

*CONTESTING RISK, PRECAUTION AND LEGITIMACY: A CASE STUDY OF **LAFARGE***

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ABSTRACT

This thesis examines debates about the precautionary principle in a tribunal and judicial review proceeding where environmental groups and individuals challenged a proposal to burn tires and other non-traditional fuel sources at a cement plant in Ontario, Canada. Chapter 1 explores scholarship on the precautionary principle and outlines the unique analytical contributions offered by administrative constitutionalism theory. Chapter 2 sets out the case study methodology employed by the author. Chapter 3 explains the legislative context. In chapters 4 through 9, each participant's arguments are analyzed in relation to the two paradigms of administrative constitutionalism: Rational-Instrumentalist and Deliberative-Constitutive. This thesis establishes that administrative constitutionalism discourse dominates the construction and contestation of environmental risk; the author further argues that administrative constitutionalism's discursive dominance has an exclusionary impact on the people, ideas and interests represented in environmental risk regulation.

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INTRODUCTION

The precautionary principle has been the subject of debate and controversy since it first emerged in Europe in the 1970s. More recently, several scholars have argued that debates surrounding the precautionary principle are linked with debates about the proper role of the public administrators who are charged with implementing the principle.¹ Questions about the source of legitimacy in regulatory decisions, the role of courts on judicial review, and the value of generalist, community and expert knowledge are at the core of disputes about both the precautionary principle and public administration. Elizabeth Fisher has used the term “administrative constitutionalism” – which refers to the constituting, limiting, and holding to account of public administration – in describing these debates about public administration.²

In Ontario, the close ties that connect debates about the precautionary principle and administrative constitutionalism were crystallized in the *Lafarge* decisions³ that are the subject of this case study. *Lafarge* originated in an attempt by the international cement company Lafarge Inc. to burn tires and other non-traditional fuel sources at a cement plant in Ontario. Precautionary ideas played a central role in the ensuing legal debates at both the administrative proceedings before the Environmental Review Tribunal and a subsequent judicial review at the Divisional Court. My research will address the following research question: What role did competing understandings of administrative constitutionalism play in disputes about the

¹ E.g. Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Portland: Hart Publishing, 2007). Fisher suggests administrative constitutionalism is an essentially contested concept whose meaning is context-specific; John Paterson, “The Precautionary Principle: Practical Reasoning, Regulatory Decision-Making and Review in the Context of Functional Differentiation” in Andreas Philippopoulos-Mihalopoulos (eds) *Law and Ecology: New Environmental Foundations* (New York: Routledge, 2011) at 83-104.

² Fisher *supra* note 1 at 24-5.

³ *Dawber v Ontario (Ministry of the Environment)*, [2007] OERTD No 25 [*Dawber*], judicial review denied in *Lafarge Canada Inc v Ontario (Environmental Review Tribunal)*, [2008] OJ No 2460 (Div Ct) [*Lafarge*].

precautionary principle in *Lafarge*? In answering that question this paper draws on the work of Elizabeth Fisher, and specifically her identification of two dominant paradigms of administrative constitutionalism – Rational-Instrumentalism (RI) and Deliberative-Constitutive (DC) – that are each associated with different understandings of the precautionary principle. The DC paradigm recognizes a “semi-independent” role for public administrators oriented around the exercise of discretion.⁴ The RI paradigm, in contrast, views public administration as an instrument of legislators that carries out specific responsibilities established through a democratic lawmaking process.⁵

This case study also introduces a new dimension to the existing scholarship on administrative constitutionalism and precaution: It recognizes administrative constitutionalism as a type of discourse that constructs, channels, and limits understandings of environmental risk regulation. Therefore instead of exclusively focusing on the two rival constituent discourses inside the umbrella discourse of administrative constitutionalism, this paper also takes a broader look at how administrative constitutionalism’s discursive dominance serves to exclude certain possibilities and participants. Maarten Hajer’s work on environmental discourses is a guiding influence on this aspect of the case study.⁶

Although this study is grounded in Elizabeth Fisher’s work on administrative constitutionalism, which is most fully developed in her book *Risk Regulation and Administrative Constitutionalism*, the literature review engages with several other theoretical lenses that observers have used to make sense of the controversies surrounding precaution. In particular, many scholars embrace a science/democracy dichotomy that frames debates about environmental

⁴ *Ibid*, 30-2.

⁵ *Ibid*, 28-30.

⁶ Maarten Hajer, *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process* (New York: Oxford University Press, 1995).

risk as centred on whether choices are best made on the basis of scientific analysis or democratic processes. Cass Sunstein, John Paterson, and David Resnik all adopt this framing to varying extents, and with their own particular nuances.⁷ Others cast the regulatory challenges posed by environmental risk in moral terms. The precautionary scholarship of Kerry Whiteside, John Applegate, and L.M. Collins is infused with sensitivity to the moral implications of regulatory choices, even if they sometimes reach diametrically opposed conclusions.⁸ The epistemology of environmental risk is another focal point for scholars who distinguish among different types and degrees of knowledge about environmental harm. Andy Stirling, Bruno Latour, David Dana, Dayna Nadine Scott, and Brian Wynne engage with these questions.⁹

This list is incomplete and the categorization is inexact. Many scholars approach precautionary issues from multiple angles, moving from the nature of risk to the contributions of scientists and to choosing the appropriate precautionary response, and this summary is merely intended to illustrate some of the diverse paths followed by observers of precautionary debates. Yet this case study is not agnostic about which approaches are most illuminating and effective: it

⁷ Cass R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (New York: Cambridge University Press, 2005); Paterson, *supra* note 1; David B. Resnik, “Is the precautionary principle unscientific?” (2003) 34 *Studies in History and Philosophy of Biological and Biomedical Sciences* 329.

⁸ Kerry Whiteside, *Precautionary Politics: Principle and Practice in Confronting Environmental Risk* (Cambridge: MIT Press, 2006); John S. Applegate, “The Taming of the Precautionary Principle”, (2002) 27 *William and Mary Environmental Law and Policy Review* 13; Lynda M. Collins, “Security of the Person, Peace of Mind: A Precautionary Approach to Environmental Uncertainty” (2013) 4(1) *Journal Human Rights and the Environment* 79.

⁹ Andy Stirling, “Science, Precaution, and the Politics of Technological Risk: Converging Implications in Evolutionary and Social Scientific Perspectives” (2008) 1128 *Annals of the New York Academy of Sciences* 95; Bruno Latour, *Politics of Nature: How to Bring the Sciences into Democracy* (Cambridge: Harvard University Press, 2004); David Dana, “The Contextual Rationality of the Precautionary Principle” in (2009) 35 *Queen’s Law Journal* 67; Dayna Nadine Scott, “Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution” (2008) 46 *Osgoode Hall Law Journal* 293; Brian Wynne, “Uncertainty and Environmental Learning: Reconceiving Science and Policy in the Preventive Paradigm” (1992) 2(2) *Global Environmental Change* 111.

adopts the analytical lens of administrative constitutionalism, and incorporates Hajer's work on environmental discourses to sharpen and enrich that lens. Like Fisher, this paper argues that the science/democracy framing – arguably the most pervasive analytical approach – is fundamentally at odds with empirical accounts of precautionary debates and therefore incapable of explaining how precautionary decisions are made. These views are further detailed in the literature review and a concluding chapter, but this paper chiefly relies on the work of Fisher, Tollefson and Thornback, Paterson and others to support the premise that public administration is the proper analytical focal point from which to understand precautionary debates. The bulk of this paper is therefore concerned with the insights gained through analyzing the discourse of administrative constitutionalism in the *Lafarge* debates.

Although the precautionary principle has appeared in many different textual forms, certain core elements are consistent. The principle is applicable where there is scientific uncertainty about the nature and/or extent of a risk to environmental or human health, and it provides for regulatory action to be taken to address the risk. When precaution is invoked in real-world regulatory contexts, it can have radically different meanings. Some believe that the precautionary principle is little more than a common sense affirmation that governments are free to regulate dangerous practices before science has cleared all confusion about the danger. Others see precaution as a radical departure from the idea that regulation of environmental risk should be based on science. This “radical” label is embraced by both proponents and critics of the principle – the former claim that precaution can transform environmentally destructive patterns

of economic development, while the latter see precaution as a gateway to irrational decision-making that will prevent much-needed technological innovations.¹⁰

Although scholarly attention to the precautionary principle has often focused on its international operation, particularly in environmental treaties and trade disputes, much of this scholarship is of limited relevance to domestic case studies like this one. Implementing the precautionary principle involves fundamentally different challenges in international and domestic contexts, perhaps most notably in regard to citizen participation.¹¹ However, this international context often informs the precautionary principle's domestic application. In the leading Supreme Court of Canada (SCC) case on the precautionary principle – *Spraytech*¹² – the Court grounded its attempts to define the principle in a survey of international legal statements on precaution.

There is no clear demarcation between international and domestic considerations of precaution. Accordingly, this review of pertinent scholarly literature focuses on works that engage with the challenges implicated in the principle's domestic application, particularly in Canada and other common law jurisdictions, while also consulting more internationally-oriented sources that nonetheless speak to these domestic challenges.

The distinction between international and domestic expressions of the precautionary principle also has profound consequences for their underlying concepts of administrative

¹⁰ E.g. Whiteside, *supra* note 8; Sunstein, *supra* note 7; John Dryzek, Robert S. Goodin, Aviezer Tucker & Bernard Ruber, "Promethean Elites Encounter Precautionary Publics" in (2009) 34(3) *Science, Technology, & Human Values* 263.

¹¹ E.g. Jacqueline Peel, *The Precautionary Principle in Practice: Environmental Decision-Making and Scientific Uncertainty* (Annandale: Federation Press, 2005) at 137-59; Fisher *supra* note 1 at 165-7;

¹² *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, [2001] 2 SCR 241, 2001 SCC 40 at paras 31-2. See also *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52 at para 20.

constitutionalism. The DC paradigm's emphasis on public participation and administrative discretion may prove more difficult to operationalize globally than in national or sub-national contexts. This perception, regardless of its validity, could also lead to the precautionary principle being understood in comparatively more RI terms internationally than domestically. The principle's evolution in domestic and international contexts may lead to different destinations.

The following literature review explores a range of alternative ways to understand precautionary debates in addition to Fisher's focus on paradigms of administrative constitutionalism, and concludes with a discussion of the unique contributions offered by linking Fisher's theory of administrative constitutionalism with Hajer's ideas about environmental discourses.

Precautionary scholars have also employed a broad range of methods, from textual analysis of how understandings of precaution have evolved in international law to philosophical treatises on risk and legitimacy to case studies of the principle's implementation.¹³ This paper follows the case study approach.

The *Lafarge* case began when Lafarge Canada Inc. sought approval from the Ministry of the Environment (MOE) to burn "alternative fuels" – including tires – at a cement manufacturing plant in Bath, Ontario, prompting hundreds of individuals and environmental organizations, including Lake Ontario Waterkeeper (LOW), to express their opposition to the proposal in written comments and public meetings. The MOE approved the proposal despite this opposition, but it added a number of conditions requiring Lafarge to monitor and mitigate the facility's

¹³ Arie Trouwborst, "The Precautionary Principle and the Ecosystem Approach in International Law: Differences, Similarities and Linkages" in (2009) 18(1) *Review of European Community and International Environmental Law* 26; Jacqueline Peel, "Precaution – A Matter of Principle, Approach or Process?" (2004) 5(2) *Melbourne Journal of International Law* 483; Christian Munthe, *The Price of Precaution and the Ethics of Risk* (New York: Springer, 2011).

environmental impact. On the same day that the Ministry approved Lafarge's proposals with these additional conditions, it announced a proposed regulation that would ban tire burning for two years because of a lack of knowledge regarding its environmental and health impacts. The proposed regulation would not apply to previously approved tire burning facilities, and since the Bath facility was the only one authorized in the province this would have the effect of prohibiting elsewhere in the province what was permitted in Bath.

Subsequently, a number of individuals and environmental organizations applied for leave to appeal the decision under Section 38 of the *Environmental Bill of Rights* (EBR).¹⁴ Section 38 allows third-party appeals of environmental decisions in certain circumstances, bypassing normal standing requirements for such appeals. Such appeals, and applications for leave to appeal, are heard by the Environmental Review Tribunal (ERT). Section 41 establishes the criteria for granting leave to appeal.¹⁵

The ERT granted leave to appeal, and the Divisional Court of Ontario upheld the ERT's decision. After the Ontario Court of Appeal rejected Lafarge's request for leave to appeal the Divisional Court's ruling, Lafarge abandoned the project.¹⁶ The MOE's failure to apply the precautionary principle was at issue throughout the proceedings, although the content of the debate on this point changed significantly from the ERT leave hearing to the judicial review. The allegations concerning the precautionary and ecosystem approaches were based on their inclusion in the MOE's Statement of Environmental Values (SEV), a document it was obliged to consider when making environmentally significant decisions pursuant to Section 11 of the *EBR*. At the ERT, all the parties agreed that the SEV – and by extension the precautionary approach

¹⁴ Section 38, *Environmental Bill of Rights*, SO 1993, Ch 28.

¹⁵ Section 41, *Environmental Bill of Rights*, *supra*.

¹⁶ *Baker v Directors, Ministry of the Environment*, Case Nos 07-009-07-016 (June 16, 2009) [ON ERT] at 8-9.

outlined in the SEV – was applicable. This changed when Lafarge and the MOE modified their position on judicial review and disputed the SEV’s applicability.

Under the first branch of the S 41 test, the leave Applicants made several distinct allegations about the MOE Directors’ unreasonableness: they failed to consider the SEV, and the principles it contains concerning the precautionary approach, the ecosystem approach, resource conservation, and public participation; they failed to obtain requisite information on baseline environmental conditions; they disregarded the common law rights of local landowners; and they discriminated against Bath residents by permitting tire burning there while proposing its prohibition elsewhere in the province. On judicial review at the Divisional Court only four grounds were considered: the proper interpretation of the S 41 test for granting leave to appeal; the relevance of the SEV, and whether the Directors properly considered the ecosystem and precautionary approaches; the relevance of common law property rights; and the alleged discrimination against residents of Bath.

My analysis of the legal issues raised in *Lafarge* is comparatively limited, and this case study will not address all of the grounds listed above. Instead I will focus on the debates surrounding the precautionary approach and the proposed moratorium on tire burning. The proposed moratorium is relevant because it was closely linked to questions about the distribution of environmental risk. Other issues will only be addressed to the extent that they illuminate the concepts of administrative constitutionalism underpinning the precautionary debates in *Lafarge*: for example, Chapter 4 features a brief discussion of how the leave Applicants linked their precautionary arguments with their criticisms of the public consultation process. In addition, the parties in *Lafarge* frequently made use of the same supporting materials and evidence under

multiple grounds. Consequently, where a fact or opinion that is related to precaution is considered under another ground, I will cite and examine it.

The case study will show that all the S 38 Applicants represented by lawyers, with the exception of Clean Air Bath, consistently relied on DC concepts throughout their submissions to the ERT and on judicial review. Lafarge mirrored this consistency by adhering to RI principles. The MOE, however, switched from largely DC arguments at the ERT to RI arguments at the Divisional Court. RI and DC principles were blended in the ERT's decision, while the DC paradigm dominated the Divisional Court's judgment. *Lafarge* left DC concepts of the precautionary principle, and administrative constitutionalism more generally, on firmer ground. RI ideas were not vanquished, but their place in Ontario environmental risk regulation was secondary to DC ideas.

The case study's findings, and the analysis those findings generate, go beyond summarizing the state of administrative constitutionalism in the *Lafarge* precautionary debates. Following a detailed review of the case study's results, I will make three interrelated arguments in a chapter discussing the results. The arguments centre on the limited relevance of a science/democracy framing, the lack of any evidence that one paradigm of administrative constitutionalism is more or less precautionary than the other, and the nature of the exclusion engendered by administrative constitutionalism's discursive dominance.

The first Part of this paper is the literature review, the parameters of which were discussed above, and following that will be a brief history of the *Environmental Bill of Rights*. These are found in Chapters 1 and 2, respectively. Chapter 3 summarizes the methods and materials used in the case study. The *Lafarge* case study is found in Parts II and III. Part II details the proceedings before the ERT, while Part III shifts to focus on the judicial review at the

Divisional Court. Chapter 4 analyzes the debates regarding the interpretation of S 41, the leave to appeal test. Chapter 5 shows how the parties in three separate grounds confronted questions of environmental risk and precaution: the second branch of the S 41 test, the precautionary approach, and the alleged discrimination against Bath residents. Chapter 6 looks at the parties' interweaving of expertise, science and proof to construct their precautionary arguments. Each Chapter in both Parts II and III also features a discussion of how the ERT and the Court, respectively, ruled on the legal issues raised by the parties. Chapter 7, the first of Part III, examines the debates regarding *Dunsmuir* and the choice to understand the ERT's role in external or internal review terms, which has significant implications for the degree of deference commanded by a Tribunal decision on judicial review. Chapter 8 focuses on the extent and form of accountability faced by MOE decision-makers, which emerged as a key issue on judicial review. Chapter 9 concludes the case study with an examination of deference's role in the conflict about upholding the ERT's findings on the risk of harm. Part IV consists of a Chapter discussing the findings.

PART I: *Overview and Literature Review*

Chapter 1

Literature Review

Understanding the problem

The precautionary principle is a legal response to the environmental problems posed by technological and industrial innovation. Yet the precise nature of the problem eludes consensus, even among supporters of the principle. The challenge, variously described as “risk” and “uncertainty”, for regulators is that the environmental consequences of allowing this innovation to progress unchecked are often unknown and potentially dangerous. How people chose to label this problem of unknown dangers often proves revealing. Usage of the word “risk” can indicate a presumption that the unknown consequences of technological developments are capable of *eventually* being defined and measured, after more scientific research.¹⁷ According to this characterization, the lack of knowledge that makes precaution necessary is temporary, and often the precautionary principle only requires delaying the implementation of a new technological practice: Certainty will be achieved in the future, but in the meantime the precautionary principle can provide guidance.¹⁸

When the same regulatory problem is called “uncertainty,” a different set of assumptions is usually found: Knowledge amounting to certainty or near-certainty may never be attainable, at least in regard to particular technological practices and ecological processes that are exceptionally complex. Precaution may therefore be needed indefinitely. These alternative epistemologies can each exist with strong and tame versions of the principle, but critics of the

¹⁷ Paterson *supra* note 1 at 85-7; Peel (2005) *supra* note 11 at 20-1.

¹⁸ Dayna Nadine Scott, “Testing Toxicity: Proof and Precaution in Canada’s Chemicals Management Plan” (2009) 18(1) *Review of European Community and International Environmental Law* 59 at 70.

precautionary principle almost invariably embrace the language of “risk” and reject the idea of indefinite uncertainty.

Cost-benefit risk assessment is the precautionary principle’s main rival in regulating technological practices with potentially adverse environmental consequences. It is based on the notion that the consequences are quantifiable and proper subjects for mathematical analysis.¹⁹ While epistemologies of both “risk” and “uncertainty” can support diverse interpretations of the precautionary principle, the language of “uncertainty” is usually only employed by proponents of the principle.

Elizabeth Fisher identifies three features of technological risk that make it resistant to agreement: first, scientific uncertainty about the nature and extent of technological risk; second, behavioral uncertainty, or human error, which may also increase the risks associated with technology (e.g. human error was instrumental in the Three Miles Island nuclear reactor accident); and third, cultural context which influences the acceptability of a risk, including how the benefits of a risk are distributed within society.²⁰ These features of technological risk combine and reinforce each other to make it difficult for people to reach agreement about how to manage or even define it, given that no precise mathematical formula or clear legal rule is capable of identifying the nature, extent and appropriate response for a given technological risk. All three of these features were present in *Lafarge*. As discussed in the case study, the dangers posed by the tire burning emissions, the trustworthiness of the Lafarge personnel managing and monitoring the plant, and the fairness of allowing tire burning in Bath while contemplating its prohibition elsewhere in the province were at the heart of *Lafarge*’s precautionary debates.

¹⁹ Sunstein *supra* note 7 at 129-38; Dana *supra* note 9 at paras 29-32.

²⁰ Fisher *supra* note 1 at 7-11.

The terminology of knowledge, and its absence, is interwoven with the science/democracy dichotomy that often frames precautionary debates. Arguments about science's inadequacy often rest on the presumption that uncertainty and ignorance characterize our understanding of many technological practices, rather than precise probability ratios expressed in mathematical terms. Because environmental decisions must sometimes be made in a state of very limited knowledge, the choices are inherently political and thus must be made democratically: The legitimacy of these political choices depends on their democratic credentials. In contrast, the idea that environmental regulation is properly entrusted to scientific experts reflects the assumption that science can provide answers about environmental consequences.²¹

Paterson complicates this science/democracy dichotomy - and the related distinction between risk and uncertainty - by drawing on David Resnik's work to distinguish decision-making under conditions of risk and ignorance. Where there is risk, probabilities can be assigned to various environmental outcomes, but this is impossible in cases of ignorance. Paterson argues that because decision-making under conditions of ignorance is inherently controversial, a political and legal response is called for.²² Quantitative analysis, such as traditional risk assessment, is simply inadequate, which in turn points to the precautionary principle's legitimacy and justiciability. Paterson acknowledges that the label "risk" can explain some regulatory challenges, but in other cases ignorance is the problem.²³ Consequently Paterson's use of "ignorance" resembles other scholars' use of "uncertainty." However, the different vocabulary

²¹ Fisher *supra* note 1 at 11-3.

²² Paterson *supra* note 1 at 86-8.

²³ *Ibid.*

highlights the radical epistemological implications of abandoning the idea that, although risks may be temporarily unknown, they are ultimately knowable.

Whiteside, in contrast to Paterson's careful delineation among decision-making conditions, seeks to transform how risk itself is understood. Instead of resorting to words like "uncertainty" or "ignorance" to describe the regulatory challenge posed by technology's unknown environmental consequences, Whiteside broadens the conceptual scope of risk and argues that its definition is unduly narrow.²⁴ Risk's meaning is expanded to encompass uncertainty. Yet the radical epistemological implications of Whiteside's reasoning are softened by his acceptance that the precautionary principle is only properly applicable where the nature of a risk is uncertain. (This raises the question of how such uncertainty is identified, which is explored later in the discussion of expertise.) Thus Whiteside acknowledges the relevance of uncertainty by recognizing that it marks a category of risk: Uncertainty and risk co-exist, precluding a clear dichotomy between the concepts.

Stirling, in his 2008 article "Science, Precaution, and Technological Risk," offers another variation by distinguishing between uncertainty and ignorance. Uncertainty, according to Stirling, exists where the range of environmental outcomes is known but the probability of each outcome is unknown. Ignorance represents the intersection of lack of knowledge about both probabilities and the range of possible outcomes.²⁵ It is apparent that Paterson and Stirling attach a different meaning to the term "ignorance," while Whiteside's taxonomy is less clear.

This is only a snapshot of the many different ways in which lack of knowledge about a technology's environmental consequences is classified and labeled by scholars.²⁶ These

²⁴ Whiteside *supra* note 8 at 51-60.

²⁵ Stirling *supra* note 9 at 98-9.

²⁶ Andreas Klinke and Ortwin Renn, "A New Approach to Risk Evaluation and Management:

differences may appear semantic or irrelevant to efforts to understand how the principle operates in practice, but it is essential to recognize that terms like “risk,” “uncertainty,” and “ignorance” can take on a variety of meanings. Making a precautionary argument, or rebutting one, requires engaging with these concepts. Accordingly, understanding precautionary debates involves clarifying how participants use these terms. Because that usage is inconsistent and often imprecise, it is analytically important to avoid attaching a fixed meaning to these terms. The results portion of this paper, found in Parts II and III, therefore examines how these terms were used, and contested, in the *Lafarge* precautionary debates. However, in the other portions of this thesis the “uncertainty” terminology is preferred because it acknowledges that ignorance is sometimes permanent and unavoidable.

Scholars who rely on the popular science/democracy framing identify understandings of risk as a key faultline between the two camps. Stirling’s idea of ignorance or Whiteside’s notion of uncertain risks are linked with the democratic side of the binary, while Sunstein’s preoccupation with quantifiable risks is associated with the science side. If risk is quantifiable and knowable, as Sunstein posits, then science can provide answers. But science’s value diminishes when certainty itself diminishes, as Stirling’s and Whiteside’s ideas reflect. Beyond these divergent understandings of risk and uncertainty, this science/democracy framing also recognizes disagreement about how decisions about the *acceptability* of risks should be made: democratically, or by experts relying on scientific evidence.

Whiteside and Sunstein are representative of dichotomy’s academic popularity, and its resulting influence on analysis of precautionary debates. Consistent with Whiteside’s deep

Risk-Based, Precaution-Based, and Discourse-Based Strategies” (2002) 22 *Risk Analysis* 1071; Latour *supra* note 9; Cherie Metcalfe, “Introduction: Emerging Paradigms of Rationality - Theory and Applications” in (2009) 35 *Queen’s Law Journal* 1.

skepticism about the ability of science to erase uncertainty about risk, he both embraces the science/democracy framing and affirms that legitimate regulatory responses to environmental risk must be rooted in democratic processes. Whiteside bases his claim that implementing the precautionary principle in a more democratic fashion enhances its effectiveness on three grounds: first, public skepticism about novel technologies and practices may counter the “excessively action-oriented worldviews associated with particular professions and forms of expertise”; second, greater transparency in decision-making will prevent regulatory capture and encourage officials to fulfill their precautionary obligations; and third, non-expert knowledge may usefully supplement expert scientific knowledge, for example by detecting unforeseen harm occurring in local communities at an early stage when it can still be mitigated.²⁷

Yet Whiteside’s views are better understood as a rejection of science’s primacy in risk regulation than as an affirmation of democracy’s value. He accepts the science/democracy dichotomy, dismisses the science side, and is thus forced to join the democracy side. This reluctance is expressed in his consideration of Bruno Latour’s and Hans Jonas’s work. Latour has written extensively on questions of science and democracy, while Jonas is sometimes credited with first recognizing and defining the precautionary principle in his 1979 book *Das Prinzip Verantwortung* (roughly translated as “The Principle of Responsibility”).²⁸

According to Jonas, there is a moral duty to prevent catastrophic risks associated with new technologies. The underlying concern or imperative is that no one has the moral authority to risk humanity’s future existence. Whiteside is critical of Jonas’s exclusive focus on catastrophic risk, as well as his conclusion that only a “tyranny” can meet this moral exigency to stop new

²⁷ Whiteside *supra* note 8 at 125, 129-30, and 131-2.

²⁸ Hans Jonas, *The Imperative of Responsibility: In Search of an Ethics for the Technological Age* (trans) Hans Jonas in collaboration with David Herr (Chicago: University of Chicago Press, 1985).

technologies from threatening humanity's survival. Jonas's anti-democratic conclusion, as Whiteside explains, is based on his belief that "people in democratic societies are addicted to the pleasures of mass consumption", and thus incapable of putting "the breaks on the compulsive dynamic of technological progress."²⁹ Although Whiteside attacks many of Jonas's ideas, he also urges scholars to go beyond reflexive dismissals of Jonas's work and instead engage with his arguments: "[i]dentifying and criticizing [Jonas's] presuppositions helps open paths to alternative ways of framing precautionary ideas."³⁰

Whiteside's next step on this path towards alternative framings is the work of Latour. Latour's ideas about the precautionary principle are built on Latour's rejection of the dichotomy between human society and nature. Latour instead characterizes many phenomena that are conventionally seen as belonging to one side of that dichotomy as "hybrids". These phenomena, which include climate change and genetically modified organisms, are simultaneously a product of human action and beyond humanity's capacity to control. Hybrids are the proper subject of democratic decision-making because choices about risk are essentially political.³¹ Whiteside favours Latour's democratic interpretation of the precautionary principle, but expresses reservations about the lack of moral significance Latour attaches to the principle.³² After this comparative examination of Latour's and Jonas's work, Whiteside concludes that Jonas had the better grasp of the unique technological, societal, and political challenges that the precautionary principle must meet. Yet Whiteside is adamant that authoritarianism is not the solution to the problems identified by Jonas: Democracy is not a panacea, but it is the only viable platform for adequately regulating environmental risk.

²⁹ Whiteside *supra* note 8 at 97.

³⁰ *Ibid* at 99.

³¹ *Ibid* at 104-6.

³² *Ibid* at 107-11.

Sunstein exemplifies the opposing viewpoint which holds that the risks presented by technological development are best regulated by scientists. Where Whiteside criticizes scientists for systematically underestimating risk because of an irrational faith in technology's safety, Sunstein rebukes supporters of the precautionary principle for irrationally distrusting technological innovation. He cites a survey of scientists asked to name present-day technologies whose invention and development would have been prevented if the precautionary principle had existed when they were created. The list included airplanes, antibiotics, X-rays and the smallpox vaccine.³³

Moreover, Sunstein criticizes the precautionary principle for being logically incoherent. He notes that prohibiting innovation carries its own risks, as in the example of the smallpox vaccine, and thus precautionary actions produce uncertain but potentially vast risks – the very types of risks that the principle is aimed at eliminating.³⁴ Instead of calling for the abandonment of the precautionary principle, Sunstein outlines a proposal for the principle's reconstruction that centres on restricting its application to catastrophic risks. Sunstein's arguments have sparked many rebuttals from supporters of precaution and others who cite flaws in his analysis,³⁵ and the scholarly debates that followed are complex and generally beyond the scope of this literature review. Yet Sunstein's views are both influential and representative of one strain of opposition to the precautionary principle. His ideas about environmental risk are echoed at points in the *Lafarge* submissions.

³³ Sunstein *supra* note 7 at 25, citing Sandy Starr, "Science, Risk, and the Price of Precaution," available at <http://www.spiked-online/Articles/00000006DD7A.htm>.

³⁴ Sunstein *supra* note 7 at 26-32.

³⁵ E.g. Gregory N. Mandel and James Thuo Gathii, "Cost-Benefit Analysis Versus the Precautionary Principle: Beyond Cass R. Sunstein's Law of Fear" (2006) 2006(5) *University of Illinois Law Review* 1037; Whiteside *supra* note 8 at 29-57; Dana *supra* note 9 at paras 7-15.

Many other scholars have rejected the science/democracy dichotomy as simplistic and misleading. This paper similarly rejects the dichotomy. These critics note that in practice precautionary debates focus on competing scientific opinions about the nature of a risk, as well as on disagreements about the nature and distribution of a risk.³⁶ Rarely, if ever, do precautionary objectors agree that science has established a practice's safety, but oppose it nonetheless.

Despite these flaws, the science/democracy dichotomy remains significant for two reasons: first, the framing is frequently invoked by participants in precautionary debates, including in *Lafarge*; and second, it informs a large portion of theoretical scholarship on the precautionary principle. These concerns about the science/democracy dichotomy's validity should also not be mistaken for a rejection of either concept's relevance in interpreting the principle, and the scholarly and regulatory debates they inspire. In particular, the role of democratic processes in legitimately regulating environmental risks is controversial both in regard to whether it *is* important, and how democratic decision-making process can be crafted. Consequently there is a rich scholarship on public consultation and the precautionary principle.³⁷ Scholars writing in this area generally share a similar desire to render environmental decision-making processes more permeable to public participation and influence, but some scholars temper this attitude with a distrust for the bias, irrationality, and inconsistency that is sometimes attributed to more inclusive deliberative processes. Research here centres on how meaningful

³⁶ Fisher, *supra* note 1 at 13; e.g. H.M. Collins and Robert Evans, "The Third Wave of Science Studies: Studies of Expertise and Experience" (2002) 32(2) *Social Studies of Science* 235; Paterson *supra* note 1.

³⁷ Dryzek et al *supra* note 10; Valerie A. Brown, "Top Down, Ground Up or Inside Out? Community Practice and the Precautionary Principle" in eds Ronnie Harding and Elizabeth Fisher, *Perspectives on the Precautionary Principle* (Sydney: The Federation Press, 1999); Peel (2005) *supra* note 11 at 27-8.

public participation is both defined and effected. Only the first part of that scholarship, which concerns the definition and criteria for meaningful public participation, is relevant to this paper.

Administrative Constitutionalism

One leading critic of the science/democracy framing is Elizabeth Fisher, who has written both independently and with Ronnie Harding about the precautionary principle and its implementation in regulatory contexts. Fisher cites two additional problems with the science/democracy dichotomy beyond the problems listed above: first, both science and democracy are difficult to define, and neither concept encompasses public administration – the primary context in which risk regulation occurs,³⁸ and second, the dichotomy fails to account for law’s role in technological risk regulation.³⁹ Both criticisms build on the same underlying premise that public administration, and law’s role in constituting and expressing its limits, cannot be understood as extensions of democracy. Fisher maintains that administrative regulation of technological risk “can never be democratic”, although it is inevitably political.⁴⁰ If this premise is accepted, the inadequacy of the science/democracy dichotomy is apparent. Moreover, precautionary controversies arise precisely when scientific consensus is most elusive. Because neither science nor democracy can provide clear answers to the regulatory challenges posed by environmental uncertainty, the science/democracy dichotomy is an unhelpful starting point for analyzing how the debates unfold.

³⁸ Fisher *supra* note 1 at 16-7.

³⁹ *Ibid* at 17.

⁴⁰ *Ibid* at 257.

Fisher therefore calls for empirical study of how technological risk sparks controversy in practice.⁴¹ She argues that technological risk regulation necessarily involves public administration, and cites four reasons in support of this claim: first, determining acceptable standards of risk requires looking at the context surrounding a particular activity, including its political and economic impact; second, information about a technological risk must be gathered and assessed, and legislators lack the time and resources for this process; third, expertise is required to make sense of this information; and fourth, regulating technological risk involves communication, which may range from requiring certain forms of scientific information to large-scale public participation, and legislators do not have the necessary time, resources, and institutional capacity to manage these communications.⁴² After outlining the importance of public administration, Fisher goes on to make her central claim: that debates about the precautionary principle, and technological risk regulation more generally, are fundamentally about administrative constitutionalism.

The significance of Fisher's argument rests on her claim that the precautionary principle's meaning is shaped by the prevailing model of administrative constitutionalism and as a consequence its definition and implementation must be understood through the lens of public administration. Fisher identifies two dominant paradigms of administrative constitutionalism – Rational-Instrumental and Deliberative-Constitutive. Each paradigm constructs technological risk differently. Under an RI paradigm, the precautionary principle is defined as a formal legal rule that shifts the burden of proof to proponents who seek to establish a project's safety and operates in specified circumstances. Under the DC paradigm, the precautionary principle guides

⁴¹ Fisher defines technological risk as “environmental and public health risks arising from human industrial activities,” *supra* note 1 at 6-7.

⁴² *Ibid* at 19-21.

the exercise of administrative discretion without imposing formal legal obligations on proponents and objectors.⁴³ The prevailing model of administrative constitutionalism will also impact how precautionary decisions are scrutinized on judicial review.⁴⁴ Crucially for the purposes of this case study, the two paradigms diverge in how they define and apply the precautionary principle.

Because debates about who should determine where and how the precautionary principle is applicable were central in *Lafarge*, Fisher's (and Harding's) work in this area is especially relevant. The DC and RI paradigms of administrative constitutionalism represent useful theoretical frameworks for analyzing legal disputes about the roles of the MOE, the ERT and the Divisional Court in shaping the precautionary principle's reach and meaning.

The DC paradigm sees public administration as "semi-independent".⁴⁵ Public administrators have considerable discretion, and their responsibilities are in large part deliberative. The DC paradigm understands technological risk as an epistemological problem with complex socio-political features. Accountability under the DC paradigm is fostered through the provision of clear and substantive reasons for administrative decisions: transparency is aimed at easing concerns about the broad discretion entrusted to unelected public administrators. In addition, reviews of administrative decisions must closely scrutinize the original deliberative process to ensure it was proper.⁴⁶ Under the DC paradigm, public administrators have an active role as "deliberative problem-solver[s]" with a duty to apply the precautionary principle. Importantly, this duty exists regardless of whether an objector raises precautionary concerns.⁴⁷

⁴³ *Ibid* at 44-6.

⁴⁴ *Ibid* at 90-4.

⁴⁵ *Ibid* at 30.

⁴⁶ *Ibid* at 30-2.

⁴⁷ *Ibid* at 151.

Rational-Instrumentalism, the second of the two dominant paradigms of administrative constitutionalism identified by Fisher, sees public administration as an extension of the legislature: its task is “to obey the pre-ordained democratic will as it is expressed in legislation.”⁴⁸ It strives for effectiveness and efficiency. The RI paradigm understands technological risk as essentially quantifiable, and capable of management and containment.⁴⁹ Accountability is achieved through straightforward assessments of whether rules were followed and legislative mandates obeyed. Under the RI paradigm, public administrators implementing the precautionary principle are passive “umpire[s]” who weigh evidence of harm and safety using burdens and standards of proof, rather than exercising discretion.⁵⁰

Fisher’s work on administrative constitutionalism also includes a close study of merits review, a process in Australian administrative law where specialized Tribunals review administrative decisions. Merits review can be understood as a form of external or internal review: the two perspectives differ in whether they define the reviewing tribunal’s institutional place as internal or external in relation to the public administrator.

The DC and RI paradigms also offer contrasting perspectives on public consultation. The two paradigms not only diverge on the significance of public consultation, they also diverge on what constitutes effective public consultation. Public consultation generates legitimacy, according to DC principles, and may even be a precondition for legitimacy. The precautionary principle is thus properly applied through participatory decision-making processes.⁵¹ The RI paradigm, in contrast, attaches minimal significance to public consultation: Expertise is narrowly held, the general public has little understanding of the complex questions that arise in

⁴⁸ *Ibid* at 28.

⁴⁹ *Ibid* at 28-31.

⁵⁰ *Ibid* at 151.

⁵¹ *Ibid* at 33.

environmental risk regulation, and therefore legitimacy may be directly at odds with relying on public consultation because it may result in irrational decisions.⁵² Thus analyzing the legal arguments surrounding public participation helps identify the theories of administrative constitutionalism that drive each party's arguments. In turn, this understanding is essential to gaining a complete picture of how precaution was understood and constructed in *Lafarge*. More concretely for the purposes of this analysis, the extent of public participation was at issue in *Lafarge*, and the strong public opposition to the project was rhetorically prominent in the leave Applicants' submissions.

Fisher also complicates this idea of a simple antagonistic relationship between both paradigms of administrative constitutionalism by citing court decisions that have attempted to reconcile DC and RI models. In particular, she analyzes how the New South Wales Land and Environment Court's decision in *Telstra*⁵³ assigned DC and RI concepts to different elements of the decision making process.

Telstra was a merits review case heard by the New South Wales Land and Environment Court. It concerned a proposal to build a phone tower outside Sydney, Australia. Both directly affected parties and third-party observers may apply for merits review. Fisher's claim is that when merits review is understood in DC terms, so is the precautionary principle, and vice versa. The Court's judgment in *Telstra* characterizes the broader public administrative framework in DC terms, while requiring decision makers to follow an RI approach in imposing formalistic burdens of proof. But according to the approach outlined in *Telstra*, the precautionary principle does not dictate outcomes – i.e. the decision maker retains the discretion to understand threats more broadly and consider other factors beyond cost-benefit analyses. *Telstra* further extends

⁵² *Ibid* at 33.

⁵³ *Telstra Corporation Ltd v Hornby Shire Council* [2006] NSWLEC 133.

DC concepts by permitting decision makers to approve a project even when applying the precautionary principle indicates that it should be rejected or modified.⁵⁴

Because Canadian administrative law exhibits elements of both the DC and RI paradigms, Fisher's ideas about administrative constitutionalism are jurisdictionally appropriate. In particular, Canadian administrative law is similarly preoccupied with resolving the tensions inherent in balancing discretion, fairness, deference to elected lawmakers and the officials they appoint, and preserving the courts' authority to review the substantive reasonableness of administrative decisions.⁵⁵ These are the same considerations that feature in Fisher's work on administrative constitutionalism.

In practice, an internal review model of merits review involves a reliance on adjudicative procedures and rules of evidence, and, in the case of precautionary decisions, a formalistic shifting of burdens of proof between the parties. This is because under the internal review model the tribunal's responsibility is to remake, and, if necessary, reverse the original decision, and adjudicative procedures are considered the "gold standard" for resolving such disputes. An external review model, in contrast, understands merits review as "a more activist form of judicial review."⁵⁶ Under an external review model the reviewing tribunal is still responsible for remaking the original decision, but because its institutional place is different it must also perform this task in a fundamentally different way. Instead of relying on adjudicative procedures, tribunals follow the approach of courts on judicial review and look to general principles of

⁵⁴ Fisher *supra* note 1 at 155-60.

⁵⁵ Mary Liston, "Governments in Miniature: the Rule of Law in the Administrative State" in eds Colleen Flood and Lorne Sossin, *Administrative Law in Context: A New Casebook* (Toronto: Emond Montgomery, 2008) at 78, 95, 100-101, 106-107.

⁵⁶ Fisher *supra* note 1 at 139.

legitimate public administration. External review understandings of merits review reflect DC concepts, while internal review models reflect RI concepts.⁵⁷

Fisher's consideration of the external and internal review models does not extend to leave to appeal proceedings like the one in *Lafarge*. Her ideas about merits review, and the two models of merits review that she identifies, are therefore pertinent without being directly applicable. But the central distinction she draws between the two models – between a *de novo* determination and a discretionary examination of the original decision aimed at fashioning the best outcome – can be translated to a leave to appeal proceeding.

Fisher's arguments about the inextricable links between precaution, public administration and law are not normative. Her position is that law is unavoidably implicated in the regulation of environmental risk, not that this is a desirable state of affairs. Thus Fisher's views are not as opposed to those of Michael M'Gonigle, Paula Ramsay, and other environmental law skeptics as they may first appear.⁵⁸ Law, according to Fisher, is not a panacea for problems of environmental risk, but it inevitably features in any response to such problems.

Debates about paradigms of administrative constitutionalism and the precautionary principle are embedded in legal culture. The forms and arenas in which these debates occur are also specific to each legal culture. Jurisdiction is consequently important in determining how the RI and DC paradigms are manifested, and how the precautionary principle is understood. Fisher's claim here – about the importance of legal culture and context in shaping *where* and *how* debates about the precautionary principle and administrative constitutionalism take place - is best

⁵⁷ *Ibid* at 135-9.

⁵⁸ Michael M'Gonigle and Paula Ramsay, "Greening Environmental Law: From Sectoral Reform to Systemic Re-Formation", POLIS Project on Ecological Governance, Faculty of Law, University of Victoria, Draft; Cynthia Giagnocavo and Howard Goldstein, "Law Reform or World Re-Form: The Problem of Environmental Rights" (1990) 35 *McGill Law Journal* 345.

expressed by examples. Fisher notes that when attending a European conference on risk and public law, she found that “German lawyers were concerned with issues of delegation, French public lawyers with issues of responsibility, and English public lawyers with neither of these things.”⁵⁹ The role of legal culture is also demonstrated by the varying focuses of Fisher’s case studies in *Risk*, from merits review to public inquiries to international dispute resolution. As Fisher states, “[T]he principle is not a free-floating ‘duty to be cautious’ but rather a principle whose interpretation will be dependent on context.”⁶⁰

Legal culture’s importance is one motivation for this case study – this paper aims to deepen our understanding of how the precautionary principle operates in Ontario, which cannot be explained solely through studies of the principle in other jurisdictions with other legal cultures – but it also limits the applicability of this study’s findings. In Ontario, the precautionary approach is located within a complex legislative framework that features a collection of other legal concepts, and this surrounding framework informs the precautionary principle’s interpretation and application. This influence is perhaps most visible in the principle’s relationship with the second branch of the *EBR*’s leave to appeal test, which introduces a “significant harm to the environment” requirement. The leave Applicants’ obligation is to show that such harm could occur, although the requisite standard of proof is contested. Parallels between the precautionary principle’s concern with risk and S 41’s demand for evidence of potential harm recur throughout the parties’ submissions in *Lafarge*. This web of reflexive legal interpretations and applications confirms Fisher’s arguments about the significance of legal culture, and indicates the need for caution when transplanting international and foreign understandings of the principle into a Canadian case study like this one.

⁵⁹ Fisher *supra* note 1 at 253.

⁶⁰ *Ibid* at 161.

Approach/Principle

The confusion and controversy surrounding the idea of precaution extends to the question of whether the terms “precautionary principle” and “precautionary approach” signify materially different concepts. Some observers label the differences semantic, while others see a vast gulf in the practical impact of a precautionary approach or principle.⁶¹ In international law, the precautionary principle dominates. But the precautionary approach is also found in many legal documents, including the Ministerial policy document – the Statement of Environmental Values – that was considered in *Lafarge*. In *Lafarge*, it was the precautionary approach, not the principle, whose relevance, meaning and application was at issue. Yet all the parties used the terms interchangeably, as did the ERT and the Divisional Court. Consequently this paper explores scholarship on both the precautionary principle and the precautionary approach.

Jacqueline Peel tackles the relationship – correlative or competitive – between the precautionary principle and approach both textually and empirically. Each analytical focal point reveals an opposite conclusion. Textually, Peel sees little difference. But her empirical inquiry into how WTO Courts and other adjudicative bodies have considered precautionary ideas revealed significant differences in the political meanings attached to the two terms. Where the precautionary principle is linked with a regulatory obligation to take precautionary measures that exists independently from economic considerations, the precautionary approach is invoked as a more flexible alternative that is incorporated into a multi-faceted decision-making process that also includes economic costs.⁶² Yet this characterization cannot be reduced to a simplistic

⁶¹ Peel (2004) *supra* note 13 at 485; Whiteside, *supra* note 8 at 68-70; Trouwborst *supra* note 13 at 32.

⁶² Peel (2004) *supra* note 13 at 491.

“economy v. environment” clash, since the idea of proportionality in selecting precautionary measures is a central element of the precautionary principle, and the precautionary approach in turn allows precautionary concerns to trump economic fears. The differences are nuanced. Peel however persuasively argues that these differences are meaningful, as reflected in the contentious courtroom and international summit debates over whether precaution should be formulated as an approach or principle. Business interests, together with certain countries, including the United States, are aligned with the precautionary approach, while environmental groups and several other countries advocate for the adoption and implementation of the precautionary principle.⁶³

In the second part of her analysis, on the textual meanings of the precautionary approach and principle, Peel’s methodological approach to understanding precaution’s written formulations resembles Applegate’s history of the concept’s evolution in environmental law: she breaks down written legal expressions of both the precautionary principle and the precautionary approach into their constituent parts, searching for discrepancies and finding few.⁶⁴ Peel, like Applegate, looks at the threshold for triggering precaution’s application provided in the written definitions, and the nature – and flexibility – of precautionary measures. Following this meticulous review, Peel found that textually the differences between the precautionary principle and approach are essentially semantic.⁶⁵ (Applegate is silent on how, or if, the precautionary approach and principle differ.)

Whiteside sees a clearer divide between the terms “precautionary principle” and “precautionary approach,” and argues that they signify fundamentally different concepts: A

⁶³ Peel (2004) *supra* note 13 at 492-3.

⁶⁴ *Ibid* at 486-93.

⁶⁵ *Ibid* at 490-2.

principle is applicable generally, while the precautionary *approach* is merely an option decision-makers can choose to follow or not. Unlike the precautionary approach, the precautionary principle creates an obligation. Whiteside also makes a second, and related, distinction: The precautionary approach assigns the decision to take precautionary measures, or not to take them, to a decision-maker's discretion.⁶⁶ However, Whiteside does not claim there is a single "true" precautionary principle: instead, he argues that the principle is formulated by society as a pragmatic response to concrete problems.⁶⁷ Thus the nature of the obligation arising from the precautionary principle changes according to how the principle is formulated.

Whiteside's arguments about the importance of the precautionary principle also rest on its capacity to make preventive action a moral imperative, not merely one of many justifiable courses of action: his conclusion that the precautionary principle is novel and unique rests on it being a *principle*.⁶⁸ It responds to contemporary concerns about the intersection between scientific uncertainty and environmental harm by providing a reasoned framework for determining whether preventive action must be taken, and, if so, which measures should be chosen. According to Whiteside, the precautionary principle generates obligations and answers, not mere options.

As Peel notes, the prospective nature of risk regulation decisions means that only hindsight is capable of conclusively showing the wisdom of regulatory choices.⁶⁹ Stirling argues that sometimes even hindsight is inadequate. He proposes that technological developments, and the environmental risks they entail, be viewed in evolutionary terms.⁷⁰ Paths are followed,

⁶⁶ Whiteside *supra* note 8 at 68-70.

⁶⁷ *Ibid* at 150.

⁶⁸ *Ibid* at 69 and 95.

⁶⁹ *Ibid* at 500.

⁷⁰ Stirling *supra* note 9 at 96-8.

decisions are made without foresight, and unexpected consequences result. Stirling cites the example of keyboard development to evoke this evolutionary character of technological development: the “QWERTY” keyboard was a response to technical exigencies faced by the typewriter’s inventors, and it has endured in modern computing devices despite the contemporary irrelevance of those historic needs.⁷¹ The linearity of traditional conceptions of scientific progress – conceptions that are also embraced by supporters of precaution, who cite the threat of humanity’s inexorable technological march forward – is subverted by Stirling’s theory. In addition to the keyboard example, Stirling cites an iteration of this phenomenon with graver consequences for the generation of environmental risk: the design of nuclear reactors. First developed for use on submarines, there is widespread agreement among nuclear scientists that the outgrowth of current designs from the initial ones constructed in those exceptional circumstances has detrimentally affected safety.⁷²

Stirling’s ideas suggest that it may be impossible to evaluate if the precautionary principle is implemented “correctly” or “wrongly.” This insight has far-reaching implications for efforts to prove the principle’s legitimacy, as well as the legitimacy of individual precautionary decisions. Beyond the uncertainty surrounding environmental risks, there is even deeper uncertainty about the consequences of possible regulatory responses. Sunstein’s list of technologies that may have never been invented if the principle existed when they were created is mirrored by another list of unknown technologies that might have been invented if precautionary actions were taken.⁷³ Because there is no single ideal regulatory response, debates

⁷¹ *Ibid* at 97.

⁷² *Ibid* at 97.

⁷³ Sunstein *supra* note 7 at 25.

about the precautionary principle's proper interpretation do not lend themselves to conclusive answers.

Fisher's theories easily fit with Stirling's perspective on risk and scientific development, and in fact Stirling cites Fisher's *Risk*.⁷⁴ Legitimacy serves as the fulcrum of precautionary debates in the absence of conclusive answers, and Fisher argues that public administration is the focal point in the ensuing discussions about legitimacy: "Debates over the precautionary principle are thus, in essence, debates over the legitimacy of the administrative state."⁷⁵ The following section explores two concepts that often support claims to legitimacy: expertise and evidence.

Expertise, Evidence and (Ir)rationality

Precautionary scholars agree on the importance of expert knowledge and experience in evaluating environmental risks, but that consensus ends when the conversation shifts to defining and recognizing expertise. RI theorists view expertise narrowly, in a similar way to critics of the precautionary principle who believe that scientists should drive risk regulation choices. DC theorists question traditional understandings of expertise, and believe that expertise is found in a variety of forms and places.⁷⁶ Shelia Jasanoff, although not associated with the study of administrative constitutionalism, exhibits a DC-inflected perspective on expertise (Anne Meuwese ascribes Jasanoff's widely cited work on expertise to the DC paradigm⁷⁷).⁷⁸

⁷⁴ Stirling *supra* note 9 at 103

⁷⁵ Fisher *supra* note 1 at 42-3.

⁷⁶ *Ibid* at 33.

⁷⁷ Anne Meuwese, "Risk Regulation and Administrative Constitutionalism by Elizabeth Fisher" (book review essay) (2008) 35(3) *Journal of Law and Society* 417.

[E]xpertise is not merely something that is in the heads and hands of skilled persons, constituted through their deep familiarity with the problems in question, but rather that it is something acquired, and deployed, within particular historical, political and cultural contexts.

Collins and Evans call for a systematic taxonomy of expertise into varieties and areas of knowledge. The impetus for Collins and Evans' work is the movement away from deference to distrust of formal specialized knowledge, a characterization that others reject for lacking nuance.⁷⁹ The solution, according to Collins and Evans, is not a return to traditional deference but instead a theory to indicate when and what forms of expertise should be relied on. They accept the essence of the science/democracy framing – the existence of distinct scientific and political spheres, which Latour, Jasanoff and others reject – but recognize wisdom on each side of the binary.⁸⁰ The question Collins and Evans pose is not “is expertise paramount?” They instead ask, “when should expertise be paramount?”

Differentiating between scientific and political questions is central to Collins and Evans' arguments, and on this point they adopt the popular distinction between scientific judgements about the nature and extent of a technology's risk, and political decisions about the acceptability of a risk. In practice this clear distinction often becomes ambiguous. Contentious debates about whether a matter is political or scientific are the common result. Collins and Evans admit this, and direct their proposed systematic classification, in part, at making this distinction clearer.⁸¹

⁷⁸ Shelia Jasanoff, “Breaking the Waves in Science Studies: Comment on H.M. Collins and Robert Evans, ‘The Third Wave of Science Studies’” (2003) 33 *Social Studies of Science* 389 at 393.

⁷⁹ Collins and Evans *supra* note 36 at 236-7.

⁸⁰ Brian Wynne, “Seasick on the Third Wave? Subverting the Hegemony of Propositionalism: Response to Collins & Evans (2002)”, (2003) *Social Studies of Science* 401; Jasanoff *supra* note 78.

⁸¹ Collins and Evans *supra* note 36 at 251.

Although Collins and Evans' ideas have attracted criticism from Jasanoff and others, the problem they seek to address – how formal and informal⁸² expertise should be integrated into political decision-making processes – is a real one. Fisher favourably notes their challenge to traditional understandings of the science/democracy dichotomy, and remarks on their attempt to create an alternative theory of expertise.⁸³ Yet she also critiques their work for failing to place enough importance on the contextual factors surrounding technological risk problems. She argues that their attempt to theorize about technological risk problems without considering the diverse contexts in which such problems arise is flawed.⁸⁴

Dryzek et al offer another perspective on expertise, collapsing the distinction between informal public and formal scientific expertise and instead positing a dichotomy between elite opinion and non-elite expertise. Expertise, as understood by Dryzek et al, is a potential threat to elite regulators who are reluctant to acknowledge the full extent of uncertain risk surrounding the technological developments they depend on to fuel economic growth.⁸⁵ This construction of expertise is consistent with DC ideals, but it contrasts sharply with Jasanoff's more radical conception of expertise. Diversity regarding the construction of expertise therefore exists both *within* and *between* DC and RI theories.

Dryzek's work on the precautionary principle reflects the DC paradigm's distrust of insular and epistemologically simplistic decision-making processes, and consequently I have linked his work with other DC theorists. But more importantly, Dryzek is a leading scholar on

⁸² "Formal" and "informal" are used here to signal whether the expertise in question is linked with a scientific discipline with public credentials and status – i.e. a university Biology Department or an Association of Oceanographers – or rooted in a loosely organized collection of knowledge without reputational credentials, such as a hiking group who frequently visit an area and are uniquely well-placed to quickly notice any environmental changes.

⁸³ Fisher *supra* note 1 at 13.

⁸⁴ *Ibid* at 246.

⁸⁵ Dryzek et al *supra* note 10 at 264-5 and 273-4.

deliberative democratic theory, and a firm advocate for the normative and consequentialist value of inclusive deliberative processes.⁸⁶

David Dana bases his consequentialist argument for the precautionary principle's rationality on evidence of human cognitive bias and *irrationality*. He explains the human tendency to overestimate certain types of risk and underestimate others, and building on this discussion outlines a case for the principle's purpose and legitimacy. If humans respond poorly to risk, frameworks like precaution are needed to encourage better reasoning.⁸⁷ Dana's arguments here recall the work of Jones and Bronitt, Whiteside, Peel and others on the relationship between the precautionary principle and burdens of proof. The reversal of burdens of proof, and modification of standards of proof, can be understood as an effort to correct for these cognitive weaknesses. To the extent that the DC paradigm rejects formalistic rules of proof, and instead prioritizes discretion exercised through participatory deliberative processes, a tension is apparent between DC theories and Dana's idea of the precautionary principle as a means to improve human cognition in the area of environmental risk. Unambiguous and strict burdens of proof would appear critically important to advance this objective.

Although some observers have reduced the precautionary principle's meaning to a reversal of the normal burden of proof that is placed on objectors to show that a practice generates environmental risk, Jones and Bronitt explain why this view is fundamentally flawed. They understand burdens of proof as being "separate and multiple", where the discharging of one burden creates a new burden to prove something else.⁸⁸ In addition, fact-finding obligations in

⁸⁶ John Dryzek, "The Australian Citizens' Parliament: A World First" (2009) Papers on Parliament, No. 51, available at http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/pops/pop51/dryzek, accessed May 25, 2013.

⁸⁷ Dana *supra* note 9 at paras 29-32.

⁸⁸ Judith Jones and Simon Bronitt, "The Burden and Standard of Proof in Environmental

precautionary decision-making often take the shape of requiring certain types of scientific information to be submitted, rather than imposing formal burdens of proof that must be discharged to a certain standard.⁸⁹

Jones and Bronitt blend empirical and normative claims in their discussion of proof and the precautionary principle. Following a review of various proposed standards of proof, Jones and Bronitt argue that where the potential degree of environmental harm is more serious, the standard of proof for proponents seeking to establish a project's safety should be higher. Standards of proof based on statistical formulas are rejected for being "complex and controversial", while fixed standards may be either too high or too low depending on the circumstances of a case. Thus Jones and Bronitt conclude that the seriousness of environmental harm and standard of proof should be proportional or "context-dependent".⁹⁰ Reciprocally, the standard of proof for objectors who are seeking to establish the applicability of the precautionary principle, and thereby shift the burden of proving a project's safety to its proponents, must be lower. Under this approach, the standard of proof for showing that there is a risk of serious or irreversible environmental harm – the objector's task – is less onerous than the standard of proof imposed on proponents trying to establish a project's safety. This initial standard of proof that must be met by objectors is named the "threshold standard of proof."⁹¹

Jones and Bronitt identify a tension between the reliance on evidential concepts to apply the precautionary principle and the lack of any factual or evidentiary obligations in democratic law-making: If precautionary decision-making is governed by a legislative framework divorced

Regulation: The Precautionary principle in an Australian Administrative Context in Elizabeth Fisher, Judith Jones, & René von Schomberg (eds) *Implementing the Precautionary Principle: Perspectives and Prospects* (Northampton: Edward Elgar, 2006) at 140.

⁸⁹ *Ibid* at 147.

⁹⁰ *Ibid* at 142.

⁹¹ *Ibid* at 143.

from evidentiary obligations, how can the precautionary principle be meaningfully implemented? Jones and Bronitt pose the question but they do not suggest any answers.⁹² This concern about systemic failures in democratic law-making unites Jones and Bronitt with Whiteside: Jones and Bronitt discuss the lack of evidentiary obligations in democratic law-making, while Whiteside points to the bias for short-term gain. These authors all share a distrust of the various possible authorities who could have responsibility for implementing the principle, whether they are judges or legislators selected in democratic elections or participating citizens.

Given this skepticism about democratic law-making processes, it is perhaps surprising that Jones and Bronitt call for clear statutory language to govern the fact-finding obligations of administrative decision-makers applying the precautionary principle. They suggest that *ad hoc* development by courts and tribunals will result in inconsistency and gaps.⁹³ Jones and Bronitt's reasoning here is evocative of the RI paradigm and its emphasis on legislative mandates as the primary source of legitimacy. Moreover, they urge legislators to stipulate both general principles for precautionary decision-making and rules that are specific to the concerns of each regulatory context. This would be a major endeavour given the sheer number and variety of regulatory contexts, making the recommendation's practicality unclear.⁹⁴

Whiteside, in contrast, maintains that the precautionary principle offers an alternative to the opaque and hierarchical decision-making seen in traditional risk assessment. This greater democratization can be accomplished by promoting openness to minority views and a more inclusive deliberative process that recognizes the value of different forms of expertise, including

⁹² *Ibid* at 145-6.

⁹³ *Ibid* at 154.

⁹⁴ *Ibid* at 154.

local knowledge.⁹⁵ These means and objectives indicate a closer connection to DC concepts, unlike Jones and Bronitt's work. Dissatisfaction with democratic law-making can thus coexist with both the DC and RI paradigms.

Opponents of formalized evidentiary and persuasive obligations generally identify a narrow and exclusionary perspective as the primary cognitive threat to avoid. This fear inspires their advocacy for an open and informal deliberative process that is highly accessible to citizen participants.⁹⁶ Technical rules concerning proof are undesirable because they would discourage participation, dialogue, and compromise. As this comparison shows, disagreements about proof often reflect deeper divisions about how humans tend to err – by risking too much or too little, following popular opinion or reflexively clinging to an oppositional populist attitude, blindly believing self-proclaimed experts or imagining conspiracies.

Strong/weak interpretation of precaution

Interpretations of the precautionary principle vary greatly in their potency. Some are only triggered by the risk of irreversible harm; some impose an exacting standard of proof on proponents seeking to establish a project's safety; some impose an obligation to take extensive precautionary measures on regulators; some essentially offer suggestions; and others are deliberately intended to disrupt conventional patterns of capitalist economic development. Observers have accordingly tended to classify precautionary formulations on a spectrum ranging from more to less robust. Applegate invokes the analogy of a tame house cat and a wild lion: both are feline, but one is strong and the other is tame.⁹⁷

⁹⁵ Whiteside *supra* note 8 at 55-7.

⁹⁶ Fisher *supra* note 1 at 44-6.

⁹⁷ Applegate *supra* note 8 at 15.

Tollefson and Thornback prefer “tamer” definitions of the precautionary principle because they can successfully respond to critics of the principle, such as Cass Sunstein.⁹⁸ In addition, the authors’ analysis of how national courts have considered the principle suggests that a tamer definition will appeal more to judges.⁹⁹ Tollefson and Thornback’s calls for a “tamer” precautionary principle are diametrically opposed to Whiteside’s arguments for an expansive understanding of the principle that includes binding moral obligations. In particular, Tollefson and Thornback’s apparent acceptance of the choice in *Telstra* to not interrogate the expert and scientific evidence used to support the project’s safety simply because no counter-evidence was presented – an RI approach – opposes Whiteside’s arguments about the principle’s moral status.¹⁰⁰ If there were a moral responsibility to apply the precautionary principle, it would not be conditional on evidence being presented by an objector. This would effectively leave unchanged the presumption of safety that the precautionary principle was intended to reverse. Tollefson and Thornback’s emphasis on the role of judges in shaping the precautionary principle’s implementation also distances them from Jones and Bronitt, who criticize this practice.¹⁰¹

Tollefson and Thornback, among other observers, identify an inverse relationship between the strength and the clarity of the precautionary principle: definitions that are more precise also tend to be weaker, and vice versa. Mårten Sundin’s analysis of the precautionary principle’s four constituent elements - threat, uncertainty, action, and command – is widely cited by scholars working in this area, including Tollefson and Thornback. His central claim is that the

⁹⁸ Chris Tollefson and Jamie Thornback, “Litigating the Precautionary Principle in Domestic Courts” (2008) 34 *Journal of Environmental Law and Practice* 33 at 37-8.

⁹⁹ *Ibid* at 44-5.

¹⁰⁰ *Ibid* at 57.

¹⁰¹ Jones and Bronitt *supra* note 88 at 154.

strength or robustness of any definition of the precautionary principle is determined by the strength of its weakest element.¹⁰²

Tollefson and Thornback draw on both Fisher's and Sundin's work by linking RI concepts to weaker and clearer definitions of the principle, and similarly linking DC concepts with stronger and vaguer definitions of the principle.¹⁰³ The authors conflate efforts to weaken and clarify the precautionary principle, and argue that such efforts help "tame" the principle. The logic behind Tollefson and Thornback's claims here is suspect. As this paper will argue, both DC and RI concepts can be deployed to make and counter precautionary claims. But Tollefson and Thornback's reasoning is also undercut by the tension between their call for judicial leadership on the principle's implementation and their stated support for the RI paradigm, which prioritizes legislative direction over judicial discretion. Expanding adjudication's role in shaping the precautionary principle is consistent with the DC paradigm, but directly opposed to RI understandings of legitimacy.

Dryzek et al's work further complicates how notions of clarity, strength and deliberative process are understood in regard to the precautionary principle. Dryzek et al identify a relationship between public involvement in environmental decision-making and precautionary outcomes, positing a divide between "precautionary publics" and "promethean elites." Greater public consultation promotes a more extensive and robust application of the principle. This contrast that Dryzek et al note is attributed to several factors, including: that publics are more vulnerable to environmental risks because they lack the protections afforded by wealth and power; that elites have closer ties with the businesses that profit from technology; that elites are

¹⁰² Mårten Sundin, "Dimensions of the Precautionary Principle" (1999) 5 *Human and Ecological Risk Assessment* 889.

¹⁰³ Tollefson and Thornback *supra* note 98 at 38-9.

more mindful of the significance of global economic competitiveness; and that publics can feel that it is their obligation to balance promethean outlooks with precautionary skepticism.¹⁰⁴

Understanding these claims requires clarifying how the term “elite” is used by Dryzek et al:

“When we use the term *elites*, we mean core policy-making elites and so exclude, for example, experts, social movement leaders, and lobbyists.”¹⁰⁵ (emphasis added) The exclusion of

“experts” from the definition makes this approach incompatible with a simplistic science/democracy framing.

Although the precautionary principle is often viewed as a competitor to cost-benefit risk assessment, Dryzek et al instead suggest that cost-benefit approaches contribute to a “precautionary discourse.” This suggestion appears in a case study of French public consultation on GMO agriculture. A citizen group reporting on the technology urged that cost-benefit conditions be satisfied before more GMO crops were introduced, and it was these calls that Dryzek et al deemed conducive to precautionary discourse.¹⁰⁶ This background suggests that context may determine whether a particular regulatory decision is precautionary, even it is not expressive of the precautionary principle *per se*.

Raymond Leigh and Andrea Olive persuasively argue that the rhetorical and practical influence of precautionary ideas must be carefully distinguished.¹⁰⁷ They drew this conclusion from a case study of regulatory efforts to phase out the use of flame-retardant chemicals that pose health risks of unclear magnitude and probability. Interviews with legislators and other

¹⁰⁴ Dryzek et al *supra* note 10 at 267-8; John R. Parkins, “De-centering Environmental Governance: A Short History and Analysis of Democratic Processes in the Forest Sector of Alberta, Canada” in (2006) 39 *Policy Sciences* 183 at 190.

¹⁰⁵ Dryzek et al *supra* note 10 at 264.

¹⁰⁶ *Ibid* at 270-1; precautionary discourses are also discussed by Raymond Leigh and Andrea Olive in “Ideas, Discourse, and Rhetoric in Political Choice” (2009) 41(2) *Polity* 189.

¹⁰⁷ *Ibid*.

participants in the regulatory process revealed that while the precautionary principle's constituent elements – including a sensitivity to limits of scientific knowledge and a readiness to demand proof of safety, rather than risk – exerted influence, the label of “precaution” was politically unpopular.¹⁰⁸

Leigh and Olive's findings about the details of this dynamic relationship between precautionary ideas and rhetoric may be confined to the United States – many commentators have noted that the precautionary principle enjoys less support in America than in other industrialized countries¹⁰⁹ – but their efforts to unravel the distinct discursive and practical contributions of precaution are instructive. In cases where precaution carries formal legal weight – as in *Lafarge* – observers must be alive to the possibility that the reverse dynamic exists, with precautionary rhetoric being invoked to advance substantively anti-precautionary arguments.

When Leigh and Olive's ideas are considered together with Dryzetk et al's French case study, and the latter's efforts to blur the bright line dividing the precautionary principle from cost-benefit analysis, the gap between scholarly and lay ideas about risk regulation becomes more apparent. Where scholars see profound differences and tensions, public participants in decision-making may see the precautionary principle and cost-benefit analysis as essentially harmonious ways of responding to environmental risk. Concepts such as burden of proof, mathematical algorithms, and epistemological theories of environmental risk are highly technical, and thus unlikely to be fully adopted by lay public participants. What this shows is that in practice, a precise and fixed definition of precaution – one that can be confidently labeled DC or RI, strong or tame - may be incompatible with extensive public involvement in risk regulation.

¹⁰⁸ *Ibid.*

¹⁰⁹ Applegate *supra* note 8 at 62; for an alternative perspective on this topic, see Jonathan B. Wiener and Michael D. Rogers, “Comparing precaution in the United States and Europe” (2002) 5(4) *Journal of Risk Research* 317.

Chapter 2

Method and Sources

Lafarge provides rich material for an empirical study of how understandings of environmental risk and administrative constitutionalism are co-produced. The choice of a case study, like any research approach, presents both limitations and opportunities. Empirical claims about the precautionary principle's definition, application and influence on a systemic scale throughout Ontario cannot be supported by a single case study. Equally, the case study method provides a figurative microscope for seeing how disputes about environmental risk are contested within the discourse of administrative constitutionalism. One particular advantage of the case study method is that it facilitates close examination of what Hajer and others term the "argumentative interaction", an idea that Hajer incorporates in his *The Politics of Environmental Discourse*.¹¹⁰

Among the possible candidates for a case study, *Lafarge* is notable for the breadth of issues raised. It featured an extensive debate about the core assumptions, values and possibilities that inform the discursive struggle over environmental risk. This range and breadth means that both high-level theories of administrative constitutionalism and the specific steps involved in making risk regulation decisions were illuminated.

The analytical focus of this case study is the discourse of administrative constitutionalism. Importantly, it is not a homogenous discourse – it contains the two dominant and competing paradigms of Rational-Instrumentalism and Deliberative-Constitutive. But this paper disputes Fisher's characterization of the paradigms as "two polar and incommensurable

¹¹⁰ Hajer *supra* note 6 at 53-5.

opposite understandings of administrative constitutionalism.”¹¹¹ (emphasis added) Although these two paradigms present different risk storylines, they share the same starting point: that problems of environmental risk and uncertainty are problems of public administration. Despite their differences, both paradigms are discourses of administrative constitutionalism and both construct environmental uncertainty as a regulatory problem. And both make skill and fluency in using the terminology of public administration a precondition for successfully advancing precautionary arguments.

To the extent that Fisher goes beyond her empirical claim about the interlocking relationship between risk regulation and public administration to argue this state of affairs is inevitable, this paper rejects that view. Following from that rejection, this case study also seeks to identify where RI and DC concepts converge and work in tandem to exclude alternative framings of environmental risk. Yet this paper fully adopts the *empirical* component of Fisher’s theory, namely that understandings of public administration and environmental risk are in practice mutually constructed and contested through the RI and DC paradigms.

The foundation of this case study is a close reading of relevant documents, including the written submissions made by the parties and interveners before the ERT and Divisional Court. Specifically, I have viewed the Tribunal and Court records for *Lafarge*, which include the parties’ written submissions. These written submissions include affidavit evidence and attached scientific reports. I reviewed each participant’s submissions to identify whether the RI, DC or neither paradigm was dominant with respect to their arguments on several topics. These nine topics were:

- the proper approach to understanding the S 41 leave to appeal test;

¹¹¹ Fisher *supra* note 1 at 27-8

- the interpretation of the “significant harm” requirement under the second branch of the S 41 test;
- the definition of the precautionary principle;
- how environmental risk or uncertainty should be understood, including what types and sources of knowledge are valued;
- the environmental discrimination claim;
- the relevance and significance of the proposed moratorium on tire-burning;
- the adequacy of the public consultation process;
- the appropriate standard of review and degree of deference on judicial review;
- and the legal status of the precautionary approach in the project approval process.

These nine points were chosen after reviewing the Tribunal and Court records and determining which issues were most linked to understandings of environmental uncertainty and the precautionary principle. As I conducted the case study, I periodically returned to the records to determine if an issue should be added to or dropped from the list of topics examined. Part way through the case study I concluded that it was necessary to include the environmental discrimination claim because it was grounded in concerns about environmental uncertainty and equity, two concerns that are intertwined with debates about the precautionary principle. No other adjustments were made to the scope of the analysis.

For each of the nine listed topics, I reviewed and identified the corresponding submissions made by the participants (unless a participant’s submissions were silent on a topic) and classified them as RI or DC as appropriate. Fisher’s table summarizing the defining characteristics of both paradigms of administrative constitutionalism guided this classification process.¹¹² Following this analysis and classification of arguments as RI or DC, each participant’s submissions were looked at holistically to determine if overall they reflected RI or

¹¹² See Fisher *supra* note 1 at 33. Although Chapter 10 elaborates on certain aspects of the RI and DC paradigms, this case study does not suggest any modifications to Fisher’s definitions of the two paradigms.

DC concepts. This exercise of analysis and classification was conducted twice, once for the arguments before the ERT and once for the judicial review at the Divisional Court. This bifurcated approach was adopted in order to capture shifts in participant arguments between the ERT and judicial review proceedings. This case study's findings are similarly reported by separating the ERT stage (detailed in Part II) and the judicial review at the Divisional Court (detailed in Part III). In most instances, a party's submissions were noticeably more RI or DC, but exceptions are highlighted and scrutinized. Points of tension or inconsistency within and between the submissions are noted.

Because Fisher's ideas spring from empirical observation, they are well-suited to a case study methodology. This grounding in real-life precautionary debates – where legal rules, economic considerations, popular opinion, and political exigencies collide – means that arguments adopted by participants seldom fit neatly within a single paradigm of administrative constitutionalism. Inconsistency and internal contradiction are rampant. Fisher's case studies have also revealed that DC and RI principles often co-exist in one party's arguments or a single Court judgment.¹¹³ Yet, as this case study demonstrates, this complexity does not degenerate into an incoherence that would cast doubt on the validity of Fisher's notion that precautionary debates are rooted in debates about administrative constitutionalism. DC and RI concepts are predominant in individual arguments and decisions, but they are rarely found in an unadulterated form. This pattern is confirmed in the Lafarge case study that follows.

In addition to Fisher's theory, the analysis employed in this case study also draws on Hajer's work on environmental discourses.¹¹⁴ In particular, Hajer's work is vitally important because it protects against concentrating on the differences between the RI and DC paradigms at

¹¹³ Fisher *supra* note 1 at 126-7.

¹¹⁴ Hajer *supra* note 6 at 45-46.

the expense of missing what the larger discourse of administrative constitutionalism accomplishes and excludes in regard to framing environmental risk. (Hajer’s work, in turn, builds on the scholarship of Michel Foucault and Michael Billig.¹¹⁵) Hajer characterizes environmental conflicts as discursive “struggles” over the construction of environmental problems, available solutions, and realities.¹¹⁶ His use of the word “struggle” is significant: environmental realities are constructed through argumentative interactions.

Crucially, the documents produced in the course of the *Lafarge* litigation – written arguments, commissioned technical reports, and adjudicative decisions – were written to persuade and explicate. Given their roots in conflict, the argumentative interaction offers a useful conceptual tool for detailing how these documents, and the arguments they contain, fit together. The S 38 applicants and respondents submitted well over ten volumes of material, the vast majority of which was explicitly directed at opposing other arguments: the written materials are the product of multi-partied arguments, not standalone expressions of a particular viewpoint. The idea of the argumentative interaction therefore provides insight into the relationship between Lafarge’s parties, a relationship that was both reflexive and competitive.

Because the discursive contest in *Lafarge* occurred within an adjudicative institutional framework, there was an umpire with the authority to reject or validate the various conceptions of administrative constitutionalism and environmental uncertainty: the ERT at the initial S 38 application, and the Divisional Court on judicial review. Consequently the case study includes a close examination of the ERT and Court judgments to determine how much weight they attached to the arguments advanced during the litigation process.

¹¹⁵ *Ibid* at 53-55.

¹¹⁶ *Ibid* at 54.

Fisher (and Harding's) use of administrative constitutionalism paradigms – specifically the RI and DC paradigms – to explain how courts have considered the precautionary principle was also adopted by Tollefson and Thornback in their article. In addition, they rely on Fisher's 2001 article "Is the Precautionary Principle Justiciable?" to argue that courts and judges must play a leading role in shaping and implementing the principle.¹¹⁷ Yet where Thornback and Tollefson's analysis favours the RI paradigm, Fisher is undecided about which paradigm is superior.¹¹⁸ This paper follows Fisher's approach in avoiding normative claims about which model is better. More fundamentally, this paper does not even accept that environmental risk is inevitably constructed through administrative constitutionalism.

One methodological challenge involves classifying the scholarly writings of Bruce Parody, the ERT member who heard *Lafarge*. Parody teaches environmental law at Queen's University, and has written about the precautionary principle.¹¹⁹ The starting point in examining Parody's work is that his scholarly work and adjudicative responsibilities are distinct and must not be confused with each other. Judges and other adjudicators often combine critical scholarship with application of laws they oppose. Some parallels can be seen in these two distinct aspects of Parody's work, but this paper does not claim any simplistic cause and effect relationships between Parody's academic views and the ERT's legal reasoning in *Lafarge*. Equally, it would diminish the completeness of the case study if Parody's scholarly writing were ignored.

¹¹⁷ Elizabeth Fisher, "Is the Precautionary Principle Justiciable?" (2001) 13(3) *Journal of Environmental Law* 315. Tollefson & Thornback note that Fisher favoured the RI paradigm in this article. But in *Risk*, published six years later, Fisher does not repeat this claim about the judiciary's central role. In fact, Fisher calls for open debate about administrative constitutionalism and the precautionary principle, which is somewhat at odds with Thornback & Tollefson's arguments.

¹¹⁸ Tollefson & Thornback *supra* note 98 at 57; Fisher *supra* note 1 at 252.

¹¹⁹ <http://law.queensu.ca/facultyAndStaff/facultyDirectory/pardy.html>; Bruce Parody, "Applying the Precautionary Principle to Private Persons: Should it Affect Civil and Criminal Liability?" in (2002) 43 *Les Cahiers De Droit* 64.

In his scholarly work, Pardy juxtaposes his ideal of environmental law with a “particularized management” approach that determines the acceptability of an anthropogenic impact on the environment through a discretionary review of various social, environmental, economic, and social factors.¹²⁰ Some parallels between Pardy’s idea of “particularized management” and the Deliberative-Constitutive paradigm are apparent, most notably in their shared emphasis on judging environmental harms in reference to their social and economic benefits. Such an approach almost inevitably leads to considerable uncertainty about what environmentally invasive conduct will be deemed acceptable, a consequence decried by Pardy. He approvingly quotes Friedrich Hayek’s famous definition of a society governed by the rule of law:¹²¹

[the rule of law] means that government in all its [activities] is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.

However, Pardy’s conception of the rule of law and his ideas about systems theories cannot be mapped on to Fisher’s theories about administrative constitutionalism. The two even diverge on Fisher’s core premise: the inevitability of public administration’s role in regulating environmental risk because risk regulation is contextual in nature and demands expertise. No such admission appears in Pardy’s work, which often focuses on private law remedies and deterrents to environmental harm.¹²² Moreover, administrative constitutionalism – and the

¹²⁰ Bruce Pardy, “The Hand is Invisible, Nature Knows Best, and Justice is Blind: Markets, Ecosystems, Legal Instrumentalism, and the Natural Law of Systems” (2008) 44 *Tulsa Law Review* 67 at 84-7.

¹²¹ *Ibid* at footnote 11, quoting Friedrich A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press 1944) at 72.

¹²² Bruce Pardy, “Environmental Rights: Mitigating Flaws of the Management Model – The Ontario Environmental Bill of Rights and the Resource Management Act 1991” (1996) *New Zealand Law Review* 239 at 242-3; Pardy (2002) *supra* note 119.

acceptance of the regulatory state that embedded within it – is arguably anathema to the classical liberal ideas evoked in Pardy’s scholarly work. Pardy’s views are nonetheless much more consistent with the RI paradigm than DC concepts. The term “discretion” is used pejoratively by Pardy, public consultation is disparaged as irrelevant to the determination of legal rights, and the potential benefits of environmentally harmful practices are considered poor justification for injecting more flexibility (and uncertainty) into environmental laws.

Although Pardy may envision a markedly smaller role for public administration in regulating environmental risk, it is apparent that where there is public administration Pardy would likely prefer an RI paradigm. Scholarly opinions must not be confused with adjudicative opinions though, and this case study will show that both DC and RI concepts are found in the ERT decision he wrote.

Chapter 3

Ontario's Environmental Bill of Rights and Third-Party Appeal Rights

Section 41 is a gateway to legal accountability. The nature of the S 41 test – and the degree of difficulty leave Applicants face – was therefore critical in determining the outcome of the *Lafarge* precautionary debates. In particular, S 41's interpretation controls the stringency of the leave to appeal test, and consequently shapes the degree of legal accountability faced by government decision-makers applying the principle. Understanding S 41 and its ambiguities, in turn, depends on unraveling its home statute: the *Environmental Bill of Rights*.

The *Environmental Bill of Rights (EBR)* was introduced in 1993 after several years of rising public concern about the environment, in regard to both the quality of Ontario's environment and the processes that governed environmental decision-making.¹²³ The need for statutory legal innovations – rather than piecemeal reform by common law courts – was widely recognized.¹²⁴ And the *EBR*'s most significant innovation was in the area of participatory rights: Part II of the *EBR* provides for public participation in the Ontario government's environmental decision-making, including through a requirement that proposals to issue emissions permits, amend environmental regulations, and take other measures with significant environmental consequences be posted to the Environmental Registry website for public notice and comment. Any comments made through this process must be considered when making the final decision. The proposal at issue in *Lafarge* was subject to these same public consultation requirements.

Section 38, the third-party leave to appeal provision, is an exception to the choice to rely on political accountability instead of legal accountability in the *EBR*. This choice represented a

¹²³ Anita Krajnc, "Wither Ontario's Environment? Neo-Conservatism and the Decline of the Environment Ministry" (2000) 26(1) *Canadian Public Policy* 111 at 116-7.

¹²⁴ Donald N. Dewees, "The Role of Tort Law in Controlling Environmental Pollution" (1992) 18(4) *Canadian Public Policy* 425.

departure from the *Michigan Environmental Protection Act (MEPA)* that helped inspire environmental rights legislation in other jurisdictions and was cited by the *EBR*'s drafters as an influence.¹²⁵ Michigan's legislation was enforceable through courts under the American public trust doctrine, which makes governments legally accountable for their management of public lands and other community resources. Canada does not have an equivalent legal doctrine, but judicial review and appeal rights can achieve similar ends.¹²⁶

Litigation and an expensive bureaucracy were the twin threats cited by the *EBR*'s critics and avoided by its drafters. A political accountability model that relied on the Legislature, and ultimately voters, to hold the government accountable for its commitments under the *EBR* was adopted by the majority New Democrat government. This model was not only an affirmative choice in favour of political accountability, but also a rejection of litigation-based accountability processes. In addition to distrust of politicians, which led to calls for more robust accountability mechanisms, there was distrust of the courts and judiciary. Neither branch of government enjoyed much popularity or trust.¹²⁷ Many groups who otherwise disagreed about the *EBR*'s content came together in opposing a legal model of accountability where courts were the forum and judges the instrument for holding the government to its environmental obligations. Expected critics of legal accountability such as industry groups and MLA's were joined by many

¹²⁵ Government of Ontario, "Introduction" in *Report of the Task Force on the Environmental Bill of Right* (July 1992) at i.

¹²⁶ Joseph F. Castrilli, "Environmental Rights Statutes in the United States and Canada: Comparing the Michigan and Ontario Experiences" (1998) 9 *Villanova Environmental Law Journal* 349 at 420-1 and 433-4.

¹²⁷ Joan Price Boase, "Beyond Government? The Appeal of Public-Private Partnerships" (2000) 43(1) *Canadian Public Administration* 75 at 77; B. Guy Peters and John Pierre, "Governance Without Government? Rethinking Public Administration" (1998) *Journal of Public Administration Research and Theory* 223 at 239; Government of Ontario, *Report of the Task Force* at 68.

environmentalists who feared the law's distorting effect on environmental reforms.¹²⁸ These environmentalists opposed the "law" in "environmental law", arguing that legal approaches to environmental problems ignored the interconnectedness of the environment and society.

Two sources of political accountability were included in the *EBR*: Ministerial Statements of Environmental Values (SEV's) and the Environmental Commissioner's Office. The *EBR* mandates that prescribed Ministries create an SEV and consider it when making "environmentally significant"¹²⁹ decisions. Some environmental advocates, particularly in the legal community, feared that without the threat of legal consequences for neglecting its responsibilities under the *EBR*, the government would abandon its environmental commitments.¹³⁰ On the other hand, members of the business community and other groups traditionally opposed to environmental movements feared that the *EBR* would give rise to numerous lawsuits and applications for judicial review of government decisions. This skeptical attitude towards legal or adjudicative forms of accountability led to a near-exclusive, but not complete, reliance on political accountability.¹³¹

Third-party appeal rights are the strongest source of legal accountability in the *EBR*. Section 41 permits Ontario residents to challenge environmental decisions taken by prescribed Ministries on the basis that they are unreasonable and would cause significant environmental harm.¹³² Yet the ECO is not authorized to use this provision or otherwise legally challenge the government's environmental decisions. Legal and political accountability mechanisms are

¹²⁸ Giagnocavo and Goldstein *supra* note 58; Elaine L. Hughes and David Iyalomhe, "Substantive Environmental Rights" (1998) 30 *Ottawa Law Review* 229 at 233-4.

¹²⁹ This term is left undefined in the *EBR*.

¹³⁰ Martin Mittelstaedt, "Environment Bill Gets Mixed Review: Ontario Document Gives Public Right to Take Civil Action Against Polluters" (July 9, 1992) *Globe & Mail* at A5.

¹³¹ Mark Winfield, "A Political and Legal Analysis of Ontario's *Environmental Bill of Rights*" (1998) 47 *University of New Brunswick Law Journal* 325 at 341.

¹³² Section 38, *Environmental Bill of Rights*, *supra*.

separated in the *EBR*, limiting any potential reinforcing relationship between the two forms of accountability. The ECO has intervened in several legal cases involving the *EBR*'s interpretation, and it follows and reports on relevant litigation, but its role in this regard is reactive.¹³³ In *Lafarge*, the MOE and ECO were at odds on the scope of the second form of political accountability provided by the *EBR*: the Ministerial SEVs. At the judicial review stage, the ECO gained leave to intervene with written submissions to the Divisional Court. The ECO disputed the MOE's argument on the SEV's relevance, although it took no position in the larger dispute about the soundness of the MOE's original decision.¹³⁴

The emphasis on political accountability, and a related prioritization of administrative discretion, are evocative of DC concepts. The term "discretion" runs through Ministerial statements on the *EBR*, both in *Lafarge* and elsewhere. DC principles are evident in the *EBR*'s combination of participatory opportunities and regulatory discretion. Despite the appearance of DC concepts, there is room for critiques of the *EBR* based on the DC paradigm. Many commentators have suggested that the *EBR*'s procedural rights are more symbolic than real.¹³⁵

Ruth McKay goes even further in her 2001 case study of two *EBR* processes involving public notice and comments, in which she argued that the *EBR* shifted more responsibility onto environmental groups and private citizens, added to their bureaucratic burdens, and made it more difficult to pursue environmental advocacy in other fora.¹³⁶ Citizen and NGO concern about the

¹³³ E.g. Environmental Commissioner of Ontario, Appendix III in *Losing Touch: Annual Report 2011/2012* (September 2012).

¹³⁴ *Lafarge Canada Inc v Ontario (Environmental Review Tribunal)*, [2008] OJ No 2460 (Div Ct) (Factum of the Environmental Commissioner at para 2) [ECO Factum].

¹³⁵ Hughes and Iyalomhe *supra* note 128; Diana D.M. Babor, "Environmental Rights in Ontario: Are Participatory Mechanisms Working?" (1999) 10 *Colorado Journal of International Environmental Law and Policy* 121.

¹³⁶ Ruth McKay, "Organizational Responses to an Environmental Bill of Rights" (2001) 22(4) *Organization Studies* 625 at 647-8.

environment was channeled towards *EBR* processes – including the public comment provisions, and the more rarely used leave to appeal provisions at issue in *Lafarge* – but these processes often prove time-consuming, costly, and ineffective in promoting environmental interests. Sharp budget cuts to environmental agencies and ministries added to the impression that the public, and not the government, was responsible for protecting Ontario’s environment.¹³⁷ These criticisms echo the RI paradigm’s emphasis on the government having ultimate responsibility for regulating environmental risk, rather than the more diffused and polycentric responsibility relationships envisioned under the DC paradigm.

The MOE’s attempt in *Lafarge* to rely on the ECO’s presence to avoid legal accountability recalls McKay’s warnings about the *EBR*’s potential to subvert environmental reforms, and illustrates the complex, and sometimes competitive, relationship between different forms of accountability. The MOE sought to rely on a weak form of political accountability – the ECO’s responsibility to report to the Legislature on the MOE’s compliance with its SEV – at the expense of a stronger form of legal accountability. A paradigm that recognizes multiple and intersecting forms of accountability, as reflected in the ECO’s arguments before the Court, avoids this “zero sum” competition between different sources and forms of accountability. Political and legal accountability are not inherently contradictory ideas, but the concerns of McKay and other observers that each can be used to undermine the other were arguably validated by the MOE’s arguments in *Lafarge*.

¹³⁷ *Ibid.*

PART II: *The Ontario Environmental Review Tribunal*

Part II details the precautionary debates at the Environmental Review Tribunal in *Lafarge*. Section 38 Applications were made by Lake Ontario Waterkeeper (LOW), Clean Air Bath (CAB), the Loyalist Environmental Coalition (LEC), and six individual applicants: Diane Dawber and Chris Dawber; Hugh Jenney and Claire Jenney; Mark Stratford and Jamie Stratford; J.C. Sulzenko; Janelle Tulloch; and Sandra Willard.¹³⁸ LEC and LOW filed their applications jointly at the ERT. The leave Respondents were the Ministry of the Environment and Lafarge Inc. On judicial review the composition of the parties making submissions changed, as explained in Part III.

Simultaneous with the MOE's approval of Lafarge's proposal to burn tires and other fuel sources at its cement facility in Bath, Ontario, and the issuance of two related Instrument Approvals, the MOE posted a press release announcing a proposed two-year moratorium on tire-burning elsewhere in the province. A lack of experience and knowledge regarding tire-burning was cited as the reason for the proposed moratorium. The S 38 Applicants responded by seeking leave to appeal the two Instrument Approvals. Several grounds were raised in the leave to appeal applications, although, as detailed in Chapter 2, this case study is limited to the precautionary debates in *Lafarge*.

The findings are divided in three chapters, chiefly for the sake of clarity and additionally to highlight the issues that proved most controversial. Chapter 4, the first in this Part, explains the competing arguments about the S 41 test that the leave Applicants needed to satisfy. The focus of Chapter 4 is directly on administrative constitutionalism and the interweaving of RI and

¹³⁸ Officially, applications were made "on behalf of" CAB and LEC by, respectively, Susan Quinton and Martin Hauschild and William Kelley Hineman. A number of individual names were also attached to LOW's application: Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois, and John Fay.

DC elements in the ERT's reasons. Chapter 5 then builds on the S 41 analysis to focus specifically on how the parties understood the problem of environmental risk and uncertainty, including the precautionary principle's interpretation and application. In Chapter 6, the understandings of knowledge and expertise revealed in the parties' written submissions are examined. Where Chapter 5 examines the precautionary principle and its constituent elements, Chapter 6 investigates how the parties understood the related evidentiary obligations, for both proponents and objectors, and the types of knowledge that could satisfy these obligations.

What unites these three chapters, along with the chapters in Part III regarding the judicial proceedings, is a preoccupation with the models of administrative constitutionalism advanced by each party. In choosing this fixed analytical lens – administrative constitutionalism – the aim is for the chapters to reference and reinforce each other while covering distinct aspects of the *Lafarge* precautionary debates.

Chapter 4

The S 41 Test: Balancing Public Access with Government Responsibility

This Chapter examines the competing RI and DC interpretations of section 41, which sets out the test for granting a third-party leave to appeal.¹³⁹

Leave to appeal a decision shall not be granted unless it appears to the appellate body that,

- (a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and
- (b) the decision in respect of which an appeal is sought could result in significant harm to the environment.

This provision offers environmental organizations and individual citizens a means of promoting the precautionary principle's application and contesting its interpretation. More than a mechanism for holding administrative decision-makers – and their political overseers – accountable if they disregard the precautionary principle, it provides a forum for contesting *how* the principle is defined and implemented. The “stringent”¹⁴⁰ conditions found in the S 41 test restrict access to that forum, and establish a (deliberately) uneven playing field. In keeping with the rules of legislative supremacy, and the principle of deference to decision-makers who exercise authority delegated by the Legislature, third-party applicants have limited authority to challenge the government's adherence to the precautionary principle. However the *EBR* is expressive of a legislative intent to bolster the public's ability to understand, participate in, and challenge the government's policymaking decisions, from legislative amendments to Instrument Approvals.

¹³⁹ Section 41, *Environmental Bill of Rights, supra*.

¹⁴⁰ This term is repeatedly used by Courts and the ERT when discussing S 41.

The *EBR* was supposed to make the playing field more even, and the question at stake in *Lafarge* was *how* even. This chapter therefore analyzes the arguments made concerning S 41's interpretation in order to better identify the influence of DC and RI themes of accountability on how the precautionary principle is understood. Before the ERT, both LEC-LOW and the MOE framed the S 41 test in DC terms. *Lafarge*, in contrast, advanced a strongly RI understanding of the S 41 test. CAB, as well as the Individual Applicants, did not engage with the specifics of interpreting S 41.

While accepting the “stringency” of the S 41 test, LEC-LOW argued it must nonetheless serve the *EBR*'s broader aim of allowing “the people of Ontario to participate in the making of environmentally significant decisions.”¹⁴¹ LEC-LOW contrasted the leave test with the appellate scrutiny that follows a grant of leave to Appeal: it is easier to gain leave to Appeal than to succeed in reversing a decision in the final Appeal hearing.¹⁴² LEC-LOW highlighted the usage of “appears” in the test's preamble and the reduced standard of proof it indicated, and urged the Tribunal to understand both branches of the test together and in conjunction with the *EBR*'s objectives. They also sought to link the second branch with the first by characterizing decisions that risk significant environmental harm as unreasonable: Permitting environmental risk is tantamount to unreasonableness, according to this reasoning.

This reflexive approach to interpreting S 41 was extended to the connection between both prongs of the test. LEC-LOW cited a previous ERT decision, *Hannah v Ontario*,¹⁴³ which found

¹⁴¹ *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Application for Leave to Appeal by Loyalist Environmental Coalition as Represented by Martin J. Hauschild and William Kelley Hineman; Lake Ontario Waterkeeper and Gordon Downie; and Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois and John Fay at para 59) [LEC-LOW Application].

¹⁴² *Ibid* at para 61.

¹⁴³ [1998] OEAB (September 16, 1998).

that where a decision could lead to significant environmental harm, it is unreasonable. In *Hannah*, the Tribunal held that “any decision which could result in significant harm to the environment would be an unreasonable decision.”¹⁴⁴ Therefore establishing the second prong of the test would be enough to support a grant of leave to appeal. By arguing that the second prong of the test is sufficient to justify a grant of leave to appeal, greater strategic significance was attached to LOW’s claim that Class I and II Instrument Approvals by definition fall within the second prong of the test. If a Class I or II Instrument Approval by definition could result in significant harm, and if any decision that could result in significant harm would be unreasonable, then the S 41 leave test would be satisfied in the case of every Class I or II Instrument Approval.¹⁴⁵ However, this reasoning was rejected by the ERT, which held that Class I and II Instrument status are indicative of the potential for significant environmental harm: the independent burden of proof under the second prong remained, but Class I and II Instrument status helped satisfy that burden.¹⁴⁶ The MOE also countered LEC-LOW’s argument here, instead emphasizing the word “and” that connected both prongs of the test.¹⁴⁷

This deceptively subtle difference in interpretation would result in radically different views of the precautionary principle’s impact. As discussed earlier, the question of whether the principle should impose precautionary *obligations* on environmental regulators is a recurring one, and LEC-LOW’s reasoning here is suggestive of such obligations. Combined with LEC-LOW’s support of a lower *prima facie* standard of proof for S 41, this would result in greater public involvement in the performance – or enforcement – of precautionary duties. Like the

¹⁴⁴ LEC-LOW Application *supra* note 141 at paras 57 and 59.

¹⁴⁵ *Ibid* at paras 89-90.

¹⁴⁶ *Dawber supra* note 3 at 8-9.

¹⁴⁷ *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Directors’ Submissions in Response to Applications for Leave to Appeal under the Environmental Bill of Rights at paras 80-3) [MOE Response].

general tone of LEC-LOW's arguments, its submission on S 41's statutory construction reflect a robust understanding of the precautionary principle based on a DC paradigm:¹⁴⁸

[...] MOE acts and omissions have effectively shielded the Lafarge proposals from meaningful public scrutiny, and have failed to ensure the achievement of the public interest purposes of the *EPA* and *EBR*. Because the decisions of the Directors are unreasonable and could result in significant environmental harm, the only appropriate remedy at this stage is to grant the Applicants full leave to appeal under the *EBR* so that the legal, technical and scientific debate over the "merits" of the Lafarge proposal can finally be adjudicated in an independent and procedurally fair forum, viz. an appeal by the Tribunal. [emphasis added]

In contrast, the MOE characterized the Tribunal's power to grant third-party appeal rights as an "exceptional remedy" confined to cases where the Ministry has breached the "public trust."¹⁴⁹ The MOE further juxtaposed this exacting standard against the false idea that S 41 bestowed a general right to "second guess" its decisions. This restrictive understanding of S 41's scope is reflected in the MOE's argument that the standard of proof should be a balance of probabilities, not a *prima facie* standard.¹⁵⁰ In outlining the S 41 leave test, the MOE also repeatedly returned to the need for Applicants to furnish evidence under both prongs of the test. The nature of this evidence was variously qualified by the terms "strong," "expert," "convincing," and "scientific."¹⁵¹ As discussed in Chapter 5, attaching a balance of probabilities standard to the second branch of the test – the significant harm requirement – undermines the precautionary principle's importance. The MOE also understood the obligations to provide evidence as moving back and forth between the Respondents and the leave Applicants, and

¹⁴⁸ LEC-LOW Application *supra* note 141 at para 133.

¹⁴⁹ *Ibid* at para 71. The term "public trust" echoes the *MEPA*'s reliance on the American public trust doctrine.

¹⁵⁰ *Ibid* at para 72.

¹⁵¹ *Ibid* at paras 75 and 78.

shifting in nature depending on how each side meets its burden.¹⁵² This notion of fluid and mutually constituting burdens of proof recalls Jones and Bronitt's work.¹⁵³

The MOE framed its arguments about S 41's purpose by noting the imperative of preserving the MOE's role as Ontario's environmental regulator.¹⁵⁴ Inherent in the MOE's reasoning is the assumption that protecting its regulatory power requires defining S 41 narrowly: It can only breach the "public trust" by failing to apply relevant law and policy; poorly applying relevant law and policy does not amount to unreasonableness. Thus the heightened deference built in the MOE's interpretation of S 41 flows from the MOE's contention that it has almost sole responsibility for regulating the environment. Although this reasoning superficially recalls an RI paradigm, when the MOE's arguments on this point are read together with its account of the Directors' decision-making process, it appears to share more with DC concepts.

The MOE's argumentative emphasis on the openness, thoroughness, and general quality of its Directors' deliberative process, together with its claims for the importance of deference in appellate reviews, falls within a DC theory of administrative constitutionalism: The MOE's application of the precautionary principle was reviewable to the extent that appellate scrutiny focuses on whether the principle was applied. But criticisms that this interpretation effectively neutralizes S 41 must be evaluated in light of the accountability introduced through public consultation: DC advocates insist that the accountability generated through participatory rights and processes is more meaningful than legal forms of accountability, such as the S 38 leave to appeal process. Access is more inclusive, costs are lower, and prevention is preferable to *ex post*

¹⁵² *Ibid* at paras 72-82.

¹⁵³ See literature review discussion on pages 36-7.

¹⁵⁴ MOE Response *supra* note 147 at para 73.

facto review. This debate should not be reduced to a conflict between more and less robust interpretations of the principle.

The MOE's narrow interpretation of S 41's purpose was therefore grounded in DC concepts. Authority over the precautionary principle's application remains almost completely vested in the government, and opportunities for review and contestation are correspondingly limited, but the understanding of administrative constitutionalism underpinning this reasoning was strikingly different from the RI understanding that emerged in Lafarge's arguments before the ERT, although both reach similar legal conclusions.

Lafarge drew a parallel between S 41 and the test for setting aside jury verdicts in civil cases. Such verdicts are only set aside when they are "so plainly unreasonable and unjust that no jury reviewing the evidence as a whole and acting judicially could have reached it."¹⁵⁵ The analogy is notable for both its expression of RI principles – civil cases are bipolar disputes between private litigants – and the high threshold for granting leave that it implies. Although this interpretation of S 41 may appear more exacting than the MOE's, it is tempered by Lafarge's acceptance of the Tribunal's previous decisions on proof, which had recognized a *prima facie* standard of proof that was less than a balance of probabilities.¹⁵⁶ Only the MOE supported a higher standard of proof before the ERT.¹⁵⁷

As detailed in Chapters 5 and 6, Lafarge and the MOE's different paths to similar destinations mirror the relationship between LEC-LOW and CAB's arguments: CAB's submissions represent an RI variation of LEC-LOW's precautionary arguments. Throughout

¹⁵⁵ *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Responding Submissions of Lafarge Canada Inc. at paras 35-7, quoting *Burlie v Chesson*, [2001] OJ No 1960 (CA) at para 7) [Lafarge Response].

¹⁵⁶ Lafarge Response *supra* note 155 at para 40.

¹⁵⁷ *Dawber*, *supra* note 3 at 7.

their submissions LEC-LOW returned to the leave to appeal provisions’ status as one participatory mechanism in a legislative scheme directed at expanding public involvement in environmental decision-making.¹⁵⁸ These DC principles exist uneasily with appellate challenges, to the extent that challenges focus on substantive legal choices and outcomes rather than impugning the deliberative process that generated those choices and outcomes. Arguing that broad public consultation is necessary, but that decisions produced by such consultation should be subjected to similarly broad appellate rights is difficult: If public consultation is important, then the results of that consultation merit respect on appellate review. Yet LOW’s criticisms of the public consultation process leading up to the issue of the Lafarge Approvals puts its appellate challenge more squarely in the DC tradition: the quality and fairness of the deliberative process was at the heart of the precautionary arguments made by the leave Applicants.¹⁵⁹

Lafarge asserted that public participation on the project was “extensive, effective, and widespread.”¹⁶⁰ Together with the MOE, Lafarge pointed to the amendments and conditions added to the proposal as evidence that public participation was meaningful. Lafarge further noted that the Approvals’ requirement to form a Community Committee ensured that public participation would be ongoing. LEC-LOW maintained that the Committee would be “an information forum rather than an advisory body or dispute resolution mechanism.”¹⁶¹ The

¹⁵⁸ LEC-LOW Application *supra* note 141 at paras 61 and 65; *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Reply of Loyalist Environmental Coalition as Represented by Martin J. Hauschild and William Kelley Hineman; Lake Ontario Waterkeeper and Gordon Downie; and Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois and John Fay at paras 8 and 12) [LEC-LOW Reply].

¹⁵⁹ LEC-LOW Application *supra* note 141 at para 75; LEC-LOW Reply *supra* note 158 at para 77; Sidney Shapiro, Elizabeth Fisher, and Wendy Wagner, “The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy” (2012) 47 *Wake Forest Law Review* 463 at 484.

¹⁶⁰ Lafarge Response *supra* note 155 at para 63.

¹⁶¹ LEC-LOW Application *supra* note 141 at para 127.

conflict over public participation primarily sprang from two opposing narratives – Lafarge used the word “story”¹⁶² – of the public consultation process. Facts, not law, were at the dispute’s centre. The S 41 Applicants advanced a DC understanding of public consultation’s importance in precautionary decision-making, the MOE based its authority on claims that it had implemented DC concepts of public participation, and Lafarge insisted that the public consultation was fulsome and impactful. Legally the arguments converge on public participation, even if Lafarge specified that the consultation exceeded what the *EBR* requires and less consultation would have still been sufficient.

The Stratfords’ Applications bypassed these debates about administrative constitutionalism and the legal contours of the decision-making process to focus purely on their resistance to the project. Jamie Stratford and Mark Stratford submitted separate but identical leave Applications that were considered together by the ERT, who referred to them jointly as “The Stratfords.”¹⁶³ Their submissions consisted of two paragraphs focusing exclusively on their opposition to the project, without any discussion of the S 41 test or elaboration on why they opposed the project. Their opposition was expressed, not justified or explained.

Sandra Willard, another individual applicant, detailed the political roots of her opposition to the project. Her submissions were composed of copies of two letters she wrote to the Minister of the Environment, and a concise list of Grounds for Appeal. Her arguments feature a distrust of Lafarge and large multinational corporations more generally. She caustically refers to “the application by the Lafarge cement industrial giant to begin using its cement kiln as a waste incineration device thereby boosting Lafarge’s profits and at the same time (oh aren’t they

¹⁶² *Ibid* at para 64.

¹⁶³ *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Application for Leave to Appeal by Mark Stratford); *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Application for Leave to Appeal by Jamie Stratford) [Stratford Applications].

wonderful) reducing greenhouse gas emissions...”¹⁶⁴ Addressing Minister of the Environment Laurel Broten, Willard sympathetically alludes to the economic constraints on the Ministry’s freedom to set stringent limits, before insisting that the consequences of approving Lafarge’s proposal are so grave that it must nonetheless be rejected. Willard also maintains that “rejecting the Lafarge proposal will not shut them down and it won’t cost jobs.”¹⁶⁵ The prioritization of economic considerations is critiqued – Willard mentions the central place of “material assets and status icons” in contemporary society – but the reconcilability of environmental and economic imperatives is insisted on.¹⁶⁶

The ERT’s remarks on the purpose of S 41 mostly consisted of a long excerpt from *Simpson v Ontario*,¹⁶⁷ a 2005 ERT decision also written by Member Pardy. While noting that the leave test is stringent, in *Simpson* the ERT also found that the test must be “applied in conjunction with the stated intent of the *EBR* to enable the people of Ontario to participate in the making of environmentally significant decisions by the government of Ontario.”¹⁶⁸ Quoting this excerpt affirmed the continuing influence of DC principles. *Simpson* also emphasized the distinction between the leave test and appellate review: “It is not necessary at this stage for the Tribunal to determine whether the Director’s decision was unreasonable, or whether significant harm to the environment will materialize.”¹⁶⁹ This careful delineation between S 41’s purpose and the narrower reach of the appeal test further suggests the DC paradigm’s central place.

Access to the deliberative forum of an appeal hearing is expanded by a generous interpretation of

¹⁶⁴ *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Application for Leave to Appeal by Sandra Willard) [Willard Application].

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Simpson v Ontario (Director, Ministry of Environment)* (2005), 18 CELR (3d) 123 (ON ERT).

¹⁶⁸ *Ibid.*, quoted in *Dawber*, *supra* note 3 at 6.

¹⁶⁹ *Ibid.*

S 41's leave to appeal rights, while the more exacting standard for overturning a decision on appeal protects exercises of administrative discretion from intrusive scrutiny. Both objectives are characteristic of a DC paradigm.

The ERT distinguished the questions asked in the first and second prong of the test: "The issue under the first branch of section 41 is contextual: are the decisions reasonable given relevant laws and policies? In contrast, the issues under the second branch are not contextual, but absolute: what could the effects of the decisions be, and are those effects significant?"¹⁷⁰ Member Pardy may have drawn this distinction independently; it does not appear in the written submissions made by the parties. As envisioned by Member Pardy, an "absolute" inquiry into the potential for significant environmental harm does not rest on determining compliance with the same applicable laws and policies that form the crux of the first prong's "contextual" inquiry. Legislative choices, and regulations created by the Cabinet, are essentially irrelevant.

The answer to the accountability and legitimacy questions posed by the ERT's logic lie in the *EBR*: The Legislature made it law, and the ERT is bound to apply the second branch of the S 41 test as it was written. Whether that answer is satisfactory is a values-laden question beyond the scope of this paper, but the implications for administrative constitutionalism must be addressed. The second branch of S 41, according to the ERT's reasoning, offers the public an opportunity to challenge the adequacy of applicable environmental laws to protect the environment from significant environmental harm. It is not a limitless, free-standing opportunity – the first prong limits the second – but it is a meaningful reflection of DC ideas about accountability and participatory deliberation. The opportunity is also widened by the ERT's

¹⁷⁰ *Dawber, supra* note 3 at 30.

finding that different facts may be relied on under each prong of the test: the potential significant environmental harm can be unconnected to the unreasonableness alleged under the first prong.

Pardy's ideas about systems theory, which he has advanced in several journal articles and a monograph, may help explain this distinction between an absolute and contextual inquiry. He calls for laws that protect ecosystems from disproportionate anthropogenic impacts with the aim of allowing ecosystems to evolve dynamically. Crucially, Pardy rejects an instrumentalist approach that seeks to direct ecosystem development towards specific ends with economic or social benefits: "The alternative is to establish and enforce general rules and principles that protect ecosystems... from undue influence, so that these [ecosystems] may operate according to their inherent characteristics and thereby create their own ends."¹⁷¹ Environmental laws, as opposed to administrative discretion, are therefore necessary because ecosystems "need legal rules and principles to protect them."¹⁷²

Reasonableness – and the DC paradigm - figures prominently in the ERT's interpretation and application of the first prong of S 41. The heading that precedes the ERT's application of the first prong of the test is evocative: "First Branch of S 41 – Reasonableness."¹⁷³ A notoriously unwieldy and imprecise concept, reasonableness is traditionally associated with DC principles and a reluctance to reverse discretionary decisions. This would appear to contradict the leave Applicants' interests, given that their aim was to overturn the Directors' discretionary decision to issue the Instrument Approvals. Yet the ERT's findings on the issue of proof undercut this potential obstacle for the leave Applicants. Drawing on the ERT's reasoning in *Residents*, which holds that the Legislature set a different standard of proof in S 41, Pardy rejected the MOE's

¹⁷¹ Pardy (2008) *supra* note 120 at 82.

¹⁷² *Ibid* at 84.

¹⁷³ *Dawber, supra* note 3 at 11.

arguments for a balance of probabilities standard and instead applied a *prima facie* standard of proof.

Section 41's reduced standard of proof operated to subvert reasonableness's traditional role as a support for administrative discretion. Instead of proving unreasonableness, the leave Applicants only needed to show that the decisions were *prima facie* unreasonable, a lower standard than a balance of probabilities. Evidence of unreasonableness remained at the centre of the Tribunal's inquiry under the first prong of S 41, yet the lower standard of proof for establishing unreasonableness weakened claims of discretionary authority.

Public participation's status as a legislative objective, and guide to interpreting the *EBR*'s provisions, explains this apparent contradiction. Reasonableness is at the heart of the first prong of the test, but its restrictive impact on opportunities for appellate review is softened by the lower standard of proof, an interpretive choice made to promote public participation in environmental decision-making. Because public consultation is highly valued under the DC paradigm, along with the administrative discretion embodied by the legal concept of reasonableness, the ERT's interpretation of S 41 can be understood as a clear implementation of DC principles.

Despite the ERT's affirmation of public participation's importance within the *EBR*'s legislative framework, the Tribunal found that the deficiencies in public participation did not rise to the level of unreasonableness demanded by S 41.¹⁷⁴ The leave Applicants arguments here centred on the failure to post certain technical documents, submitted by Lafarge and relied on by the MOE, on the Environmental Registry website for public notice and comment. After noting that the Instrument Applications were open for public comment over 120 days, and the technical documents in question did not substantively change the proposal, the ERT found in favour of the

¹⁷⁴ *Ibid* at 23-4.

leave Respondents on this ground – it “was not such an error as to make it appear that no reasonable person could have made the decision in question.”¹⁷⁵ Yet the Tribunal’s comments fall short of an endorsement of the MOE’s conduct. It held that because the documents were important enough to be relied on, they should have been posted, even if the failure to do so could not satisfy the S 41 test.¹⁷⁶

In his scholarly writing, Pardy has criticized public consultation’s role in environmental decision-making, stating that where traditional environmental assessment “permits public input, a systems approach relies on legal rights not subject to the views of onlookers.”¹⁷⁷ His scholarly comments on the philosophy underlying the *EBR* are also evocative of RI concepts: “the agency best able to protect the environment is government.”¹⁷⁸ Although this view is not shared by Pardy in his role as a scholar, it is consistent with this interpretation and application of the *EBR*.

Returning to this chapter’s opening query about how the S 41 test balances government authority with opportunities for public scrutiny and challenge, the ERT’s decision suggests that while the balance remains uneven and tilted towards government respondents, it is far more welcoming of prospective third-party appellants than the MOE and Lafarge claimed. In the next chapter, the analysis moves past the questions of statutory interpretation discussed here to investigate the competing understandings of precaution, uncertainty and harm revealed in the participants’ submissions.

¹⁷⁵ *Ibid* at 24.

¹⁷⁶ *Ibid* at 24.

¹⁷⁷ Bruce Pardy, “Environmental Assessment and Three Ways to not do Environmental Law” (2010) 21 *Journal of Environmental Law and Practice* 139 at 149.

¹⁷⁸ Pardy (1996) *supra* note 122 at 244.

Chapter 5

Risk and Caution

The SEV states that where there is uncertainty about environmental risk, “the Ministry will exercise caution in favour of the environment.” “Exercising caution” implies a deliberative approach or state of mind, more than a specific obligation to ensure particular environmental outcomes. The phrase evokes DC values, namely the critical importance of decision-making processes. The SEV’s commitment to Ministerial caution relates to the deliberative process it will employ in cases of uncertainty; the commitment does not extend to guaranteeing results. It should be noted that the SEV’s words on the precautionary approach, and the precautionary principle’s significance to the *EBR* legislative scheme, cannot be reduced to these words. As explored later in this chapter, LEC-LOW offered an alternative conception of the precautionary principle’s role that made use of this broader statutory context. However, the MOE’s submissions on the precautionary principle can be traced to this commitment to “exercise caution,” as reflected by the equivalency they drew between a careful and thorough decision-making process, and compliance with the SEV’s precautionary commitment.¹⁷⁹ This emphasis on process illustrates the impact of DC perspectives on the precautionary principle’s interpretation.

Any reliance on the precautionary principle in the Directors’ original decision was implicit – the leave Respondents did not claim that the Directors’ made a precautionary decision and named it as such. Nor did the leave Applicants argue that the Directors’ failure to clearly cite the precautionary principle conclusively proved that they disregarded the principle. Both sides looked to the decision itself for support of their respective positions on whether the precautionary principle was followed. But the parties diverged in how much weight they assigned the

¹⁷⁹ MOE Response *supra* note 147 at para 148.

Directors' decision-making process. Consistent with the LEC-LOW's DC-flavoured submissions, they cast doubt on the transparency and fairness of the original decision-making process.¹⁸⁰ These same qualities were invoked by the MOE in its submissions. The MOE based its claims about the soundness of the original decision on a lengthy narrative of the deliberative process that led to the qualified approval of Lafarge's proposals.¹⁸¹

The proposed moratorium on tire burning, and its simultaneous announcement on the same day the Lafarge Approvals were issued, figured prominently in LEC-LOW's arguments. Besides the impression produced by the MOE's implicit acknowledgement that it lacked experience and knowledge regarding tire burning, LEC-LOW highlighted the inconsistency – and alleged unfairness – of exposing Bath residents to a risk while proposing to shield other Ontario residents from the same risk. This argument appears in the following passage: “In the circumstances, the Directors' decision-making does not represent exercising caution in favour of the environment; instead, it represents exercising caution in favour of Lafarge.”¹⁸²

LEC-LOW even framed some of its precautionary concerns as a failure to obtain necessary information, in a separate ground in their leave to appeal Application. Noting that where required information is missing, uncertainty develops, LEC-LOW alleged there were “significant evidentiary gaps” in the information the Directors' relied on.¹⁸³ Crucially, this appeal ground was independent from the SEV. Like with the second prong of the test, LEC-LOW sought to infuse the leave to appeal provisions with precautionary ideas, thereby extending the principle's reach. These attempts recall precautionary theorists who argued that the precautionary

¹⁸⁰ LEC-LOW Application *supra* note 141 at paras 76-9 and 71; LEC-LOW Reply *supra* note 158 at para 112.

¹⁸¹ MOE Response *supra* note 147 at paras 27, 53 and 148.

¹⁸² LEC-LOW Application *supra* note 141 at para 69.

¹⁸³ *Ibid* at para 77.

principle amounts to a philosophy of risk regulation, rather than a narrowly applicable rule. Beyond any consequences for the array of legal and statutory interpretation questions at issue in *Lafarge*, these attempts to inject precautionary ideas into the *EBR*'s appeal framework had wider significance for debates about the principle's significance in environmental regulation.

Equity's connections with the precautionary principle appeared most prominently in LEC-LOW's statements about the proposed moratorium. Permitting tire burning in Bath while prohibiting it elsewhere in Ontario was deemed "discrimination."¹⁸⁴ LEC-LOW also stressed the MOE's own statements, made prior to the leave Application, that characterized the fuel plant as a "pilot project."¹⁸⁵ Although the MOE rejected this description before the ERT, the phrase was used in a Ministry news release announcing the Approvals. Pushing this "pilot project" label further, LEC-LOW claimed that it was a "major scientific experiment."¹⁸⁶ Thus the Approvals represented official authorization of an experiment with potentially dangerous impacts on the health and welfare of Bath residents, making it discriminatory.

The recurring theme in CAB's arguments is the importance of fairness as a guiding principle, and the unfairness of permitting tire burning in Bath while contemplating its prohibition elsewhere in the province. This understanding of fairness is implicit in CAB's commitment (detailed in Chapter 6) to weighing the precautionary concerns on "moral grounds" and its support for an "apolitical" decision-making process.¹⁸⁷

Going beyond LEC-LOW's allegations about the Approvals' discriminatory affects, LEC-LOW also argued that the "experiment" was poorly designed and would therefore fail to

¹⁸⁴ *Ibid* at para 36.

¹⁸⁵ *Ibid* at para 93.

¹⁸⁶ *Ibid* at para 85.

¹⁸⁷ *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Application for Leave to Appeal by Susan Quinton for Clean Air Bath at Part 6) [CAB Application].

produce useful information on the safety of tire burning. It was both discriminatory and pointless, an unfair burden on Bath residents that offered little in the way of compensatory benefits.¹⁸⁸ (This line of argument is explored in Chapter 6.)

Janelle Tulloch's submissions centred on the material prepared by Dr. Neil Carman, whose work also featured in LOW and LEC's submissions. Tulloch excerpted around two pages of Carman's 1997 report on tire burning. In addition, Tulloch highlighted Bath's unique character and charms – "Bath is a beautiful, small community..." – and her concern about only allowing tire burning there. She also expressed her conviction that the environment would suffer, as well as human and animal health.¹⁸⁹ The MOE disputed Tulloch's characterization of the central issue at stake in the leave hearing. The issue, according to the MOE, was "whether the burning of tires under the current circumstances, including the technology, safeguards and restrictions outlined in the Certificates of Approval will result in a significant, negative impact." (emphasis added) Tulloch instead focused on the issue of danger: her arguments did not share the expectation of certainty contained in the phrase "will result."¹⁹⁰

This intersecting vocabulary of experiments, risk, benefits, and discrimination is expressive of a DC conception of the precautionary principle. According to this DC perspective, the principle is more than a method of responding to environmental risk and scientific uncertainty: It promotes environmental justice by fairly distributing environmental costs and economic benefits. Of course critics of the precautionary principle note the economic imperative of development, even at the price of environmental risk and harm, but this broader understanding of the principle rejects the assumptions that underlie those criticisms. For example, DC

¹⁸⁸ LEC-LOW Reply *supra* note 158 at paras 76 and 170.

¹⁸⁹ *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Application for Leave to Appeal by Janelle Tulloch) [Tulloch Application].

¹⁹⁰ MOE Response *supra* note 147 at para 105.

advocates of the precautionary principle insist that the dangers flowing from economic development are unfairly concentrated in certain regions and populations.

Unlike its fellow Respondent at the ERT, Lafarge, the MOE addressed the linkages between the precautionary principle and the second prong of the leave test, a matter the ERT had recently considered in *Davidson*.¹⁹¹ Implicitly accepting the proposition that the precautionary principle must inform efforts to interpret the second prong of the test, the MOE then approached that interpretive task with negative instead of affirmative language: The precautionary principle “does not require the withholding of an approval where the Applicant fails to provide evidence to support his/her concerns regarding the potential for significant harm to the environment.”¹⁹² (emphasis in the original) This negative framing, which echoes the language found in the first branch of the S 41 test, left unanswered the question of whether the precautionary approach *allows* decision-makers the discretion to withhold such an Approval, for example in circumstances where probative evidence of both safety and risk are scarce.

The implications of this interpretive silence are two-fold: first, the facts in *Lafarge* arguably fall into this category marked by uncertainty, where persuasive evidence of both safety and risk is lacking; and second, it fails to address the scope of the Directors’ authority under the precautionary principle to *withhold* Instrument Approvals, a legal question relevant to *Lafarge* and future cases because the obligation to exercise discretionary powers reasonably makes questions about how such discretion is used potentially determinative in appeals and judicial reviews.¹⁹³ Establishing that applying the precautionary principle involves the exercise of administrative discretion does not remove it from the ambit of the S 41 test, especially since the

¹⁹¹ *Ibid* at para 77.

¹⁹² *Ibid* at para 77.

¹⁹³ Discretionary decisions generally attract a reasonableness standard on judicial review.

first prong of the test expressly includes the concept of reasonableness, a concept that also guides the review of discretionary decision-making.

The incompleteness that characterizes the MOE's statements on the relationship between the second prong of the S 41 test and the precautionary principle is evocative of logical tensions in the MOE's interpretation of the test, but the incompleteness also reflects the influence of DC principles that shrink the scope of appellate review. According to this perspective, proving that the Directors' were not *obliged* to reject the proposal on precautionary grounds effectively defeats any appellate challenge. The absence of an obligation to reject the Proposal indicates that both approval and rejection would fall within the range of responses that could survive a reasonableness review.

What is most notable about these competing views is what they share: a reliance on DC principles. Sprinkled throughout LEC-LOW's arguments about the conditions' inadequacy are references to concerns raised by critics that the MOE allegedly ignored in granting the Approvals and drafting the conditions.¹⁹⁴ The same emphasis on deliberative quality is also seen in the MOE's replying submissions, which focus on the extent to which the conditions redefined Lafarge's original proposal.¹⁹⁵ LEC-LOW measured thoroughness in relation to concerns raised by the public and environmental critics, and the MOE measured its Directors' performance in reference to the amendments it forced on Lafarge's proposal. Both sides built their claims on the (lack of) quality in the deliberative process, and both sides emphasized the significance of the conditions attached to the Approvals, but they diverged on the reference point they used to

¹⁹⁴ LEC-LOW Application *supra* note 141 at paras 67, 71, and 76-9.

¹⁹⁵ MOE Response *supra* note 147 at paras 5-6; *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Affidavit of Richard Lalonde, P. Eng at paras 74-89).

evaluate the quality of those conditions: the views of critics, or the wishes of the project's proponent, Lafarge.

Lafarge countered the leave Applicants' precautionary claims by repeatedly asserting that emissions would fall below applicable MOE limits. Lafarge sought to transform the precautionary principle's focus on risk of environmental harm into a concern about compliance with regulatory standards. The Directors' monitoring and reporting conditions supposedly answered this concern about regulatory breaches, meaning that the precautionary principle was considered and precautionary measures were imposed.¹⁹⁶ A lack of supportive precedent may have frustrated Lafarge's efforts to blur the distinction between risk of environmental harm and risk of regulatory non-compliance.

The same narrow definition of harm is found in Lafarge's comments on the second prong of the S 41 test. Both prongs of the test must be satisfied in order to gain leave to appeal a decision, thus a more expansive interpretation of precaution accomplishes little if the second prong undermines its purpose. Burden of proof formed the crux of Lafarge's arguments here: Where there is compliance with regulatory numerical limits, the burden of proof shifts to the S 41 leave applicant and this burden can only be satisfied with scientific evidence.¹⁹⁷

The precautionary principle's reach was at stake in this dispute over the "significant harm" test. If Lafarge's view prevailed, along with the MOE's argument that each prong of the test must be established on a balance of probabilities, the result would be a drastic reduction in the precautionary principle's force. Evidence of the *probability* of significant environmental harm would be required and the precautionary principle is designed for application in cases where uncertainty, not evidence, predominates. The distance between the leave Respondents'

¹⁹⁶ MOE Response *supra* note 147 at paras 52-4 and 82.

¹⁹⁷ Lafarge Response *supra* note 155 at paras 79 and 82.

understanding of the significant harm test and even a relatively contained interpretation of the principle is expressed by Lafarge’s demand for “hard evidence” of harm under the former.¹⁹⁸

Like the MOE, Lafarge claimed that because the proposed ban was not current law, it was therefore irrelevant and properly disregarded by the Directors.¹⁹⁹ (LEC characterized the MOE’s claims on this point as “disingenuous.”²⁰⁰) Lafarge also left unaddressed the argument that the proposal indicated there were concerns within the Ministry about the risks posed by tire burning that made the Directors’ Approvals unreasonable. Again following the MOE’s logic, Lafarge made the same alternative argument that the tire burning ban exhibited a precautionary approach.²⁰¹ In addition, Lafarge framed its claims about the proposed ban’s irrelevance in RI terms, as part of the Directors’ – and the ERT’s – obligation to accept and apply the law as it stands. Any pleas to change the law, and usurp the Legislature and Ministry’s authority, by making proposed legal reforms *de facto* law must be resisted.²⁰²

Yet the proposed moratorium on tire burning frustrated Lafarge and the MOE’s arguments about environmental risk. The MOE’s narrative of a thorough and expert deliberative process resulting in qualified Approvals of Lafarge’s project could not accommodate the proposed moratorium on tire burning. Both CAB and the LEC constructed their precautionary arguments around this fact. Simply citing the proposed Regulation and related admission of the MOE’s lack of knowledge about tire burning satisfied the threshold for establishing the precautionary principle’s relevance – lack of scientific certainty about an activity’s environmental consequences. It would follow from the proposed Regulation, and

¹⁹⁸ *Ibid* at para 82.

¹⁹⁹ *Ibid* at paras 44 and 130-1.

²⁰⁰ LEC-LOW Reply *supra* note 158 at para 96.

²⁰¹ Lafarge Response *supra* note 155 at para 132.

²⁰² *Ibid* at 44.

acknowledgement of the uncertainties surrounding burning tires, that the Directors were bound to consider the precautionary approach.

The MOE's initial answer to this strategic dilemma was Rational-Instrumentalism, although it added an "in the alternative" DC-inflected argument. Moving from DC to RI arguments, from one page to the next, the MOE submitted that the proposed moratorium could not be properly considered by either the Directors who made the original decision, or the Tribunal scrutinizing that decision. It was a "proposed" regulation, and therefore irrelevant. While elsewhere in its submission the MOE suggests that its staff are both numerous and part of a holistic deliberative process, on this point the MOE implied that the consideration of Lafarge's proposal and the drafting of the proposed moratorium occurred in separate and unconnected parts of the Ministry.²⁰³ The MOE also relied on the different legal characters of a Certificate of Approval and a Regulation: unlike with the former, the Lieutenant-Governor in Council retains discretion over the approval of a Regulation. According to the MOE, the proposed regulation was inapplicable because it was a proposal, and the decision whether to accept the proposal – to make it binding or not – was beyond the Directors' control.²⁰⁴

Yet this argument left unaddressed the *concerns* that gave rise to the proposed moratorium. Both the LEC-LOW and CAB Applications circumvented doubts about the legal status of proposed regulations to focus squarely on the risks and lack of knowledge underlying the proposed moratorium.²⁰⁵ The MOE only addressed this point in its alternative arguments, summarized in a brisk forty-nine word claim that if the Tribunal were to consider the proposed Regulation in its review, it should find that by limiting tire burning to "a small number of

²⁰³ *Ibid* at paras 23-7 and 50-3.

²⁰⁴ *Ibid* at para 151.

²⁰⁵ LEC-LOE Reply at paras 97-8; CAB Application *supra* note 187.

facilities” the MOE was following the precautionary principle.²⁰⁶ Banning and conditional approval, according to this reasoning, were two precautionary responses to the same underlying concern. The precautionary principle did not dictate a singular response to the risks and uncertainties surrounding tire burning, but instead offered a range of suitably precautionary responses.

This DC understanding of the precautionary principle resisted the RI notion that the principle produces specific and predictable regulatory outcomes. The inconsistency highlighted in the leave Applicants’ submissions was not troubling because the MOE did not seek uniformity, and the precautionary principle did not demand it. Precaution could inspire a proposed moratorium in one set of circumstances and conditional approval in another deliberative process. Although speculation about the reasoning behind the ERT’s rejection of the MOE’s reasoning is both unproductive and beyond this paper’s reach, the strained coherence in this part of the MOE’s submissions illustrates the difficulty faced by advocates seeking to blend RI and DC arguments. The line separating flexible and nuanced arguments from incoherent ones is sometimes delicate.

The Individual Applicants especially struggled with the persuasive and evidentiary demands of making precautionary arguments. The Dawbers and Jenneys submitted virtually identical Applications in which they made the following assertion.²⁰⁷

There is a good reason to believe that no reasonable person would have gone against their own former medical officer, Dr. Alban Goddard-Hill’s warnings about the dangers of creating deadly dioxins in cement kilns that burned tires. It is my understanding that one

²⁰⁶ MOE Response *supra* note 147 at para 153.

²⁰⁷ *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Application for Leave to Appeal by Diane and Chris Dawber) [Dawber Applications]; *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Application for Leave to Appeal by Hugh and Claire Jenney) [Jenneys Application]

gram of dioxin can kill thousands of people; therefore, it would be very unwise to create them.

In October, 2004, Dr. Goddard-Hill outlined his objections to the Lafarge project in a letter to Environment Minister Dombrowsky.²⁰⁸ Although the Dawber and Jenney Applications did not attach Dr. Goddard-Hill's letter, it was included by LEC-LOW in their supporting materials. His letter features sharp criticism of traditional Risk Assessment: "[It] has been used by industry as a licence to make a profit by polluting the environment for three decades now."

Precautionary considerations are the foundation of Willard's list of Grounds for Appeal. Willard argued that the proposal should only be approved "if it could be proven safe up front," and that "the ability to quickly demonstrate the direct correlation between human illnesses and air pollutions is not a hard science in a multi-polluted world."²⁰⁹ This last assertion links the ecosystem approach with precautionary ideas in a mutually reinforcing relationship. Willard also calls for the exclusion of anyone affiliated with Lafarge from oversight and data collection responsibilities, which is consistent with her allusions to the conflict between Lafarge's economic goals and the public interest.

J. Sulzenko, one of the individual applicants, maintained that the Approvals should be reversed in the absence of an environmental assessment or full public consultation: The implication is that more scientific or democratic legitimacy was needed. Precautionary concerns are also highlighted in Sulzenko's arguments: "Surely it makes more sense... to find out through a full environmental assessment process that involves full public consultations what the consequences are of adding such a toxic mix to an old kiln BEFORE anything goes into the

²⁰⁸ Dr. A.C. Goddard Hill, "Letter", October 21, 2004. A copy of his letter is available online: <http://eloerg.tripod.com/waupos/id19.html>, accessed June 22, 2013.

²⁰⁹ Willard Application *supra* note 164.

air.”²¹⁰ Sulzenko’s comments recall Dryzek et al’s notion of a precautionary discourse that extends beyond the precautionary principle. The idea of tame and robust interpretations of the precautionary principle may also shed light on Sulzenko’s objectives: the options of a more extensive environmental assessment or a fuller public consultation process may evoke different models of administrative constitutionalism, but they would both constitute a robust application of the precautionary principle.

Unlike this fluid understanding of precaution, the ERT’s reasoning on the precautionary principle centred on the issue of proof: who must prove what. After finding that the proposed moratorium on tire-burning represented an acknowledgement that the MOE lacked experience with the practice, Member Pardy concluded that the precautionary approach obliged “the Directors to consider the incineration of tires to be as hazardous as it could possibly be, and to place the onus of establishing the absence of environmental harm upon the source of risk.”²¹¹ This formulation of the precaution has attracted criticism on the grounds that it demands that proponents prove a negative – i.e. the absence of risk – and is thus incoherent and impractical.

Scott has refuted this criticism of the precautionary principle by pointing to an alternative understanding of the proponent’s obligation: “The precautionary principle, in shifting the burden of proof, demands... evidence of the absence of harm.”²¹² Member Pardy’s sweeping characterization of the precautionary principle’s standard of proof is not generally shared by supporters of the principle; the idea that the precautionary principle requires proof of a negative

²¹⁰ *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Application for Leave to Appeal by J. Sulzenko) [Sulzenko Application].

²¹¹ *Dawber supra* note 3 at 21.

²¹² Dayna Nadine Scott, “Shifting the Burden of Proof: The Precautionary Principle and its Potential for Democratizing Risk” in Law Commission of Canada (eds) *Law and Risk* (Toronto: UBC Press, 2005), 50-87 at 56.

is usually only expressed by critics of the principle, such as Sunstein. In fact, LEC-LOW specifically disavowed this understanding of the precautionary principle.²¹³

The Response of the Directors suggests that reliance by the Applicants on the precautionary approach is misplaced because it would lead to the banning altogether of a process or proposed action such as the Lafarge proposal in circumstances of uncertainty. [...] The Applicants submit that the Directors' [*sic*] and Lafarge have again misconstrued and mis-characterized the position of the Applicants. [...] [I]f the test burn conditions [*sic*] the approval are deficient to the point of being incapable of providing the correct answers, as suggested in the Leave to Appeal Application, then any decision to allow permanent burning of alternative fuels based on flawed test burn results will be similarly deficient. By any yardstick, such a decision is not precautionary. [emphasis added]

On first impression, Member Pardy's interpretation of the precautionary approach recalls RI concepts in its formalistic understanding of proof and narrow focus on the parties immediately involved in the decision: the Directors and the "source of risk," in this case Lafarge. It also constitutes a robust definition of the precautionary principle, one that is far from the "tame" interpretation supported by Thornback and Tollefson, and even further from the soft regulatory approach to environmental risk urged by Sunstein. Requiring that regulators assume a practice is "as hazardous as it could possibly be" invites stringent evaluation of projects with uncertain but even potentially serious environmental impacts. However, the practical implications of this interpretation rest on the SEV's legal weight and the precise nature of the obligations it imposes, and when Member's Pardy's interpretation of the precautionary approach is contextualized accordingly, that first impression changes: the DC paradigm is predominant in the ERT's examination of the precautionary approach.

Section 11 of the *EBR* states that Ministers must "consider" their SEV's when making environmentally significant decisions; the obligation is arguably more procedural than substantive. Crucially, regulators retain the discretion to approve a proposal even when applying

²¹³ LEC-LOW Reply *supra* note 158 at paras 74, 76.

the precautionary approach indicates that it should be rejected. The ERT's robust definition of the precautionary approach is balanced – and arguably attenuated – by its limited significance for the ultimate decision.

The ERT's findings on the relevance of the proposed moratorium on tire burning in regard to the precautionary approach amounted to another victory for the DC paradigm. Rejecting the MOE's and Lafarge's assertion that the proposal was irrelevant because it had not been made law by the Directors' superiors in the Ministry and Cabinet – a formalistic hierarchy-based argument that recalls RI concepts – the ERT held that the proposal was a “policy” within the meaning of S 41.²¹⁴ Consequently, the Directors should properly have considered the proposal even though it had not been officially approved by the Minister and Cabinet. This represents a clear departure from the RI ideas expressed by the Tribunal in its other comments on the proposal's significance.

The ERT considered the proposed ban on tire burning in two separate grounds: the precautionary and the discrimination claim. This divided analysis may appear surprising in light of the above discussion in the literature review on the links between the precautionary principle and efforts to equitably distribute environmental risk (and accompanying socioeconomic benefits). In addition, it is difficult to trace the legal basis of the discrimination argument. The Tribunal cited an earlier ERT decision, *Safety-Kleen*,²¹⁵ for the proposition that consistency is essential to reasonable environmental decision-making: “consistency is one of the characteristics of a system of governance based on the rule of law.”²¹⁶ In the next paragraph of *Safety-Kleen*, this broad statement is qualified by noting the legislative reliance on site-specific Instrument

²¹⁴ *Dawber supra* note 3 at 19-20.

²¹⁵ *Safety-Kleen Canada Inc v Ontario (Director, Ministry of Environment)* (2006), 21 CELR (3d) 88 (ON ERT) [*Safety-Kleen*].

²¹⁶ *Dawber supra* note 3 at 27.

Approvals. *Safety-Kleen*, in reasoning adopted by Member Pardy, reconciled this apparent contradiction by holding that environmental *effects* – rather than regulatory guidelines and emissions limits – are what must be consistent.²¹⁷

This recalls Pardy’s comments about the importance of rule of law principles in “The Invisible Hand” and other academic works. In addition, Pardy’s emphasis on the superiority of effects-based environmental laws fits easily with this understanding of environmental discrimination, which should not be confused with DC concepts of equity. Consistency, more than fairness, is the value underlying the Tribunal’s concern about discriminatorily permitting tire burning in Bath while banning it elsewhere.

This is an exacting standard that could potentially justify searching and intrusive scrutiny of administrative decisions, with implications for public administration frameworks. Even precautionary theorists who highlight the importance of equity typically advocate for an open public deliberation on the distribution of risks and benefits, in keeping with DC concepts, rather than a bright-line rule that adverse environmental impacts must be kept constant over an area as large as Ontario. Once consistency of environmental effects, including risks, is accepted as intrinsic to reasonable environmental decision-making, the simultaneous issuance of the Approvals and the proposed moratorium appears obviously reasonable. Describing the Lafarge plant as a “pilot project” further supports this impression of unreasonableness.²¹⁸

These comments on the importance of consistency raise questions about the theory of administrative constitutionalism underpinning the Tribunal’s reasoning on this point. The sharpness – or inflexibility – of the command against inconsistent distributions of environmental risk seems to leave little room for discretion, suggesting the influence of RI principles. And

²¹⁷ *Ibid* at 28.

²¹⁸ *Ibid* at 28.

unlike the precautionary approach, whose relevance is dependent on its inclusion in the SEV and which must only be “considered” when making environmentally significant decisions, the requirement to not discriminate appears more far-reaching. Avoiding discrimination is framed as an obligation, and not merely as a value or priority that should inform administrative decision-making.

In contrast, DC ideas infused the Tribunal’s contemplation of these same facts surrounding the proposed ban under its analysis of the precautionary approach. On these two separate grounds, Member Pardy found that the proposed ban established the appearance of unreasonableness – under both RI and DC theories.

It should be noted that in Member Pardy’s analysis of the precautionary principle he also made the more modest finding that the proposed ban revealed a lack of knowledge about tire-burning that made the Approvals *prima facie* unreasonable.²¹⁹ This reasoning is easily reconciled with both RI and DC theories – the proposition that where lack of knowledge is admitted, precaution should be taken is not in tension with either paradigm of administrative constitutionalism – but it is significant that Member Pardy did not solely rely on this relatively uncontroversial finding. Instead he chose to import the DC understanding of a more fluid and polycentric administrative decision-making process where “relevant” law and policy is defined more expansively and less hierarchically.

One intriguing aspect of the ERT’s decision is its simultaneous recognition of the importance of equitably distributing environmental risk and exclusion of those equitable considerations from its analysis of the precautionary principle. The effect of this split approach was to better insulate the leave Applicants’ victory from legal challenge. Reviewing courts could

²¹⁹ *Ibid* at 20-1.

potentially uphold the ERT’s decision regardless of their views on the importance of equitably distributing risk and the related question of what part consistency plays in exercises of administrative discretion.

In the final paragraph of his comments on precaution, Member Pardy switches between “approach” and “principle.” Shortly following his interpretation of the precautionary approach and its related obligations surrounding proof, Pardy condemns the Directors’ Approvals by noting that “[s]uch an approach is not consistent with the precautionary principle.”²²⁰ (emphasis added) Whiteside’s emphasis on the significance of the word “principle” is instructive in light of the SEV’s use of “precautionary approach.”²²¹ The slippage between “principle” and “approach” – which is seen throughout the parties’ submissions – may indicate that in relation with how environmental harm, uncertainty and risk are understood, and burdens of proof allocated, there is little meaningful difference between the two formulations. (Lafarge even referred to “the precautionary principle/approach,” implying that the two are interchangeable.²²²) What difference there is appears in the nature of the regulatory response envisioned: The precautionary principle imposes obligations on regulators, while the precautionary approach offers guidance that should be considered, but not necessarily followed.

²²⁰ *Ibid* at 21.

²²¹ Whiteside *supra* note 8 at 68-70.

²²² Lafarge Response *supra* note 155 at para 51.

Chapter 6

Expertise: Contesting Science and Providing Proof

Expertise figures prominently in the debates regarding the second branch of the test, the significant harm requirement. The content of expert evidence is summarized together with the authors' qualifications. For example, Member Pardy notes that a report submitted by the S 41 Applicants was prepared by "Dr. Brian McCarry of the Department of Chemistry at McMaster University." The evidence of two "local Medical Officers of Health" was also highlighted.²²³ As the following discussion demonstrates, fears about the precautionary principle threatening the authority of scientific experts in environmental regulation and decision-making were not realized in the ERT proceedings.

LEC-LOW emphasized Lafarge's environmental violations in other jurisdictions, including Quebec, in its arguments.²²⁴ Lafarge in its responding submissions arguably placed even more emphasis on its reputation, listing a series of environmental accomplishments and constructing a corporate image as a paragon of environmental and social responsibility.²²⁵ On both sides, these competing reputational claims are presented with little comment or explanation about their legal significance: their importance to *Lafarge's* legal outcomes is apparently self-evident. But for the purposes of this analysis, the rhetorical and legal ends served by these claims are important. LEC-LOW, in reply submissions it made after Lafarge's and the MOE's responding factums were filed, attempted to clarify the relevance of its reputational claims:²²⁶

[...] [T]he Applicants do not take the position that Lafarge's history of environmental non-compliance was so extensive that the Directors ought not to have issued any approvals to Lafarge. However, the Applicants submit that that history of non-

²²³ *Dawber, supra* note 3 at 33.

²²⁴ LEC-LOW Application *supra* note 141 at paras 7 and 74.

²²⁵ Lafarge Response *supra* note 155 at paras 2 and 8-10.

²²⁶ LEC-LOW Reply *supra* note 158 at para 119.

compliance should have been expressly considered by the Directors, and should have resulted in further and better conditions to safeguard the environment and local health and safety.

Perhaps the clearest use for these claims was in debates about the proper weight accorded to each party's scientific evidence, including the engineering and modeling reports. All the parties attempted to polish their credentials and place their scientific claims in the context of their reputational claims. The Facts section of the Applicants' and Respondents' factums move fluidly between environmental and reputational claims. Lafarge cited awards and recognitions it had received for its environmental performance together with summaries of its technical reports on the proposed projects.²²⁷ The "objective" scientific evidence was bolstered by claims of organizational excellence that would easily fit in a corporate or NGO profile – or in a press release. Expertise, reputation, and objectivity were mutually constructed.

The Dawber and Jenney Applications similarly expressed skepticism about the trustworthiness of Lafarge's expertise: "[U]nlike the US Environmental Protection Agency you are satisfied with a self regulating system. Recent findings prove that this system is not viable."²²⁸ The sentiment expressed here is reminiscent of concerns raised by other leave Applicants: that the MOE's and Lafarge's claims regarding expertise, namely the reliance on Lafarge to monitor and mitigate its own environmental impact, was misguided. Trusting in Lafarge's expertise and good faith was a mistake, according to the Dawbers and Jenneys.

Before the Directors' Approvals were issued, CAB was one of several environmental groups to urge the MOE to hold a public hearing on the proposed project. Although public hearings are more closely associated with DC understandings of administrative constitutionalism and the proper regulation of risk, CAB framed its request in distinctly RI terms. While clarifying

²²⁷ Lafarge Response *supra* note 155 at 6-11.

²²⁸ *Ibid.*

that it was not casting any doubts on the integrity and objectivity of the technical staff evaluating Lafarge's proposal, CAB raised concerns about "political" influences on the MOE's ultimate decision on Lafarge's proposal.²²⁹ Political and bureaucratic power are threats, while objectivity is the antidote. Recalling that the RI paradigm emphasizes clear and exact legislative rules, rather than a reliance on discretionary authority, assists in discerning the strong influence of RI ideals. The Ministry of the Environment was thus distinguished from its staff. CAB invoked the ideal of an "apolitical" deliberative process that is responsive to public concerns.²³⁰ According to this reasoning, public consultation is the reverse of political influence. This implicitly counters critics that highlight the potential for such participatory processes to devolve into irrationality, prejudice, and fear-mongering.²³¹

CAB, in this section of its arguments for a public hearing, also cited the MOE's commitment that "this decision [to approve or reject Lafarge's proposal] will not only be made on technical, but also moral grounds."²³² It is unclear what the phrase "moral grounds" signaled here, either when it was used by the MOE's staff or when CAB repeated it. But the distinction between "technical" and "moral", together with the opposition constructed between public participation and political influence, is instructive. Further clues are provided in the sentence immediately following the reference to "moral grounds," which notes the importance of evaluating the proposed project "on its merits."²³³ Thus "moral grounds," public consultation, and "merits" are aligned on one side, and on the other side "political influence" is grouped with exclusive reliance on "technical grounds."

²²⁹ CAB Application *supra* note 187.

²³⁰ *Ibid.*

²³¹ Bruce Pardy (2010) raised similar concerns, *supra* note 177 at 153.

²³² CAB Application *supra* note 187 at Part 6.

²³³ *Ibid.*

The MOE, unlike its fellow leave Respondent Lafarge, sourced its claims about the precautionary nature of the decision not only in the extensive conditions attached to the Approvals, but also in the deliberative process that generated those conditions. The MOE's submissions feature lists of Lafarge's supporting documentation - down to specific emails and letters - and the corresponding scrutiny, questioning, and analysis performed by the MOE's "technical staff."²³⁴ According to the MOE, the original decision was the product of careful review and analysis by technical and scientific professionals. The MOE located its claims to authority, and the deference it sought from the reviewing Tribunal, in this combination of expertise and thoroughness.

Building on their arguments about Lafarge's responsibility for proving the project's safety, LEC-LOW argued that the evidence relied on by the MOE and Lafarge failed to refute the potential for significant harm established by the Approvals' status as Class I and II Instruments. Basing its arguments on commissioned scientific reports that investigated the proposed project, LEC-LOW further criticized the adequacy of the conditions attached to the Proposals. Key weaknesses cited by LEC-LOW included the limited number of contaminants listed in the testing requirements, as well as the technologies used for the monitoring.²³⁵ Where the leave Respondents described the conditions as exhaustive and refined, LEC-LOW suggested they were inadequate and incomplete. The picture that emerges in LEC-LOW's review of the conditions is that of a lengthy, but poorly formulated list. In contrast, the MOE in particular suggests that the dozens of conditions are proof of a thorough and expert evaluation process.

²³⁴ MOE Response *supra* note 147 at para 5; *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Victor Low Affidavit at para 13).

²³⁵ LEC-LOW Application *supra* note 141 at paras 34-5, 98-101, 115-6.

In regard to precaution, the most significant part of the MOE's submissions on proof concerns the interlocking ideas of expertise and evidence. The MOE argued that where a decision is supported by scientific evidence, only "strong expert evidence" contradicting the decisions' reasonableness suffices to grant leave under S 41.²³⁶ The MOE claimed that the evidence provided by the Applicants failed to meet this threshold, in part because much of its evidence centred on questions about the adequacy of the data relied on by the Directors to establish the project's safety.²³⁷ Thus the S 41 Applicants' precautionary arguments depended on providing *contradictory* scientific evidence, not merely casting doubt on the evidence supporting the decision. Precautionary arguments could therefore only satisfy the leave test, according to the MOE's reasoning, if they were based on contradictory evidence. Casting doubt on the evidence of safety was not enough.

A demand for "hard" evidence of risk results in a dramatically weaker version of the precautionary principle. Evidence of safety can prevail even when its validity is persuasively challenged, so long as the challenge falls short of positively establishing risk. The precautionary principle's purpose of removing the need for "full scientific certainty" is thus frustrated, while the concerns of Sunstein and other skeptics are largely answered. Scientific evidence of safety can only be countered with evidence of actual risk: once evidence of safety is presented, simply challenging its veracity is not enough.

Beyond presenting their own reports and related affidavits – "prepared by five experts" – Lafarge also attacked Dr. Carman's report: "the opinion and allegations of Dr. Carman should be afforded little or no weight on the basis that [he] lacks the required independence. Dr. Carman is an advocate for environmental groups and individuals seeking to prevent the use of Alternative

²³⁶ MOE Response *supra* note 147 at para 75.

²³⁷ *Ibid* at para 78.

Fuels and in particular Tire Derived Fuels.”²³⁸ Lafarge, citing Dr. Carman’s CV, also noted his advocacy work against burning tires for fuel in several U.S. jurisdictions. This advocacy, according to Lafarge, proved unsuccessful in these other jurisdictions.²³⁹

The use of AF [alternative fuels] and TDF [tire-derived fuels] use has been consistently and increasingly embraced in other jurisdictions in Canada, the United States and around the world as an effective and environmentally beneficial measure. Contrary to suggestions and allegations, the technology and experience is not novel or experimental.

LOW-LEC, in their reply submissions, disputed Lafarge’s characterization of Dr.

Carman’s work:²⁴⁰

There is no legal or other reason for the Tribunal to disregard the evidence of Dr. Carman, just as there is not reason to disregard the evidence of the Lafarge experts merely because they have a history of representing proponent interests, or to disregard the evidence of the MOE’s experts merely because they are employed by MOE to represent its interests.

LEC-LOW’s reasoning here is attractive, but a close reading suggests that one of Lafarge’s objects in casting doubt on Dr. Carman’s expertise was to highlight the support for tire burning shown by American regulators. The expertise of American regulators was invoked to impugn the expertise relied on by the leave Applicants. Lafarge repeatedly made these implicit claims regarding the expertise of regulators in other jurisdictions who approved Lafarge’s activities, and tire burning in particular. Several reports and discussions regarding these other jurisdictions were featured by Lafarge in their materials, including the “Alternative Fuels

²³⁸ Lafarge Response *supra* note 155 at para 30.

²³⁹ *Ibid* at para 138.

²⁴⁰ LEC-LOW Reply *supra* note 158 at para 56.

Report” prepared by Lafarge to answer public concerns about burning tires for fuel, and the Affidavit of Mike Lepage, an Engineer who prepared a study of the project for Lafarge.²⁴¹

Member Pardy surveyed the evidence submitted by both sides, concluding that they were “diametrically opposed.”²⁴² Lafarge and the MOE had argued, in conjunction with their claims about the proper standard of proof, that in situations where expert evidence was contradictory, leave to appeal should be denied.²⁴³ This reasoning was rejected by the Tribunal, which instead based its finding that the second branch of the test was satisfied precisely on the existence of contradictory – and expert – evidence. Findings that the leave Applicants’ claims about the danger posed by the proposed plant were backed by “credible, qualified experts,” the ERT granted leave to appeal the Instrument Approvals.²⁴⁴

Yet this victory did not extend to the Individual Applicants. After a more in-depth examination of the individual applicants’ standing under S 38, which is not pertinent to this paper’s analysis, the ERT quickly dismissed all the individual Applications for failing to provide the technical evidence and legal analysis demanded by S 41.²⁴⁵ This was done in one paragraph. Expertise was an immediately present issue in the ERT’s assessment of the individual Applications. Member Pardy stated that the individual Applicants’ concerns were “genuine,” and their submissions “articulate,” but his finding that “none of these applications are accompanied by supporting material of any weight” proved fatal.²⁴⁶

²⁴¹ *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Alternative Fuels Report at 24); *Dawber v Director, Ministry of the Environment*, [2007] OERTD No 25 (Mike Lepage Affidavit at para 33).

²⁴² *Dawber*, *supra* note 3 at 33.

²⁴³ Lafarge Response *supra* note 155 at para 24; MOE Response *supra* note 147 at paras 76-79.

²⁴⁴ *Dawber*, *supra* note 3 at 33-4.

²⁴⁵ *Ibid* at 9.

²⁴⁶ *Ibid* at 9.

This echoes the MOE’s criticism of the Jenneys’ application for lacking adequate supporting information, contrasting this lack with the “detailed affidavits from technical staff, each of whom is a highly qualified expert in his or her field” that the MOE provided.”²⁴⁷ Superiority in both legal and scientific expertise was being claimed here. The MOE criticized the Jenneys’ choice to simply quote Dr. Goddard-Hill’s work rather than introducing it via documents or affidavits, a formal legal procedure and one that the Jenneys may have been unfamiliar with.

The supporting material that the ERT deemed necessary for a S 41 application is costly – the services of the legal and scientific professionals who created LOW’s and LEC’s joint applications are expensive. A *de facto* requirement that leave Applicants be lawyers and scientific professionals, or retain their services, severely restricts access to appellate opportunities. Sulzenko anticipated these barriers in the closing paragraph of his application: “I tried to navigate the MOE site but had great difficulty. I hope this letter serves in a formal enough way to request the MOE decision be appealed.”²⁴⁸

²⁴⁷ MOE Response *supra* note 147 at para 92.

²⁴⁸ Sulzenko Application *supra* note 210.

PART III: *The Divisional Court of Ontario*

Lafarge waited about six months before filing its application for judicial review, and another two months passed before the application was completed.²⁴⁹ LOW argued that the delay should disqualify Lafarge's judicial review application under the doctrine of laches, which allows Courts to withhold a remedy in cases where a party had been unduly slow in initiating or pursuing proceedings. The Court dismissed LOW's request but rebuked Lafarge for the delay.²⁵⁰

On judicial review the Environmental Commissioner of Ontario (ECO) gained intervenor status. The ECO confined his submissions to S 41's purpose and the relevance of the SEV without taking a position in the broader dispute. At the Divisional Court Lafarge was termed the "Applicant," while the MOE, despite its support for Lafarge, was considered a "Respondent." This was presumably because the Ministry and the ERT are both part of the Ontario government. However, for ease of reference I will continue to refer to Lafarge and the MOE as "leave Respondents." LOW and the other S 38 Applicants will continue to be referred to as such.

Another change on judicial review was that the S 38 Applicants filed separate materials. LOW independently submitted a factum and supporting evidence, as did the LEC and five individuals who had previously been associated with LEC's and LOW's joint application at the ERT. These five individuals – Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois and John Fay (DSBLF) – were represented by Joseph Castrilli, who also appeared on their behalf at the ERT. Thus there were three sets of S 38 applicant materials before the Court. On a number of points they referenced and relied on each other's submissions.

Because the MOE was formally a Respondent on judicial review, it filed its submissions after Lafarge. The MOE submitted its factum approximately six weeks after Lafarge's, and two

²⁴⁹ *Lafarge*, *supra* note 3 at para 79.

²⁵⁰ *Ibid* at paras 77-81.

weeks after the S 38 Applicants filed their factums. It is not clear why the MOE filed last. The result was that the MOE could respond to all the parties' arguments, while the S 38 Applicants were unable to address the MOE's claims, including change in position on the SEV's relevance, in their written submissions. (This shift is discussed below in Chapter 8.) The ECO, however, filed its intervening submissions on the SEV's significance and the EBR almost three months after the MOE. Lafarge and the MOE subsequently replied to the ECO's submissions, leading to an additional debate on the SEV's relevance.

Lafarge alleged several errors in the Tribunal's reasoning, most significantly with respect to the proper interpretation of the S 41 test, the SEV's relevance, and the application of the principles – including the precautionary approach - that the SEV contains. But Lafarge's arguments remained largely consistent between the ERT hearing and the judicial review proceedings, except on the question of the SEV's relevance. Precaution – and the relationship between expertise and assessments of risk - featured prominently in the debate surrounding the SEV and the second branch of the S 41 test.

Section 43 of the EBR, which denies any right of appeal to the ERT's acceptance or denial of a S 41 leave application, formed the crux of the S 38 Applicants' arguments on judicial review.²⁵¹ Where environmental concerns and the language of risk had dominated their arguments before the ERT, on judicial review the theory and practical concerns of administrative constitutionalism reigned. The root legal conflict on judicial review was whether the ERT's

²⁵¹ *Lafarge Canada Inc v Ontario (Environmental Review Tribunal)*, [2008] OJ No 2460 (Div Ct) (Factum of the Respondents Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois, and John Fay at paras 19-22) [DSBLF Response]; *Lafarge Canada Inc v Ontario (Environmental Review Tribunal)*, [2008] OJ No 2460 (Div Ct) (Factum of the Respondents Martin Hauschild and William Kelley Hineman on behalf of Loyalist Environmental Coalition at paras 11-3) [LEC Response]; *Lafarge Canada Inc v Ontario (Environmental Review Tribunal)*, [2008] OJ No 2460 (Div Ct) (Factum of the Respondents Lake Ontario Waterkeeper and Gordon Downie at paras 1-3) [LOW Response].

decision was *intra vires* or *ultra vires* its jurisdiction. That jurisdiction was of course a statutory creation, meaning that the question of who should identify and interpret the law governing the Directors' original decision – the MOE, the ERT, or the Divisional Court – was itself a question of statutory interpretation. Answering the questions of law before the Divisional Court depended on uncovering legislative intent. However constitutional and rule of law principles are also implicated in judicial reviews, and *Lafarge*, like other complex administrative law cases, contained dilemmas that could only be resolved through balancing deference to the legislature and exercises of legislative authority with adherence to the foundational principles of administrative constitutionalism. The result of that balancing exercise would be shaped by the choice to adopt a more DC- or RI-inflected model of administrative constitutionalism.

Dunsmuir,²⁵² a Supreme Court of Canada case that modified the law that governs standard of review analysis, was released shortly after the parties filed their submissions. The Divisional Court allowed the parties to submit additional arguments on standard of review in light of the *Dunsmuir* decision.

On judicial review all the S 38 Applicants stood by the Tribunal's reasoning, devoting their efforts to countering the leave Respondents' criticisms of the Tribunal's judgment rather than advancing the arguments they had initially made. The Tribunal's interpretation of the S 41 test was defended, as were its findings on the precautionary approach. However, the Tribunal's judgment was largely silent on the SEV's relevance, because it was uncontested there, and provided little guidance on the selection of a standard of review. On these two issues the S 38 Applicants advanced the same DC concepts they had embraced at the ERT leave hearing.

²⁵² *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

The three chapters in this Part address issues that are specific to the judicial review context and therefore offer insights that are distinct from the material covered in Part II's review of the ERT arguments. Chapter 7 examines the arguments about choice of a standard of review and the related determination of the ERT's role in a S 38 application. Chapter 8 considers the ERT's interpretation of the S 41 test and the dispute about its reasonableness, as well as the newly emergent issue of the SEV's relevance. Chapter 9 analyzes the competing understandings of precaution and environmental uncertainty advanced on judicial review, along with the nature of the deference shown to the ERT's reasons on those points. Each chapter engages with foundational questions about different forms of accountability within the *EBR* framework and draws on Chapter 3's overview of the *EBR*. These foundational questions gained prominence at the judicial review stage following the leave Respondents' new opposition to the SEV's relevance in the S 41 test and the responding intervention by the ECO.

Although some of the legal questions raised in *Lafarge* on judicial review may appear removed from controversies about the precautionary principle's definition, they speak to how the principle is applied, and more specifically the measure of authority enjoyed by administrative decision-makers applying the principle. It is the Divisional Court's judicial review of *Lafarge* that most convincingly supports Fisher's theory about the inextricable links between administrative constitutionalism and the precautionary principle.

Chapter 7

Dunsmuir: Internal or External Review

Where questions of expertise and the persuasiveness of competing scientific claims at the ERT were primarily limited to the technical reports commissioned by the parties, the question of the ERT's expertise in deciding questions of law and fact emerged as a critical one at judicial review. In particular, expertise is an important consideration in the selection of a standard of review. The SCC's judgment in *Dunsmuir* - released in March, 2008, shortly after all the parties submitted their factums – impacted how Tribunal decisions like the one at issue in *Lafarge* are scrutinized.²⁵³ All the parties filed supplementary arguments to address *Dunsmuir's* modifications to the law on choice of standard of review. Given the SCC's elimination of the most deferential standard of patent unreasonableness, the LEC and the other S 41 applicants amended their arguments to request a standard of reasonableness.²⁵⁴ In their original submissions, they sought either reasonableness or patent unreasonableness.²⁵⁵ Thus the dispute over standard of review remained fundamentally unchanged – the S 41 applicants still wanted a deferential standard, while *Lafarge* and the MOE asked for the most exacting standard.²⁵⁶ But the

²⁵³ Although observers have interpreted *Dunsmuir* in multiple ways (E.g. Gerald P. Heckman, “Substantive Review in Appellate Courts since *Dunsmuir*” (2009) 47 *Osgoode Hall Law Journal* 751.), the Court's repudiation of patent unreasonableness as an appropriate standard of review signaled a clear rejection of the highly deferential attitude embodied in that standard. Others comments in *Dunsmuir* however confirmed deference's enduring significance in judicial review.

²⁵⁴ DSBLF Response *supra* note 251 at paras 20-1; LEC Response *supra* note 251 at para 9; LOW Response *supra* note 251 at para 14.

²⁵⁵ DSBLF Response *supra* note 251 at para 40; LEC Response *supra* note 251 at para 28; LOW Response *supra* note 251 at para 26.

²⁵⁶ *Lafarge Canada Inc v Ontario (Environmental Review Tribunal)*, [2008] OJ No 2460 (Div Ct) (Supplementary Factum of the Applicant at paras 6-13) [*Lafarge Supplementary Factum*]; *Lafarge Canada Inc v Ontario (Environmental Review Tribunal)*, [2008] OJ No 2460 (Div Ct) (Supplementary Factum of the Respondents the Directors under S. 9 and S. 39 *Environmental Protection Act*, Ministry of the Environment on the Standard of Review at para 4) [*MOE Supplementary Factum*].

Court's judgment in *Dunsmuir* – and the SCC's efforts to clarify the principles underlying judicial review in the majority and concurring opinions – shaped how the parties made the case for their chosen standard of review. The nature of the dispute remained unchanged, but *Dunsmuir* altered the dispute's legal boundaries.

Dunsmuir, and prior standard of review jurisprudence, directed reviewing Courts to examine the purpose of a Tribunal's enabling statute in assessing the measure of deference owed to a Tribunal's decision.²⁵⁷ Statutory intent is also relevant later in the substantive review of a Tribunal's decision: it determines the extent of deference and grounds the Court's assessment of whether that degree of deference was exceeded. This inquiry resembles the choice to adopt an external or internal review model in merits proceedings, as explored in Chapter 1.

The case study reveals a striking distinction in how the parties approached the interpretation of S 41: Lafarge isolated S 41, while the S 38 Applicants sought to integrate it with the *EBR*'s other provisions.²⁵⁸ Lafarge's arguments break down the language in S 41 to find its "plain meaning," while the S 38 Applicants' submissions invoke the purposive approach to statutory interpretation that seeks to reconcile a provision's words with the legislative objectives of its statute.²⁵⁹ The MOE, although it eventually reached the same conclusions as Lafarge, took a different approach to interpreting S 41 that more closely examined its place in the *EBR*.²⁶⁰

²⁵⁷ *Dunsmuir*, *supra* note 243 at para 64; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 26.

²⁵⁸ *Ibid* at paras 43-8; LOW Response *supra* note 251 at paras 27-32; DSBLF Response *supra* note 251 at paras 50 and 52; LEC Response *supra* note 251 at paras 30-7.

²⁵⁹ *Lafarge Canada Inc v Ontario (Environmental Review Tribunal)*, [2008] OJ No 2460 (Div Ct) (Factum of the Applicant at paras 44-50) [Lafarge Factum]; LOW Response *supra* note 251 at para 34; DSBLF Response *supra* note 251 at para 50; LEC Response *supra* note 251 at paras 33-6.

²⁶⁰ *Lafarge Canada Inc v Ontario (Environmental Review Tribunal)*, [2008] OJ No 2460 (Div Ct) (Factum of the Respondents, the Directors, Ministry of the Environment at para 64) [MOE Factum].

The emphasis... is not on granting leave to third party applicants but in giving the public an opportunity to provide comments, through the Registry, before an environmentally significant decision is made, and in having the Director take those comments into consideration.

As discussed in Chapter 1's literature review, the role of specialized tribunals in the DC and RI paradigms depends on the choice to adopt an internal or external review model. But in regard to the ERT's role, the leave Applicants and Respondents were neatly divided. Each side expressed radically different perspectives on the ERT's role in hearing the S 41 leave application. Lafarge described the ERT's adjudicative role in sparse terms:²⁶¹

[I]t 'approximates a conventional judicial paradigm' seeking to resolve a dispute between two parties – those who wish to appeal and those who do not want an appeal to proceed. In essence, the role of the Tribunal in making the Decision was to review the submissions of two parties, complete with affidavit evidence and legal submissions, much in the same way a Court would hear an application or a motion for leave to appeal.

This characterization of the ERT's role is indicative of the internal review model. The Tribunal is tasked with resolving a bipolar dispute and must choose between two outcomes: granting or refusing leave to appeal.

In its responding factum, LOW highlighted this passage to dispute it and the claims that Lafarge based on this narrow conception of the ERT's responsibilities. LOW presented an external review understanding of the ERT's role, one that recognized a more expansive – and DC – view of the ERT's jurisdiction:²⁶²

Contrary to the Applicant's claim that the ERT is merely 'seeking to resolve a dispute between two parties,' the jurisdictional reality is that the ERT must determine mixed matters of law, fact, policy and the public interest when considering [S 41] applications under the EBR.

LOW further described this process as "polycentric," a revealing word choice that illustrates the gap between LOW's embrace of DC principles and the leave Respondents'

²⁶¹ Lafarge Factum *supra* note 259 at para 38.

²⁶² LOW Response *supra* note 251 at para 16.

alternative conception of the ERT's task in RI terms.²⁶³ By characterizing the ERT's task as multi-faceted, complex, and polycentric, LOW sought to buttress its argument that the ERT's expertise was distinct from the Court's expertise, making the Tribunal's decisions entitled to more deference.²⁶⁴ The MOE explicitly rejected the "polycentric" label, arguing that "the [S 41] test does not give the Tribunal broad discretionary powers or a range of policy laden choices nor does it involve the assessment of scientific, technical or policy based issues."²⁶⁵ Viewed in isolation, this might simply indicate a limited role for the Tribunal in keeping with an external review model of merits review that protects regulatory choices from administrative appeals. Yet as discussed below in Chapter 8, the MOE defined the role of its own Directors in similarly narrow terms, including with respect to the precautionary principle. RI concepts were thus consistently invoked by the MOE.

Like the other S 38 Applicants on judicial review, LEC cast S 41's purpose in DC terms by stating that the ERT's grant of leave to appeal was "merely a decision that will enable further public participation before" making a final decision to uphold or reverse the Approvals.²⁶⁶ This reasoning may also imply a bridging role for S 41: it establishes the criteria for re-evaluating the soundness of a decision reached within an RI administrative paradigm in a DC process. S 41, according to this interpretation of LEC's arguments, is the trigger for making an RI deliberative process into a DC one.

The immediate legal effect of the S 38 Applicants' arguments about the ERT's broad jurisdiction, if accepted, would be to bolster the ERT's claims to deference from the Divisional Court. This same broader understanding of the ERT pointed to a DC understanding of the

²⁶³ *Ibid* at para 25.

²⁶⁴ LOW Response *supra* note 251 at para 25.

²⁶⁵ MOE Factum *supra* note 260 at para 54.

²⁶⁶ LEC Response *supra* note 251 at para 24.

precautionary principle that was alive to the potential for inequitable distribution of risk and sensitive to diverse sources and forms of expertise. The ERT's task was not merely to decide a private dispute between two parties based on the preponderance of available scientific evidence, but also to consider any gaps and uncertainties in that evidence together with the public's interest.

Although the ERT's expertise was most directly implicated in the choice of standard of review, it was also relevant in regard to the ERT's specific findings of fact. The ERT's expertise in statutory construction, and questions of law more generally, was strongly contested, while its authority in scientific and factual areas proved less controversial.²⁶⁷

The MOE attempted to circumvent the question of the ERT's expertise in fact-finding by alleging that the ERT had failed to make requisite findings of fact on the second branch of the S 41 test, and that when it had made findings of fact – most notably with respect to whether the Approvals reflected a precautionary approach – underlying errors of law made it appropriate to reverse those findings.²⁶⁸ Accordingly, there were no findings of fact that should attract the Court's deference. This reasoning speaks to a cautious recognition of the Tribunal's claims to deference in regard to fact-finding: The Tribunal's conclusions on these points are not attacked squarely, but are instead tied to alleged errors of law.

Returning to *Dunsmuir*, the practical consequence for *Lafarge* – and the conflict between competing understandings of the precautionary principle at issue in *Lafarge* – was renewed scrutiny of the ERT's claims to deference from reviewing courts. Yet *Dunsmuir*, at least in the context of S 38 leave applications, did not alter the law regarding the Directors' claims to

²⁶⁷ LOW Response *supra* note 251 at paras 14-20; LEC Response *supra* note 251 at paras 18 and 59-60; Lafarge Factum *supra* note 259 at paras 34-6, 83-6, and 88-90; MOE Factum *supra* note 260 at paras 53 and 87; DSBLF Response *supra* note 251 at para 78.

²⁶⁸ MOE Factum *supra* note 260 at paras 57-60 and 83.

deference for its decisions. That reflects the ERT's origins as a Tribunal created by statute, carrying out duties prescribed by statute: its review of the Directors' decision did not engage the common law rules of standard of review that were at issue in *Dunsmuir* because those rules apply to the work of reviewing courts, not tribunals. The ERT's review was governed by its enabling statutory provisions, most significantly S 41 itself, and informed by the common law rules of procedural fairness.²⁶⁹ *Dunsmuir*'s implications for the decisions addressed in *Lafarge* – the Directors' original approvals and the ERT's grant of leave to appeal – were therefore uneven.

LOW maintained that *Dunsmuir*'s effect on standard of review analysis was minor: the new standard of review analysis retained the same essential questions that were asked in the “pragmatic and functional analysis.” The significance of deference was maintained despite the elimination of the patent unreasonableness standard, and application of the correctness standard remained limited to exceptional cases. LOW's overarching argument was the enduring significance of deference post-*Dunsmuir*, especially when expert Tribunals acted within their own statutorily defined jurisdiction.²⁷⁰

The Court ultimately selected the standard of reasonableness, as requested by the leave Applicants. The Court reviewed all aspects of the ERT's decision on this standard. This followed the Court's findings that the Tribunal has specialized expertise, and familiarity with the questions before it on the S 41 leave application. S 43 of the *EBR*, which prohibits appeals from a grant of leave to appeal under S 41, was deemed “a weak form of privative clause.”²⁷¹

²⁶⁹ Although the MOE and *Lafarge* alleged that the ERT breached the rules of procedural fairness by failing to provide adequate reasons or make requisite findings of fact, the Divisional Court rejected these claims. Regardless, that issue is beyond the scope of this analysis.

²⁷⁰ LOW Response *supra* note 251 at paras 6 and 13.

²⁷¹ *Lafarge*, *supra* note 3 at para 32.

S 41 also binds the ERT, at least in part, to a reasonableness standard – the first prong of the test asks whether “no reasonable person” could have made the challenged decision. *Lafarge* therefore featured a kind of “double reasonableness” standard: The S 38 Applicants sought leave to appeal the Directors’ Approvals on a standard of reasonableness, and needed to satisfy the ERT there was a *prima facie* case for that decision’s unreasonableness, and on judicial review the Court reviewed the ERT’s assessment of that same *prima facie* case on a reasonableness standard.

Unraveling the various legal standards and degrees of proof operating in *Lafarge* is both analytically demanding and a necessary step in understanding how the precautionary principle is applied in Ontario law. *Lafarge*, the MOE, and LEC all made lengthy written arguments on the proper interpretation of S 41, focusing on the terms “appear,” “good reason to believe,” and “no reasonable person.”²⁷² As noted by the Court in its judgment, this labyrinthine debate on proof seen in the submissions is confusing and difficult to decipher.²⁷³ Rather than detail the specifics of the debate, my aim here is simply to identify the concepts and values underlying the parties’ comments on proof.

Lafarge’s statements on proof illustrate and reinforce its efforts to make the leave test more onerous.²⁷⁴ This object – restricting appellate scrutiny of regulatory decisions – is potentially consistent with both RI and DC paradigms, but the two paradigms offer different legal paths towards reaching that goal. As illustrated by the MOE’s arguments at the ERT, DC principles are capable of grounding a narrow interpretation of leave to appeal rights. But *Lafarge*’s submissions to the reviewing Court display the same adherence to RI principles seen in

²⁷² *Ibid* paras 48-50 and 56; MOE Factum *supra* note 260 at paras 65-70; and LEC Response *supra* note 251 at paras 39-44.

²⁷³ *Lafarge*, *supra* note 3 at paras 43-5.

²⁷⁴ *Lafarge* Factum *supra* note 259 at paras 44-8.

its arguments at the ERT. Lafarge described the S 41 hearing as fundamentally adjudicative – “[t]he decision is to be based on the evidence and arguments submitted by two (or more) parties in opposition to each other.”²⁷⁵ This adversarial framing is far removed from the leave Applicants’ characterizations of the ERT’s task, which centred on its place within the *EBR*’s panoply of procedural rights, mechanisms, and environmental objectives.

The Divisional Court ultimately concluded that the ERT’s interpretation of the S 41 test was more than reasonable: it was correct.²⁷⁶ Following the classic approach to questions of statutory interpretation, the Court closely analyzed the provision’s words together with the legislative purpose it served. But the opening paragraph of its consideration of S 41 foreshadowed the Court’s ultimate conclusion: “Part II of the EBR allows the general public to participate in and influence decision-making of the Ministry which has environmental significance.”²⁷⁷ Statutory intent is the Court’s starting point, and intent is discerned by looking at the surrounding provisions. This interpretive choice marked a victory for the leave Applicants’, and the ECO’s, arguments that S 41 was part of the EBR fabric, and not an isolated legal accountability mechanism divorced from the *Act*’s overriding objectives.

The Court outlined the competing rationales for more or less expansive – DC or RI, respectively – interpretations of S 41’s appeal rights. Citing Winfield’s 1998 “Political and Legal Analysis of Ontario’s *Environmental Bill of Rights*,”²⁷⁸ the Court outlined several reasons that may have motivated the legislative choice to make S 41’s test narrow. The list reads like an RI manifesto.²⁷⁹

²⁷⁵ *Ibid* at para 38.

²⁷⁶ *Ibid* at para 48.

²⁷⁷ *Ibid* at para 37.

²⁷⁸ Winfield (1998) *supra* note 131. The MOE cited Winfield’s article in its Factum at para 71.

²⁷⁹ *Lafarge*, *supra* note 3 at para 41.

1. The instrument holder has much more at stake than do members of the public who may have no physical or economic connection to the subject matter;
2. Appeals are very costly, in terms of legal and transaction costs, administrative resources, predictability and delay. There is an important social value in minimizing these costs by reserving appeals for cases of real unfairness and bungling; and
3. It is the mandate and primary role of government decision makers to serve the collective public interest and third party appeals should be limited to those cases where regulators have betrayed or failed their public trust.

Yet the Court also recognized that contrary to these motivating policy concerns, the *EBR* expressly aims to allow Ontarians “to participate in the making of environmentally significant decisions by the Government of Ontario.”²⁸⁰ The language echoes the language in the S 38 Applicants’ submissions.²⁸¹ The implicit contrast between Winfield’s summary of possible reasons why the test is strict – reasons attributed to the Legislature by “commentators” – and the *EBR*’s “stated intent” to foster public participation further tipped the scales towards the leave Applicants, and the DC paradigm.

The Court’s findings on the question reflected the influence of DC ideas about public involvement in deliberative processes. Holding that the requisite standard of proof under S 41 is evidentiary – a *prima facie* standard – the Court framed the leave Applicants’ evidentiary obligation as a threshold test. Section 41 Applicants must establish “that there is a serious question to be tried.”²⁸² Although the Court characterizes this test as “stringent,” the Tribunal’s task on a S 38 Application is clearly distinguished from its task on a full appellate review. Lafarge and the MOE’s efforts to blur the difference between the S 41 test and the appellate review task failed.²⁸³

²⁸⁰ *Ibid* at para 42.

²⁸¹ LOW-LEC Application *supra* note 133 at para 61.

²⁸² *Lafarge*, *supra* note 3 at para 45.

²⁸³ *Ibid*.

Strategic considerations may also motivate the choice to adopt an internal or external review model of a Tribunal's role. One question raised by the arguments in *Lafarge* is whether the external or internal review model better insulates a Tribunal decision from challenge on judicial review. *Lafarge's* and the MOE's efforts to frame the ERT's role in adjudicative terms, as an umpire deciding a private dispute, and the S 38 Applicants rejection of that characterization may indicate a shared assumption that framing the ERT's role as an internal reviewer would make its decisions more susceptible to being overturned. Discretion is central to both the external review model and Canadian administrative law, where the degree of discretion entrusted to a Tribunal proves critical in determining how much deference Courts must show on judicial review. In Canada at least, the close relationship between deference and discretion points to the external review model's capacity to make Tribunal decisions more resistant to judicial review.

If their places were reversed and the leave Respondents had been successful before the ERT, perhaps the parties' support for the internal and external review models on judicial review would have also been reversed. Only mere speculation is possible on this point, but it is important to note the potential for what Fisher terms "analytical opportunism" in judicial review proceedings where parties may find themselves being a Respondent in one case and an Applicant in the next.²⁸⁴ The choice to adopt an internal or external review model may therefore reflect a party's satisfaction with a Tribunal decision rather than deep-rooted views about administrative constitutionalism.

These clashing understandings of the ERT's role – as a source of law, or a statutory interpreter with no special capabilities – are underpinned by DC and RI paradigms, respectively. But the Court's judgment rejected these extremes, despite exhibiting a more DC character. The

²⁸⁴ Fisher *supra* note 1 at 89-124.

Court concluded that the ERT's interpretations of the *EBR* and *SEV* were entitled to deference, but refrained from recognizing the Tribunal as the creator of law in the form of binding precedent constructed from case law.²⁸⁵ In this, as with other aspects of the Court's decision, RI and DC principles were blended, and the exact measure of both paradigms' acceptance was left open for further litigation. *Lafarge* illuminates the influence of DC and RI concepts in shaping disputes about the precautionary principle, while leaving many questions about the outcome of such disputes unresolved.

²⁸⁵ *Ibid* at paras 56-7.

Chapter 8

Accountability: Legal v Political

Both Lafarge and the MOE accepted the SEV's relevance before the ERT, but argued the opposite on judicial review.²⁸⁶ Although S 41's relationship to the *EBR* was a recurring point of dispute, the issue emerged most clearly in the submissions exchanged by the ECO, the MOE and Lafarge regarding the SEV's status. The ECO, in his intervening submissions, maintained that the SEV fits within the definition of "relevant policy" in the first branch of S 41.²⁸⁷ Lafarge and the MOE, in their reply to the ECO, argued that the Instrument Approval decisions subject to S 41 appeals are far removed from the legislative objectives and concerns expressed in the *EBR*'s SEV provisions.²⁸⁸ The S 38 Applicants highlighted the MOE's and Lafarge's change of position on the SEV's relevance.²⁸⁹

Contrary to the submissions of the Applicant [for judicial review], there is nothing improper or jurisdictionally incorrect in the ERT's consideration of the MOE's SEV promulgated under the *EBR*. Significantly, neither the [judicial review] Applicant nor the Directors took the position at the leave stage that the SEV was an irrelevant consideration. Instead, the Applicant and Directors claimed that the issuance of the two waste-burning approvals complied with the SEV. However, the ERT properly rejected this claim in relation to the SEV provisions regarding the ecosystem approach and precautionary principle. [emphasis added]

This reversal expanded the dispute: where the parties had previously agreed on the precautionary principle's relevance but diverged on whether it had been followed, now they disagreed on the more foundational question of whether the Directors were free to consider it at all.

²⁸⁶ Lafarge Factum *supra* note 259 at paras 67-71; MOE Factum *supra* note 260 at paras 76-82.

²⁸⁷ ECO Factum *supra* note 134 at para 3.

²⁸⁸ Lafarge Factum *supra* note 259 at para 10; MOE Factum *supra* note 260 at paras 14-23.

²⁸⁹ LOW Response *supra* note 251 at paras 35 [quoted]; DSBLF Response *supra* note 251 at para 71.

The word “free” is deliberately used here in relation to the dispute about the SEV’s significance. Lafarge and the MOE alike implicitly argued that not only could the SEV, and by extension the precautionary principle, be ignored by Directors issuing Approvals, but that it *must* be ignored.²⁹⁰ The following comments appear in the MOE’s factum:²⁹¹

The SEV was not intended to guide decisions by Directors when issuing instruments under s. 9 or s. 39 of the EPA. [...] [T]he statutory scheme was not set up for Directors to take [the SEV] into account when making decisions whether or not to issue instruments. [The Air Approval was issued under S 9, the Waste Approval was issued under S 39]

Thus the MOE did not seek to expand its own discretionary authority so that it could alternatively rely on or disregard the precautionary principle as it wishes: this would be consistent with some DC concepts that allow administrative decision-makers great latitude in determining precaution’s usefulness in the circumstances of a particular decision, but it was not the MOE’s chosen approach in *Lafarge*. The Directors lacked authority to consider the SEV, and furthermore because the SEV is not “relevant” policy the Directors cannot properly rely on it. If the Court had fully accepted the MOE’s arguments, Directors would be unable to deny Approvals on the basis of precautionary concerns. The effect of the MOE’s argument, if it had succeeded, would have been to restrict its own discretion. Lafarge’s support of this argument is unremarkable, given the general opposition to the precautionary principle in the business community, but the MOE’s willingness to adopt the same narrow understanding is more noteworthy.

In what was likely a concession to the strategic demands of defending a judicial review application, the S 38 Applicants’ arguments regarding the S 41 test mostly focused on defending the Tribunal’s reasoning, and the same Tribunal jurisprudence that Lafarge and the MOE

²⁹⁰ MOE Factum *supra* note 260 at paras 77-80; Lafarge Factum *supra* note 259 at para 70.

²⁹¹ MOE Factum *supra* note 260 at paras 77 and 80.

challenged. LOW denied that “Member Pardy had [gone] on an arbitrary frolic when he granted leave” to the S 38 Applicants.²⁹² The Tribunal’s interpretation of the S 41 test was defended on two grounds: first, it was consistent with the provision’s language and purpose; and second, it was consistent with the Tribunal’s previous jurisprudence in recent years.²⁹³

The MOE, like Lafarge, urged the Court to reject the ERT’s previous jurisprudence on the SEV and its relevance under S 41. The MOE made two related arguments about the SEV’s reach: first, the *EBR* allowed the Minister significant discretion in determining how the SEV applied to environmentally significant decision; and second, only the ECO, in its Reports to the Legislature, could hold the MOE accountable for improperly exercising its discretion in applying the SEV.²⁹⁴ The first argument supported the MOE’s claim that the SEV was relevant in drafting Acts, Regulations, and policies, but irrelevant in making decisions – including the issuance of Instrumental Approvals in *Lafarge* – pursuant to those same Acts, Regulations, and policies. Accordingly, Directors should not consider the SEV when making Instrument Approval decisions because the SEV expressly does not provide for that consideration. Yet even if the MOE and Lafarge failed to convince the Court that the ERT’s finding about the SEV’s relevance was unreasonable, this second argument, if accepted, would put the issue of compliance with the SEV beyond the ERT’s jurisdiction.

The effect of the second claim – that only the ECO can hold the MOE accountable for not complying with its SEV – was to shield the broader issue of whether the SEV was complied with from the reviewing Court’s scrutiny, as well as excluding the SEV from the ERT’s analysis in

²⁹² LOW Response *supra* note 251 at para 29.

²⁹³ *Ibid* at paras 27-8. See also DSBLF Response *supra* note 251 at para 54; and LEC Response *supra* note 251 at paras 37-48.

²⁹⁴ MOE Supplementary Factum *supra* note 256 at paras 6-8; MOE Factum *supra* note 260 at para 79.

any subsequent leave to appeal cases. Because the SEV's reference to the precautionary principle is the only explicit mention of the principle in the *EBR* legislative scheme, the success of the S 38 Applicants' precautionary claims largely depended on this argument's failure.

Clarifying the ECO's role and the nature of the MOE's accountability in connection with the SEV was therefore critical to deciding the legal fate of the precautionary principle. As Fisher's theory predicts, debates about the precautionary principle's role in approving or rejecting proposals like Lafarge's are inseparable from debates about government accountability, a foundational aspect of administrative constitutionalism. The core of the ECO's submissions concerned accountability, and specifically the ECO's own role in promoting accountability. Perhaps counterintuitively, the MOE sought to elevate the ECO's significance in ensuring accountability beyond how the ECO himself defined his role. Where the MOE claimed that the ECO had sole responsibility for determining its compliance with the SEV, and reporting on any non-compliance to the Legislature in his Annual Reports,²⁹⁵ the ECO presented an alternative picture of the *EBR*, one that included intersecting and duplicative accountability mechanisms involving the Legislature, specialized Tribunals, and the Courts.²⁹⁶

The MOE suggested that accountability was linear and largely toothless, while the ECO presented a contrasting image of a textured accountability framework that made the SEV's obligations almost inescapable. Neither framework fits neatly within a solely RI or DC paradigm. RI theories prize strong accountability mechanisms, like the ECO called for, but they also emphasize a linearity that is much clearer in the MOE's arguments.

The extent of the MOE's embrace of RI concepts on judicial review was more clearly shown by the MOE's assertion that the SEV – and the principles it contains – are too “broad”

²⁹⁵ MOE Factum *supra* note 260 at paras 79-80.

²⁹⁶ ECO Factum *supra* note 134 at paras 54-6.

and “sweeping” to provide any guidance in deciding whether to issue an Instrument Approval.²⁹⁷ Building on this claim, the MOE argued that the SEV could not be “policy” as defined in the *EBR* because it could not provide such guidance. Guidelines containing specific emission and containment limits could provide guidance to Directors reviewing Instrument applications: numerical thresholds were applicable, but the precautionary principle (and ecosystem approach) were incapable of application in the same context. This echoes the critiques of Sunstein that the principle represents a generalized attitude of caution, rather than a functional rule to apply in situations of risk and uncertainty.

Consistent with its emphasis on a hierarchical understanding of administrative decision-making, the MOE also characterized its Directors’ authority as minimal, and inadequate to apply the SEV’s principles. The MOE, in a submission that was ignored by the Court in its judgment, insisted that because the *EBR* refers to the “Minister’s” responsibility to consider the SEV, and the Minister of the Environment had not explicitly delegated that task to the MOE’s Directors, they therefore lacked the jurisdiction to apply the SEV.²⁹⁸ This formalistic understanding of the Directors’ role closely aligns with the RI paradigm. It is also at odds with Canadian views of administrative constitutionalism, which recognize that delegated authority and responsibility flow together: If an administrative decision-maker exercises delegated authority, then corresponding responsibilities – such as the application of a relevant law – must also be fulfilled.²⁹⁹ The MOE’s arguments on the Directors’ restricted authority are more illustrative of

²⁹⁷ *Lafarge Canada Inc v Ontario (Environmental Review Tribunal)*, [2008] OJ No 2460 (Div Ct) (Reply Factum of the Directors, the Ministry of the Environment, to the Environmental Commissioner at para 20) [MOE Reply to ECO].

²⁹⁸ *Ibid* at para 12.

²⁹⁹ David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 134-44.

its own acceptance of RI principles than any fissures in the current state of Canadian law on administrative delegation.

Although parties may abandon positions taken for a Tribunal hearing and adopt new ones on judicial review, there is a logical tension inherent in arguing that a Tribunal was unreasonable to accept the same legal argument that the same party previously made in the same proceeding. LOW, LEC, and the other S 38 applicants highlighted this tension in regard to Lafarge's changed position on the SEV's – and precautionary approach's – relevance.³⁰⁰ The S 38 Applicants could not directly address the MOE's changed position in their written submissions because the ERT's factum was filed later, but their comments on Lafarge's shift applied equally to the MOE. The inconsistency, however, may be explained as a strategic choice to not contest the ERT's previous jurisprudence on the issue when arguing before that Tribunal. The judicial review proceeding represented an opportunity to challenge the ERT's jurisprudence before judges who were not responsible for its creation.

The nature and scope of this opportunity – specifically the degree of deference the reviewing Court owes the Tribunal – is a matter of administrative constitutionalism. Lafarge and the MOE claimed that only minimal deference was due because the points of statutory interpretation at issue were not specific to environmental decision-making.³⁰¹ In contrast, the S 38 applicants even argued that “Tribunal case law has made the SEV relevant law and policy.”³⁰²

Consistent with the general tenor of LOW's submissions on judicial review and at the ERT, LOW's reasoning in regard to the SEV adheres closely to DC principles: Because the ERT exercises administrative authority, it benefits from the DC model's respect for administrative

³⁰⁰ LOW Response *supra* note 251 at para 35; DSBLF Response *supra* note 251 at para 71.

³⁰¹ Lafarge Factum *supra* note 259 at para 16.

³⁰² DSBLF Response *supra* note 251 at para 70.

discretion. LOW drew on ideas of accountability in arguing that it was appropriate for the ERT to consider the SEV, including the precautionary principle. Citing the *EBR*'s provisions that compel prescribed Ministries to draft an SEV and consult it when making environmentally significant decisions, LOW posited the provisions amounted to a "legal duty." Building on this claim, LOW argued that the ERT acted reasonably in determining that the SEV fell within the ambit of "relevant law." LOW further noted that past ERT decisions similarly relied on the SEV.³⁰³

Beyond its expansive reading of the *EBR*'s accountability provisions, LOW also emphasized the ERT's institutional responsibility to promote accountability and compliance. Responsibility and authority are closely aligned concepts in administrative law, which made LOW's submissions on this point essential for its broader arguments on Standard of Review and the jurisdictional propriety of the ERT's decision. This foundational character of LOW's claims about the ERT's accountability powers is apparent in LOW's submissions on the SEV's relevance: "it is not open to this Honourable Court to effectively re-try the case, or to find facts, regarding SEV compliance... As discussed below, the task of determining [leave to appeal] applications has been assigned by the Ontario legislature to the ERT, not the courts."³⁰⁴ Here LOW is presenting a kind of "zero sum" view of accountability, where the ERT's role in promoting accountability with the *EBR* effectively supplants the Court's jurisdiction.

Lafarge, in contrast, defined the ERT's responsibilities in sparse terms, and then challenged the ERT's performance of those responsibilities. Lafarge's attitude to the ERT's past decisions, including *Lafarge*, was openly critical. Calling the ERT's interpretation of the test

³⁰³ LOW Response *supra* note 251 at para 38.

³⁰⁴ *Ibid* at para 39.

“overly lenient,” Lafarge urged the Court to overhaul the ERT’s jurisprudence in this area.³⁰⁵ It alleged that “the clear language of the test in S 41 has been misapplied to the point where an applicant need not even show that a decision was wrong – merely that it appears to have been unreasonable.”³⁰⁶ Establishing “good reason” to believe the wrongness of a decision was the minimum demanded by S 41, not a task reserved for the appellate review following a successful leave application. The standard of proof is a balance of probabilities, and what must be proven to that standard is the existence of “good reason to believe that no reasonable person could have made the decision.”³⁰⁷

Compared to the Court’s firm endorsement of the Tribunal’s interpretation of the S 41 test, its comments on the relevance of the SEV were more measured: “it is arguable, and, therefore, reasonable to have regarded the SEV as relevant policy...”³⁰⁸ This still represented a victory for the S 41 Applicants, but the Court’s language indicates that the victory may have been a product of the earlier standard of review finding: it is unclear if the Tribunal’s finding on the SEV’s relevance would have withstood a correctness review. And the Court’s conclusion on this issue may have been determinative: “Lafarge argued that at the heart of the case is the question whether the Directors unreasonably failed to consider the SEV.”³⁰⁹ Lafarge could have prevailed on this question either by showing that the Directors were free to disregard the SEV, or by showing that they had adequately considered it.

Responding to the leave Respondents’ allegation that the Tribunal improperly scrutinized the adequacy of laws and regulations instead of simply focusing on their application, the Court

³⁰⁵ Lafarge Factum *supra* note 259 at para 45.

³⁰⁶ *Ibid* at para 46.

³⁰⁷ *Ibid* at para 47.

³⁰⁸ *Lafarge, supra* note 3 at para 56.

³⁰⁹ *Ibid* at para 58.

quoted from the Tribunal’s judgment on this point: “The Tribunal agrees that the laws and policies that apply to the Directors’ decisions are not themselves the subject of the test under the first branch of section 41 [...]”³¹⁰ (emphasis added) In contrast, the leave Respondents had maintained that the ERT’s own characterization of its approach was inaccurate, in an implicit accusation of a lack of transparency.³¹¹ The Court’s decision to approvingly quote this passage signaled its confidence in the Tribunal’s transparency and acceptance of the distinction the Tribunal drew between the first and second branches of the S 41 test. Deference prevailed and the SEV’s relevance was accordingly secured. Both the legal foundation for the Court’s ruling on this point – deference to a specialized tribunal’s findings – and the resulting recognition of a polycentric accountability framework to promote the precautionary approach’s influence are characteristic of DC values.

³¹⁰ *Ibid* at para 49, quoting page 12 of *Dawber*, *supra* note 3.

³¹¹ *Lafarge Factum supra* note 259 at para 72; *MOE Factum supra* note 260 at para 82.

Chapter 9

Proving Harm with Deference

The correct – or reasonable – interpretation of the second prong of S 41 emerged as a particularly contentious issue on judicial review. Lafarge’s preferred construction of the S 41 test implicitly excluded precautionary ideas by making no provision for uncertainty. Claiming that a proper statutory interpretation would result in the denial of leave to appeal where the Applicants and Respondents present contradictory evidence, Lafarge asked that regulatory decisions escape appellate scrutiny where uncertainty exists – yet contradictory evidence, where both sides have solid empirical foundations, necessarily results in uncertainty.³¹² DSBLF disputed Lafarge’s contention that only novel environmental harm – i.e. harm beyond the *status quo* – can meet the threshold for significant environmental harm under the second prong of the S 41 test. Contrary to the idea that only new harm can be significant, DSBLF maintained that all of the proposed project’s emissions must be evaluated, not only any increase in emissions.³¹³

However, the volume of submissions on this point was unmatched by the Court, which dealt with the issue briefly. Rejecting Lafarge’s argument that where expert evidence is divided, leave must be denied,³¹⁴ the Court instead based its finding of reasonableness precisely on the existence of (expert) disagreement and resulting uncertainty about the potential for significant environmental harm. The Court also affirmed the Tribunal’s view that compliance with numerical limits is not determinative.³¹⁵

Recalling that there is no statutory obligation to include precaution within a ministerial SEV also assists with efforts to construe the meaning of “significant harm to the environment” in

³¹² Lafarge Factum *supra* note 259 at para 51.

³¹³ DSBLF Response *supra* note 251 at para 64.

³¹⁴ Lafarge Factum *supra* note 259 at para 51.

³¹⁵ *Lafarge, supra* note 3 at paras 68-9.

S 41: The command to avoid redundancy, a tenet of statutory interpretation, is inapplicable here because S 41 was not drafted with any guarantees that the precautionary principle would be reflected elsewhere in the regulatory framework.

In finding for the leave Applicants on the second branch of S 41, the Court stated that it “should not second guess the Tribunal in this regard.”³¹⁶ This remark represents a denial of the leave Respondents’ arguments that the decisions of the Directors merit deference on judicial review. The Court’s deference was reserved for the ERT. As Fisher notes, the role of specialized appellate tribunals like the ERT is ambiguous under both the RI and DC paradigms. Yet the presence of DC concepts in the Court’s judgment, including in its consideration of the second branch of the test, suggests that the deference is grounded in DC principles.

The debates surrounding the application of the precautionary approach featured a similarly complex reliance on DC and RI concepts. Lafarge’s submissions on the precautionary approach centred on distinguishing a lack of experience with tire burning from scientific uncertainty about the risks posed by the practice. The Tribunal, according to Lafarge, had confused these two concepts. The MOE’s acknowledgement that it lacked experience with tire burning was insufficient to trigger the precautionary principle’s application because outside Ontario regulators were familiar with burning tires for fuel, and scientific evidence established the practice’s safety.³¹⁷ Lafarge also claimed that the Tribunal erred by not examining whether the conditions attached to the Approvals reflected a precautionary approach. Following an admission that the precautionary principle imposes a burden of proof on a source of

³¹⁶ *Ibid* at para 71.

³¹⁷ Lafarge Factum *supra* note 259 at paras 85-7.

environmental risk, Lafarge criticized the Tribunal for not inquiring into whether Lafarge satisfied that burden.³¹⁸

Although Lafarge attempted to exclude the SEV and the precautionary principle from S 41's ambit, its claims about the Tribunal's interpretation of the principle were more modest. Lafarge aimed at marginalizing the precautionary principle and reducing its legal significance, but Lafarge did not seek to transform the content of the principle from how the Tribunal had understood it. A narrower understanding of scientific uncertainty that looks to the decisions of scientists and regulators in other jurisdictions at the expense of local experience may be suggestive of RI concepts, but DC theories can also accommodate an understanding of scientific uncertainty that is grounded in global scientific knowledge. Thus Lafarge's arguments here sought to refine rather than transform the Tribunal's interpretation of the precautionary approach.

The MOE arguments on this point were more radical. In a shift from its stance at the ERT, the MOE supported a narrower understanding of the precautionary principle.³¹⁹

[Precaution] is irrelevant to the issue of whether or not Certificates of Approval should be issued in respect of a facility that has emissions to the environment, except to the extent that terms and conditions in the approval might prevent adverse effects to the environment. (emphasis added)

Crucially, this was an alternative argument: it was only applicable if the Court rejected the MOE's arguments about the relevance of the SEV and the precautionary approach. Thus the "irrelevance" cited by the MOE did not refer to the issue of whether the Directors must consider the precautionary approach.

According to the reasoning outlined in the above passage, precaution only serves to minimize environmental harm; it cannot direct – or empower - regulators to *prohibit* a practice

³¹⁸ *Ibid* at paras 86-8.

³¹⁹ MOE Factum *supra* note 260 at para 88.

with harmful emissions. The MOE acknowledged the gulf separating this interpretation from the Tribunal's interpretation, and claimed that the Tribunal had "misinterpreted the Precautionary Principle and consequently has erred in its application to the facts of this case."³²⁰ The MOE's arguments on judicial review were consistently RI, but the MOE's definition of the precautionary principle is so tame here that it is unclear whether it even qualifies as precaution. Lafarge in its submissions argued that the conditions attached to the Approvals reflected a precautionary approach, but unlike the MOE it did not claim that precaution was "irrelevant" to the question of permitting or rejecting a proposal with environmental effects.³²¹

The S 38 Applicants emphasized that the Tribunal made findings of fact in regard to the precautionary approach that the Court should not "retry," but they did not adopt Member Pardy's "as hazardous as it could possibly be" formulation of the principle.³²² LEC maintained that the precautionary approach consisted of three elements: "(1) a threat of environmental harm; (2) uncertainty; and (3) action."³²³ It further stated that "insight and the awareness of the vulnerability of ecosystems combined form the basic rationale of the precautionary approach."³²⁴

On both the precautionary approach and environmental discrimination grounds, the S 38 Applicants emphasized that the Tribunal found that the Directors had failed to consider either issue at all; it was not a question of whether the Directors had unreasonably applied the precautionary approach or erred in concluding that there was no discrimination. LEC defined the question before the Court on the discrimination claim as follows: "[Was the ERT] reasonable in

³²⁰ *Ibid* at para 87.

³²¹ Lafarge Factum *supra* note 259 at paras 83-4.

³²² LOW Response *supra* note 251 at para 39.

³²³ LEC Response *supra* note 251 at para 59.

³²⁴ *Ibid*.

finding that the Director should have considered the possibility of discrimination...”³²⁵

(emphasis in the original)

Like its arguments on the precautionary approach, Lafarge’s criticisms of the Tribunal’s discrimination finding were measured. Lafarge concentrated on the *Safety-Kleen* decision, which it alleged that the Tribunal had misinterpreted. Consistency of environmental *effects* was the critical factor, not the activities in question. Because permitting tire burning in Bath would not expose its residents to adverse environmental effects, according to Lafarge, no discrimination would follow from approving Lafarge’s project while banning the practice elsewhere in the province.³²⁶ The DSBLF Applications, in addition to emphasizing that the Tribunal made findings of fact on this point, noted that Member Pardy wrote the *Safety-Kleen* decision and was thus unlikely to have misinterpreted it.³²⁷

The MOE, in contrast to Lafarge, challenged the legal foundations of the Tribunal’s reasoning on the discrimination ground. No legal requirement to keep adverse environmental effects constant throughout the province was admitted by the MOE.³²⁸

[The Tribunal] did not indicate what law or policy required the Director to ensure consistent environmental effects throughout Ontario. It did not as there is none. In fact the legal regime in which the Director must operate specifically provides for the Lieutenant Governor in Council to make regulations that by their nature discriminate.

This sharply diverges from the ERT’s reasoning, as well as the arguments made by both Lafarge and the S 38 Applicants. However, the Court’s opinion on this issue is unclear. Like the ERT, the Court grounded its consideration of the precautionary approach around the practice of tire burning. But despite concluding that the Tribunal’s findings in regard to discrimination were

³²⁵ *Ibid* at para 64.

³²⁶ Lafarge Factum *supra* note 259 at paras 97-102.

³²⁷ DSBLF Response *supra* note 251 at para 86.

³²⁸ MOE Factum *supra* note 260 at para 97.

reasonable, it did not determine if the discrimination ground “standing alone, would be sufficient to support the granting of leave.”³²⁹ (The same statement also applied to the common law rights ground.)

The Court held that because the Approvals were issued “in the face of uncertainty about environmental risks from the adverse effects of tire burning ...,” the Tribunal reasonably found that the Directors' unreasonably ignored the precautionary approach.³³⁰ Reasonableness is operating at two levels here: in the ERT's assessment of the leave Application, and the Court's review of the ERT's performance. This complexity is reflected in the Court's concluding sentence on the Tribunal's SEV findings: “it was reasonable for the Tribunal to conclude that it appeared that there is good reason to believe that no reasonable person could have made the decisions to issue the CofAs without applying an ecosystem approach and a precautionary approach to its decisions.”³³¹

After making these finding in favour of the leave Applicants on the interpretation of the S 41 test, the SEV's relevance, and the Directors' failure to consider the ecosystem and precautionary approaches, the Court declined to make a definitive finding on the discrimination ground.³³² While accepting that the Tribunal's findings were reasonable,³³³ the Court also refrained from stipulating whether the discrimination finding was enough to satisfy the S 41 test. As discussed earlier in Chapter 5, Member Pardy's reasoning on the discrimination claim featured RI ideas and rested on the same facts that were considered through a DC lens in the context of the precautionary approach. Both grounds involved questions about environmental

³²⁹ *Lafarge*, *supra* note 3 at para 62.

³³⁰ *Ibid* at para 60.

³³¹ *Ibid* at para 60.

³³² *Ibid* at para 62.

³³³ *Ibid*.

risk. It is unclear how the Court would have decided on the discrimination issue, but it is worth noting that the Court had the opportunity to uphold the Tribunal's findings about environmental risk on both DC and RI grounds, and chose the DC ground. The result of the Court's choice in *Lafarge* was that DC understandings of precaution had a firmer place in Ontario law than their RI counterparts.

The DC-infected arguments made by LEC, LOW and the DSBLF applicants throughout the *Lafarge* case therefore gained favour with the Court. CAB's strongly RI and precautionary arguments – advanced before the ERT, but not pursued on judicial review – and Lafarge's RI but anti-precautionary arguments were both comparatively unsuccessful. The MOE, however, adopted inconsistent arguments before the ERT and Divisional Court and found little success with either approach. This offers a useful reminder that the choice to rely on DC- or RI-principles may have no impact on the ultimate result. But the dismissal of the Individual Applications illustrates that the choice to embrace *neither* model, and instead advance a purely precautionary claim that disregards questions of administrative constitutionalism, virtually guarantees failure. These conclusions are further explored in the following Chapter.

PART IV: *Reflections and Discussion*

Chapter 10

Discussion

The literature review examined three broad, and overlapping, areas of scholarship that share a preoccupation with understanding environmental risk and the (non-)responses it provokes: science/democracy theory; the study of precautionary and promethean ideas, including the potency of different conceptions of the precautionary principle; and administrative constitutionalism theory. The methodology applied to investigate the *Lafarge* debates owes most to the third category, administrative constitutionalism and specifically Fisher's idea of RI and DC framings. The study's findings, however, speak to the relationship among all three areas of scholarship. In this chapter, I will make three concise and inter-related arguments, each of which is grounded in the study's findings: first, the science/democracy framing is inadequate and marked by logical contradictions; second, neither the DC nor the RI paradigm is more precautionary than the other, and consequently the question of which paradigm prevails in a given jurisdiction or context has little significance for how environmental risk is regulated; and third, the discourse of administrative constitutionalism has an acute exclusionary impact. Hajer's discussion of credibility and the role it plays in securing the dominance of a particular environmental discourse further explains these empirical findings and informs the analysis found in this chapter.³³⁴

Discourses depend on their exclusionary capacities for their ongoing existence, and this aspect of the empirical findings perfectly accords with the theoretical work of Hajer and others. There is nothing remarkable or surprising in the mere fact that administrative constitutionalism

³³⁴ *Ibid* at 59-60.

functions to exclude certain voices and perspectives from environmental decision-making: discourses exclude. But exploring what – and who – is excluded is a prerequisite for contemplating alternative approaches to constructing and contesting environmental risk, and their relative merits.

Abandoning the science/democracy dichotomy:

The findings confirm that environmental risk is constructed and contested in Ontario through the discourse of administrative constitutionalism. They also confirm criticisms of the science/democracy framing: as discussed in the literature review, the RI and DC models can both claim to be more democratic and more inclusive of scientific expertise. The results accordingly vindicate Fisher's search for an alternative prism to explain the construction and contestation of environmental risk, namely administrative constitutionalism.

However, an important caveat limits the scope of this conclusion: In other contexts, including ones involving environmental decision-making, science and democracy may exist in a dichotomous relationship. Because the precautionary principle is invoked where there is scientific uncertainty, it may be that scientific and democratic values conflict less because the former cannot claim to offer a clear direction to either favour or oppose a project. Precautionary concerns are strongest when science is least capable of providing a certain answer. This is not necessarily true in every environmental decision-making context, and the analysis here does not support universalizing the criticisms of adopting a science/democracy framing in precautionary debates to *all* environmental debates.

Both science and democracy were significant in the *Lafarge* precautionary debates, but they did not neatly fit into an oppositional relationship. Participants frequently invoked both

concepts to support their positions. And the core disagreement underlying precautionary debates – whether safety should be presumed or subject to a rigorous standard of proof³³⁵ – cannot be divided along a science/democracy framing because both sides accommodate precautionary principle supporters and critics. This core disagreement was most immediately apparent in the arguments about what expert evidence is needed to satisfy the second branch of the S 41 test, which concerns the risk of significant environmental harm. The MOE maintained that if “strong expert evidence” points to the project’s safety, the second branch cannot be satisfied.³³⁶ The S 41 applicants countered, in a submission that was ultimately accepted by the ERT, that when expert evidence is contradictory, a sufficient possibility of environmental harm is established to satisfy the second branch of the test.³³⁷ The two arguments therefore diverged on this core issue of whether safety or danger is presumed when the scientific evidence does not point to a single answer.³³⁸

The genesis of the science/democracy framing’s enduring popularity and influence may lie in debates like the one discussed here regarding contradictory evidence, which are more aptly described as being concerned with expertise. Where Sunstein, Whiteside and others attribute disagreements between citizen advocates of precaution and scientists who support technological innovation to a deeper tension between science and democracy, the results here support Jasanoff, Fisher and others who see such disagreements as being about expertise.³³⁹ More practically, it is impossible to draw a line between “supporters” and “opponents” of science in the *Lafarge*

³³⁵ Paterson *supra* note 1 at 86-8.

³³⁶ MOE Response *supra* note 147 at para 75.

³³⁷ Dawber, *supra* note 3 at 33-4.

³³⁸ Willard’s claim that “hard science” cannot provide quick answers about risks in complex ecosystems is also concerned with how to regulate when science does not provide clear directions: Willard Application *supra* note 164.

³³⁹ Jasanoff *supra* note 78 at 394-5; Fisher *supra* note 1 at 33, 82.

debates: all participants, including the individual applicants, argued that the scientific evidence – including any *lack* of evidence – supported their position.

Crucially, disagreements about whether there is a scientific consensus on a specific environmental risk issue, and what that scientific consensus supports, should not be confused with disagreements about the relative value of science and democracy. The *Lafarge* debates illustrate that the proposed project’s critics and supporters alike looked to scientific evidence, while disagreeing about what that evidence revealed.

Member Pardy’s discussion of environmental discrimination further illustrates how the dichotomy fails to adequately explain precautionary debates. Equity – namely the objective of ensuring that environmental impacts and risks are kept constant across Ontario – drives Pardy’s reasoning on this point. However, the normative assumptions underlying his reasoning are at odds with both the importance of choice and the resulting accommodation of difference in most democratic theories, as well as the scientific reality that environmental conditions across an area the size of Ontario cannot be measured according to a single standard or kept uniform.³⁴⁰

The broad brush strokes of Member Pardy’s reasoning on the environmental discrimination claim, with its reliance on rule of law considerations, recalls administrative constitutionalism as the concept is defined by Fisher. Both are concerned with the nature and extent of state authority, including the accountability standards to which government actors are held. Yet it cannot be said to fit comfortably within either an RI or DC framework. The inflexibility is anathema to the DC paradigm, while the lack of any clear legislative authority distinguishes it from Rational-Instrumentalism. Ultimately, Member Pardy’s rule of law reasoning appears to share more with the RI than the DC model, but it also speaks to the

³⁴⁰ Collins and Evans *supra* note 36 at 235-238; Trouwborst *supra* note 13 at 28-29.

potential for precautionary arguments to exist in tension with both scientific and democratic values. Like the LEC-LOW and CAB arguments that pursued robustly precautionary arguments through reliance on different paradigms of administrative constitutionalism, precautionary arguments can integrate one, both, or neither side of the democracy and science pairing.

Exploring the concept of deference further confirms the inadequacy of a science/democracy finding. Deference underpins the law of judicial review and determining the measure of deference that is owed to an administrative decision-maker can prove decisive in a judicial review challenge. One question specifically raised by the findings is the intersection of democracy with judicial review, and in particular the choice of a standard of review. The deference embodied in the standard of reasonableness is not free-standing, but instead deference *to* officials appointed (directly or indirectly) by elected officials.³⁴¹ The nexus between deference and a concern for respecting democratic choices is therefore readily apparent. But before too quickly jumping from recognition of this nexus to a return to the traditional science/democracy framing epitomized by Sunstein and Whiteside, Fisher’s remarks about the “analytical opportunism” that characterizes precautionary debates within the discourse of administrative constitutionalism must be considered.³⁴² The S 38 Applicants all spoke of the ERT’s statutorily-designated expertise and responsibility, and resulting claims to deference, but based on the research conducted here there is no indication that the S 38 applicants’ views on standard of review amounted to more than a strategic choice to limit the court’s review of its victory at the ERT. There is simply no indication as to the origins and foundations of the S 38 Applicants’ arguments on standard of review, beyond their stated interest in opposing the proposed facility’s construction.

³⁴¹ Liston *supra* note 55 at 100-101.

³⁴² Fisher *supra* note 1 at 89-124.

The lack of a solid boundary separating the two sides of the dichotomy is perhaps best captured by the “experiment” terminology embraced by LEC-LOW in its submissions regarding the MOE’s “pilot project” announcement. The claim of unfairness supported the inappropriateness of subjecting Bath residents to an “experiment”, and the allegations of methodological frailties supported the claim of unfairness and discrimination. Consistent with the submissions by all parties, LEC-LOW sought to blend democratic and scientific values.

Moreover, efforts to extend the science/democracy framing to the deference analysis on judicial review must fail because the ERT’s authority is rooted in viable claims to both democratic legitimacy *and* scientific expertise.³⁴³ Opposition to showing deference to the ERT’s decisions is most obviously based on a desire to ensure that the best possible decisions are made and skepticism about the ERT’s ability to accomplish that goal relative to a Court’s ability. This concern cannot be linked to any underlying views about the relative value of science and democracy.

What emerges from the findings on the nexus between deference and democracy is that while democracy remains both critically important and contested in conflicts between RI and DC advocates, a science/democracy dichotomy cannot be mapped onto those conflicts. Science, as opposed to scientific expertise, does not even feature significantly in arguments about standard of review. And even if “scientific expertise” might be capable in some contexts of standing in for “science” in a dichotomous relationship with democracy, that possibility does not extend to judicial review: Both democracy and scientific expertise belong on the same side of the ledger in choosing a standard of review; both militate in favour of deference.³⁴⁴ Exploring the place of

³⁴³ Liston *supra* note 55 at 99-100.

³⁴⁴ *Ibid.*

science, or scientific expertise, in the context of standard of review therefore further reveals the inadequacy and logical tensions inherent in a science/democracy framing.

Pointing out the problems with a science/democracy framing does not say anything affirmative about how environmental uncertainty *is* constructed. But here the case study's findings provide insight and support for Fisher's theories about administrative constitutionalism and environmental uncertainty. While DC and RI arguments are often mixed together in a single participant's submissions, one paradigm would be dominant. With the arguable exception of the Individual Applicants, each party's ultimate position – to either favour or oppose the MOE's approval of the proposed facility – was advanced in distinctly RI or DC terms. More specifically, the constructions of environmental risk they advanced were expressed in predominantly RI or DC terms. In interpreting the S 41 test for granting leave to appeal, defining the applicable standards and burdens of proof, discussing competing expert reports and evidence, and constructing environmental risk and harm, the participants relied on their understandings of administrative constitutionalism. Thus the results here confirm the findings of the previous empirical studies and theoretical works on the inadequacy of a science/democracy framing and the significance of administrative constitutionalism.

The agnosticism of conflicts between the RI and DC paradigms:

In light of the case study's findings, it is difficult to identify any connection between tangible environmental outcomes and whether the RI or DC paradigm is ascendant. The question of which paradigm prevails in debates regarding administrative constitutionalism appears to have little or no significance for how environmental risk is constructed and regulated. In regard to the relative strength of the various interpretations of the precautionary principle advanced in the

Lafarge debates, LOW and CAB closely resemble each other despite their support for different models of administrative constitutionalism. Similarly, Lafarge and the MOE supported different models of administrative constitutionalism at the ERT but shared the same preference for weaker interpretations of the precautionary principle.

Both the RI and DC paradigms accommodate strongly precautionary and promethean arguments. Each paradigm served as the vehicle for arguments favouring and opposing the proposed facility, and each served to present both precautionary and promethean arguments on environmental risk. The *Lafarge* debates therefore demonstrate that neither paradigm of administrative constitutionalism is inherently more or less precautionary. LOW and CAB both advanced strongly precautionary views through, respectively, DC and RI concepts. The MOE switched from DC to RI arguments on judicial review, but consistently supported a weak interpretation of precaution that imposed no substantive obligations.

On first impression, the differences in regard to burdens and standards of proof may appear to produce a substantive difference between two paradigms that makes one more precautionary than the other. Some observers maintain that the precautionary principle simply reverses the burden of proof. But neither the DC nor RI paradigms support a more or less stringent standard of proof: They differ in the emphasis placed on questions of proof, and how rigidly they characterize the applicable standards and burdens of proof.³⁴⁵ Thus the MOE's DC-inflected submissions on proof at the ERT – submissions that envisioned burdens of proof shifting between the S 38 applicants and respondents in a variable and contextualized manner – ultimately dovetailed with Lafarge's RI-inflected submissions on proof.³⁴⁶ Both Lafarge and the

³⁴⁵ Fisher *supra* note 1 at 30-31.

³⁴⁶ MOE Response *supra* note 147 at paras 72-82; Lafarge Response *supra* note 155 at paras 35-40.

MOE argued for the recognition of stringent obligations on the part of S 38 applicants with respect to proof.

A better understanding of the close links that bind constructions of environmental risk with constituent discourses of administrative constitutionalism paves the way to understanding what is lost and gained by framing debates about where our environmental knowledge ends - and what to do when it does - in the language of DC and RI concepts. As the case study details, administrative constitutionalism encompasses significant diversity in its constituent RI and DC discourses. Administrative constitutionalism includes a panoply of precautionary and promethean ideas, even if they all share the same belief that environmental uncertainty is a problem of a public administration. This is vividly demonstrated in CAB's submissions, which call for Ministry scientists and civil servants to lead the decision-making process instead of politicians and political appointees.³⁴⁷ The question therefore becomes which part of government should be making environmental risk decisions, and choosing this starting assumption excludes other possible ways of approaching environmental risk.

There is a striking contrast between the centrality of conflicts between the two paradigms and the ultimate environmental insignificance of which one prevails. Consistent with Fisher's theories, environmental risk in the *Lafarge* debates was contested through the discourse of administrative constitutionalism, and specifically the conflict between RI and DC paradigms. Arguments about institutional roles and scope for discretion occupied the bulk of each party's written submissions. Yet these two different visions of public accountability and institutional organization offered by paradigms appear to say almost nothing about environmental risk and the

³⁴⁷ CAB Application *supra* note 187.

(lack of a) need for a precautionary response. Instead the two paradigms serve as platforms for either precautionary or promethean arguments, as the case may be.

The strongest thread running through the MOE's judicial review arguments is not an RI or DC paradigm, but a commitment to whichever argument most narrowly defines its precautionary powers *and* responsibilities. This approach, including the abrupt shifts between DC and RI concepts it entailed, arguably sacrificed coherence. Although the Court's unvarnished opinion of the shifts is unknown, the opposing parties attempted to exploit the resulting inconsistencies in the MOE's arguments. This response from the MOE's legal adversaries indicates that relying principally either on RI or DC principles in disputes about the precautionary principle may be strategically advantageous. Thus the coalescing around DC or RI principles that Fisher witnessed in her case studies of debates about the precautionary principle may reflect legal tactics in addition to deeply held beliefs about administrative constitutionalism.

This case study cannot establish a link between the strategic demands of litigation and the tendency for parties in a dispute about the precautionary principle to adopt a distinctly RI- or DC-paradigm. The evidence is insufficient. But a close reading of arguments made in *Lafarge* reveals that a strategic price was paid when DC and RI principles were blended in a mutually contradictory fashion. While Fisher suggests that this coalescing is explained by participants' views about the proper state of public administration, this potential strategic aspect offers an alternative explanation for why individual participants in precautionary debates tend to coalesce around RI or DC models. It also speaks to why the discourse of administrative constitutionalism divides into these two camps: they are storylines, to use Hajer's term, and coherency is rewarded when crafting storylines to use before Tribunals and courts.³⁴⁸

³⁴⁸ Hajer *supra* note 6 at 44-45.

This is not to say that the two paradigms are entirely neutral platforms for the arguments regarding environmental risk that they convey. As Fisher suggests, even equally strong interpretations of the precautionary principle take different forms depending on which paradigm it is expressed and applied in. LOW and CAB, for example, both made strongly precautionary arguments but the former emphasized inclusive deliberative processes, while the latter emphasized unbiased scientific evidence. Both are hallmarks of the DC and RI paradigms, respectively. Thus administrative constitutionalism is not entirely irrelevant to how the precautionary principle is constructed, even if the primacy of RI or DC ideas has little significance for the specific question of how *robustly* the principle is defined.

In general, the environmental risk scholars who have engaged with theories of administrative constitutionalism have not extended their analysis to the question of whether one paradigm is more precautionary than the other. One modest exception is Tollefson and Thornback's work, which endorses the RI paradigm on the grounds that it is more appropriate for judicial application and promotes a more contained interpretation of the precautionary principle.³⁴⁹ Implicitly, Tollefson and Thornback's preference follows from a distrust of the more potent, and potentially unwieldy, definitions of the precautionary principle. Besides Tollefson and Thornback, the question of which model is more strongly precautionary has attracted minimal study. This paper's argument that neither model is more precautionary than the other accordingly strikes out new ground that remains largely unexplored.

³⁴⁹ Tollefson & Thornback *supra* note 98 at 57.

The failed promise of the Deliberative-Constitutive paradigm:

The DC paradigm of course claims to provide for a more inclusive decision-making process that welcomes diverse voices and community-specific understandings of environmental risk. Inclusivity is one of its underlying aims and the goal that DC supporters strive to reach. But the case study findings, viewed in conjunction with Hajer's examination of environmental discourses, complicate this aspirational picture of the DC model. In practice the DC model functions in symbiosis with the RI model. They are defined in opposition to each other and through debates about the proper direction of administrative constitutionalism. In an imagined decision-making forum where the DC model enjoyed a complete victory over its RI competitor and debates about administrative constitutionalism became obsolete, less exclusionary processes can be envisioned. Both DC supporters and critics of precaution could contest and thereby co-produce understandings of environmental risk in a shared process that would be open to broad-based public involvement. This speculation, however, is hypothetical, utopian and arguably odds with the mutually constituting nature of the two paradigms. The plausibility of the DC paradigm existing independently of rational instrumentalism is highly doubtful.

Since the DC model exists within a constantly renewing discourse of administrative constitutionalism, all participants are expected to engage with that discourse.³⁵⁰ Meaningful access to decision-making processes – where “meaningful” includes having credibility – is conditional on understanding and participating in debates regarding administrative constitutionalism. The same condition applies regardless of whether DC or RI concepts are adopted because in either case participants must establish their credibility within the umbrella discourse of administrative constitutionalism.

³⁵⁰ Fisher *supra* note 1 at 7-11; Shapiro et al *supra* note 162 at 466.

The MOE's submissions before the ERT, where it emphasized deliberative quality *and* vociferously contested the Individual Applications, exemplifies this internal limit on the DC paradigm's ability to promote inclusion. Crucially, there was no internal contradiction or tension between the MOE's positions on the legal significance of deliberative quality and its insistence that the individual applications must be rejected for failing to adequately address the legal and evidentiary issues. Both positions are consistent with the DC principles it emphasized at the ERT. While the DC model emphasizes deliberative quality, including openness, it exists within the discourse of administrative constitutionalism. Credibility within that discourse of course demands expert usage of its terminology and careful invocation of its storylines, as Hajer explains.³⁵¹

The DC paradigm's inability to remedy the exclusionary impacts of administrative constitutionalism's dominance is a new observation that suggests the need for refining current theory in this area. Yet the scope of such refinements would be confined. The findings and analysis here support nuanced modifications, not revolutionary changes. That is because the findings confirm the DC model's support for inclusivity and increased public consultation, despite its limited success in that endeavour. Thus this analysis does not collapse the core distinction between the DC and RI models on the proper role of public consultation, nor does it cast doubt on the sincerity of DC advocates who stress the value of public consultation. Instead it merely establishes the limited *utility* of DC support for publicly accessible deliberative processes.

That limited utility must also not be overstated. Without the influence of DC ideas, the discourse of administrative constitutionalism might become more exclusionary. The EBR

³⁵¹ Hajer *supra* note 6 at 48-49.

process studied in this paper – a process that resulted in the overturning of a government decision opposed by many community members – itself reflects the influence of DC ideas, as Chapter 3’s history of the EBR outlines. It should also be recalled that the definition of the precautionary approach found in the SEV evokes DC concepts, including in its reference to exercising caution and integration within a broader framework of considerations. Despite being embedded within the exclusionary discourse of administrative constitutionalism, and thus incapable of fully realizing its promise to open up environmental decision-making processes, the DC paradigm nonetheless makes those processes more accessible and transparent.

Moreover, the DC model may very well reinforce the role and influence of comparatively well-resourced groups like LOW that do not draw on the formal legal authority prized in the RI model. But LOW’s credibility was a product of its familiarity with administrative constitutionalism or, more precisely, the familiarity of the legal professionals representing LOW. The DC paradigm may therefore provide more opportunities for dissident and non-governmental voices to play a central role in precautionary debates, even while familiarity with the discourse of administrative constitutionalism remains a prerequisite for securing that role.

Exclusion:

The fundamental lack of connection between the two competing paradigms, and any identifiable tendency for a more or less precautionary understanding of environmental uncertainty, prompts a question: what is the significance of these debates about administrative constitutionalism for the problem of environmental uncertainty and its regulation? And how does illuminating these debates about administrative constitutionalism further our understanding of how environmental uncertainty is constructed given that both paradigms accommodate wholly

different understandings of environmental uncertainty? The answer lies in the consequences that flow from constructing and contesting environmental uncertainty in the discourse of administrative constitutionalism. Although whether the DC or RI model prevails may not have much significance for environmental outcomes, the dominance of administrative constitutionalism in constructing environmental uncertainty has far-reaching consequences. The full extent and nature of the consequences, however, remains unknown because this dominance functions to silence alternative voices. We cannot be sure of what such voices would say if they were confident of being heard.

Beyond the rich material provided by the *Lafarge* submissions, two methodological choices proved essential for discovering and engaging with these consequences. First, this paper rejects the assumption that environmental risk is inevitably constructed through the discourse of administrative constitutionalism. Because inevitability is not assumed, there is room for imagining alternatives, and consequently more importance is attached to fully understanding the implications of the *status quo* of dominant RI and DC paradigms. Second, Hajer's work spotlights and problematizes the exclusionary aspects of discourses. As the fate of the Individual Applications indicates, administrative constitutionalism demands a high level of familiarity with complex terminology and access to professional expertise, which combine to make it literally exclusionary for many citizen participants who lack the requisite financial and other resources. It is also exclusionary in another sense because the very construction of environmental risk through administrative constitutionalism precludes alternative constructions.

A glimpse of the alternative paths foreclosed by reliance on administrative constitutionalism is found in Sandra Willard's submissions. Willard extensively quoted and relied on the Minister's public statements about the importance of protecting the environment,

and suggested that approving Lafarge’s proposal would represent a violation of those statements: “Please use your discretion to reject Lafarge’s application or require a full Environmental Assessment. I prefer the rejection and would consider that in keeping with your own words from your own mouth.”³⁵² Willard’s arguments departed from the general focus on S 41, its place within the *EBR*, and the rules that guide Instrument Approval decisions: she directly confronted the economic objectives and restrictions that shape environmental decision-making.³⁵³

However, the *EBR*’s accountability framework, including S 41, excludes any mechanism to promote scrutiny or discussion regarding the broader political, economic and budgetary choices made by government. (Budgets are excluded from the *EBR*’s public consultation provisions.³⁵⁴) Choices about the economy, trade policy, and labour relations – among other issues – may limit the government’s environmental performance, but those choices are excluded from the legal debates that occur in S 41 proceedings.³⁵⁵ Sandra Willard’s submissions radically transcend the limits of administrative constitutionalism, making her arguments unique in the *Lafarge* debates: the resulting dismissal of her application shows that the hegemony of administrative constitutionalism is capable of excluding both people and ideas from environmental decision-making in Ontario.

The result of administrative constitutionalism’s dominance is that precautionary advocates cannot make effective arguments that directly express their concerns about environmental threats and the inequities in how they are distributed. Instead they must argue

³⁵² Willard Application *supra* note 164.

³⁵³ Mark Winfield, “The Ultimate Horizontal Issue: The Environmental Policy Experiences of Alberta and Ontario, 1971-1993” (1994) 27(1) *Canadian Journal of Political Science* 129 at 129-30; Dryzek et al *supra* note 10.

³⁵⁴ Eva Ligeti, “Ontario Regulation 482/95 and the *Environmental Bill of Rights: A Special Report*” (January 17, 1996).

³⁵⁵ McKay, *supra* note 136 at 62-3.

about public administration and how it should function. Precautionary, or anti-precautionary, objectives must be pursued indirectly by linking the desired regulatory outcome with an RI or DC argument about public administration. At their core, all the parties in the *Lafarge* debates – with the important exception of the individual applicants – relied on essentially the same logic to advance their (anti-)precautionary objectives: If administrative constitutionalism is understood properly, then the S 41 test is (or is not) met in regard to the precautionary approach.

Administrative constitutionalism, not environmental objectives, animated this logic.

Revisiting at this juncture the Divisional Court’s central finding underscores how inaccessible and removed from the realities faced by Bath residents the *Lafarge* debates became:

[I]t was reasonable for the Tribunal to have concluded that without assessing the specific potential cumulative ecological consequences of approving the Lafarge applications, and given the concern that the CofAs were made in the face of uncertainty about environmental risk from the adverse affects of tire burning, the Directors' decision was unreasonable because of the failure to take into account SEV principles. Thus, it was reasonable for the Tribunal to conclude that it appeared that there is good reason to believe that no reasonable person could have made the decisions to issue the CofAs without applying an ecosystem approach and a precautionary approach to its decisions.³⁵⁶

It is an open question how many of the people interested in the *Lafarge* debates from the initial public comment stage onwards could even find sense in this passage. *Lafarge*’s culmination in this central finding by the Divisional Court encapsulates both how instrumental administrative constitutionalism is in regulating environmental risk and the rhetorical concealment it engenders. This lack of clarity recalls Rob Nixon’s arguments in his book *Slow Violence and the Environmentalism of the Poor* about the barriers that combine to conceal the full reality of

³⁵⁶ *Lafarge*, *supra* note 3 at para 60.

environmental harms.³⁵⁷ Scott, in a review of Nixon's book, noted the culpability of administrative law in this regard.³⁵⁸

Consequently, people like the Individual Applicants in *Lafarge* who are unwilling or unable to indirectly advance their precautionary objectives through RI or DC arguments are excluded, in this case by the dismissal of their applications in one paragraph. The Stratfords' submissions, for example, are entirely outside the discourse of administrative constitutionalism. Like their fellow individual applicants the Dawbers, the Jenneys, and Sulzenko, it is clear that the Stratfords participated in the ERT process because they did not want a tire-burning facility in their hometown. There is no evidence of engagement or interest in broader questions about public administration, which are precisely the type of questions that must be addressed to gain credibility within the discourse of administrative constitutionalism. This is of course entirely consistent with the work of Hajer on how environmental discourses establish boundaries for who and what are included.³⁵⁹

Sulzenko's call for a full environmental assessment and public consultation on the grounds that it "makes more sense" also reflects the alternative logic of focusing directly on environmental risk, not administrative constitutionalism.³⁶⁰ Because administrative constitutionalism is enshrined in the S 41 test, and dominates the construction and contestation of environmental risk, arguments that are outside the discourse of administrative constitutionalism, like Sulzenko's, are largely ignored.

³⁵⁷ Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Cambridge: Harvard University Press, 2011) at 15-16, 39-40.

³⁵⁸ Dayna Nadine Scott, "Slow Violence and the Environmentalism of the Poor, by Rob Nixon" (2012) 50(2) *Osgoode Hall Law Journal* 479 at 481.

³⁵⁹ Hajer *supra* note 6 at 59-60.

³⁶⁰ Sulzenko Application *supra* note 210.

Another contextual detail further illuminates the barriers faced by participants in debates where full participation is contingent on making sophisticated arguments through the discourse of administrative constitutionalism: The S 41 Applicants in *Lafarge* were successful in terms of the legal outcome of the proceedings – leave to appeal was granted, upheld on judicial review, and, as explained in the introduction, the project was later abandoned – but their application for a costs award was denied. The sum they sought totaled \$284,655.19.³⁶¹ As the ERT explained:³⁶²

The amounts claimed by each of the Costs Applicants include all Counsel fees, expert witness fees, and miscellaneous disbursements (including photocopying and telecommunication charges, as well as travel and accommodation costs), incurred during the course of the entire proceeding.

Under the Tribunal’s Rules of Practice, costs can only be awarded “if the conduct or a course of conduct of a Party has been unreasonable, frivolous, vexatious, or if the Party has acted in bad faith.”³⁶³ The S 41 Applicants sought costs from Lafarge, not the MOE, and argued that Lafarge’s conduct was unreasonable and therefore met the Rules of Practice standard. This argument was rejected by the ERT in lengthy written reasons that detailed the procedural history of the case and scrutinized the parties’ conduct. That ruling was later upheld in a reconsideration decision.³⁶⁴ Although this paper cannot address the many competing objectives and concerns underlying costs rules,³⁶⁵ recalling the financial cost of participating in the *Lafarge* case enriches our understanding of administrative constitutionalism’s discursive dominance and the implications of that dominance.

³⁶¹ *Baker v Directors, Ministry of the Environment*, Case Nos 07-009-07-016 (June 16, 2009) at 4. The costs application was heard by the ERT following the Divisional Court’s judicial review decision, and the Vice-Chair was Dirk C. VanderBent, not Bruce Pardy.

³⁶² *Ibid.*

³⁶³ *Ibid* at 5.

³⁶⁴ *Baker v Ontario (Ministry of the Environment)*, [2009] OERTD No 55.

³⁶⁵ For a discussion of these concerns, see Faisal Bhabha, “Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions” (2007) 33 *Queen’s Law Journal* 139.

The above analysis traces the significance of administrative constitutionalism's dominance in constructing environmental risk, and the relative insignificance of whether the DC or RI model prevails. Specifically, the outcome of conflicts between the DC and RI paradigms – and the question of which paradigm is ascendant – has little impact on the response to environmental uncertainty. In contrast, the discourse of administrative constitutionalism functions to exclude voices and ideas that cannot fit within its boundaries and adopt its terminology: this raises questions about who and what is excluded by this dominance. Because this paper does not accept that administrative constitutionalism's discursive dominance is inevitable, the question that calls for further contemplation and research is whether its dominance is desirable. Although conflicts between the DC and RI paradigms may have minimal environmental significance, does administrative constitutionalism's dominance change how governments respond to environmental uncertainty? The concern driving this curiosity is whether environmental uncertainty is regulated differently because it is constructed and contested through the discourse of administrative constitutionalism. If so, efforts to remake how environmental uncertainty is addressed must engage with and challenge the dominance of administrative constitutionalism.

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