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## The Environmental Emergency and the Legality of Discretion in Environmental Law

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# The Environmental, Democratic, and Rule-of-Law Implications of Harper's Environmental Assessment Legacy

Jocelyn Stacey<sup>1</sup>

## Introduction

Canada's leading environmental law scholars have identified Harper's legacy as a full-scale attack on the environment,<sup>2</sup> one that simultaneously diminished the federal government's role in environmental protection and sought to increase federal influence over resource development. Indeed, the list of measures and actions taken by the Harper government that undermine environmental protection is striking: The federal role in conducting environmental assessment was radically reduced<sup>3</sup> as was its role in protecting navigable waters.<sup>4</sup> Fisheries protections were narrowed.<sup>5</sup> New regulation-making authority was exempt from ordinary procedural requirements, for no apparent reason.<sup>6</sup> Ocean dumping controls were relaxed.<sup>7</sup> Critical habitat requirements for species at risk were loosened.<sup>8</sup> The government systemically failed to develop recovery strategies for species at risk, contrary to legislative requirements.<sup>9</sup> The government formally withdrew from the Kyoto Protocol<sup>10</sup> and repealed the *Kyoto Protocol Implementation Act*.<sup>11</sup> The authority to deny interprovincial pipeline approvals was moved from

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<sup>2</sup> Jason Maclean, Meinhard Doelle and Chris Tollefson, "The Past, Present and Future of Canadian Environmental Law: A Critical Dialogue" (2016) 1:1 *Lakehead LJ* 79; Lynda M. Collins and David R. Boyd, "Non-Regression and the *Charter* Right to a Healthy Environment" (2016) 29 *JELP* 287.

<sup>3</sup> This is the focus of this article, see Part II *infra* for an overview of the most significant changes.

<sup>4</sup> Bill C-45, *A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2012, cls 173-178 (assented to 14 December 2012), SC 2012, c 31 [*Jobs and Growth Act*] [online]. Available from:

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5942521&File=4>;

Amanda K Winegardner, Emma E Hodgson and Adrienne M Davidson, "Reductions in Federal Oversight of Aquatic Systems in Canada: Implications of the New Navigation Protection Act" (2015) 72 *Can J. Fisheries & Aquatic Science* 602.

<sup>5</sup> Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2012, cls 132-156 (assented to 29 June 2012), SC 2012, c 19 [*Jobs, Growth, and Long-Term Prosperity Act*] [online]. Available from:

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5697420&file=4>; Jason Unger, "Lamenting What we HADD? A *Fisheries Act* Habitat Dirge or Much Ado about Nothing" (2016) 29 *JELP* 1; Martin ZP Olszynski, "From 'Badly Wrong' to Worse: An Empirical Analysis of Canada's New Approach to Fish Habitat Protection Laws" (2015) 28 *JELP* 1 [Olszynski Fisheries].

<sup>6</sup> *Fisheries Act*, RSC 1985, c F-14 ss 35(4), 43(4).

<sup>7</sup> *Jobs, Growth, and Long-Term Prosperity Act*, *supra* note 5 cls 316-350.

<sup>8</sup> *Ibid* at cls 163-169; *Species at Risk Act*, SC 2002, C 29, s 77(1).

<sup>9</sup> *Western Canadian Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148 at para 85.

<sup>10</sup> *Jobs, Growth, and Long-Term Prosperity Act*, *supra* note 5 cl 699.

<sup>11</sup> *Ibid* at s 699.

the National Energy Board to federal Cabinet.<sup>12</sup> The National Roundtable on Environment and Economy, a government advisory body on sustainable development, was disbanded.<sup>13</sup> Environmental non-governmental organizations were targeted for auditing on their charitable status.<sup>14</sup> The Experimental Lakes Area, a world-class research facility, was defunded.<sup>15</sup> Library materials from Fisheries and Oceans Canada were destroyed.<sup>16</sup> The RCMP and CSIS engaged in coordinated, covert surveillance of peaceful activities by environmental and Indigenous groups.<sup>17</sup> Government scientists were muzzled.<sup>18</sup> The budgets for Environment Canada and Fisheries and Oceans were slashed.<sup>19</sup>

Collectively these measures result in a radical reduction of the federal government's role in environmental protection. They appear to reflect an assumption of a zero-sum trade-off between resource development and environmental protection. Others have argued they are part of a concerted effort to subsume "the environment" under "a singular resource extraction paradigm."<sup>20</sup> The argument advanced here is that that the precise changes to environment law not only reflect this substantive vision of the environment, they also represent an attempt to exempt environmental decisions from the requirements of the rule of law. Underlying this argument is the premise that a democratic government committed to the rule of law must publicly justify its decisions on the basis of core constitutional principles, such as fairness and

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<sup>12</sup> *Jobs, Growth and Prosperity Act*, *supra* note 5 at cls 104.

<sup>13</sup> *Jobs, Growth, and Long-Term Prosperity Act*, *supra* note 5 at cls 578-594.

<sup>14</sup> D Tsao, Z Stoffman, G Lloyd-Smith, K Mohomoud & C Sandborn, *Tax Audits of Environmental Groups: The Pressing Need for Law Reform*, (Victoria: University of Victoria Environmental Law Centre, 2015).

<sup>15</sup> Diane Orihel & David Schindler, "Experimental Lakes Area is Saved, but it's a Bittersweet Victory for Science", *The Globe and Mail* (1 April 2014), online:

<<http://www.theglobeandmail.com/opinion/experimental-lakes-area-is-saved-but-its-a-bittersweet-victory-for-science/article17753956/>> (the facility was later reopened under a new operator, The International Institute for Sustainable Development).

<sup>16</sup> Gloria Galloway, "Purge of Canada's fisheries libraries a 'historic' loss, scientists say" (7 Jan 2014) *The Globe and Mail* online: <<http://www.theglobeandmail.com/news/politics/purge-of-canadas-fisheries-libraries-a-historic-loss-scientists-say/article16237051/>> .

<sup>17</sup> Shawn McCarthy, "CSIS, RCMP monitored activist groups before Northern Gateway hearings" (21 November 2013), *The Globe and Mail* online: <<http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/csis-rcmp-monitored-activists-for-risk-before-enbridge-hearings/article15555935/>>.

<sup>18</sup> E.g. Jonathon Gatehouse, "When science goes silent" (3 May 2013), *Macleans* online: <<http://www.macleans.ca/news/canada/when-science-goes-silent/>>.

<sup>19</sup> Environment and Climate Change Canada, *2014-2015 Report on Plans and Priorities*, (Government of Canada) online: <<https://www.ec.gc.ca/default.asp?lang=En&n=024B8406-1&offset=3&toc=show#s3>> and Peter O'Neil and Gordon Hoekstra, "Federal budget cuts \$100 million from fisheries and oceans over three years" (21 Mar 2013) *The Vancouver Sun* online: <<http://www.vancouversun.com/news/Federal+budget+cuts+million+from+fisheries+oceans+over+three+years/8133846/story.html>>.

<sup>20</sup> Jonathan Petyon and Aaron Franks, "The New Nature of Things? Canada's Conservative Government and the Design of the New Environmental Subject" (2016) 48:2 *Antipode* 453 at 456. See also Denis Kirchhoff and Leonard JS Tsuji, "Reading Between the Lines of the 'Responsible Resource Development' Rhetoric: The Use of Omnibus Bills to 'Streamline' Canadian Environmental Legislation" (2014) 32:2 *Impact Assessment and Project Appraisal* 108 at 110[Kirchhoff and Tsuji].

reasonableness. This rule-of-law requirement is most clearly reflected in section 1 of the *Charter*, but is also the core commitment contained within our common law constitution, realized, in part, through the courts' administrative law function of judicial review.<sup>21</sup>

The obligation to give publicly-regarding reasons (i.e. reasons that are not solely self-interested and that can be accepted by others) is also the consensus point amongst theorists of deliberative democracy, who espouse "an ideal of politics where people routinely relate to one another... by influencing each other through the publicly valued use of reasoned argument, evidence, evaluation and persuasion."<sup>22</sup> Thus the requirement of public justification lies at the intersection of the rule of law and deliberative democracy.<sup>23</sup> Public justification takes seriously the capacity of legal subjects—those subject to the law—to "reason with the law."<sup>24</sup> It both respects and enables individual autonomy by protecting legal subjects from arbitrary decision-making and also facilitating their participation in the ongoing project of contesting (or not) and deliberating upon the content of the law. On this view, individual participation is inherent within legal authority.

The crux of this article is that environmental assessment law provides an essential framework for publicly-justified decision-making in the Canadian environmental context. This means that the Harper-led changes to environmental assessment can be understood as an attempt to exempt environmental decision-makers from the basic requirements of a democratic conception of the rule of law. The article focuses specifically on environmental assessment law, rather than a broader suite of Harper's environmental measures, for several reasons. Rewriting Canadian environmental assessment legislation was a cornerstone of the Harper government's environmental legacy. It was a comprehensive change to a single piece of legislation that nicely captures the Harper vision of a narrow federal role, a narrow understanding of environmental protection, and a capitulation to the federal government's resource development agenda. Furthermore, environmental assessment laws are often thought of as the "mainframe of environmental law."<sup>25</sup> Indeed, as I suggest in this article, environmental assessment presently performs a quasi-constitutional role in Canadian environmental decision-making in the sense that it provides an indispensable framework for public justification.

The article argues that Harper's dramatic changes to federal environmental assessment give rise to a two-dimensional legacy in environmental law: first, a legacy of impoverished

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<sup>21</sup> Evan Fox-Decent, "Democratizing Common Law Constitutionalism" (2010) 55 McGill LJ 513 at 513.

<sup>22</sup> Amy Gutmann, "Democracy" in Robert Goodin, Philip Pettit and Thomas Pogge, eds, *A Companion to Contemporary Political Philosophy* (Oxford: Blackwell Publishing, 2007) 521 at 527.

<sup>23</sup> Jocelyn Stacey, "The Promise of the Rule of (Environmental) Law" 53:2 OHLJ [forthcoming in 2016]; David Dyzenhaus, "The Legitimacy of Legality" (1996) 46 UTLJ 129 [Dyzenhaus Legitimacy]; Hoi Kong, "Election Law and Deliberative Democracy: Against Deflation" (2015) 9 JPPL 35 [Kong].

<sup>24</sup> Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford and Portland: Hart Publishing, 2012) at 10; Kong, *supra* note 23 at 41.

<sup>25</sup> Jane Holder, *Environmental Assessment: the Regulation of Decision-Making* (Oxford: Oxford University Press, 2004) at 1 [Holder].

environmental decision-making that reflects a narrow, resource-oriented vision of the environment, and second, a legacy of undermining democratic and rule-of-law values in environmental law. This argument unfolds through three parts. The first part introduces the basic structure, purpose and practice of environmental assessment. It argues that environmental assessment is best understood as providing a framework for public justification in environmental decision-making. And it identifies how a misunderstanding of this justificatory function paved the way for criticism—from all sides—of Canadian environmental assessment law. The second part introduces Harper’s major changes to Canadian environmental assessment. Drawing on existing literature, it argues that one aspect of the changes is poorer environmental decisions. The reduction in the scope and rigour of environmental assessment in Canada leaves our public decision-makers less informed about the environmental effects of their decisions. The third part extends on this existing environmental commentary. It argues that the changes to federal environmental assessment undermine the federal government’s ability to offer adequate justification for its environmental decision, and thus suggest an attempt to exempt the government from the ongoing project of democratic governance under the rule of law. The article concludes by observing that Harper’s legacy in environmental law has created significant challenges for reinstating and then coordinating robust environmental assessment in the Trudeau era.

### **I. Environmental Assessment: Publicly Justifying Environmental Decisions**

Environmental assessment is the practice of studying, understanding and attempting to predict the potential environmental effects of certain activities (e.g. developing a new mine) before deciding whether these activities are allowed to proceed. It formalizes the common sense notion that we ought to ‘look before we leap’. The Supreme Court of Canada has described environmental assessment as “a planning tool that is now generally regarded as an integral component of sound decision-making.”<sup>26</sup> What these benign descriptions belie, however, is the fact that environmental assessment carries the weight of much of the hope and expectation for environmental law more generally. Environmental assessment is intended to promote sustainable development,<sup>27</sup> facilitate consultation with aboriginal peoples, coordinate decision-making between levels of government, and encourage public participation.<sup>28</sup> But it is also an attempt to regularize and channel that which cannot easily be tamed. The very nature of environmental assessment brings to the surface heated debates about nature and natural

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<sup>26</sup> *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 [*Oldman*].

<sup>27</sup> *Canadian Environmental Assessment Act*, SC 1992, c 37 at s 4 [*CEAA 1992*] and *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52 at s 4 [*CEAA 2012*]. Although arguably not in its current form: Meinhard Doelle, “The Role of EA in Achieving a Sustainable Energy Future in Canada: A Case Study of the Lower Churchill Panel Review” (2013) 25 JELP 113; A John Sinclair, Alan Diduck and Patricia Fitzpatrick, “Conceptualizing Learning for Sustainability through Environmental Assessment: Critical Reflections on 15 Years of Research” (2008) 28 *Environmental Impact Assessment Review* 415 at 417 (sustainability as the normative end point of environmental assessment).

<sup>28</sup> *Ibid* *CEAA 1992*, s 4 and *CEAA 2012* at s 4.

resources, environmental protection and development, and scientific, Indigenous and all other ways of understanding our relationships with each other and the environment.

In broad strokes, environmental assessment is generally comprised of *anticipation*, *participation* and the *determination* of whether a proposal is likely to cause significant adverse environmental effects. Environmental assessment requires gathering information about the project and its possible effects in order to anticipate the environmental consequences of approving the project. It typically includes some form of public participation, which incorporates information from a range of sources. The extent and depth of the assessment varies with the nature of the proposed project. Major development proposals attract more rigorous assessments than minor proposals. The end result of the assessment is a determination of whether the proposal is likely to cause significant adverse environmental effects, and if so, whether the project can nonetheless be justified.<sup>29</sup> Because of this final determination, environmental assessment does not require decision-makers to reach any particular outcome (i.e. even projects with significant negative effects may be justified and then approved). For this reason, environmental assessment is often characterized as essentially procedural in nature.<sup>30</sup> At the same time, however, environmental assessment serves (or ought to serve) underlying substantive objectives by providing a forum for explicitly considering whether the risks of projects are acceptable and whether proposals reflect the best use of our land and resources.<sup>31</sup> Often these processes lead to modifications in the project design and the incorporation of mitigating conditions intended to prevent and reduce anticipated environmental harm.<sup>32</sup>

Environmental assessment can also be understood as providing a framework for publicly justifying environmental decisions on the basis of underlying constitutional principles of fairness and reasonableness. The participatory component of environmental assessment – i.e. notice-and-comment or public hearings – creates the opportunity for those affected by the decision to be heard, analogous to the administrative law requirement of procedural fairness. At the same time, the assessment can generate a robust pool of information that provides a reasoned basis for the decision-maker's determination of whether a project ought to proceed and on what conditions. In the Canadian context, one need not look further than the language of the *Canadian Environmental Assessment Act 2012 (CEAA 2012)* to see that environmental assessment ought to perform a justificatory role. Where a project is likely to result in significant

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<sup>29</sup> *Ibid* CEAA 1992 at ss 20(1)(b) and 37(1) and CEAA 2012 at s52(4).

<sup>30</sup> Holder, *supra* note 25 at 19-20; Matthew J Lindstrom, "Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law" (2000) 20 J Land Resources & Envtl L 245.

<sup>31</sup> *National Environmental Protection Act 1969 (US)* § 4331(b)-(6); Tsleil-Waututh Nation, "Tsleil-Waututh Stewardship Policy" online: <<http://www.twnation.ca/About%20TWN/~media/Files/Stewardship%20January%202009.ashx>>.

<sup>32</sup> Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham, Ont: LexisNexis, 2008) at 25, n20 [Doelle 2008].

adverse environmental effects, section 52(4) requires the Governor in Council to decide whether those effects “are justified in the circumstances.”<sup>33</sup>

Environmental assessment legislation is distinct from other environmental statutes and regulations in that it “is a planning tool, not a regulatory tool.”<sup>34</sup> The distinction is one of both timing and purpose: environmental assessment happens at an early stage in order to consider the need, alternatives, and design of the project. In contrast, environmental regulation governs the operation of the project. There is an additional and significant distinction, at least in the Canadian context, in that environmental regulatory decisions do not, at present, fulfill the rule-of-law requirement of public justification. Regulatory decisions at the federal level (e.g. issuing pollution permits, or authorizations to destroy fish habitat) are not, generally speaking, transparent, publicly accessible, reasoned, or subject to any meaningful form of review.<sup>35</sup> This means that, in Canada, environmental assessment is the primary means by which the federal government meets its rule-of-law obligation to publicly justify its environmental decisions. Environmental assessment can thus be understood as having a quasi-constitutional role because it provides the means through which the government can fulfill its constitutional obligation to govern according to the rule of law.

The courts, however, have largely overlooked this justificatory function and have instead viewed environmental assessment in largely technical and formal terms. The first Supreme Court of Canada decision on environmental assessment upheld an expansive role for the federal government in conducting environmental assessment, even when predicted environmental effects pertained to matters of provincial jurisdiction.<sup>36</sup> At the same time, however, the Supreme Court emphasized the essentially procedural nature of environmental assessment. Indeed a key distinction for the Court, between environmental assessment and regulation (such as the *Fisheries Act*) was that the former “is fundamentally procedural while the other is substantive in nature.”<sup>37</sup> The Federal Court of Appeal has a long history of narrowly interpreting the requirements of environmental assessment legislation. Prominent decisions include deference to federal decision-makers narrowly “scoping” the proposed project to include only features requiring federal approval (e.g. the bridge crossing fish habitat, not the

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<sup>33</sup> *CEAA 2012*, *supra* note 27, s 52(4).

<sup>34</sup> Doelle 2008, *supra* note 32 at 18.

<sup>35</sup> David Boyd, *Unnatural Law* (Vancouver: UBC Press, 2003) at 233, 245-8; Olszynski *Fisheries*, *supra* note 5 (relying on freedom of information requests to access *Fisheries Act* authorizations); Jocelyn Stacey, “The Environmental Emergency and the Legality of Discretion in Environmental Law” (2015) 52:3 OHLJ 983 (on the reluctance of courts to interfere with environmental decisions on review). The Ontario Bill of Rights [*Environmental Bill of Rights*, SO 1993, c 28] establishes, at least on paper, more robust requirements for environmental decision-making. But see Mark Winfield, “Decision-Making, Governance and Sustainability Beyond the Age of ‘Responsible Resource Development’” (2016) 29 JELP 129 at 141-143 (on the ways in which these requirements are being circumvented in practice).

<sup>36</sup> *Oldman*, *supra* note 26; Doelle 2008, *supra* note 32 at 67-75.

<sup>37</sup> *Oldman*, *supra* note 26 at 42; *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 at para 14.

entire logging operation),<sup>38</sup> and holding that an assessment will be unreasonable only if the decision-maker “gave no consideration at all to [the] environmental effects.”<sup>39</sup> More recently, the Federal Court upheld as reasonable the Governor in Council’s determination that the effects of the Site C Dam were “justified in the circumstances,” despite the fact the decision did not explain *in any* fashion the basis for that conclusion.<sup>40</sup>

Construed as a formal pre-approval exercise, rather than a rule-of-law imperative, environmental assessment is easily vulnerable to criticism. Environmental groups argue that it is toothless and unmoored from advancing underlying substantive environmental goals.<sup>41</sup> Industry highlights its ineffectiveness at achieving environmental outcomes and argues that environmental assessment is wasteful, burdensome and leads to costly delays to development.<sup>42</sup> Joe Oliver, the Minister of Natural Resources at the time of the changes to federal environmental assessment law, stated “[u]nfortunately, our inefficient, duplicative and unpredictable regulatory system is an impediment [to diversifying Canada’s markets]. It is complex, slow-moving and wasteful. It subjects major projects to unpredictable and potentially endless delays.”<sup>43</sup> The stage was set for Harper’s environmental assessment legacy.

## II. The Legacy Part I: Impoverished Environmental Decisions

Harper’s changes to the federal environmental assessment occurred in two waves. First the 2010 Budget Implementation Bill (Bill C-9) amended the *Canadian Environmental Assessment Act (CEAA)* to increase the discretionary powers of Ministers conducting environmental assessments<sup>44</sup> and to streamline various procedures.<sup>45</sup> In addition, the bill exempted from environmental assessment all infrastructure projects contained in the stimulus package for responding to the financial crisis.<sup>46</sup> The timing of these changes was odd because they coincided

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<sup>38</sup> *Friends of the West Country Assn v Canada (Minister of Fisheries and Oceans)*, [2000] 2 FCR 263 [*West Country*]; *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31.

<sup>39</sup> *Ontario Power Generation Inc v Greenpeace Canada*, 2015 FCA 186 at para 130.

<sup>40</sup> *Peace Valley Landowner Association v Canada*, 2015 FC 1027 [PVLVA].

<sup>41</sup> This sentiment is especially strong in the US: Lindstrum, *supra* note 30. See arguments in the Canadian context in favour of sustainability assessment as a more substantive version of environmental assessment: Sinclair *supra* note 27; Robert B Gibson, “Sustainability Assessment: Basic Components of a Practical Approach” (2006) 24:3 *Impact Assessment and Project Appraisal* 170.

<sup>42</sup> House of Commons, Standing Committee on Environment and Sustainable Development, *Statutory Review of the Canadian Environmental Assessment Act: Protecting the Environment, Managing our Resources* (March 2012).

<sup>43</sup> Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 1st Sess, No 115 (2 May 2012) at 1550.

<sup>44</sup> This was a direct response to the Supreme Court’s decision in *MiningWatch*, *supra* note 37.

<sup>45</sup> Meinhard Doelle, “CEAA 2012: The End of Federal EA as We Know it?” (2012) 24 *JELP* 1 at 1-2 [Doelle 2012].

<sup>46</sup> *Ibid.*



with the Act's legislated 7-year review.<sup>47</sup> It turned out that these changes were only a precursor to a second wave of changes that ushered in the complete reshaping of federal environmental assessment in 2012. After an abridged legislative review, conducted over only a few weeks by the Standing Committee on Environment and Sustainable Development, the repeal of *CEAA* and enactment of *CEAA 2012* were proposed in the 2012 Budget Implementation Bill (Bill C-38). After only two months in the House of Commons and the rejection of all proposed amendments to *CEAA 2012* provisions, Bill C-38 was passed in June 2012. Later in the same year, Bill C-45 introduced additional changes to *CEAA 2012*, increasing the amount of discretion delegated to decision-makers under the Act.<sup>48</sup>

The previous version of *CEAA* was by no means perfect.<sup>49</sup> But the 2012 changes to environmental assessment are a dramatic retreat in the face of strong international trends and academic commentary in favour of a gradually expanding role for environmental assessment in terms of proposals considered, public participation and the objectives served.<sup>50</sup> For example, experience with project-specific environmental assessment revealed the need for strategic environmental assessment of higher-level policy and programmatic decisions in order to assess social and environmental effects systematically rather than through a piecemeal, project-by-project approach.<sup>51</sup>

In contrast to this trend of inclusivity, Harper's rewriting of federal environmental assessment created a highly exclusive assessment regime. This part focuses on three major ways in which federal environmental assessment was narrowed.<sup>52</sup> First, the Act substantially reduces the number of projects that require an environmental assessment. Second, the Act defines environmental effects narrowly to only include some effects within federal jurisdiction. Third, the Act reduces the role for public participation in environmental assessment. The legacy of these changes is impoverished public decision-making, which is now less informed by potential impacts on the environment.

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<sup>47</sup> *Ibid* at 2.

<sup>48</sup> *Jobs and Growth Act*, *supra* note 4, ss 435-432.

<sup>49</sup> For a brief summary of perennial issues, see: Robert B Gibson, "In Full Retreat: The Canadian Government's New Environmental Assessment Law Undoes Decades of Progress" (2012) 30:3 *Impact Assessment and Project Appraisal* 179 at 179-80 [Gibson 2012].

<sup>50</sup> Gibson 2012, *supra* note 49 at 179; Denis Kirchoff, Holly L Gardner and Leonard JS Tsuji, "The Canadian Environmental Assessment Act, 2012 and Associated Policy: Implications for Aboriginal Peoples" (2013) 4:3 *The International Indigenous Policy Journal* 1 at 9 [Kirchoff 2013]; Donald McGillivray and Jane Holder, "Taking Stock" in Jane Holder and Donald McGillivray, eds, *Taking Stock of Environmental Assessment* (Abingdon, UK: Routledge-Cavendish, 2006) 1 at 3.

<sup>51</sup> Robert B Gibson et al, "Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options" (2010) 20:3 *JELP* 175; Bram F Noble, "Promise and Dismay: The State of Strategic Environmental Assessment Systems and Practices in Canada" (2009) 29:1 *Environmental Impact Assessment Review* 66.

<sup>52</sup> For a more comprehensive account of the changes to the *CEAA* see Doelle 2012, *supra* note 45.

Only projects that are specifically designated by regulations are subject to *CEAA 2012*'s environmental assessment requirements, subject to the residual discretion of the Minister of the Environment to order an environmental assessment for a project not otherwise designated.<sup>53</sup> However, even designated projects can be exempt from a federal environmental assessment if they undergo an equivalent provincial assessment.<sup>54</sup> The previous legislation essentially required an assessment for any project that required the exercise of federal authority (e.g. an approval from Fisheries and Oceans to alter fish habitat).<sup>55</sup> The default under the previous legislation, in other words, was that a project was included in the regime, unless it was specifically excluded.<sup>56</sup> In contrast, *CEAA 2012* reverses this default rule; only projects specifically designated as "in" potentially require federal assessment.<sup>57</sup>

*CEAA 2012* further narrows the role of environmental assessment by requiring the Canadian Environmental Assessment Agency (CEA Agency) to make an initial decision about whether any designated project in fact requires an assessment.<sup>58</sup> Even designated projects may not require an assessment as a result of a summary determination that they will not cause significant, adverse environmental effects. This mechanism, in other words, contradicts the very purpose of environmental assessment by assuming that a decision-maker is able to confidently determine in advance, and without the benefit of an actual assessment, which projects are likely to cause significant environmental harm.

The result has been a striking reduction in the number of federal environmental assessments conducted each year. The immediate effect of *CEAA 2012* was to cancel approximately 3,000 ongoing assessments.<sup>59</sup> Since then, the number of completed federal environmental assessments has dropped from over 6,000 annually under the previous legislation<sup>60</sup> to only about a dozen each year.<sup>61</sup> This is because the lowest level of assessment, a "screening" which accounted for approximately 99% of assessments under the prior regime,<sup>62</sup>

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<sup>53</sup> *CEAA 2012*, *supra* note 27, s 14(2)

<sup>54</sup> *Ibid* s 32.

<sup>55</sup> *CEAA*, *supra* note 27, s 5. The requirements for triggering the *CEAA* (1995) were in fact more complex because they were drafted in a way to preclude constitutional challenge. For a more detailed discussion see: Doelle 2008, *supra* note 32 at 86.

<sup>56</sup> *Exclusion List Regulations, 2007*, SOR/2007-108; *Exclusion List Regulations*, SOR/94-639.

<sup>57</sup> *Regulations Designating Physical Activities*, SOR/2012-147, s 2-3. Again, it is slightly more complex than this because there is residual discretion of the Minister to order an assessment for something not on the list.

<sup>58</sup> *CEAA 2012* *supra* note 27, s 10. See also the requirements for projects on federal lands and outside of Canada: ss 67, 68.

<sup>59</sup> Kirchoff 2013, *supra* note 50 at 5.

<sup>60</sup> These numbers are from the publicly-reported information on the *CEAA* Registry. In 2006, 2007, and 2008, respectively there were 5216, 6647, 3983 environmental assessments completed.

<sup>61</sup> These numbers are from the *CEA* Registry. In 2013, 2014, and 2015, respectively, there were 15, 11 and 12 environmental assessments completed.

<sup>62</sup> Doelle 2012, *supra* note 45 at 4.

was eliminated by *CEAA 2012*. When a project is determined to require an assessment under *CEAA 2012*, it now proceeds either through a standard “assessment”<sup>63</sup> or a “panel review.”<sup>64</sup>

Second, *CEAA 2012* redefines the “environmental effects” to be considered in an environmental assessment. The previous legislation defined environmental effects broadly to include “any change that the project may cause in the environment.”<sup>65</sup> The courts have held that it was constitutionally permissible for federal departments to consider environmental effects even when those effects were subjects of provincial jurisdiction.<sup>66</sup> In contrast, *CEAA 2012* defines environmental effects only as some components of the environment within federal jurisdiction (e.g. fish and fish habitat, migratory birds, changes to federal lands, effects on aboriginal peoples).<sup>67</sup> The definition of environmental effects “covers only a small fraction of the interconnected biophysical effects that are included in the minimum usual scope of environmental assessments globally.”<sup>68</sup> The effect of such a change is that the federal decision-maker must now base his/her decision on a restricted understanding of environmental effects. In light of the specificity of the effects considered, it is much less likely that the decision-maker will make a finding of significant adverse environmental effects.<sup>69</sup> It is further unlikely that such a narrow understanding of environmental effects can provide a sufficient basis for determining whether a project can be justified in the circumstances.<sup>70</sup> As a result, only a joint environmental assessment by the province and federal government has the potential to result in a fulsome assessment of a proposal’s environmental effects.

*CEAA 2012* has extensive implications for public participation. The most significant change is the reduction in the number of environmental assessments, which removes consideration of these project proposals from the public sphere. Under the previous legislation, projects subject to screenings at least required online, publicly-accessible records of the project and assessment.<sup>71</sup> Since the vast majority of these projects no longer fall under the scope of federal environmental assessment, there is no public notice of the proposal. And it is not safe to assume that provincial environmental assessment regimes will fill in these gaps, as the

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<sup>63</sup> *CEAA 2012*, *supra* note 27, ss 15-20.

<sup>64</sup> *Ibid*, ss 39-48.

<sup>65</sup> *Ibid*, s 2.

<sup>66</sup> *E.g. West Country*, *supra* note 38 at para 34.

<sup>67</sup> *CEAA 2012*, *supra* note 27, s 5. Notably it leaves out climate change. Other factors are narrowed or eliminated: e.g. alternative means instead of alternatives to the project (s 19): *Gibson 2012*, *supra* note 49 at 184.

<sup>68</sup> *Ibid* at 182.

<sup>69</sup> *Ibid* at 184. In the case of panel reviews, which have a largely unchanged format, the assessment is “unrecognizable to anyone familiar with panel reviews under *CEAA 1995*”: *Doelle 2012*, *supra* note 45 at 10.

<sup>70</sup> *Gibson 2012*, *supra* note 49 at 185.

<sup>71</sup> *CEAA*, *supra* note 27 at ss 55-55.6. Additional public participation for a screening was at the discretion of the Minister (s 18(3)). See *Inverhuron & District Ratepayers’ Assn. v. Canada (Minister of The Environment)*, 2000 CanLII 15291 (FC); *Lavoie v. Canada (Minister of The Environment)*, 2000 CanLII 15896 (FC).

application of provincial legislation can also be quite narrow.<sup>72</sup> For projects subject to *CEAA 2012* requirements, public participation is constrained by tight legislated timelines. For example, the public only has 20 days to comment on whether a designated project should be assessed under the Act.<sup>73</sup> While projects that undergo an assessment are subject to public notice-and-comment requirements,<sup>74</sup> *CEAA 2012* narrowly redefines a class of participant, the “interested party.”<sup>75</sup> Only if an individual is an interested party, that is “directly affected...[or] has relevant information or expertise,”<sup>76</sup> is she/he entitled to full participation in a panel review.

The benefits of public participation in environmental assessment have been widely noted.<sup>77</sup> Historically, public participants have proven to be the “most motivated and often most effective in ensuring careful and critical review of project proposals and associated environmental assessment work.”<sup>78</sup> Local knowledge and citizen concerns are an important counterbalance to the fact that the proponent is otherwise the sole source of information about the effects of the proposed project.

The massive reduction in public participation under *CEAA 2012* will lead to poorer environmental decisions, but it also sends a strong signal about whose interests really matter in Harper’s vision of the environment. The changes disproportionately undermine Indigenous participation, groups who are often the most closely affected by development projects, and who often already face substantial barriers to participation due to remote locations and/or lack of resources and capacity to effectively intervene.<sup>79</sup> Moreover, *CEAA 2012* excludes or marginalizes individuals and groups with issue-specific concerns, such as climate change.<sup>80</sup> The result is that environmental decisions are based on skewed understandings of the possible environmental effects of a project, and have led to “a collapse in the role of formal decision-making processes as mechanisms for producing decisions which are seen as legitimate and therefore likely to win

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<sup>72</sup> E.g., *Environmental Assessment Act* SBC 2002, c 43 (where the thresholds for designated projects is quite high and subject to change for political expediency: Colin Payne, “BC Gov Backtracks on Environmental Assessment Exemption Decision” *The Castlegar Source* (15 April 2014) online: <<http://castlegarsource.com/news/updated-bc-gov-backtracks-environmental-assessment-exemption-decision-30930>>).

<sup>73</sup> *CEAA 2012*, *supra* note 27, s 10

<sup>74</sup> *Ibid*, ss 17, 24

<sup>75</sup> *Ibid*, 2(1).

<sup>76</sup> *Ibid*, s 2(2). See also Geoffrey H Salomons and George Hoberg, “Setting boundaries of participation in environmental impact assessment” (2014) 45 *Environmental Impact Assessment Review* 69 at 70 (on how the “directly affected” requirement tends to privilege private property interests and geographic proximity which does not always reflect the nature of the environmental issues under assessment) [Salomons and Hoberg].

<sup>77</sup> Doelle 2008, *supra* note 32 at 32; Alan Bond et al, “Impact Assessment: Eroding Benefits Through Streamlining?” (2014) 45 *Environmental Impact Assessment* 46 at 48; *Ibid*, at 70; Sinclair, *supra* note 27.

<sup>78</sup> Gibson 2012, *supra* note 49 at 183-4; Sinclair, *supra* note 27 at 416

<sup>79</sup> Kirchhoff 2013, *supra* note 50 at 10.

<sup>80</sup> Kirsten Mikadze, “Pipelines and the Changing Face of Public Participation” (2016) 29 *JELP* 83 at 87, 104-105; Dayna Nadine Scott, “Situating Sarnia: ‘Unimgained Communities’ in the New National Energy Debate” (2013) 25 *JELP* 81.

acceptance among the affected parties.”<sup>81</sup> The formal decision-making processes, contrary to their original purpose, become yet another source of controversy and dispute.

In sum, the extent of the changes made to federal environmental assessment have leading commentators now arguing that what remains no longer counts as environmental assessment.<sup>82</sup> According to Doelle, the new regime simply gathers “information already required for existing federal regulatory decisions”<sup>83</sup> Similarly, Gibson notes that the new Act “positions assessment as a post-planning regulatory hoop inevitably under pressure for speedy decisions that do not require substantial changes to the established plans.”<sup>84</sup> The Act, in his view, “gets its streamlining chiefly by undermining effectiveness.”<sup>85</sup> The result, in other words, is a legacy of public decision-making that does not, in any robust way, attempt to anticipate the environmental consequences of the exercise of public authority.

### **III. The Legacy Part II: Eroding the Commitment to a Democratic Conception of the Rule of Law**

Harper’s legacy in environmental assessment is more fundamental than poorly-informed environmental decisions; it is also a legacy of undermining Canada’s commitment to governing under a democratic conception of the rule of law. This part extends on existing critiques of *CEAA 2012* in three ways. First, it argues that informed decisions and public participation are internal to a democratic conception of the rule of law, at least when we understand the rule of law in a more demanding sense than minimal compliance with a statutory norm. Second, it argues that, because of the special quasi-constitutional role of environmental assessment law in enabling public justification, the changes to federal environmental assessment ought to be understood as an attempt to exempt environmental decision-making from the requirements of the rule of law. Third, reframing existing critiques of *CEAA 2012* in rule-of-law terms provides a basis for understanding the ongoing obligations of our public institutions with respect to the deficient legislation.

The rule of law, as is often noted, is an “essentially contested concept.”<sup>86</sup> The conception of the rule of law advanced here is the idea that public officials must publicly justify their decisions on the basis of core constitutional principles. It is a conception elaborated by Dyzenhaus, who states that its basic content is that

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<sup>81</sup> Winfield, *supra* note 35 at 145-146.

<sup>82</sup> Doelle 2012, *supra* note 45 at 15; Gibson 2012, *supra* note 49 at 179.

<sup>83</sup> Doelle 2012, *supra* note 45 at 15.

<sup>84</sup> Gibson 2012, *supra* note 49 at 183.

<sup>85</sup> *Ibid* at 185.

<sup>86</sup> WB Gallie, ‘Essentially Contested Concepts’ (1955) 56 *Proceedings of the Aristotelian Society* 167, 169.

legislation must be capable of being interpreted in such a way that it can be enforced in accordance with the requirements of due process: the officials who implement it can comply with a duty to act fairly, reasonably and in a fashion that respects the equality of all those who are subject to the law and independent judges are entitled to review the decisions of these officials to check that they do so comply.<sup>87</sup>

This understanding of the rule of law is a version of common law constitutionalism, which posits that the common law is a source of deep-seated principles that are refined over time through the practice of giving reasons. Two of these common law principles are fairness and reasonableness, which are expressed through basic administrative law requirements enforced by judicial review. Together they give rise to an obligation on public officials to publicly justify their decisions on the basis of these principles. That is, public officials must demonstrate that their decisions are both fair and reasonable.

The requirement of public justification has been repeatedly, though imperfectly, identified by the Supreme Court of Canada. The fullest expression of a requirement of public justification was by the Court in *Baker*, which imposed an obligation on administrative officials, in some instances, to offer reasons for their decisions that demonstrate that they exercised discretion in accordance with core principles of Canadian law.<sup>88</sup> The Court's watershed decision in *Dunsmuir* later highlighted the role of reasonableness review in ensuring "justification, transparency and intelligibility within the decision-making process."<sup>89</sup>

These core common law principles are constitutional in the sense that they are constitutive of law. In Dyzenhaus's words, "you cannot have rule by law without rule of law."<sup>90</sup> Put differently, it is compliance with the rule of law (i.e. public justification on the basis of common law principles) that gives a public decision the quality of law. Legislation that conforms to Fuller's well-known indicia of the rule of law (publicity, generality, prospectivity, etc) is the first step in complying with the requirement of public justification because it puts the implementation of the legislation under the supervision of the courts. When a would-be lawmaker fails to comply with the rule of law, as in the case of Fuller's allegorical King Rex,<sup>91</sup> she fails to make law. And when a legislature attempts to exempt government action from judicial supervision, by for example clearly and explicitly suspending the application of basic due process requirements, such a law may be valid but it lacks the quality of law that gives it its legal

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<sup>87</sup> David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, (Cambridge University Press, 2006), 12-3.

<sup>88</sup> *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at para 56.

<sup>89</sup> *Dunsmuir v New Brunswick* 2008 SCC 9 at para 47.

<sup>90</sup> David Dyzenhaus, "Accountability and the Concept of (Global) Administrative Law (2009) *Acta Juridica* 3 at 6.

<sup>91</sup> Lon L Fuller, *The Morality of the Law*, Rev ed (New Haven: Yale University Press, 1969) at 33-41.

authority.<sup>92</sup> On this view, the rule of law requires, not only that legislation possesses formal rule-of-law features, it also requires that whenever and however that legislation comes into contact with the lives of individuals, its implementation is publicly justified.

The rule of law, on this view, is constitutive of a particular relationship between legal subject, the individual subject to the law, and lawmaker. Compliance with the rule of law means law is in a form that legal subjects can understand, deliberate upon and contest on the basis that it does not reflect core constitutional principles. It allows, in other words, individuals to “reason with the law.”<sup>93</sup> Importantly, however, this conception of the rule of law can only be realized within a deliberative democracy,<sup>94</sup> in which individuals expect every exercise of power to be justified and “in which leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command.”<sup>95</sup> It is therefore a democratic conception of the rule of law because individual participation is simultaneously essential to its realization and enabled by its fulfillment.

The public-justification conception of the rule of law imposes on environmental decision-makers obligations to demonstrate that their decisions are reasonable and fair.<sup>96</sup> In other words, reasonable, informed environmental decisions that are procedurally fair to those affected are requirements of the rule of law. When environmental decisions comply with these requirements they have the authority of law.<sup>97</sup> From this perspective, environmental assessment performs a quasi-constitutional role in the sense that environmental assessment, when it enables public participation and generates reasoned decisions, is constitutive of legal authority in environmental law. Recall that this is, at present, a unique role, because the vast majority of federal environmental decision-making is not meaningfully subject to the rule-of-law requirements of fairness and reasonableness.

We are now in position to see how the extensive changes to federal environmental assessment law not only undermine environmental protection; they can also be interpreted as an attempt to exempt environmental decision-making from the fundamental rule-of-law requirement of public justification. The clearest evidence of this exemption from public

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<sup>92</sup> Dyzenhaus analogizes this to the effect of s 33 of the Charter, where the unconstitutional law does not cease to be unconstitutional even though it is legally valid: David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) at 211.

<sup>93</sup> *Supra* note 24.

<sup>94</sup> Dyzenhaus *Legitimacy*, *supra* note 23 at 162.

<sup>95</sup> Etienne Mureinik, “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 *South African Journal on Human Rights* 31 at 32.

<sup>96</sup> I have written elsewhere on how environmental principles, such as the precautionary principle, inform these requirements: Jocelyn Stacey, *The Constitution of the Environmental Emergency* (2016) [unpublished, archived at McGill University Faculty of Law Library].

<sup>97</sup> This understanding of the rule of law provides an explanation for Winfield’s observation that the changes to environmental assessment have undermined its legitimacy as a formal decision-making process: *supra* note 81.

justification is that the vast majority of federal environmental decisions now proceed without having first undergone a federal environmental assessment. The result is that these decisions are made with minimal legal constraints on environmental decision-makers. Permits and approvals for pollution and environmental degradation are made without any public notice, public input, reasons for the decision and, consequently, no opportunity for independent review.<sup>98</sup>

Even where an assessment does occur, it is not clear that the legislative requirements can produce publicly-justified decisions. For example, the Act's explicit requirement that the effects of a project be "justified in the circumstances" cannot, in its current form, amount to adequate public justification. Public justification requires decisions to be reasonable, i.e. supported by reasons that reflect the purposes of the legislation and relevant considerations. The narrow definition of environmental effects renders the Act's purpose, "to encourage federal authorities to take actions that promote sustainable development in order to achieve a healthy environment and a healthy economy"<sup>99</sup> meaningless. A "healthy environment" is one that includes far more than the highly circumscribed environmental effects defined in the Act. Moreover, any justification decision is inevitably based on a disproportionate balancing of economic benefits and environmental harm, where the government (presumably) takes into account all possible economic benefits<sup>100</sup> but only the environmental effects that engage federal authority. Absent some compelling argument for the differential inclusion of economic and environmental effects, an environmental assessment decision premised on such a skewed basis is not reasonable.

Framing *CEAA 2012* in rule-of-law terms also reveals that Harper's process of enacting new legislation through unprecedentedly large omnibus bills was entirely consistent with the substance of the new legislation. On one level, the rationale both for the use of omnibus legislation and the overhaul in environmental assessment was economic stimulus. On another level, they can both be understood as attempts to undermine the commitment to a democratic conception of the rule of law. The requirement of public justification sits at the interface between the rule of law and deliberative democracy. This means that legislators are not only political actors within a deliberative democracy that generate reasons that they hope their constituents will accept. They are also legal actors who perform a legal role by putting in motion a process of lawmaking whereby legal subjects are able to receive the public justification to which they are entitled. In other words, the legal obligation of legislators is to debate in a way

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<sup>98</sup> This is true even when legislation imposes specific substantive requirements on the executive. E.g., s 6 of the *Fisheries Act* lists factors that the Minister must consider, but there is no way to know whether this requirement is met because the approvals are not publicly accessible.

<sup>99</sup> *CEAA 2012*, *supra* note 27, s 4(1)(h).

<sup>100</sup> How could one discern only the benefits that arise from the aspects of the project that engage federal jurisdiction?



that ensures that when government implements that legislation, it is capable of being implemented in a manner that complies with the requirement of public justification.<sup>101</sup>

What are the implications of reframing of Harper's changes to *CEAA 2012* in rule-of-law terms? After all, *CEAA 2012* is a legally valid statute even if, as this account argues, it has a questionable claim to legal authority. Yet, the public-justification conception of the rule of law imposes positive obligations on those public officials responsible for the administration and enforcement of the Act. Dyzenhaus writes, of judges:

they must take the legal regime that Parliament has provided and read into it whatever legal protections they can ... because they are working as judges within a legal order, and not as some other kind of official in some other kind of order; for example, the order Fuller described as managerial, in which the point of its structures is to make more efficient the transmission of commands from the top of the hierarchy to the bottom.<sup>102</sup>

Such a requirement extends not only to judges but all the legal actors working within the legal system. This means, for example, that those individuals appointed to conduct panel reviews (the most rigorous form of environmental assessment) have a legal obligation to justify decisions that exclude individuals on the basis that they are not "interested parties" under the legislation. That specific justification would have to reflect the Act's purpose of "provid[ing] for meaningful public participation,"<sup>103</sup> the information-gathering function of environmental assessment, and the potentially far-reaching environmental effects of a major development project.

Moreover, public justification requires the courts to play a reason-demanding role when conducting judicial review. On this view, it is unacceptable for a court to find that a justification decision under section 52 of *CEAA 2012* is reasonable in the absence of any reasons justifying that decision.<sup>104</sup> In instances where reasons have been offered and they demonstrate the legislated bias against a comprehensive consideration of environmental effects, then the court ought to make a clear statement that the decision formally complies with the legislation, but the legislation undermines the ability of the executive to make publicly justified decisions in accordance with the rule of law. The effect would be that the decision is legally valid, but much like in the case of an Act covered by the notwithstanding clause, or a declaration of incompatibility made under the United Kingdom Human Rights Act, the court has alerted the public to the legislation's questionable claim to legal authority.

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<sup>101</sup> David Dyzenhaus, "Deference, Security and Human Rights" in Ben Goold and Liora Lazarus eds, *Security and Human Rights* (Oxford: Oxford University Press, 2007) 125 at 143.

<sup>102</sup> David Dyzenhaus "Preventive Justice and the Rule-of-Law Project" In Andrew Ashworth, Lucia Zedner & Patrick Tomlin, eds, *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013) at 113-4.

<sup>103</sup> *CEAA 2012*, *supra* note 27, s 4(1)(e).

<sup>104</sup> *PVLA*, *supra* note 40.

In sum, this part has argued that environmental assessment is quasi-constitutional in the sense that it is an indispensable site of public justification in federal environmental decision-making. It argued that part of Harper's legacy, by enacting *CEAA 2012*, fundamentally undermined the possibility of publicly justified environmental decisions. *CEAA 2012* can therefore be understood as an attempt, by the Conservative-dominated Parliament, to exempt environmental decision-making from democratic governance under the rule of law. Finally, understanding the changes to *CEAA 2012* in this way shows how it is possible, and indeed a rule-of-law imperative, for the institutions tasked with implementing and enforcing *CEAA 2012* to interpret the legislation in a way that preserves our commitment to a substantive and democratic conception of the rule of law.

## Conclusion

This article argued that Harper's legacy in environmental law has been to undermine environmental protection and publicly-justified environmental decision-making. In conclusion, it is worth looking ahead to see what of this legacy might survive the next government, which campaigned on a radically different approach. I offer one prediction and one caution. The prediction is that we should expect to see a much stronger role for Indigenous environmental assessments in Canadian environmental law. A significant byproduct of Harper's environmental legacy was the galvanization of environmental resistance by Indigenous Canadians through the Idle No More movement.<sup>105</sup> Moreover, in a direct response to the changes to federal environmental assessment law, many Indigenous groups have begun to codify and enforce their own Indigenous environmental assessment laws, which unsurprisingly contain fundamentally different approaches to environmental assessment.<sup>106</sup> The Tsleil-Waututh Nation, for example, conceives of environmental assessment as a means to discharge responsibility to land and future generations and to determine the best use of land.<sup>107</sup> They call for comprehensive socio-ecological assessment that eschews any strong division between people and the environment.<sup>108</sup> This is a welcome development for Canadian environmental law, but one that undoubtedly poses further, deeper challenges for intergovernmental cooperation in environmental assessment, cooperation that has never been fully realized at even the level of provincial-federal relations.

The caution is that the changes to environmental assessment may not be as easy to undo as they may seem. Despite the overtness of Harper's environmental agenda, particularly

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<sup>105</sup> See "The Story", *Idle No More*, online: <<http://www.idlenomore.ca/story>> ; "9 Questions on Idle No More" *CBC News* (5 January 2013), online: <<http://www.cbc.ca/news/canada/9-questions-about-idle-no-more-1.1301843>> .

<sup>106</sup> See, e.g., Tsleil-Waututh, *supra* note 31; Jessica Clogg et al, "Indigenous Legal Traditions and the Future of Environmental Governance in Canada" (2016) 29 *JELP* 227.

<sup>107</sup> Tsleil-Waututh, *supra* note 31 at 12.

<sup>108</sup> *Ibid* at 11-12.

with respect to major projects such as pipelines, many of the legal changes to environmental assessment are subtler. In addition, these changes are consistent with the well-worn characterization of environmental assessment as a purely formal and mechanical exercise. A “streamlined” federal environmental assessment regime is entirely consistent with this characterization. While the new government has promised environmental assessment reform,<sup>109</sup> the stop-gap measures proposed by the Trudeau government for two major interprovincial pipeline proposals may, in this vein, prove prophetic. These measures create an additional step, after the *CEAA 2012*-assessment, in which the government will conduct its own assessment of the upstream greenhouse gas emissions associated with the pipelines and conduct additional aboriginal consultation.<sup>110</sup> In no way does this address the real problem of *CEAA 2012*, which is its inability to generate fair and reasoned decisions. This article suggests that the way for the Trudeau environmental legacy to supersede Harper’s is to begin by conceiving of environmental assessment as the linchpin to its commitment to environmental governance under the rule of law.

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<sup>109</sup> Justin Trudeau, “Minister of Environment and Climate Change Mandate Letter”, Office of the Prime Minister, online: < <http://pm.gc.ca/eng/minister-environment-and-climate-change-mandate-letter> >.

<sup>110</sup> Canada, Natural Resources Canada, “Interim Measures for Pipeline Reviews”, online: <<http://news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=1029989&crtr.tp1D=930>>.