Ireland*", 19 June 2015.

Another advantage of adopting this model is that it would be possible to include a criminal jurisdiction within it. Judges operating within the existing courts' structure, who are appointed in accordance with Article 35 of the Constitution, have the power to grant a wide range of remedies, including injunctive relief, which would be particularly important where what is at issue is a threat to the environment. Further, decisions issued by the established courts tend to attract more publicity and public scrutiny than those issued by administrative tribunals.

As against this, there are a number of features inherent in the existing courts' structure which would make it difficult to establish a system well-equipped to deal with the particular challenges arising in environmental law cases. Firstly, it is an adversarial system which is not necessarily suited to achieving the kind of mediated compromise that will be desirable in many cases. Secondly, the courts' system is already overwhelmed and struggling to allocate sufficient resources to the existing workload. Thirdly, taking a case to court can be both expensive and intimidating for litigants.

The second model would involve the creation of a new court of local and limited jurisdiction in accordance with Article 34.3.4 of the Constitution. Article 34.3.4 provides that "(t)he Court of first instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law". This is the provision which was used to establish both the District Court and the Circuit Court. Both courts were originally created by the Courts of Justice Act 1924 and their powers are limited by statute. On the civil side, the Civil Law (Miscellaneous Provisions) Act 2013 caps the awards which each Court can make in respect of individual claims.

The constitutionality of these courts has been challenged in a number of cases. However, the Supreme Court has leaned in favour of interpreting Article 34.3.4 in a practical manner which allows the court system to function efficiently. In *Tormey v. Ireland*,[406] the plaintiff had argued that the statutory provision which gave the Circuit Court an exclusive jurisdiction in relation to most indictable crimes was unconstitutional. However, the Supreme Court held that it was clear from Article 34.3.1 of the Constitution, read together with Article 34.4.3, that it was envisaged that the Circuit Court would be able to exercise jurisdiction in relation to certain matters to the exclusion of the High Court.

Similarly, in *Permanent TSB v. Langan,*[407] the Supreme Court rejected a challenge to the Circuit Court's jurisdiction to deal with cases involving certain categories of buildings where the rateable valuation had not been prescribed by law. It did not accept that this constituted the conferral of an unlimited jurisdiction on the Circuit Court, with Clarke C.J. noting that there are a variety of means by which jurisdiction can be limited. He held that the requirement to limit jurisdiction did not necessitate a value limit in every case. He considered it significant that the jurisdiction in question was limited by reference to a defined and not overbroad category of cases.

It appears to follow from the above that the Oireachtas could legislate for the creation of a specialised environmental court of local and limited jurisdiction if it wished to do so. This could be an entirely new court model, so long as its jurisdiction was clearly limited by statute. This would be similar to the model adopted by the first, and perhaps the most famous, environmental court, the Land and Environment Court of New South Wales.

[406] [1985] I.R. 289.
[407] [2017] IESC 71

Many of the specific features of the Land and Environment Court of New South Wales have been discussed above but for present purposes it is sufficient to note that the court was created by the Land and Environment Court Act 1979. Section 16 of that Act provides that the jurisdiction of that court shall be divided into the following eight separate but related classes:

1. Environmental planning and protection appeals;
2. Local government and miscellaneous appeals and applications;
3. Land tenure, valuation, rating and compensation matters;
4. Environmental planning and protection, development contract and strata renewal plan civil enforcement;
5. Environmental planning and protection summary enforcement;
6. Appeals from convictions relating to environmental offences;
7. Other appeals relating to environmental offences and
8. Mining matters.

However, s. 22 of the 1979 Act appears to vest the New South Wales Court with a power akin to original jurisdiction and ss. 20(2) and 71 grant the Court some of the powers which would ordinarily be exercised by the Supreme Court. Further, s. 56 of the 1979 Act appears to preclude any appeal in respect of broad categories of cases. These are features which a court of limited and local jurisdiction established in accordance with Article 34.3.4 of the Constitution could not adopt. As such, it appears that a constitutional amendment would be required to replicate these features of the New South Wales model in Ireland.

The third model is perhaps the more attractive option from the perspective of those interested in founding a more dynamic court which has the ability to respond with the urgency which environmental law cases often require. The Constitution also allows for this. While Article 34.1 provides that "*justice shall be administered in courts established by law by judges*", Article 37.1 qualifies this by providing that

> *"nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution*."

The interaction of these provisions, and the extent to which they permit the creation of new courts was recently considered by the Supreme Court in *Zalewski v. An Adjudication Officer and the Workplace Relations Commission, Ireland and the Attorney General*[408]. It is clear from the majority judgment that justice may be administered in bodies which are not courts, and by people other than judges, in cases which do not involve criminal trials.[409] However, O'Donnell J. (as he then was) stressed that the Constitution provides that only limited functions and powers of a judicial nature may be exercised by such a body. He considered that the functions conferred on the Workplace Relations Commission were limited for a number of reasons: the subject-matter was confined to employment issues only, there was no question of the Commission enjoying original jurisdiction and its powers were set out exhaustively in legislation, the awards which could be made were limited, one of the available remedies (reinstatement) could be substituted by the District Court, there was a full appeal to the Labour

[408] [2021] IESC 24.
[409] Para. 110.

Court, which could itself be appealed on a point of law to the High Court and the Commission could be subject to judicial review.

Having regard to the decision in *Zalewski*, it appears that it is open to the legislature to establish an analogous environmental law commission or tribunal. This option is attractive for a number of reasons. It would provide for a readily identifiable one-stop-shop for all environmental law cases of a civil nature. Legislation could require adjudicating officers to have particular expertise in a relevant filed which would be particularly useful given the scientific nature of many of the disputes likely to arise. It could also make provision for the resources that are appropriate to deal with cases involving environmental law issues and in particular, the urgency that will often arise. While the creation of such a body would involve a significant degree of up-front investment, in the longer term it should prove more cost effective than the existing courts' system. In light of the decreased formality inherent in such a system, it is also likely to be less intimidating for prospective litigants.

However, in order to be constitutionally permissible, the jurisdiction and powers of any such tribunal or commission would have to be strictly limited. It is clear from Article 37.1 of the Constitution that it could not exercise any jurisdiction in criminal matters- a limitation which is significant given that many environmental law cases are criminal in nature. In addition, it seems unlikely that it could grant any form of injunctive relief. Again, this limitation is problematic given that so many prospective litigants will be seeking to avoid imminent and irreparable harm to the environment. It is also implicit in the majority decision in *Zalewski* that the awards which such a body could make would be limited which could make it difficult to disincentivise larger entities from committing further acts which are damaging to the environment. Further, as a body operating outside the existing courts' structure, its decisions are likely to attract less attention than decisions of the court, which may stunt its influence.

On balance and in light of the mixed civil and criminal nature of environmental cases, it seems that the first model, which involves the creation of a specialised environmental court, or a "green division", within the existing courts' structure, combined with an administrative tribunal along the lines of the WRC provides the most straightforward option. It avoids the jurisdictional limitations inherent in courts of local and limited jurisdiction and administrative tribunals. While it would require some legislation to separate it from the ordinary civil and criminal law courts, the general framework is already there so the task of legislators would not be unduly onerous. In circumstances where the structure already exists, it would be constitutionally sound. Further, in light of the High Court's inherent jurisdiction, it is best equipped to provide the broad range of remedies which environmental law disputes demand.

The appropriate forum will have to be studied and decided upon by Government. However, two observations can be made:

First, there is an international consensus that to facilitate real environmental justice, the establishment of a court by itself is not sufficient, in addition the ECT needs to operate with suitable procedural rules, including wide rules of standing, the ECT system cannot cost too much for litigants, decision makers need access to scientific and technical expertise, and the remedies which the ECT can apply need to be able to broker agreed solutions and future action, using alternative dispute resolution and mediation.

Second, looking at the Irish system, an environmental division of the High Court - a so called Green Chamber with a judge appointed from the roster of other High Court judges within a regular (nonspecialized) court assigned environmental cases- is not likely to give the benefit of

ease of access to justice, reduced costs, expert decision maker or provide innovative problem solutions. The High Court is still bound by all the well cited barriers to access to justice. The Commercial Court model is not suitable: it is significantly more expensive to go the Commercial Court than an ordinary court, and it is designed to move commercial and high value multinational type disputes through quickly. A green Chamber judge would not build up long term expertise, because a High Court judge assigned to any specialised Court is only there for a limited period of time and would be rotated to other High Court wings such as family, commercial, criminal etc., or promoted.

Finally, the normal practice and procedures of the High Court would apply, and the law likely to be interpreted in line with existing legal methods of interpretation. Pring and Pring note in their extensive study of environmental courts worldwide, that "*it is difficult for a green chamber to adopt different rules, fees, or court procedures from those used by its parent regular court*" [410]

The opportunity to create a truly innovative tribunal, with a problem-solving approach, restorative justice and ADR could not easily be realised in the traditional high court model. A specialist tribunal in Ireland could, however, operating an environmental code described in this blueprint, create its own culture.

This paper, and the work of the Task Force aim to stimulate developments in Ireland so as to achieve the adoption of a successful ECT in Ireland.

[410] Experiences of Sweden's Environmental Courts Ulf Bjällås, Presiding Judge on the Environmental Court of Appeal in Stockholm from 1999 until his retirement in 2010, Accessed at https://law.pace.edu/sites/default/files/IJIEA/jciBjallas_Final%203-17_cropped.pdf, 15th October 2020.