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Decision-Making, Governance and Sustainability beyond the Age of 'Responsible Resource Development'

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Abstract

This paper examines the role of environmental assessment and public participation in environmental decision-making, particularly in the context of governmental efforts to aggressively 'streamline' these processes over the past two decades. The paper argues that the proponents of streamlining have overlooked a key political rationale for the establishment of environmental assessment processes from the early 1970s onwards. Specifically, in addition to improving the quality of decision-making, environmental assessment and public participation processes were established to provide structures through which disputes over the distribution of the costs, benefits and risks of proposed infrastructure and resource development projects could be resolved in a manner which all participants regarded as legitimate. In contrast, the potential for 'streamlined' decision-making processes to intensify rather than resolve social and political conflicts is highlighted through a number of Canadian examples. These include the proposed Alberta to British Columbia Northern Gateway Pipeline project, the renewable energy project approval process in Ontario, and the cancellation of proposed natural gas-fired power plants in the same province. The paper argues that the political risks associated with the types of outcomes seen in these cases may provide an important window of opportunity to reform decision-making processes in the direction of advancing sustainability and enhancing the legitimacy and acceptance of the resulting choices.

Introduction

One of the defining features of the modern era of environmental policy-making and management has been the introduction of two closely linked procedural policy tools, environmental impact assessment and mechanisms for public participation in decision-making. These instruments, which began to win widespread acceptance in the 1970s,

were regarded as having to potential to shift governmental decision-making processes around infrastructure and resource development projects in direction of environmental sustainability and greater democratic accountability and legitimacy.

In practice, environmental assessment processes and enhanced opportunities for public participation in decision making have made substantial contributions to improving the quality of environmental decision-making. However, their hoped for potential to alter the trajectory of economic activities in the direction of sustainability has never been fully realized. More ominously, over the past two decades these processes have become the targets of extensive 'streamlining' efforts by governments in name of "cutting green tape" and facilitating economic development, the latter understood in very conventional terms. These processes have been epitomized by the re-writing of the *Canadian Environmental Assessment Act* through the "responsible resource development" provisions of federal government's 2012 budget implementation legislation, the notorious Bill C-38.[1] Similar, although less brazen, developments have taken place at the provincial level as well. Canada has not been alone in these directions. Environmental impact assessment processes have been subject to similar 'streamlinings' in the United Kingdom, Australia, South Africa.[2]

Canadian experience with these sorts of 'streamlining' efforts is now relatively advanced. There is emerging evidence that they have not produced the outcomes that their proponents hoped for. Experiences ranging from the fate of the proposed Alberta to British Columbia (BC) Northern Gateway pipeline, whose approval was one of the major goals of the Bill C-38 amendments to federal environmental and natural resources legislation, to the establishment of an expedited approval processes for conventional and renewable energy projects in Ontario, seem to be illustrating that rather than facilitating speedy approvals and moving project construction forward, 'streamlining' efforts have had the opposite effect. The social, political and legal conflicts

[1] *Jobs, Growth and Long-term Prosperity Act, 2012*, S.C. 2012, c. 19.

[2] A. Bond, J. Pope. A. Morrison-Saunders, F. Retief, and J.A.E. Gunn, "Impact Assessment: Eroding benefits through streamlining," *Impact Assessment Review*, 45 (2014): 46-53.

around these projects have been compounded and intensified, rather than resolved, resulting in greater uncertainty and delay than ever.

The central hypothesis of this paper is that the architects of streamlining have lost sight of one of the major reasons why environmental assessment processes were developed in the first place. Although the desire to better inform environmental decision-making was an important consideration, at least in a Canadian context, the central political rationale for establishing environmental assessment processes and their affiliated public participation processes, lay elsewhere. Rather, formalized assessment and decision-making process were intended to provide structures through which social and political conflicts over the distribution of costs and benefits associated with resource and infrastructure projects could be addressed in a manner that all participants would regard as procedurally just, fair and therefore legitimate in their outcomes. The effort to 'streamline' has effectively stripped these processes of this legitimating capacity, a factor reinforced by a perceived shift in the role of governments from arbitrators in societal disputes to proponents of particular projects and technologies. In the result, decisions are not accepted by major constituencies with interests in their outcome. Rather they choose to continue, and in some cases intensify, their opposition through other legal and political means.

The past few years can only be described as a time of despair for proponents of environmental/sustainability assessment and public participation in decision-making in Canada.[3] At the same time, recent events involving the management of major projects under 'streamlined' approval processes have highlighted the potential for these approaches to carry significant political risks for the governments involved. The recognition of these types of political risks, whose avoidance was part of the original rationale for the establishment of environmental assessment and public participation processes, may provide the foundation for political arguments for revisiting the design of

[3]See, for example, R.B. Gibson, "In full retreat: the Canadian government's new environmental assessment law undoes decades of progress," *Impact Assessment and Project Appraisal*, 30:3, 179-188, 2012; M. Doelle, "CEAA 2012: The End of the Road for Federal EA in Canada?" *Journal of Environmental Law and Practice,* 25 JELP, 2012; and M.Winfield, "The Environment, 'Responsible Resource Development' and Evidence Based Policy-Making in Canada", for Shaun Young ed., *Evidence Based Policy-Making in Canada.* (Toronto: Oxford University Press, 2013), pp.196-221.

decision-making and approval processes around resource and infrastructure projects in the future.

The Evolution of Environmental Decision-Making in Canada

Approaches to environmental decision-making have evolved through a number of distinct phases through the post-World War II period, reflecting changes in the dominant governing and policy paradigms in the field.[4]

Bipartite Bargaining/Pollution Control

The period from beginnings of the development of regulatory and institutional infrastructures for resource and environmental management in Canada in the late 19th century up to late 1960s was defined by a governing paradigm of "bipartite bargaining".[5] Participation in decision-making was effectively limited to the relevant government agencies and affected private sector economic interests, or between the different levels of government involved. There were no formal opportunities for public input into decisions, and even informal opportunities to comment on proposed projects were rare.

In policy terms, the central role of the state was understood to be one of facilitating economic development, seen in conventional terms, including the provision of transportation and other infrastructure necessary to facilitate resource extraction, processing and export and other industrial activities. To the extent that environmental considerations entered the decision-making process at all, under the dominant "pollution control" policy paradigm the focus was on mitigating the environmental and health consequences of resource extraction, industrialization and urbanization, while minimizing interference with these processes. In institutional terms responsibility for environmental matters was fragmented, with different aspects of the environment (air,

[4] Governing paradigms describe the range of state and non-state actors who dominate the processes of policy formulation, decision-making and implementation. Policy paradigms, in contrast, refer to the prevailing ideas and norms held by different actors in the process in terms of defining problems and the scope of appropriate responses. See Skogstad, G. *Internationalization and Canadian Agricultural Policy: Policy and Governing Paradigms.* (Toronto, ON: University of Toronto Press, 2008) Ch.1, pp.3-42.
[5] G.Hoberg,"Environmental Policy: Alternative Styles" in M.Atkinson, ed., *Governing Canada: Institutions and Public Policy* (Toronto: Harcourt Brace Javanovich 1993) pp. 307-342.

water, land-use, waste management, energy, natural resources) being dealt with under different pieces of legislation and frequently by different agencies.[6]

The emergence of environmental assessment and public participation in environmental decision-making.

By the late 1960s these dominant policy and governing paradigms around the environment became subject to increasing challenges. The pollution control policy paradigm seemed less and less able to provide effective responses to the cross-media and cumulative environmental and health effects of industrial activities that where being highlighted by the emerging body environmental science. It was also becoming clear that the institutionally and legislatively fragmented approach to the management of environmental issues was unable to provide comprehensive perspectives on the potential environmental impacts of proposed projects.[7]

At the same time, the results of 'bipartite bargaining' decision-making processes were increasingly seen to lack political legitimacy, particularly due to their failures to consider local knowledge or interests in the affected communities. Indeed, challenges to these dominant policy and governing paradigms were central themes in the emergence of the environment as an integrative political, legal and institutional concept, public policy issue, focus for a broad-based social movement and of what we now term environmental non-governmental organizations (NGOs).[8]

Governmental responses this situation took a number of different forms. Institutionally functions related to management of different aspects of the environment integrated into single departments and ministries of the environment. In terms of the policy process, the response focussed strongly on two procedural policy instruments: environmental impact assessment; and structures for public participation in decision-making. Procedural

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[6] M.Winfield, *Blue-Green Province: The Environment and the Political Economy of Ontario* (Vancouver: UBC Press, 2012), Ch.2, pp. 17-39.

[7] P.Muldoon, , A.Lucas., R.B. Gibson, P.Pickfield and J. Williams, *An Introduction to Canadian Environmental Law and Policy 2nd Edition* (Toronto: Emond-Montgomery Publishers, 2015), pp.14-28.

[8] Winfield, *Blue-Green Province*. pp.17-39. See also R. O'Connor, *The First Green Wave: Pollution Probe and the Origins of Environmental Activism in Ontario*. (Vancouver: UBC Press 2015).

instruments are mechanisms designed to change the nature of decision-making processes themselves, typically to specifically embed considerations into decision-making that were not present before. In contrast substantive policy instruments, like law and regulation, or economic instruments, such as carbon taxes, are designed to directly influence the behaviour of individuals, communities and corporations around specific issues or activities.[9] The intent was to inject environmental considerations into decision-making around infrastructure and resource development projects by requiring environmental impact assessments before they could proceed. In addition, specific opportunities for public input and comment were provided, initially largely through the environmental impact assessment processes themselves, although later on a more generalized basis, and even through stand-alone legislation

The environment impact assessment model was inspired in large part by US *National Environmental Policy Act* (NEPA) of 1969. NEPA required the preparation of environmental assessments and environmental impact assessments of proposed actions by agencies of the US federal government. In Canada a federal environmental assessment process was created through the Federal Environmental Assessment Review Process Guidelines of 1973. Ontario was the first province to adopt stand-alone environmental assessment legislation, though the 1975 *Environmental Assessment Act.*[10]

The assessment processes were generally intended to provide a more integrated picture of potential project impacts of projects than could be provided by the existing, institutionally and legislatively fragmented, environmental regulatory regime. It was hoped that the process would provide early warnings of potential problems and, by establishing a standardized assessment process, enhance the consistency of decision-making around major projects with significant environmental and social implications. More broadly, there were expectations that the processes would provide opportunities for the integration of environmental considerations into what had hitherto been

[9] On substantive and procedural policy instruments see M. Howlett, "Policy Instruments and Implementation Styles: The Evolution of Instrument Choice in Canadian Environmental Policy," in D.L.VanNijnatten and R.Boardman, eds., *Canadian Environmental Policy: Context and Cases*. (Vancouver: UBC Press, 2005), pp.25-45.
[10] RSO 1990, c. E.-18.

considered economic decision-making. Structures for public involvement in the process would provide opportunities to access local knowledge about potential problems associated with proposed project locations. More broadly they would enhance the legitimacy and likely acceptance of the resulting decisions by ensuring that the concerns of the affected communities were heard and considered.[11]

While these benefits, traditionally associated with impact assessment processes, were important drivers of the development of environmental assessment regimes in Canada other, more political, rationales were also at work. In particular, environmental assessment processes were seen to offer the potential to provide structures through which growing political and social conflicts around major infrastructure and resource development projects might be more effectively managed and resolved. At the time of the development of the *Environmental Assessment Act* in Ontario, for example, the government of then Progressive Conservative premier William Davis was faced with growing conflicts with rural communities in southwestern Ontario over plans by the provincially owned utility, Ontario Hydro, to develop a network of high capacity transmission lines through the region. Consistent with conventional practice at the time, Ontario Hydro had developed its plans without any public consultation or discussions, prompting angry responses and protests from the affected landowners and communities.[12]

At the federal level, the 1974-77 Mackenzie Valley Pipeline Inquiry, led by Thomas Berger, generally regarded the first meaningful federal environmental assessment in Canada, similarly emerged as a process for the resolution of conflicts over distribution of risks and benefits associated with energy development in the Mackenzie Valley. The

[11] Bond, Pope, Morrison-Saunders, Retief, and Gunn, "Impact Assessment: Eroding benefits through streamlining."
[12] See N.Freeman, *The Politics of Power: Ontario Hydro and its Government 1906 – 1995. (*Toronto, ON: University of Toronto Press, 1996), pp.139-150. See also Ontario Power Authority, "Overview of the Development of Power System Planning in Ontario" *Supply Mix Advice: Volume 3*. (Toronto: Ontario Power Authority, 2005) s.3.1, pp.1-12.

inquiry was established during a period of minority government during which there were major debates over the future direction of northern development.[13]

In both cases the conflicts over proposed infrastructure became large and intense enough that they carried the potential for significant political consequences for the governments of the day. Environmental assessment processes offered the potential to provide a forum for the management and resolution of disputes over major resource and infrastructure projects in a manner that all sides would regard as having legitimacy and therefore likely lead to acceptance, as opposed to deepening the political and legal disputes they had prompted. This function of environmental assessment processes as providing mechanisms for the management and resolution of disputes over major projects has continued into the present. The judicial recognition of the potential role of environmental assessment processes as mechanisms through which Canadian governments can fulfil their 'duty to consult' with aboriginal people highlights this point.[14]

Structures for public participation in decision-making were significant features of the emerging environmental assessment processes. These mechanisms typically included public notices and invitations to comment on proposed projects, as well as opportunities to make depositions and in some cases, more formal presentations of evidence before environmental assessment panels and hearings. Expansions and formalizations of public participation opportunities though municipal land-use planning processes took place during the same period. Public notice and comment requirements began to be embedded in federal policies regarding the development of new regulations from the late 1970s onwards. The concept of third party "public interest" standing in judicial proceedings, where matters before the courts had legal or policy implications beyond the immediate interests of the parties involved, was affirmed and expanded during the same period.[15]

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[13] For a discussion of circumstances around the establishment of the Berger Inquiry see generally, R.Page, *Northern Development: The Canadian Dilemma* (Toronto: McClelland and Stewart 1986).
[14] See, for example, K.N. Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada*. (Regina: University of Regina Press, 2013)
[15] See *Thorson vs. Canada (Attorney-General)*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors vs. McNeil* [1976] 2 S.C.R. 265; *Minister of Justice vs. Borowski* [1981] 2 S.C.R. 575; and *Findlay vs. Canada (Minister of Finance*) [1986] 2 S.C.R. 607 [1].

The concept of public participation mechanisms as procedural policy instruments establishing formalized rules of general application reached their height through the Ontario's 1993 *Environmental Bill of Rights* (EBR).[16] The legislation established public notice and comment requirements on approvals, policies, regulations and legislation proposed under specified legislation, facilitated through an publicly accessible electronic registry. The legislation also established processes through which members of the public could file requests for reviews of specific policies, regulations and legislation, or investigations of alleged violations of environmental laws. The provisions required that the provincial government provide responses to these requests and a rationale where the request was rejected. Third party rights of appeal of environmental approvals (subject to a very stringent leave test) were established, where such rights existed for proponents. The legislation also incorporated a very limited citizen suit provision, removed restrictions on public nuisance lawsuits, and provided protection for whistleblowers reporting violations of environmental laws. An office of the Environmental Commissioner of Ontario was created to oversee and report on the implementation of the legislation.

Similar, but less comprehensive and integrated developments took place at the federal level at the same time. A public petition process, very similar to the Ontario EBR Request for Review process, was established through the 1995 amendments to the *Auditor General Act*[17] creating the office of the Commissioner for Environment and Sustainable Development (CESD). In addition, the *Canadian Environmental Protection Act,(CEPA) 1999*[18] created an electronic registry to facilitate public notice and comments on guidelines, policies and regulations proposed under the Act.[19] CEPA 1999 also contained provisions permitting members of the public to request investigations of alleged violations of the act and to initiate "environmental protection actions," similar to the citizen suit provisions in the Ontario legislation.

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[16] S.O. 1993, c.28.
[17] *An Act to Amend the Auditor General* Act, S.C. 1995, c. 43.
[18] S.C. 1999, c.33.
[19] The federal registry was narrower in scope than its Ontario counterpart. Unlike the Ontario EBR provisions the CEPA registry does not provide notice and comment opportunities on specific approvals, such as those issued under CEPA for ocean dumping or imports and exports of hazardous wastes.

Internationally, the 1994 North American Agreement on Environmental Cooperation incorporated provisions permitting any person or non-governmental organization to file a submission with the North American Commission for Environmental Cooperation asserting that a Party to the North American Free Trade Agreement (NAFTA) is failing to effectively enforce its environmental laws. The process can result in the development and publication of a factual record on the matter by the Commission.

More broadly, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted in 1998. The convention was developed under the auspices of the United Nations Economic Commission for Europe (UNECE), and designed to formalize and provide minimum standards for structures for public participation in environmental decision-making throughout the UNECE area, including eastern European countries joining the European Union. The convention, which came into force in 2001, provides that: all citizens have broad and easy access to environmental information; the public be informed of relevant projects and have opportunities to participate in the decision-making; and the public has rights to judicial or administrative recourse where a Party violates or fails to adhere to environmental law and the convention's principles. There are currently 46 parties to the convention, all in Europe and Central Asia, where it has had a significant impact on the development of environmental law.[20] Canada is a member of the UNECE, but has never signed or ratified the convention.

The Decline of Environmental Assessment, and Public Participation

In Canada, the adoption of the Ontario EBR, creation of CESD petition process and the inclusion of public participation provisions of CEPA 1999 in the mid-to late 1990s have come to represent the zenith of the use of procedural instruments to formalize mechanisms for public participation in environmental decision-making.

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[20] On the impact of the convention see, for example, M.Pallemaerts, ed., *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*. (Groningen NE: Europa Law Publishing, 2011).

The impact of environmental assessment processes reached their height during same period. In Ontario, the mid-1990s were marked by the conclusion of three *de facto* strategic environmental assessments. The assessment of Timber Management on Crown Land led to major revisions to the province's forest management regime, while the Ontario Waste Management Corporation's proposal for a centralized, comprehensive hazardous waste disposal facility was rejected and the province's policy approach re-oriented in the direction of pollution prevention. Ontario Hydro's proposed twenty-year electricity Demand/Supply Plan (DSP) was withdrawn as its core assumptions about future electricity demand collapsed during the environmental assessment hearing on the plan.[21]

At the federal level, the 1989 *Rafferty-Alameda*[22] and 1992 *Oldman dam*[23] decisions affirmed the binding status of the 1984 Federal Environmental Assessment Guidelines Order and the federal government's right to conduct assessments of provincially initiated projects. The decisions ultimately prompted adoption of federal environmental assessment legislation, the 1992 *Canadian Environmental Assessment Act* (CEAA).[24] There were also hopes for the forward evolution of environmental assessment in the direction of strategic policy and plan, rather than project, level assessments. These concepts were reflected in the 1990 federal Cabinet Directive on the Assessment of Plans, Programs and Policies. Emergent concepts of sustainability assessment pointed in the direction of achieving more effective integration of environmental, social and economic considerations, and advancing sustainability rather than simply mitigating the adverse effects of infrastructure and resource development projects.[25]

Although some of these concepts, particularly sustainability assessment, would find uptake with some federal environmental assessment review panels, including those

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[21] Winfield, *Blue Green Province*, pp.79-80.
[22] *Canadian Wildlife Federation Inc. v. Canada (Minister of Environment),* [1989] 3 F.C. 309,[1989]; *Saskatchewan Water Corp. v. Canadian Wildlife Federation Inc.* [1990] 2 W.W.R. 69, 38 Admin. L.R. 138(F.C.A.)

[23] Friends *of the Oldman River Society v. Canada (Minister of Transport*), [1992] 1 S.C.R. 3
[24] S.C. 1992, c-37.
[25] See R.B.Gibson, S. Hassan, S.Holtz, J.Tansey and G. Whitelaw, *Sustainability Assessment: Criteria and Process* (Oxford: Earthscan 2005)

reviewing the Voisey's Bay mine development (1997) and the MacKenzie Gas Project (2009), the overall story regarding environmental assessment and public participation processes in Canada, as in many other jurisdictions[26] has evolved in less hopeful directions. Environmental Assessment processes have found themselves under attack as "green tape" barriers to economic development, and subject to extensive 'streamlining' efforts at the federal and provincial levels as a consequence. These processes have been driven in part by the dominance of neo-liberal ideas around limiting the role of the state in the functioning of markets, and also by the dynamics of trade liberalization and globalization, which have strongly reinforced the roles of resource commodity extraction and export in the Canadian economy.[27]

There have been parallel erosions of formal opportunities for public participation in decision-making both inside and outside of environmental assessment process for the same reasons. In some jurisdictions, including Canada, the situation has devolved into governmental attacks on legitimacy of those attempting to participate in decision-making processes around infrastructure and resource development projects[28], and the characterization of those opposed to such projects as potential threats to national security.[29]

The most explicit case has been at the federal level. CEAA found itself the target of challenges from time came into force in 1995 onwards, particularly from natural resource industries. However, a combination of litigation initiated by environmental NGOs and generally strong support from successive federal environment ministers had largely succeeded in maintaining some degree of integrity in the process. The situation

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[26] Bond, Pope, Morrison-Saunders, Retief, and Gunn, "Impact Assessment: Eroding benefits through streamlining," *Impact Assessment Review*.

[27] See, for example, B.Haley "From staples trap to carbon trap: Canada's peculiar form of carbon lock-in". *Studies in Political Economy* 88 : 97-132 (2011).

[28] Oliver, J., Minister of Natural Resources (2013) "An open letter from the Honourable Joe Oliver, Minister of Natural Resources, on Canada's commitment to diversify our energy markets and the need to further streamline the regulatory process in order to advance Canada's national economic interest." January. http://www.nrcan.gc.ca/media-room/news-release/2012/1/1909

[29] See, for example, Royal Canadian Mounted Policy (RCMP) *Critical Infrastructure Intelligence Assessment: Criminal Threats to the Canadian Petroleum Industry* (Ottawa: RCMP, 2014). Accessed June 24, 2015 at http://www.desmog.ca/sites/beta.desmogblog.com/files/RCMP%20-%20Criminal%20Threats%20to%20Canadian%20Petroleum%20Industry.pdf.

has changed significantly following the arrival of a Conservative federal government led by Stephen Harper in 2006.

The Conservative government's 'reforms' of the approval process for major natural resource extraction projects began in 2007 with the establishment of the Major Projects Management Office, housed within Natural Resources Canada. The office was mandated to coordinate and expedite federal regulatory approvals for "major resource projects."

Significant revisions to the federal environmental assessment process began with the 2009 budget. The 2009 budget implementation legislation (Part 7) amended the *Navigable Waters Protection Act* (NWPA) to permit the federal Minister of Transport to redefine the types of projects and water bodies where approvals would be required under the act and thereby trigger federal environmental assessment requirements under CEAA. Shortly after the legislation received Royal Assent, the minister issued an order exempting all "minor works and waters" from the NWPA approval requirements.

In addition, in the context of the fall 2008 economic downturn, calls for economic stimulus to counteract its effects, and municipal complaints about 'red tape' (i.e. requirements for CEAA screening level assessments before receiving federal funding for infrastructure projects), exemptions from CEAA were provided via regulation for a wide range of 'infrastructure' projects over two years. These exemptions were made permanent through the government's 2010 budget.

While the federal environmental assessment process escaped further "reform" in the 2011 budget, the revision of CEAA was the centrepiece of the government's "Responsible Resource Development" initiative and 2012 budget implementation legislation. Bill C-38, the *Jobs, Growth and Long-Term Prosperity Act*, repealed the existing act and replaced it with new legislation.

The CEAA 2012 regime effectively eliminated the screening level assessment process for smaller projects. At the same time, the application of the federal assessment process to larger projects became discretionary, and even where such assessments were required they would only examine a very narrow range of issues, typically where

federal regulatory approvals would be required. Considerations of the need and rational for projects, their overall environmental impacts, cumulative effects, social and economic consequences (except narrowly in relation to aboriginal peoples) contributions to sustainability and the availability of alternatives were eliminated from the process.[30]

Other provisions of the revised statute were designed to limit public participation in the process. Specifically participation was limited to those determined to have an "interest" in designated projects. Amendments to the *National Energy Board* Act, also made through Bill C-38 limited rights to participate in NEB hearings to those "directly affected" by a given project,[31] limit the scope of hearings to factors "directly related" to a project as opposed to any upstream or downstream effects. These provisions limiting rights of participation in hearings reflected participation standards adopted in Alberta energy and environmental regulation in the 1990s.[32]

At the federal level these efforts to limit participation have taken on even more ominous tones. There have been strong suggestions that the Canada Revenue Agency (CRA) is engaged in an aggressive program of auditing the "political activities" of NGOs with charitable status, with a particular focus on those who have been critical of the government's environmental and natural resources policies, with purpose of suppressing their public activities.[33] Moreover, recent reports from the Royal Canadian Mounted Policy (RCMP) and Canadian Security and Intelligence Service (CSIS) have suggested opponents of energy resource development constitute threats to national

[30] See Gibson, "In full retreat;" Doelle, "The End of the Road for Federal EA in Canada?"; and Winfield, "The Environment, 'Responsible Resource Development' and Evidence Based Policy-Making in Canada."

[31] In April 2013 the NEB announced new requirements flowing from the C-38 amendments that any person wishing to comment on a matter before the board complete a ten page application form establishing their status as "directly affected."

[32] G.H. Salomons and G. Hoberg, G. "Setting boundaries of participation in environmental impact assessment," *Environmental Impact Assessment Review* 45 (2014) 69-75.

[33] See Broadbent Institute, *Stephen Harper's CRA: Selective Audits, "Political" Activities and Right Leaning Charities* (Ottawa: Broadbent Institute 2014) and D.Tsao, Z. Stoffman, G.Lloyd-Smith, K.Mohomoud, and C.Sandborn *Tax Audits of Environmental Groups: The Pressing Need for Law Reform.* (Victoria: University of Victoria Environmental Law Centre, 2015)

security.[34] The agencies have admitted to "monitoring" the activities environmental and aboriginal groups.[35] The federal government's proposed anti-terrorism legislation (Bill C-51 – *The Security of Canada Information Sharing Act, 2015*) has been widely criticized for identifying as "threats to the security of Canada" as including any activities that may interfere with the "economic and financial stability of Canada"[36] and for potentially criminalizing peaceful advocacy, protest, dissent and artistic expression.[37]

Parallel, although sometimes more subtle processes of "streamlining" environmental assessment and public participation processes have been occurring at the provincial level as well. Ontario's *Environmental Assessment Act*, for example, was substantially revised in 1996 to reduce scope of assessments, effectively eliminating consideration of the need for and alternatives to projects and undertakings. Assessments have instead been focussed on the mitigation of the direct impacts of projects. The practice of conducting public hearings before the quasi-judicial Environmental Assessment Board for major projects and undertakings, a central component of the public aspects of the process, was abandoned in the late 1990s, with the last hearing before the board occurring in 1998.[38]

The processes of "streamlining" have continued with respect to wider public participation mechanisms since the 2003 provincial election, which saw the Progressive Conservative government, which had been the architect of the 1996 rewriting of the *Environmental Assessment Act* replaced by a nominally more progressive Liberal government. These trends intensified significantly following the 2008 economic downturn.

In particular, the Ministry of the Environment began to 'reform' of its non-environmental assessment approvals processes. Under the new model the ministry would no longer actively review most applications for environmental approvals. Rather, proponents

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[34] RCMP, *Critical Infrastructure Intelligence Assessment: Criminal Threats to the Canadian Petroleum Industry*.
[35] A. Boulitier, "Ottawa admits tracking hundreds of protests," *The Toronto Star*, September 14, 2014.
[36] Bill C-51, *The Security of Canada Information Sharing Act, 2015* (s.2).
[37] K.Roach, and C.Forcese, *Canada's Proposed Anti-Terrorism Law: An Assessment* accessed at www.antiterrorlaw.ca May 27, 2015.
[38] Environmental Commission for Ontario (ECO), *2007/08 Annual Report: Getting to K(no)w* (Toronto. ECO, 2008).

would simply assert their compliance with the required practices and procedures by "registering" with the ministry before proceeding with their proposed activities. The process, which began to be implemented in the fall of 2011, eliminated the rights of members of the public, established through the *Environmental Bill of Rights*, to notice of and the opportunity to comment on proposed approvals before they were granted. The opportunity to appeal approvals to the Environmental Review Tribunal was also eliminated.[39] Similar streamlining 'reforms' began to be pursued by the Ministry of Natural Resources at the same time.[40]

With respect to energy, the new Liberal government abandoned the previous Progressive Conservative government's market-oriented reforms in electricity sector. Instead the concept of system planning was reintroduced through the 2004 *Electricity Restructuring Act*.[41] However, the province then made an explicit decision not to follow the precedent of the handling of Ontario Hydro's 1989 Demand-Supply Plan and conduct a strategic level assessment of the resulting system plans. Instead the province argued that it made more sense to consider environmental impacts at the level of individual projects.[42] Regulations accompanying the exemption of the proposed Integrated Power System Plan (IPSP) did require that the OPA demonstrate that it had "considered sustainability" in developing its plan.[43] The meaning of this requirement has never been tested, as the one and only public hearing before the Ontario Energy Board on a system plan was suspended in September 2008, barely two weeks after it began.[44]

With respect to individual energy projects, exemptions from environmental assessment requirements were provided for all solar power projects, emergency generators and small wind, gas-fired, biomass, cogeneration, landfill gas, on-site generation and

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[39] R.Nadarajah, M.Carter-Witney and E.Macdonald. *Modernizing Environmental Approvals: EBR Registry No 010-9143* (Toronto: Canadian Environmental Law Association, Canadian Institute for Environmental Law and Policy and Ecojustic.ca, 2010).

[40] Ontario Ministry of Finance, "Ministry of Natural Resources Transformation," 2012 *Ontario Budget: Chapter I: Transforming Public Services* accessed at http://www.fin.gov.on.ca/en/budget/ontariobudgets/2012/ch1.html#c1_ministryONRT April 2, 2013.

[41] S.O. 2004, c.23.

[42] M.Mittlestaedt, "Nuclear Plan Skips Key Green Review." *Globe and Mail,* June 15, 2006.

[43] Ontario Regulation, 424/04

[44] M.Winfield, R. Gibson , T.Markvart, K.Gaudreau and J.Taylor, "Implications of Sustainability Assessment for Electricity System Design: The case of the Ontario Power Authority's Integrated Power System Plan," *Energy Policy,* 38 (2010), 4115-4126.

transmission projects. “Screening” level reviews were required for other wind, gas, biomass, landfill gas, cogeneration, and on-site use generation projects and hydro-electric projects up to 200MW.[45] These assessments are a “proponent driven, self-assessment process”.[46] The reports resulting from screening level assessments are not required to be submitted to the province, although the province can “elevate” projects subject to screening level reviews to full individual project assessments if it choses to do so. In practice such “elevations” have never occurred. Individual project assessments were limited to large transmission projects, hydro facilities over 200MW capacity, and facilities burning over 100 tonnes/day municipal solid waste or using hazardous or liquid industrial wastes as fuel. Newly built nuclear or nuclear refurbishment projects were not addressed via the provincial regulation on the premise that they would be subject to federal environmental assessments under the *Canadian Environmental Assessment Act* (CEAA).

The 2009 *Green Energy and Green Economy Act*,[47] one of the centrepieces of the government’s response to the 2008 economic downturn, established a Renewable Energy Approval (REA) process for solar photovoltaic (PV), wind, and bio-energy projects (i.e. anaerobic digestion, biofuels, biogas and thermal treatment faculties).[48] Projects falling under the REA process are exempted from the requirements of the *Environmental Assessment Act*, and an REA approval replaces the requirements for approvals under the *Environmental Protection* and *Ontario Water Resources Acts*. Projects subject to the REA process are also exempted from the province’s *Planning Act* with respect to land-use planning, explicitly eliminating any requirements for municipal planning approvals of renewable energy projects. Renewable energy projects

[45] Ontario Regulation, 116/01.
[46] Ontario Ministry of the Environment (MoE) *Guide to Environmental Assessment Requirements for Electricity Projects* (Toronto: Ontario Ministry of the Environment, 2011) p.17.
[47] S.O. 1009, c.12.
[48] Small wind (<3kW) and solar (<10kW or roof or wall mounted systems) are exempted from the environmental approvals process altogether, while hydro power projects remain outside of the REA process and subject to the requirements of *the Environmental Assessment* Act and other environmental approvals.

continue to be subject to approval requirements under some natural resources management legislation.[49]

Responses and Consequences

As noted earlier, the Canadian experience with respect to governmental efforts to 'streamline' environment assessment and public participation processes is not unique. Similar initiatives have been seen in the UK, Australia, and South Africa. These developments have begun to attract commentary in the environmental assessment literature. However, these discussions have, so far, largely focused on the direct loss of the benefits traditionally associated with assessment and public participation processes. Specific concerns have been expressed over the losses of: consistency and fairness in decision-making; the potential to obtain early warnings of problems with proposed projects; comprehensive and effective consideration of evidence, including local and traditional knowledge; the prospects for better integration of environmental, economic and social considerations in the interests of advancing sustainability; and opportunities public involvement.[50] So far, less attention has been given to the broader political consequences of these developments. Nearly twenty years into its own 'streamlining' efforts, Canada is now emerging as an important case study in the downstream consequences of 'streamlining' processes.

The requirements for decision-making processes to be able to obtain socio-political and community acceptance where there are significant controversies over the distribution of the costs, benefits and risks associated with projects and undertakings are relatively well articulated. The core elements are seen to include perceptions by participants that processes are procedurally just, provide distributional justice in their outcomes, and engender trust.[51] Procedural justice can be defined to include opportunities for

[49] P.Mulvihill, M.Winfield., and J.Etcheverry, "Strategic Environmental Assessment and Advanced Renewable Energy in Ontario: Moving Forward or Blowing in the Wind?" *Journal of Environmental Assessment, Planning and Management*, Vol.15 (2013), No.2.
[50] Bond, Pope, Morrison-Saunders, Retief, and Gunn, "Impact Assessment: Eroding benefits through streamlining;" Salomons and Hoberg, "Setting boundaries of participation in environmental impact assessment."
[51] R.Wustenhagen, M. Wolsink and M.J.Burer "Social acceptance of renewable energy innovation: An introduction to the concept," *Energy Policy*, 35 (2007) 2683-2691.

interested and concerned members of the public to participate in the decision-making processes, to present evidence, including local and traditional knowledge, to decision-makers, and for there to be reasonable consideration by decision-makers of that evidence. Opportunities to challenge the evidence provided by proponents are also essential. Distributional justice is understood to imply decision-making processes which produce outcomes that are seen to be fair in their distribution of costs, benefits and risks, both within the present (intragenerational justice) and potentially between the present and the future (intergenerational justice). Trust in the process requires that decision-makers be seen as independent, acting as arbitrators between competing interest as opposed to being proponents for one side or the other. The process needs to be free of bias, and a “no” needs to be a serious possibility if it is to win the trust of its public participants.

The ‘streamlining’ initiatives adopted at the federal and provincial levels in Canada over the past two decades have generally moved in the opposite direction from that suggested by these criteria. In some cases, as with screening level assessments at the federal level, and most energy related projects at the provincial level, assessment processes have been effectively eliminated. The remaining processes score poorly in terms of all three criteria.

With respect to procedural justice, the Bill C-38 reforms to the CEAA and NEB processes are quite explicit in their goals and means of reducing opportunities for public participation in decision-making. Similarly the scope of evidence which can be considered has been explicitly constrained. Provincial level initiatives like the revision of the environmental assessment process to effectively remove public hearing processes and narrow the scope of what assessments do occur, and the reform of the environmental approvals process in Ontario, although more subtle, have had similar impacts. The elimination of the municipal role in decision-making through the REA process has been perceived in comparable terms by renewable energy opponents.[52]

[52] Mulvihill, Winfield., and Etcheverry, "Strategic Environmental Assessment and Advanced Renewable Energy in Ontario: Moving Forward or Blowing in the Wind?"

The resulting decision-making processes are also failing to produce outcomes that are perceived to be just in distributional terms. The NEB's December 2013 approval of the Alberta to BC Northern Gateway pipeline, for example, has done nothing to reduce opposition to the project from members of the public, aboriginal communities and the BC provincial government on basis that the project imposes significant costs and risks on British Columbia for no significant benefit.[53]

Similarly the REA process in Ontario has done little to alleviate the conflicts within communities hosting renewable energy projects over the distribution of benefits and perceived risks and landscape impacts. Opponents have continued to challenge approvals of wind energy projects in particular, before the province's Environmental Review Tribunal and the courts.[54] The 'reform' of the environmental approvals process in Ontario in the direction of "registrations" is seen to have significantly weakened the capacity of the process to deal with the cumulative effects of multiple emission sources, particularly in communities that are already highly impacted by industrial pollution.[55]

Perhaps more fundamentally there has been a collapse of trust in the decision-making processes, particularly by those who perceive themselves as being likely to bear the costs and risks, and receive very few benefits from proposed projects. In the cases of energy infrastructure (e.g. pipeline) approvals at the federal level, and of renewable energy projects in Ontario, streamlining efforts were perceived as reflection of a shift in the role of decision-making and approval processes, and by implication more broadly, the role of the state. Governments were no longer perceived as arbitrators in disputes over the distribution of costs, benefits and risks in relation to specific undertakings, but rather as proponents of particular technologies and economic interests.

The overall result, seen in the ongoing and escalating legal and political disputes over energy pipeline development for the purposes of exporting oil sands products from

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[53] CBC, "Northern Gateway pipeline approved with 209 conditions," June 17, 2014 accessed at http://www.cbc.ca/news/politics/northern-gateway-pipeline-approved-with-209-conditions-1.2678285.
[54] D.Hasselback, "Ontario's wind farm approval process faces constitutional challenge" *Financial Post,* November 14, 2014.
[55] Nadarajah, Carter-Witney and Macdonald *Modernizing Environmental Approvals*.

Alberta in British Columbia,[56] Ontario[57] and Quebec,[58] is a collapse of the role of the formal decision-making processes as mechanisms for producing decisions which are seen as legitimate and therefore likely to win acceptance among the affected parties. Given that the streamlined processes fail all three criteria of procedural justice, distributional justice and trust, those with serious concerns or opposition to projects, do not accept the resulting decisions as legitimate. Indeed, the streamlining initiatives, like the federal government's Bill C-38 and Ontario's REA process, have become intensifying focal points of the conflicts themselves

In these situations, opponents of proposed projects are choosing to continue their opposition through other means – legal challenges, protests, demonstrations and blockades. In the longer term, they have engaged in political activities intended to bring about the electoral defeat of the governments promoting the projects in question. Such responses have been evident in the activities of wind energy opponents in Ontario in the lead up to the 2011 and 2014 provincial elections. Some interpretations of the impact of these activities suggest that they significantly affected the outcome of the 2011 election, which saw the Liberal government reduced from majority to minority status.[59] Significant political risks have been identified for the current federal government in the context of the upcoming federal election in British Columbia as a result of its handling of the Northern Gateway and Kinder-Morgan pipeline approval processes.[60] Disputes, again

[56] Re: the Kinder-Morgan Pipeline expansion see J.Gordon, "Kinder-Morgan Canada pipeline runs into a mountain of opposition," *Reuters,* October 21, 2014.

[57] Re: Line 9 Reversal, see CBC News, Enbridge Pipeline Road Blocked By Protesters In Burlington" May 20, 2014; Re: Energy East, see S.McCarthy, "Opposition builds to Energy East pipeline plan," *The Globe and Mail,* October 13, 2014.

[58] Re: Line 9 reversal, see CBC News, "Enbridge's Line 9 pipeline reversal plan not OK'd by Montreal" CBC News, September 14, 2014; Re: Energy East, see Reuters, "TransCanada scraps Quebec oil port, delays Energy East pipeline" April 2, 2015.

[59] L.C. Stokes,"The Politics of Renewable Energy Policies: The Case of Feed-in Tariffs in Ontario, Canada," *Energy Policy*, 56 (2013), 490–500.

[60] Canadian Press (CP) "Focus groups hint Conservatives out of sync on Northern Gateway" *CBC News* July 20, 2014 accessed at http://www.cbc.ca/news/politics/focus-groups-hint-conservatives-out-of-sync-

absent any structure for their resolution, over the impacts of 'fracking' for natural gas may have had significant impacts on the 2014 New Brunswick election.[61] Natural gas 'fracking' also emerged as a significant issue in Nova Scotia in the lead up to the 2013 provincial election.[62] In that case the issue was referred to an advisory panel for a *de facto* strategic environmental assessment just prior to the election

Perhaps the most significant example of the political consequences of planning and assessment process failures seen so far in Canada related to the cancelation of two proposed natural gas-fired electricity plants in Ontario in the lead-up to the 2011 provincial election. In the absence of any meaningful strategic or facility level assessment process, the plants were located by the province's electricity planning agency, the Ontario Power Authority, exclusively on the basis of technical engineering criteria. There were no opportunities for public input into the sitting decisions.

When local residents began to identify concerns regarding the location of the plants, the effective exemption of the plants from the requirements of the *Environmental Assessment Act* meant that there was no formal process through which they could express their concerns. In response, the communities began to organize public campaigns against the plants, including efforts explicitly designed to result in the election of opposition party representatives in the affected ridings. In the context of the upcoming 2011 provincial election, the situation prompted to interventions by the

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on-northern-gateway-1.2712538\. In electoral terms, the Conservatives drew 45 per cent of the popular vote in BC in the 2011 federal election. In recent months they have been consistently polling in the 30 per cent range in the province. See Ekos Politics, "NDP Continues to Rise as Liberals and Conservatives Continue to Slide," June 15, 2015, accessed June 25, 2015 at http://www.ekospolitics.com/index.php/2015/06/ndp-continues-to-rise-as-liberals-and-conservatives-continue-to-slide/.

[61] CP, "New Brunswick election: Brian Gallant, Liberals win majority government," *The Toronto Star*, September 22, 2014.

[62] See G.Steele, "Wheeler's fracking report is good news for Liberals," *The Globe and Mail*, August 29, 2014. See also Nova Scotia Independent Panel on Hydraulic Fracturing, *Report* (Sydney, NS: Cape Breton University, 2014).

Premier's office to cancel the proposed projects. Controversies over the handling and ultimate cost of the cancellations would eventually lead to the resignation of first the Minister of Energy, Chris Bentley and then Premier Dalton McGuinty himself, in October 2012.[63]

The types of outcomes seen in Ontario with respect to renewable energy development and the gas-plant controversies, and which have been identified as having the potential to affect the outcome of the upcoming federal election in BC, are precisely the types of political consequences that the original political architects of environmental assessment and public participation processes sought to avoid.

The current federal government, for its part, has so far chosen to ignore these risks. Rather, as noted earlier, it has focussed disabling more institutionalized sources of opposition to resource development and infrastructure projects through the activities of the CRA, and portraying other opponents as risks to national security. At the provincial level in Ontario, there has been at least some partial official recognition, in some cases, that serious problems may be emerging around the decision-making processes for major undertakings, particularly with respect to energy projects.

In the aftermath of the gas-plant cancellation scandal and the controversies over wind energy development projects, a number of studies on the energy approvals process were undertaken by the Ontario Power Authority (OPA) and Independent Electricity System Operator (IESO)[64] and the provincially sponsored Mowat Centre at the University of Toronto.[65] These studies have emphasized the need for greater community and municipal involvement in the processes of siting significant new energy facilities. The Legislature's Standing Committee on Justice Policy reached similar

[63] M.Winfield, "What lessons should Ontario draw from the gas-plant cancellation scandal? *Ottawa Citizen*, May 13, 2013. See also Standing Committee on Justice Policy *The Cancellation and Relocation of the Gas Plants and Document Retention Issues*. Toronto: Legislative Assembly of Ontario, 2015).

[64] Ontario Power Authority/Independent Electricity System Operator *Engaging Local Communities in Ontario's Electricity Planning* Continuum (Toronto: OPA and IESO 2013). http://www.onregional-planning-and-siting-dialogue.ca/pdf/Regional_Planning-Siting_Report.pdf

[65] Richard Carlson, Eric Martin, Pamela Nowina and Mary Ellen Richardson , *Getting the Green Light: The Path to Public Support for Ontario's Power Plans* (Toronto: Mowat Centre. 2014).

conclusions in its study on the cancellation and relocation of the gas plants.[66] Some adjustments to the decision-making process around individual projects have been made as a result, particularly the need for community support for new renewable energy projects. There have also been efforts to engage municipalities in regional level energy planning exercises.[67] The question of what will happen were significant community or municipal opposition emerges has been left unanswered in this work, as have the wider questions related to the need for strategic level assessments and reviews of the province's overall electricity strategy.[68]

It is important to note that these practical and political challenges arising from 'streamlinings' are not limited to conventional 'hard' path technologies and infrastructure. The Ontario experience with renewable energy approvals, for example, highlights the consideration that the deployment of relatively low-impact technologies that are widely seen as important to achieving sustainable transitions to a low-carbon economy can also fall victim to situations where planning and approvals processes fail the core tests of trust and procedural and distributional justice. In fact, with most of the province's planned conventional (principally natural gas-fired) energy facilities now constructed, the primary impact of the modest reforms to the energy project approval processes will be to complicate the approval of low-impact renewable energy projects.

Ways forward

Canada finds itself in the situation of developing a substantial body of experience with the post-streamlining operation of environmental assessment and public participation processes. The mainstream environmental assessment literature on Canada and other jurisdictions undertaking substantial 'streamlining' exercises highlights the potential for losses of the benefits traditionally associated environmental assessment processes. These benefits include improved consistency and fairness in decision-making, opportunities for early warnings of problems with proposed projects, opportunities to

[66] Standing Committee on Justice Policy, *The Cancellation and Relocation of the Gas Plants and Document Retention Issues*, Recommendations 1-10.
[67] Independent Electricity System Operator (IESO) "Regional Planning Process" accessed at http://www.powerauthority.on.ca/power-planning/regional-planning/process-background May 27, 2015.
[68] Mulvihill, Winfield., and Etcheverry, "Strategic Environmental Assessment and Advanced Renewable Energy in Ontario: Moving Forward or Blowing in the Wind?"

integrate environmental, social and economic decision-making and to improve public involvement in decisions.

The Canadian experience highlights a number of deeper challenges emerging from these ‘streamlining’ processes. As process participants, particularly those with concerns regarding proposed natural resource development and infrastructure processes, engage with the ‘streamlined’ processes, they find that they no longer meet the tests of trust and procedural and distributional justice. In response, rather than accepting the outcomes of the ‘streamlined’ process and abandoning their opposition to proposed undertakings, they instead move their opposition to other legal and political forums. In addition to delays in individual project implementation due to protests and legal challenges, in some cases the consequences have involved very high political risks and costs. The results have included major modifications to and even cancelations of projects and programs, electoral losses, and in the case of the Ontario gas-plant controversy, the resignation of a provincial Premier.

There is some recognition of these risks among government officials, and even among private sector proponents, although acknowledgement at the political level has been more limited so far. Although the traditional rationalist-planning arguments in favour of meaningful and effective assessment and participation processes will be important, the political risks associated with the process failures seen in Ontario and at the federal level are more likely to provide the basis for more compelling arguments to political decision-makers about why governments and proponents need to reconsider their approaches to environmental assessment and public participation in decision-making. Processes which are perceived to be trustworthy, procedurally just in their processes and distributively fair in the outcomes are not only likely to produce better decisions, but also to reduce the levels of political and legal conflict associated with decision-making over major resource and infrastructure undertakings.

The situation creates opportunities for greater opportunities than to simply restore processes to their status before they were ‘streamlined.’ In the case of CEAA, for example this may not even be entirely desirable. The circumstance may present an opportunity to engage in a reset in terms our approaches to assessment and

participation as opposed to the normal processes of incremental adjustment and improvement.

With respect to public participation, the concept of a substantive right of participation in public decision-making, as proposed in MP Linda Duncan's proposed *Canadian Environmental Bill of Rights*[69] offers the prospect of a more systemic response to the limitations of standing in CEAA, NEB and other federal processes, CRA audits of 'political' activities, and the RCMP and CSIS's monitoring activities. A similar concept has been advanced in the context of Ontario's proposed legislation to combat Strategic Lawsuits Against Public Participation (SLAPPs).[70] Such a right would also be useful in combating the incremental erosion of participation structures like the Ontario EBR. Specific interventions around these themes will still be required as well.

The situation with respect to the future design of environmental and sustainability assessment processes is more complicated. Approaches that respect complexity, and allow for public participation and the proper presentation and consideration of evidence, while not placing themselves at risk of 'streamlining' due to the weight of their own processes, have yet to be found. Finding such approaches will be essential to advancing sustainability and democratic governance in the future.

[69] Bill C-634 *Canadian Environmental Bill of Rights* (1st Reading October 29, 2014) ss.11 and 12.
[70] R.Nadarajah, and H.Wilkins, *Breaking the silence: the urgent need for anti-SLAPP legislation in* Ontario(Toronto: Canadian Environmental Law Association, Canadian Institute for Environmental Law and Policy and Ecojustic.ca, 2010).