

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

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

## **Abstract**

This article argues that environmental issues confront us as an ongoing emergency. The epistemic features of serious environmental issues – the fact that we cannot reliably distinguish *ex ante* between benign policy choices and choices that may lead to environmental catastrophe – are the same features of an emergency. This means that, like emergencies, environmental issues pose a fundamental challenge for the rule of law: They reveal the necessity of unconstrained executive discretion. Discretion is widely lamented as a fundamental flaw in Canadian environmental law, which undermines both environmental protection and the rule of law itself. Through the conceptual framework of the environmental emergency, this article offers a critique of the current understanding of discretion in environmental law and suggests how an alternative conception of the rule of law can both constitute and constrain the state's regulative authority over the environment.

## **Keywords**

Environmental law

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

JOCELYN STACEY\*

This article argues that environmental issues confront us as an ongoing emergency. The epistemic features of serious environmental issues – the fact that we cannot reliably distinguish *ex ante* between benign policy choices and choices that may lead to environmental catastrophe – are the same features of an emergency. This means that, like emergencies, environmental issues pose a fundamental challenge for the rule of law: They reveal the necessity of unconstrained executive discretion. Discretion is widely lamented as a fundamental flaw in Canadian environmental law, which undermines both environmental protection and the rule of law itself. Through the conceptual framework of the environmental emergency, this article offers a critique of the current understanding of discretion in environmental law and suggests how an alternative conception of the rule of law can both constitute and constrain the state's regulative authority over the environment.

Cet article prétend que les problèmes environnementaux nous assaillent à la manière d'une urgence renouvelée. Le caractère épistémique des problèmes environnementaux graves – le fait que nous ne puissions faiblement distinguer *ex ante* entre des choix bénins de politiques et des choix susceptibles de mener à une catastrophe environnementale – a

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la même valeur que celui d'une urgence. Il en ressort que, tout comme les urgences, les problèmes environnementaux représentent une difficulté fondamentale pour la primauté du droit : ils soulignent la nécessité d'un pouvoir discrétionnaire sans contrainte. On déplore largement le fait que l'absence de pouvoir discrétionnaire représente un vice fondamental des lois canadiennes sur l'environnement, qui sape tant la protection de l'environnement que la primauté du droit elle-même. En analysant le cadre conceptuel de l'urgence environnementale, cet article apporte une critique de l'interprétation actuelle du pouvoir discrétionnaire des lois sur l'environnement et suggère un moyen par lequel une nouvelle conception de la primauté du droit pourrait à la fois conditionner et contraindre le pouvoir régulateur de l'État sur l'environnement.

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“Our planet’s health and its capacity to function for the journey through time are now deeply imperilled. We stand on the edge of climate catastrophe.”<sup>1</sup>

FOR DECADES, ENVIRONMENTAL LAW SCHOLARS have grappled with the apparent limits of law in improving environmental protection. Scholars offer a wide variety of explanations for the perceived impotence of environmental law ranging from its anthropocentric character<sup>2</sup> to its lack of reflexivity<sup>3</sup> or, more

1. David Spratt & Philip Sutton, *Climate Code Red: The Case for Emergency Action* (Victoria, AUS: Scribe Publications, 2008) at 144.
2. Jane Holder, “New Age: Rediscovering Natural Law” (2000) 53:1 *Curr Legal Probs* 151 at 166-67.
3. Eric W Orts, “Reflexive Environmental Law” (1995) 89:4 *Nw U L Rev* 1227; Andreas Philippopoulos-Mihalopoulos, “Towards a Critical Environmental Law” in Andreas Philippopoulos-Mihalopoulos, ed, *Law and Ecology: New Environmental Foundations* (New York: Routledge, 2011) 18.

generally, to its immaturity.<sup>4</sup> One leading environmental law scholar describes environmental law as “hot law” because it concerns situations in which “the agreed frames, legal and otherwise, for how we understand and act in the world are in a constant state of flux and contestation.”<sup>5</sup> This article takes up the challenge of understanding both the promise and limits of law in governing the environment. Its central argument is that the challenge environmental issues pose for law is best understood as the same challenge that emergencies pose for law. This is because, like emergencies, environmental issues require decisions to be taken under conditions of profound epistemic frailty, where the chance of catastrophe cannot be reliably eliminated in advance.

The specific context of the article is administrative law, which covers a vast range of environmental decision making in Canada. Understanding environmental issues as an ongoing emergency offers a novel and comprehensive perspective on both environmental decision makers and the institutions that oversee the exercise of their administrative authority. Administrative law requirements are a primary concern of many Canadian environmental law scholars who are rightly apprehensive about the use of administrative discretion to undermine environmental protection. Approaching environmental law from the emergency perspective reveals that existing accounts have identified the symptom (discretion) without yet fully confronting the much deeper theoretical problem that environmental issues pose for governing through law. This article advances an understanding of the rule of law—one built on common law reasoning—that is capable of providing meaningful legal constraints on environmental decision making.

The account of environmental law offered in this article—an account of the “environmental emergency”—emerges from environmental thinking itself. Environmentalists are often accused of being “alarmists,”<sup>6</sup> “doomsayers,”<sup>7</sup>

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4. Elizabeth Fisher et al, “Maturity and Methodology: Starting a Debate about Environmental Law Scholarship” (2009) 21:2 J Envtl L 213 (discussing the perceived immaturity of environmental law); D Paul Emond, “‘Are We There Yet?’: Reflections on the Success of the Environmental Law Movement in Ontario” (2008) 46:2 Osgoode Hall LJ 219 at 222.
  5. Elizabeth Fisher, “Environmental Law as ‘Hot’ Law” (2013) 25:3 J Envtl L 347 at 347-48 [citations omitted] [Fisher, “‘Hot’ Law”]. See also Michael M’Gonigle & Paula Ramsay, “Greening Environmental Law: From Sectoral Reform to Systemic Re-Formation” (2004) 14 J Envtl L & Prac 333.
  6. Bjorn Lomborg, *Cool It: The Skeptical Environmentalist’s Guide to Global Warming* (New York: Alfred A Knopf, 2007). Lomborg calls the language in the epigraph “catastrophespeak” and argues that this “hyperbole” inhibits “a sensible dialogue on the political and economic arguments for action” (*ibid* at 128, 130-31).
  7. Frank B Cross, “The Naïve Environmentalist” (2002) 53:2 Case W Res L Rev 477 at 478.

“radicals,”<sup>8</sup> and “extremists”<sup>9</sup> in the increasingly polarized debates surrounding serious environmental issues. The “carbon bomb”<sup>10</sup> has replaced the notorious “population bomb,”<sup>11</sup> and, as reflected in the epigraph, current environmental ‘alarmists’ are now fixated on catastrophic climate change. The language of environmental catastrophe is often grounded in genuinely perceived threats, but it is also often used as a deliberate strategy to mobilize a complacent public and push for environmental reform. This article argues that it is worth taking these claims seriously—not because they are necessarily correct nor to provoke political action—but for the purpose of better understanding how environmental decisions can be made in accordance with principles of a democratic society governed by the rule of law. For this reason, the concept of the environmental emergency should be of interest to environmental law scholars and to public law scholars more generally. Not only does this framework offer insight into existing approaches in Canadian environmental law, it also shows that environmental issues—like emergencies—can force us to re-examine our “agreed legal frames.”<sup>12</sup> The environmental emergency has important implications for understanding how creative institutional design can allow for the realization of the rule of law in complex decision-making contexts.

The article proceeds in three main parts. Part I makes the argument that environmental issues can be understood as constituting an ongoing emergency, from the perspective of the challenge they pose for the rule of law. The problem emergencies pose for the rule of law is fundamental and, unlike most topics in environmental law, has a long history in political and legal theory. At its most basic, the emergency is a sudden and extreme event, defined here as an unforeseeable, extreme threat.<sup>13</sup> I argue that environmental issues possess these constitutive features due to their complexity and indeterminacy, and thus pose

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8. Joe Oliver, “An open letter from Natural Resources Minister Joe Oliver,” *The Globe and Mail* (9 January 2012), online: <[www.theglobeandmail.com/news/politics/an-open-letter-from-natural-resources-minister-joe-oliver/article4085663](http://www.theglobeandmail.com/news/politics/an-open-letter-from-natural-resources-minister-joe-oliver/article4085663)> (comments by Joe Oliver, then Federal Minister of Natural Resources, in anticipation of the Joint Review Panel on the Northern Gateway Pipeline).
  9. “How To Spot An Environmental Extremist,” *Ethical Oil* (27 September 2011), online: <[www.ethicaloil.org/news/how-to-spot-an-environmental-extremist](http://www.ethicaloil.org/news/how-to-spot-an-environmental-extremist)>.
  10. “Carbon bomb” refers specifically to Alberta’s oil sands. See Elizabeth McGowan, “U.S. Climate Protests Shift to Blocking Keystone XL Pipeline Approval,” *Reuters* (27 June 2011) online: <[www.reuters.com/article/2011/06/27/idUS323166223820110627](http://www.reuters.com/article/2011/06/27/idUS323166223820110627)> (quoting Bill McKibben).
  11. Paul R Ehrlich, *The Population Bomb* (New York: Ballantine Books, 1968).
  12. Fisher, “‘Hot’ Law,” *supra* note 5.
  13. See Part I(A), below.

the same kind of challenge to the rule of law. The problem of emergencies—including the environmental emergency—is that their unforeseeable and potentially catastrophic nature seemingly necessitates unconstrained executive discretion. This key observation is at odds with a position taken by many legal scholars seeking to enhance environmental protection in Canada. I refer to this as the environmental reform position and argue that it portrays administrative discretion as inherently objectionable—not only a threat to environmental protection, but also a threat to the rule of law itself.

Part II of the article builds on the emergency framework to diagnose the ‘problem’ of discretion identified by the environmental reform position. In this section, I argue that emergencies prompt us to reconsider our most basic assumptions about law, discretion, and what it means to govern in accordance with the rule of law. I use Carl Schmitt’s challenge, the challenge to show how emergencies can be governed by law, as a starting point for unpacking the core assumptions about the ability of law to constrain emergency powers.<sup>14</sup> I argue that the emergency challenge is to a *formal* conception of the rule of law, which presumes that the legislature is the only legitimate source of legal norms and is therefore undermined by executive discretion. In order to preserve the formal conception, judges, when faced with the exercise of discretionary authority, will create either “legal black holes” or “legal grey holes,” where discretion is governed by the rule of law only in the thinnest sense of formal compliance with validly enacted legislation.<sup>15</sup> Using these concepts of legal black and grey holes, I demonstrate the persistence of the formal conception in Canadian environmental law, which validates the environmental reform position’s concern that discretionary environmental decisions are not subject to robust legal constraints.

In Part III, I canvas possible responses to the environmental emergency. I first address the solutions that follow from the environmental reform position—stricter *ex ante* legal rules and delegation to an independent expert decision maker. But since these solutions are also products of the formal conception of the rule of law, we will see that they cannot offer a solution to the environmental reform position’s concern. I then introduce an account of common law constitutionalism, which understands rule-of-law constraints as “the constraints of adequate justification.”<sup>16</sup> Common law constitutionalism suggests that creative

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14. David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006). [Dyzenhaus, Constitution].

15. *Ibid.*

16. David Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 14:1 SAJHR 11 at 30 [Dyzenhaus, “Justification”].

institutional design can allow all public decisions to be subject to meaningful rule-of-law constraints, even in the highly complex and unpredictable context of the environmental emergency.

## I. THE ENVIRONMENTAL EMERGENCY

This section introduces the argument that the challenge that environmental issues pose to law is best understood as the challenge of emergencies. By “environmental emergency,” I do not mean any event or series of events—extreme weather, earthquakes, or the like—since these are emergencies in a conventional sense. Rather, this section argues that the core problem of (conventional) emergencies focuses our attention on the systemic features of environmental issues that emerge from the complex, adaptive nature of ecological systems. Before undertaking this argument, however, I will first set out the constitutive features of emergencies and introduce the challenge they pose to the rule of law, which sets the stage for the argument that follows. Relying on an example of an unprecedented insect epidemic in Western Canada, I then argue that these emergency features inhere in environmental issues as well. In the last section, I show that this concept of the environmental emergency conflicts with a dominant position in Canadian environmental law: the environmental reform position.

### A. THE EMERGENCY FRAMEWORK

Emergencies, in particular national security emergencies, have moved to the centre stage of public law post-September 11 (“9/11”).<sup>17</sup> This literature is extensive. It addresses numerous vexed questions concerning both the controversial substance of emergency response powers and the challenge of ensuring that the exercise of these powers remains subject to meaningful rule-of-law constraints, such as due process.<sup>18</sup> Much of this literature has been framed explicitly in response to a controversial legal theorist, Carl Schmitt, who wrote in the Weimar period

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17. Oren Gross, “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?” (2003) 112:5 Yale LJ 1011 at 1014.

18. For an excellent cross-section of these debates, see Victor V Ramraj, ed, *Emergencies and the Limits of Legality* (New York: Cambridge University Press, 2008).

but whose work has again risen to prominence in the contemporary emergency literature.<sup>19</sup>

Schmitt argues that the emergency cannot be governed by law. He describes the emergency as an unforeseeable, existential threat that cannot be anticipated in law.<sup>20</sup> Schmitt maintains that the emergency reveals the necessity of unconstrained executive discretion, since the emergency and its response cannot be anticipated through positive legal norms.<sup>21</sup> Where the state faces a truly existential threat, Schmitt argues that the sovereign (or the modern-day executive) may need to suspend legal order altogether,<sup>22</sup> but the fact that the sovereign is so empowered reveals that it is in the position to respond the most expeditiously to serious, though not existential, threats.<sup>23</sup> In the face of an unforeseeable and extreme emergency, Schmitt argues, the sovereign can do whatever is necessary to bring the crisis to an end; executive discretion cannot be constrained by law.

Schmitt's work, though extreme and unsettling for most legal scholars, seemed to offer an explanation for the sweeping executive action taken by the United States in the wake of the 9/11 terrorist attacks.<sup>24</sup> The challenge for most legal scholars writing after 9/11 was to show that the American emergency response was not, as Schmitt would have predicted, inevitable. They sought to show that Schmitt was wrong in his assumptions about law and its ability to constrain emergency power.<sup>25</sup> Schmitt's question, then, is a question of the first

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19. David Dyzenhaus, "The Permanence of the Temporary: Can Emergency Powers be Normalized?" in Ronald J Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 21 at 22; Bruce Ackerman, "The Emergency Constitution" (2004) 113:5 Yale LJ 1029; Sanford Levinson, "Constitutional Norms in a State of Permanent Emergency" (2005) 40:3 Ga L Rev 699 at 706, 721-22; Eric A Posner & Adrian Vermeule, *Terror in the Balance* (New York: Oxford University Press, 2007) [Posner & Vermeule, *Terror*]; Gross, *supra* note 17 at 1038-39.
  20. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Cambridge, Mass: MIT Press, 1985) at 6.
  21. *Ibid* at 6-7.
  22. *Ibid* at 12.
  23. See Eric A Posner & Adrian Vermeule, *The Executive Unbound* (Oxford: Oxford University Press, 2010) at 32-33.
  24. The President of the United States declared a state of emergency and authorized indefinite detention at Guantanamo Bay, 'advanced interrogation tactics,' and warrantless spying all initially through unilateral executive action. See Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge: Cambridge University Press, 2011) at 4.
  25. David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) at 34-35, 40 [Dyzenhaus, *Constitution*]; Ackerman, *supra* note 19; Levinson, *supra* note 19.

order. Simply put, there is no point in debating the appropriateness of particular legal measures in times of crisis if Schmitt is correct that emergency powers cannot be governed by law.

While Schmitt's argument about the rule of law is controversial, his definition of the emergency is not. Constitutional law scholars accept the basic terms of Schmitt's challenge: to show how law can govern the response to an extreme and unforeseeable threat.<sup>26</sup> The core challenge posed by an emergency arises from two epistemic features: that is, a lack of *ex ante* knowledge about the specific events that may produce an emergency and a lack of *ex ante* knowledge about how to respond to such an unforeseen event. These features can arise when the state faces a political or national security threat—as Schmitt claims—but, as we will see, these features inhere in environmental issues as well.

## B. THE CHALLENGE OF ENVIRONMENTAL ISSUES

The argument that the key emergency features inhere in environmental issues follows, in short, from the current scientific understanding of ecological systems as complex, adaptive systems. Ecosystems are comprised of myriad intricate and indeterminate relationships between humans, plants, animals, and the abiotic components of the environment, such as the climate. These relationships are themselves adaptive, or changing over time, which makes predicting the impacts of our actions on the environment extremely difficult. Complex, adaptive systems are characterized by two phenomena. The first is indeterminacy,<sup>27</sup> or the fact that ecosystems are comprised of non-linear dynamics, which are vastly different than the direct, linear and causal linkages that can be determined in a scientific

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26. If anything, constitutional law scholars have relaxed the threshold for what constitutes an emergency. Schmitt focused on a truly existential threat, but the prevalence of Schmitt's challenge in the post-9/11 literature suggests that something less than an existential threat can constitute an emergency, given that, as dramatic as terror attacks of the last two decades have been, they have not been existential threats. Furthermore, the basic problem that emergencies pose for law can be traced back to John Locke's *Second Treatise*. See John Locke, *The Second Treatise of Government* (An Essay Concerning the True Original, Extent and End of Civil Government) and *A Letter Concerning Toleration* (New York: Barnes & Noble, 1966) at 81-82 (ss 159-60). See also Gross, *supra* note 17 (offers a nice overview of how a core understanding of the emergency permeates political and legal theory).

27. Brian Wynne, "Uncertainty and Environmental Learning" (1992) 2:2 *Global Environl Change* 111 at 114.

laboratory.<sup>28</sup> In fact, their relationships are so complex they are incompressible, meaning that the “simplest model is the process itself” and “[t]he only way to determine the future of the system is to run it: there are no shortcuts.”<sup>29</sup> Even when ecological relationships are well understood, the most minuscule errors in measurement can cause drastically inaccurate predictions because of the non-linear dynamics of the system.<sup>30</sup> The second phenomenon is the relatively high chance of an extreme event, or tipping point, that dramatically and unexpectedly changes the dynamics of the system. Extreme events—such as large hurricanes, earthquakes, or pest outbreaks—occur with surprising frequency,<sup>31</sup> and can disrupt the system such that it does not return to its prior state.<sup>32</sup>

One example of the complex, adaptive nature of ecosystems and their potential for an unknown, extreme event is the ongoing unprecedented mountain pine beetle epidemic in Western Canada. It is the second largest insect epidemic in North American history.<sup>33</sup> The beetle has decimated the lodgepole pine population across the province of British Columbia.<sup>34</sup> At times, the beetles travelled in such density that they could be seen as a light drizzle on weather radar and “fell like rain out of the sky.”<sup>35</sup> The mountain pine beetle now covers an unprecedented range, extending well into the neighbouring province of Alberta. Moreover, having overrun its historic host, the beetle has begun to attack new species for the first time, making the entire pan-Canadian boreal forest susceptible

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28. CS Holling, “Resilience and Stability of Ecological Systems” (1973) 4 *Ann Rev Ecology & Systematics* 1; K Mickelson & WE Rees, “The Environment: Ecological and Ethical Dimensions” in EL Hughes, AR Lucas & WA Tilleman, eds, *Environmental Law and Policy*, 3rd ed (Toronto: Emond Montgomery Publications, 2003) 1 at 9.
29. EC, Community Health and Consumer Protection, *Nanotechnologies: A Preliminary Risk Analysis on the Basis of a Workshop Organized in Brussels on 1–2 March 2004 by the Health and Consumer Protection Directorate General of the European Commission* (Brussels: EC, 2004) 71 at 81.
30. Daniel A Farber, “Probabilities Behaving Badly: Complexity Theory and Environmental Uncertainty” (2003) 37:1 *UC Davis L Rev* 145 at 153; Mickelson & Rees, *supra* note 28 at 9.
31. Farber, *supra* note 30 at 153–54.
32. Mickelson & Rees, *supra* note 28 at 10.
33. Andrew Nikiforuk, *Empire of the Beetle: How Human Folly and a Tiny Bug Are Killing North America’s Great Forests* (Vancouver: Greystone Books, 2011) at 55.
34. By 2012, it had killed 53 per cent of all commercially viable pine in the province. See British Columbia, Ministry of Forests, Lands and Natural Resource Operations, *A History of the Battle Against the Mountain Pine Beetle: 2000 to 2012* (Victoria, BC: FLNRO, 2012) at 3, online: <[www.for.gov.bc.ca/hfp/mountain\\_pine\\_beetle/Pine%20Beetle%20Response%20Brief%20History%20May%202012.pdf](http://www.for.gov.bc.ca/hfp/mountain_pine_beetle/Pine%20Beetle%20Response%20Brief%20History%20May%202012.pdf)> [History].
35. Nikiforuk, *supra* note 33 at 74.

to attack.<sup>36</sup> The epidemic is a natural disaster, albeit an unconventional one, analogized by one author to a slow-moving tsunami.<sup>37</sup>

The epidemic will wreak havoc on the British Columbia forest industry, the province's primary natural resource industry. It has killed vast areas of forest in the interior of British Columbia, turning the landscape red, then grey, as the attacked trees die. The result has been a short-term boom of available timber that needs to be logged before it rots.<sup>38</sup> Even still, the beetle is out-logging the loggers,<sup>39</sup> meaning that around half of all lodgepole pine, deliberately managed for long-term harvesting, will not be available for harvest in ten- to fifty-years' time.<sup>40</sup>

The possibility of catastrophe was not considered by decision makers responsible for decades of forest management decisions preceding the beetle epidemic.<sup>41</sup> Mountain pine beetle outbreaks are a regular occurrence in forests dominated by lodgepole pine, to be sure.<sup>42</sup> But not on this scale. Although we now know that the combination of fire suppression<sup>43</sup> and climate change<sup>44</sup> were the main drivers of the epidemic, the complexity of ecological relationships

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36. Ben Parfitt, *Battling the Beetle: Taking Action to Restore British Columbia's Interior Forests* (Vancouver: Canadian Centre for Policy Alternatives, 2005) at 16.

37. Nikiforuk, *supra* note 33, ch 3 at 50ff ("The Lodgepole Tsunami"). Nikiforuk also quotes the manager of a beetle action coalition, "It's not something you've ever seen before. It's like a tsunami that takes twenty-five years instead of two seconds" (*ibid* at 74).

38. This is known as the timber's "shelf-life" and is typically in the ten- to fifteen-year range, depending on local conditions. See Forest Practices Board, *Evaluating Mountain Pine Beetle Management in British Columbia: Special Report* (August 2004) at 16, online: <www.for.gov.bc.ca/hfd/library/documents/bib96861.pdf> [Forest Practices Board, *Evaluating*].

39. In some areas, by as much as twenty-three times. See Nikiforuk, *supra* note 33 at 62.

40. Harry Nelson, "Does A Crisis Matter? Forest Policy Responses to the Mountain Pine Beetle Epidemic in British Columbia" (2007) 55:4 Can J Agric Econ 459 at 463.

41. Forest management decisions were not initially made with lodgepole pine in mind. See Roger J Whitehead, Les Safranyik & Terry L Shore, "Preventative Management" in Les Safranyik & Bill Wilson, eds, *The Mountain Pine Beetle: A Synthesis of Biology, Management and Impacts on Lodgepole Pine* (Victoria: Pacific Forestry Centre, 2006) 173 at 186. No forestry company had a management plan or lease provision accounting for beetle outbreaks. See Nikiforuk, *supra* note 33 at 52.

42. Forest Practices Board, *Evaluating*, *supra* note 38 at 9.

43. Fire suppression tripled the area covered by mature lodgepole pine. See Kim McGarrity & George Hoberg, "The Beetle Challenge: An Overview of the Mountain Pine Beetle Epidemic and its Implications" (August 2005) at 4 [unpublished, archived at The University of British Columbia, Faculty of Forestry]. Fire suppression is a basic and uncontroversial forest management practice for maintaining timber yield. See *History*, *supra* note 34 at 2.

44. Historically, mountain pine beetle populations were kept in check by very cold weather—typically minus thirty-five degrees Celsius for several days. This type of weather event has not occurred in the British Columbia interior since the winter of 1995–1996.

made it extremely difficult to know in advance how disparate forest management decisions could have an impact upon the beetle's long-term population dynamics let alone predict how those decisions would intersect with the then undiscovered phenomenon of climate change. Moreover, the ongoing dynamics of the beetle continue to defy prediction. "[T]he pine beetle did everything the experts said it couldn't do: it flew over mountains, it invaded northern forests, it attacked spruce trees, and it wiped out pine plantations not much thicker in diameter than baseball bats."<sup>45</sup>

Indeterminacy poses a serious problem for environmental decision making. It means that our understanding of the problem is necessarily incomplete and that our ability to predict the effects of our decisions on the environment is limited.<sup>46</sup> Moreover, indeterminacy means that both our understanding of the problem and the problem itself are constantly evolving. Environmental decisions are often made in a "no-analogue" state,<sup>47</sup> where past decisions are of limited usefulness because they were influenced by a host of complex interactions that have changed over time. For example, fire suppression decisions in the first half of the twentieth century were not predictive of possible effects on the mountain pine beetle in the latter half of the century because never before had these management decisions intersected with climate change.

This incomplete understanding poses an additional challenge because complex, adaptive systems also contain the relatively high probability of extreme events,<sup>48</sup> which are also not always knowable in advance. Disturbances within complex, adaptive systems are not accurately described by simplistic bell curve distributions, in which the probability of severe events decays rapidly and allows decision makers to ignore the possibility of extreme events that are "off the chart." Rather, complex, adaptive systems are characterized by "fat tail probabilities,"<sup>49</sup> meaning that extreme, even catastrophic events, occur with surprising

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45. Nikiforuk, *supra* note 33 at 57.

46. JB Ruhl, "The Pardy-Ruhl Dialogue on Ecosystem Management, Part IV: Narrowing and Sharpening the Questions" (2007) 24:1 Pace Envtl L Rev 25 at 28.

47. Arild Underdal, "Complexity and Challenges of Long-Term Environmental Governance" (2010) 20:3 Global Envtl Change 386 at 388.

48. Farber, *supra* note 30 at 152-55; Mickelson & Rees, *supra* note 28 at 9-10.

49. Farber, *supra* note 30 at 155.

frequency. Decision makers cannot justifiably disregard the possibility of such extreme events.<sup>50</sup>

The current mountain pine beetle is just that extreme event: A beetle epidemic so severe that it could not have been predicted by looking at the historical record of mountain pine beetle outbreaks or indeed any prior insect outbreak in Canada. It is the unavoidable nasty surprise;<sup>51</sup> the unexpected outcome that we did not even know to look for when deciding to implement widespread fire suppression. The mountain pine beetle epidemic illustrates that even when we have a decades-old approach to a problem with a seemingly sound grasp of its dimensions, extreme unforeseeable events still occur. Our necessarily incomplete understanding of ecological systems means that surprises—sometimes catastrophic surprises—are unavoidable.

Our understanding of ecological systems as complex, adaptive systems means that the epistemic features of emergencies are inherent within all environmental issues. While it is certainly not the case that all environmental issues contain the possibility of an extreme event or catastrophe, our inability to distinguish in advance the ones that contain this possibility from the ones that do not justifies viewing all environmental issues from this perspective. It is not possible to “carve out irreversible or catastrophic risks for special treatment,”<sup>52</sup> since, as the beetle example illustrates, we cannot reliably identify these in advance. Moreover, the dynamics of complex systems mean that some of the most pernicious features of catastrophes, such as their irreversibility, “should be expected to characterize all decision nodes within complex adaptive systems.”<sup>53</sup> In other words, what may, at the time of their making, seem like trivial or benign regulatory decisions can in fact have irreversible environmental effects even if their full impacts do not materialize until well into the future, long past when anything can be done about it. Put differently, each environmental issue can be understood as an “emergency in miniature,”<sup>54</sup> in which decisions must be taken under conditions of uncertainty and the possibility that each decision will be the one that triggers the catastrophe

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50. For example, Douglas Kysar’s analysis of the risk assessment for hurricane protection proceeding Hurricane Katrina, which eliminated one of the most extreme hurricanes from the analysis as a statistical outlier. See Douglas A Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity* (New Haven, Conn: Yale University Press, 2010) at 77 [Kysar, *Regulating*].

51. Farber, *supra* note 30 at 167.

52. Douglas A Kysar, “It Might Have Been: Risk, Precaution and Opportunity Costs” (2006) 22:1 J Land Use & Envtl L 1 at 22.

53. *Ibid.*

54. Dyzenhaus, *Constitution*, *supra* note 14 at 60.

cannot be eliminated in advance. In this way, the concept of the environmental emergency reflects our current understanding of ecological systems, irrespective of the actual probability of a catastrophe or whether, in the end, it in fact occurs. It is our epistemic inability to distinguish benign from catastrophic policy choices that justifies viewing all relevant events and policies through the prism of the emergency paradigm.

By building on this understanding of complex, adaptive ecological systems, the environmental emergency underscores the fact that environmental decisions are always taken under conditions of uncertainty. Even at times when environmental issues have received abundant scientific attention, unforeseen dimensions still arise. Daniel Bodansky argues that “[m]any of today’s most serious problems were unanticipated and would probably not have been prevented even if regulators had chosen the cautious approach.”<sup>55</sup> In other words, the challenge for environmental law is not simply acquiring and incorporating better environmental science but coping with the complex features inherent in the issues themselves.<sup>56</sup> The challenge, then, is to understand how the rule of law can operate under conditions of such profound uncertainty.

### C. THE ENVIRONMENTAL REFORM POSITION

Understanding environmental issues as an ongoing emergency means that environmental law faces the same basic challenge as the emergency context: The challenge of discretion. As we saw in Part I(A), above, Schmitt argued that the emergency revealed the inevitable need for executive discretion, since the executive was best positioned to respond to the emergency. However, in reaching this conclusion, the environmental emergency conflicts with a dominant position in Canadian environmental law, the environmental reform position, which objects to the pervasiveness of discretion in Canadian environmental law.

While the environmental reform position is not monolithic, its core attributes are shared among many Canadian environmental law scholars. In particular, environmental reformers lament the extent of administrative discretion that permeates Canadian environmental law. David Boyd calls environmental statutes “paper tigers” because their lofty goals are subtly but consistently undermined by discretionary “loopholes” through which industry receives

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55. “Scientific Uncertainty and the Precautionary Principle” (1991) 33:7 *Env Sci & Pol Sustainable Dev* 4 at 43.

56. Douglas A Kysar, “Climate Change, Cultural Transformation, and Comprehensive Rationality” (2004) 31:3 *BC Envtl Aff L Rev* 555 at 565.

authorizations to pollute, degrade, and harm the environment.<sup>57</sup> Environmental reformers are rightly concerned about the exercise of discretion in a way that undermines statutory objectives and contributes to Canada's poor track record on environmental protection.<sup>58</sup>

These concerns about discretion stem from the fact that it is often exercised to allow short-term interests to trump long-term environmental protection.<sup>59</sup> This observation is supported by numerous theories of regulation that posit that regulated industries are able to coordinate and advance their interests within the administrative process whereas environmental interests are under-represented due to their diffuse and often intangible nature.<sup>60</sup> Furthermore, regulators face both epistemic and resource constraints that require considerable cooperation from regulated parties both to provide relevant information, and to comply with regulation in the absence of rigorous monitoring and enforcement.<sup>61</sup> The significance of Canada's natural resource industries in the Canadian economy has nurtured this cozy relationship between industry and government,<sup>62</sup> which, in turn, fuels a deep distrust of executive discretion by environmental reformers.

Some reformers also argue that the extent of discretion in Canadian environmental law undermines the rule of law itself.<sup>63</sup> Bruce Parry argues that environmental law "is one of the most extreme examples of legal disciplines in which the commitment to principles of predictability, abstraction, and separation

57. *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 231. For additional examples of this critique, see Linda Nowlan, "CPR for Canadian Rivers – Law to Conserve, Protect, and Restore Environmental Flows in Canada" (2012) 23:3 J Envtl L & Prac 237 at 257; Bruce Parry & Annette Stoehr, "The Failed Reform of Ontario's Mining Laws" (2012) 23:1 J Envtl L & Prac 1 at 6, 13-14; Emily Walter, "Decoding Codes of Practice: Approaches to Regulating the Ecological Impacts of Logging in British Columbia" (2005) 15:2 J Envtl L & Prac 143 at 156.

58. Boyd, *supra* note 57 at 5-10. My previous work has also assumed the environmental reform position for this reason. See Shaun Fluker & Jocelyn Stacey, "The Basics of Species at Risk Legislation in Alberta" (2012) 50:1 Alta L Rev 95.

59. Boyd, *supra* note 57 at 232, 237-38, 263. See also Commission for Environmental Cooperation, online: <[www.cec.org/](http://www.cec.org/)> (parties have filed dozens of petitions on Canada's failure to enforce its environmental laws).

60. For a nice overview of these theories as well as a critique of their weaknesses and an evaluation of their empirical support, see Stephen P Croley, "Theories of Regulation: Incorporating the Administrative Process" (1998) 98:1 Colum L Rev 1 at 32ff.

61. D Paul Emond, "The Greening of Environmental Law" (1990) 36:3 McGill LJ 742 at 744-45.

62. Stepan Wood, Georgia Tanner & Benjamin Richardson, "What Ever Happened to Canadian Environmental Law?" (2011) 37:4 Ecology LQ 981 at 1025.

63. Lynda Collins, "Tort, Democracy and Environmental Governance: The Case of Non-Enforcement" (2007) 15:1 Tort L Rev 107 at 111.

of powers has been consistently abandoned.”<sup>64</sup> Pervasive administrative discretion means that significant environmental policymaking does not take place in the open legislature. Rather, as Lynda Collins observes, “crucial decisions regarding trade-offs between short-term economic gain and long-term harm to health and the environment are ... made behind closed doors generally without the knowledge of the electorate, and therefore without accountability.”<sup>65</sup>

Reformers further observe that environmental statutes lack specific and clear legal rules and, instead, set out broad objectives to ‘manage’ the environment while simultaneously maintaining or promoting natural resource development. This means that environmental decisions amount to “discretionary judgment calls,”<sup>66</sup> in which virtually any decision is defensible<sup>67</sup> in light of the broad and potentially conflicting legislative objectives. Indeed, the environmental reform position highlights the fact that the courts provide an ineffective constraint on the exercise of discretion in environmental law. Environmental decisions are often not reviewable by the courts or are reviewed on such a deferential basis that virtually any decision is legally permissible.<sup>68</sup> The environmental reform position therefore concludes that executive decision makers are not effectively constrained by the rule of law.

The difficulty revealed by the environmental emergency is that administrative discretion is necessary not only to respond immediately to an urgent environmental catastrophe—to stem the tide of a mountain pine beetle epidemic, for example—but also to ensure that each environmental decision reflects the best understanding of the invariably dynamic problem at hand. Yet this kind of profound discretion does not square easily with a traditional understanding of the rule of law, as reflected by the concerns of the environmental reform position. It means that the executive exercises significant policymaking authority, authority that is not effectively constrained either by *ex ante* legislative rules or by *ex post* judicial review. In these respects, the executive holds and exercises decision-making power in much the way Schmitt thinks that sovereigns must hold and exercise power to deal with national security emergencies. As we shall now see, the challenge that emergencies pose for the rule of law is the best way to understand the problem we face in the environmental context.

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64. “Environmental Assessment and Three Ways Not to Do Environmental Law” (2010) 21 J Envtl L & Prac 139 at 149 [Pardy, “EA”].

65. *Supra* note 63 at 110-11.

66. Pardy, “EA,” *supra* note 64 at 149; Collins, *supra* note 63 at 111.

67. Pardy, “EA,” *supra* note 64 at 147.

68. Boyd, *supra* note 57 at 269.

## II. THE 'PROBLEM' OF DISCRETION IN ENVIRONMENTAL LAW

This section builds on Schmitt's challenge: To show how emergencies can be governed by law in order to uncover our basic assumptions about law and its ability to constrain emergency powers. The real challenge in the emergency context arises from a *formal* conception of the rule of law, which equates law with rules enacted by the legislature. Drawing on the emergency literature, I argue that the formal conception is incapable of constraining emergency power because it makes no room for the exercise of administrative discretion. In the emergency context, a desire to preserve the formal conception of the rule of law leads judges to find legal black holes, in which statutes attempt to exempt the executive from legal constraints,<sup>69</sup> and grey holes, in which there are some constraints on executive action but not enough to constrain it in any meaningful way.<sup>70</sup> In other words, legal black and grey holes emerge when the formal conception collides with the exercise of administrative discretion. As we will see, these concepts of legal black and grey holes allow us to flesh out fully the nature of the problem of discretion that is the core concern of the environmental reform position.

### A. THE CHALLENGE OF EMERGENCIES

As we have seen, Schmitt's basic argument is that emergencies cannot be governed by law. Schmitt argues that since the exception is unknowable in advance, the best that can be done is to indicate who can make the decisions that must be made to contend with the exception. He claims that it is the sovereign, or executive, who has the authority to decide "whether there is an extreme emergency as well as what must be done to eliminate it,"<sup>71</sup> and thus that the exception is what reveals who is in fact the sovereign.<sup>72</sup> Any attempt to prescribe how the sovereign must respond to the exception is undermined by the fact that the exception cannot be predicted in advance and therefore may require the violation of pre-existing

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69. Dyzenhaus, *Constitution*, *supra* note 14 at 3. The term "legal black hole" was used to describe the US detention regime at Guantanamo Bay. See Johan Steyn, "Guantanamo Bay: The Legal Black Hole" (2004) 53:1 ICLQ 1.

70. Dyzenhaus, *Constitution*, *supra* note 14 at 3.

71. Schmitt, *supra* note 20 at 5.

72. *Ibid* at 6, 13.

rules. The sovereign, then, is unconstrained both in declaring the exception and determining what to do about it.<sup>73</sup>

Schmitt's account of the emergency presupposes a specific understanding of law: He equates law with general legislative rules enacted in advance of the emergency. On Schmitt's understanding of law, the legislature is the only legitimate source of legal norms, and since emergencies cannot be anticipated, they cannot be governed by pre-existing legal rules. I follow David Dyzenhaus and others by calling this the "formal conception of the rule of law" because it emphasizes the requirement of a formal allocation of distinct powers between institutions of government.<sup>74</sup>

For those that adhere to a formal conception of the rule of law, there are only two possible responses to the emergency. The first is to follow Schmitt in declaring that emergencies cannot be governed by law and in advocating an extralegal response to the emergency that empowers public officials to take whatever actions they see fit to respond to a crisis.<sup>75</sup> By and large, however, an extralegal approach is seen as incompatible with modern liberal-democratic principles.<sup>76</sup> Dyzenhaus calls this the "compulsion of legality": The reality that public officials are not wont to act in open contravention of the law but will rather seek to legitimize their acts by claiming that they have legal authority.<sup>77</sup>

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73. *Ibid* at 6-7. The need for unfettered authority—including the decision to suspend the legal order altogether—cannot be ruled out, according to Schmitt, because it may be needed to defend against an existential threat. Schmitt argues that the exception reveals that the state cannot be completely circumscribed by law since responding to the exception hinges on the discretionary decision-making power of the sovereign.

74. David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: Baker v Canada" (2001) 51:3 UTLJ 193 at 197-205; Martin Loughlin, "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" (1978) 28:2 UTLJ 215; Geneviève Cartier, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?" (2003) 53:3 UTLJ 217.

75. See *e.g.* Mark Tushnet, "Emergencies and the Idea of Constitutionalism" in Mark Tushnet, ed, *The Constitution in Wartime: Beyond Alarmism and Complacency* (Durham, UK: Duke University Press, 2005) 39; Posner & Vermeule, *Terror*, *supra* note 19. Gross advances an extralegal approach but argues that it is grounded in a Lockean understanding of prerogative powers. See Gross, *supra* note 17.

76. See Thomas Poole, "Constitutional Exceptionalism and the Common Law" (2009) 7:2 Intl J Const L 247 at 252-58 (on the move away from prerogative powers).

77. "Cycles of Legality in Emergency Times" (2007) 18 Pub L Rev 165 at 167 [Dyzenhaus, "Cycles"].

The second possible response is to attempt to “accommodate” emergencies within the legal order.<sup>78</sup> Accommodation can take many forms, but it seeks to strike a compromise by imposing some rule-of-law requirements while still allowing for the inevitable flexibility needed by the executive to respond to a crisis. For example, a statute may set out requirements for responding to an emergency, such as Canada’s *Emergencies Act*<sup>79</sup> and *Emergency Management Act*.<sup>80</sup> The problem is that, since the emergency is unforeseeable, the requirements contained in the pre-existing statute will be necessarily very broad and will unavoidably delegate expansive discretionary authority to the executive.<sup>81</sup> The more extreme or unforeseeable the emergency, the more that pre-existing laws need to be stretched in order to ground the emergency response in law.

Dyzenhaus helpfully characterizes the problem of accommodation in terms of legal black and grey holes. Legal black holes arise from situations in which the legislature attempts to create a space uncontrolled by law, for example, by delegating ostensibly unfettered discretion to the executive to act in response to a crisis. Canada’s now repealed *War Measures Act*<sup>82</sup> is a paradigmatic example of a legal black hole: A legislative blank cheque<sup>83</sup> to the executive to do whatever it likes. Dyzenhaus argues that legal grey holes are even more problematic than legal black holes, however, because they give the appearance of legal constraint without actually constraining executive action meaningfully.<sup>84</sup> They are legal black holes in disguise.<sup>85</sup> When emergency response decisions are challenged in court, judges adhering to a formal conception of the rule of law will validate these

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78. See especially Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New Brunswick, NJ: Transaction Publishers, 2002); Ackerman, *supra* note 19. See also Oren Gross & Fionnuala Ni Aolain, *Law in Times of Crisis* (New York: Cambridge University Press, 2006) ch 1 at 17ff; Eric A Posner & Adrian Vermeule, “Accommodating Emergencies” (2003) 56:3 *Stan L Rev* 605; John Ferejohn & Pasquale Pasquino, “The Law of Exception: A Typology of Emergency Powers” (2004) 2:2 *Intl J Const L* 210.

79. RSC 1985, c 22 (4th Supp).

80. SC 2007, c 15.

81. Moreover, as Schmitt would point out, even an emergency statute may need to be suspended to respond to a truly extreme threat. It should also be noted that accommodation also comes in the form of judges relaxing ordinary rule-of-law requirements such as due process. See *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 77, [2002] 1 SCR 3; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 (the Court avoids the true nature of the detention scheme to find that it does not violate the right to detention); Dyzenhaus, “Cycles,” *supra* note 77 at 174. [*Suresh*].

82. RSC 1970, c W-2.

83. Dyzenhaus, *Constitution*, *supra* note 14 at 50.

84. *Ibid* at 42.

85. *Ibid* at 3.

black and grey holes by holding that the executive acts with legal authority.<sup>86</sup> But this effectively creates a ‘rule-of-law façade,’ from which executive decisions are governed by law only in the thin sense that they comply formally with validly enacted legislation even though their enabling legislation may not set out any substantive constraints on the exercise of discretion.<sup>87</sup>

The response of the government of British Columbia to the mountain pine beetle epidemic created numerous potential legal black and grey holes. For example, the Lieutenant Governor in Council (“LGIC”) promulgated an emergency *Bark Beetle Regulation* that enabled targeted harvesting efforts and relaxed ordinary administrative requirements.<sup>88</sup> The *Beetle Regulation* delegated unfettered discretionary authority to the Minister of Forests to identify emergency management areas for mountain pine beetle treatment “if satisfied” that a forest was attacked or in danger of attack.<sup>89</sup> In addition, the regulation was itself authorized by a statutory provision that delegated open-ended discretion to the executive to issue regulations “respecting the protection of forest resources.”<sup>90</sup> The Minister of Forests also exercised discretion to determine the “policies and procedures”<sup>91</sup> to apply the minimum royalty to beetle-killed timber. Finally, the Chief Forester dramatically increased the allowable annual cut, raising the total amount of timber that companies could harvest in heavily affected regions to facilitate the epidemic response.<sup>92</sup> Each response was a highly controversial, discretionary decision taken at the administrative—not the legislative—level.

Note that the prevalence of discretion in the mountain pine beetle example is precisely the concern of the environmental reform position, a concern that

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86. For a particularly clear example of this, see *Hamdi et al v Rumsfeld, Secretary of Defense et al*, 542 US 507 (2004). The US Supreme Court finds that the use of military tribunals for American enemy combatants was authorized by the very generic Authorization for the Use of Military Force.

87. Dyzenhaus, *Constitution*, *supra* note 14 at 3. See also *Secretary of State for the Home Department v MB*, [2006] EWHC Admin 1000 at para 103 [*Re MB*, Admin] (Sullivan J used the phrase “thin veneer of legality” to describe the UK special detention regime).

88. BC Reg 286/2001 [*Beetle Regulation*].

89. *Ibid*, s 2.

90. *Forest Practices Code of British Columbia Act*, RSBC 1996, c 159, s 211.1, as repealed by *Forest and Range Practices Amendment Act, 2003*, SBC 2003, c 55, s 103.

91. *Forest Act*, RSBC 1996, c 157, s 105.

92. Nelson, *supra* note 40 at 465. While the Chief Forester must “consider” a list of statutorily prescribed factors in reaching this decision, he has considerable policy-making discretion over how to account for these factors in his ultimate decision. *Forest Act*, *supra* note 91, s 8(8); Jeremy Rayner, “Fine-Tuning the Settings: The Timber Supply Review” in Benjamin Cashore et al, *In Search of Sustainability: British Columbia Forest Policy in the 1990s* (Vancouver: UBC Press, 2000) 140 at 142.

we can now situate within the formal conception of the rule of law. Since the epidemic was unforeseen and the understanding of its dynamics changed rapidly over the course of each season, discretion was essential to respond quickly to the epidemic. The response was difficult to specify in advance and therefore could not be effected exclusively through *ex ante* legislative rules.<sup>93</sup> Moreover, all three decisions resulted from the exercise of *everyday* administrative discretion: regulation making,<sup>94</sup> individual exemptions from ordinary forestry requirements, and discretionary decisions on stumpage fees and total harvest—all forms of discretion that the environmental reform position understands as threatening the rule of law. The legislature deliberately delegated this authority to make significant policy decisions about British Columbia's forests, and indeed, it is difficult to see how it could have done otherwise. All of the decisions require sophisticated knowledge of the forest industry and continual updating across all regions of the province in response to changing environmental, economic, and social conditions.

In other words, the possibility of legal black and grey holes extends beyond the immediate aftermath of an emergency since such holes emerge whenever the formal conception of the rule of law intersects with the exercise of discretion. The emergency is one striking example of the exercise of discretion, but discretion exists in non-exceptional cases as well. Dyzenhaus observes that every discretionary decision, for Schmitt, must be a “mini state of emergency or exception”<sup>95</sup> because the “official ... has to make a quasi-sovereign or legislative decision, one that is ultimately unconstrained by legal norms.”<sup>96</sup> What remains to be seen is whether these kinds of discretionary environmental decisions are in fact subject to a formal conception of the rule of law, which we now know from the environmental emergency would result in the creation of legal black and grey holes that leave discretion effectively unconstrained by the rule of law.

## B. BLACK AND GREY HOLES IN ENVIRONMENTAL LAW

We shall now see that the environmental emergency validates the concerns of the environmental reform position: The formal conception persists in Canadian

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93. Even alternative proposals would have proceeded through the same discretionary regulatory mechanisms. See generally Parfitt, *supra* note 36.

94. The *Beetle Regulation* was an emergency regulation but did not differ substantively from ordinary environmental regulation in which discretionary authority to make orders or exemptions is utterly commonplace. See Boyd, *supra* note 57 at 140, 142.

95. Dyzenhaus, *Constitution*, *supra* note 14 at 60.

96. *Ibid.*

environmental law and results in the creation of legal black and grey holes that do not meaningfully constrain the exercise of discretion in the environmental context. As I will explain, judges committed to the formal conception create legal black holes when they declare environmental decisions not justiciable, only subject to review for *vires*, and not subject to common law requirements of procedural fairness. They create legal grey holes when they fail to give substantive statutory constraints any rule-of-law “teeth.” First, however, it is necessary to say more about how legal black and grey holes come to be in administrative law.

The influence of the formal conception on Canadian administrative law can be traced to A.V. Dicey’s conception of the rule of law, which distinguishes between the dual roles of the legislature and the judiciary.<sup>97</sup> On the one hand, he argues, the legislature possesses a monopoly over lawmaking and, on the other, the judiciary possesses a monopoly over law interpretation.<sup>98</sup> The modern administrative state presents a fundamental problem for this conception of the rule of law. When the legislature deliberately delegates discretionary authority to administrative decision makers, Diceyan—or formalist—judges attempt to preserve the formal conception of the rule of law in the face of conflicting legislative intentions. On the one hand, the legislature signals that the administrative decision maker, not the court, has final decision-making authority; but, on the other, the logical inference is that the legislature intends *some* limits on the statutorily-created decision maker’s power.

The formalist judge attempts to reconcile this tension by according the administrative decision maker “free rein within certain legal limits,”<sup>99</sup> which means that judges will strictly enforce the statutory language and common law requirements of procedural fairness but will give decision makers free rein over the substance of their decisions. In other words, formalist judges are content to create legal black holes whereby issues that fall within the administrator’s statutory jurisdiction are only governed by the rule of law insofar as they are authorized by validly enacted legislation. And they will be content to create legal grey holes, meaning that they will find the statutory language poses no meaningful constraint on the exercise of discretion.

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97. AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (Toronto: Macmillan Company of Canada, 1959). Dicey’s conception has been “remarkably influential” on Canadian administrative law. See *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at para 74, 74 DLR (4th) 449, Wilson J.

98. Dyzenhaus & Fox-Decent, *supra* note 74 at 198.

99. *Ibid* at 204.

## 1. LEGAL BLACK HOLES: ENVIRONMENTAL REGULATIONS

As we saw in the mountain pine beetle context, the legislature often delegates significant discretionary authority to the executive to issue regulations. Many of the details and difficult trade-offs required by environmental statutes are left to regulations. This means that the executive has discretion both over whether to issue regulations and what those regulations should say. The environmental emergency reveals that regulations issued by the executive exist in a legal black hole: The failure to issue regulations is not justiciable, regulations are subject only to *vires* review, and they are not subject to the requirements of procedural fairness.

On the failure to issue regulations, the law is very clear: The matter is not justiciable.<sup>100</sup> Regulations have the force of law; they are a form of delegated legislation and thus an extension of parliamentary sovereignty. Parliament can choose to legislate (or not) over any matter. Applying the same logic to delegated legislation, courts have concluded that they cannot require the executive to issue regulations where it has not done so.<sup>101</sup> But regulations cannot, in principle, be entirely off limits for formalist judges. The promulgation of regulations, just like any other exercise of delegated authority, is bound by its statutory scheme, and the formalist judge must patrol those statutory boundaries. Formalist judges, then, feel a great deal of strain when faced with challenges to the legality of regulations.

The Federal Court's decision in *Friends of the Earth – Les Ami(e)s de la Terre v Canada (Governor in Council)*<sup>102</sup> brings this formalist tension to the surface. The issue arose from the executive's intransigence regarding the federal *Kyoto Protocol Implementation Act*.<sup>103</sup> The legislation, passed by the opposition parties against the minority government, set out ostensibly binding requirements, including a requirement to issue regulations to mitigate climate change by a specific deadline, which the executive failed to do.<sup>104</sup> The administrative decision not to issue regulations by a statutory deadline fell squarely within the traditional law-making monopoly, which requires judicial abstinence from the formalist's perspective. But the refusal to act also directly undermined the objective of the legislation and the specific language of the authorizing provisions. The only way

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100. See e.g. *Canadian Council for Refugees v Canada*, 2008 FCA 229 at para 53, [2009] 3 FCR 136; John Mark Keyes, *Executive Legislation*, 2nd ed (Toronto: LexisNexis Canada, 2010) at 529.

101. *Ibid.*

102. 2008 FC 1183, [2009] 3 FCR 201 [*FOTE*].

103. SC 2007, c 30, as repealed by *Jobs, Growth, and Long-Term Prosperity Act*, SC 2012, c 19, s 699.

104. *Ibid.*, ss 7-9.

the Federal Court could make sense of this tension was to conclude that the provisions “reflect only a permissive intent”<sup>105</sup> and that the legislature did not intend to create legally enforceable duties.<sup>106</sup> This interpretation allowed the Federal Court to keep the formal conception intact. The court created a legal black hole by patrolling the boundaries of the legislation and simply concluding that there were none that could be legally enforced.<sup>107</sup>

In addition, the executive typically has broad discretion over the substance of regulations. The environmental reform position highlights the concern that the substance of regulations can easily undermine the environmental protection goals articulated by the legislature. Judicial review of regulations in Canada again seems to validate this concern. Regulations are subject to judicial review only for their *vires*; that is, on the narrow question of whether they fall within the scope of the statutory authority under which they were promulgated.<sup>108</sup> *Vires* review is a direct product of the formal conception. From this perspective, the judicial role is to police the boundaries of the statute. The substance of the regulations, their wisdom, and their ability to achieve the legislative objective are entirely off limits to the courts. Only if the regulation is “irrelevant,” “extraneous,” or “completely unrelated to the statutory purpose” will the court find that the regulation is invalid.<sup>109</sup> This means that it is extremely difficult to challenge regulations that undermine environmental protection goals contained in their enabling legislation. Both the purpose of environmental legislation and the specific provisions enabling regulation making are often cast in extremely broad terms, meaning that it would take an outrageous regulation to exceed these statutory limits.<sup>110</sup>

Moreover, environmental regulations are not subject to the duty of procedural fairness. The doctrine of procedural fairness has consistently required judges to

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105. *FOTE*, *supra* note 102 at para 37.

106. *Ibid* at para 35.

107. *Ibid* at para 46. The court states: “[T]he Court has no role to play reviewing the reasonableness of the government’s response to Canada’s Kyoto commitments within the four corners of the [Act].”

108. The Supreme Court of Canada most recently affirmed this in *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64, 3 SCR 810.

109. *Ibid* at para 28.

110. See *e.g.* *Sandy Pond Alliance to Protect Canadian Waters Inc v Canada (Attorney General)*, 2013 FC 1112, 81 CELR (3d) 175. The Federal Court upheld a regulation that permitted the conversion of a lake into a tailings pond for untreated mining effluent on the basis that the *Fisheries Act* was for the “general management” of the fisheries (*ibid* at para 70).

formally classify decisions to determine whether the duty of fairness applies.<sup>111</sup> While the courts have expanded the duty of fairness from decisions categorized as judicial or “quasi-judicial” to most administrative decisions, they have retained a category of “legislative” decisions that are not subject to common law procedural requirements.<sup>112</sup> The legislative distinction is a remnant of the formal conception, under which the integrity of the legislative process was maintained through judicial non-interference.<sup>113</sup> Judges broadened the requirements of procedural fairness to encompass all adjudicatory administrative decisions out of concern for the preservation of the integrity of the judicial process. But these requirements had no such role in decisions of a legislative nature.<sup>114</sup> Since environmental decisions are often complex, “political” matters that courts implicitly understand as part of the traditional law-making monopoly, they are not typically subject to the duty of procedural fairness.<sup>115</sup>

The formal conception singles out the “law-making” character or appearance of the administrative decision. Regulations fall squarely within the law-making category because they are functionally identical to legislation and are thus understood to be outside the proper sphere of the courts. But this conclusion overstates important distinctions between the two. Unlike the legislature, the executive has no inherent authority to make law. This means that regulations always exist within a legal framework. And while regulations are typically issued by elected decision makers—a minister or cabinet—it is incorrect to assume, as the formal conception seems to, that this is a sufficient condition for democratic legitimacy. Legislation is democratic not only because it is enacted by elected officials but also because it is the product of deliberation and open debate by opposing parties.<sup>116</sup> While formal regulations are subject to some uniform requirements such as publication,<sup>117</sup> procedural requirements for regulations are

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111. Grant Huscroft, “From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review” in C Flood & L Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publications, 2012) 147 at 148-49.

112. *Ibid* at 156-57.

113. Cartier, *supra* note 74 at 237.

114. *Ibid*.

115. *Imperial Oil v Quebec (Minister of the Environment)*, 2003 SCC 58 at para 38, 2 SCR 264.

See also *Canadian Society of Immigration Consultants v Canada (Citizenship and Immigration)*, 2011 FC 1435 at para 113, 3 Imm LR (4th) 175.

116. Cartier, *supra* note 74 at 242-43.

117. *Statutory Instruments Act*, RSC 1985, c S-22 (notably, the s 5 requirement of publication).

patchy.<sup>118</sup> Moreover, the formal conception ignores the fact that the legislature has deliberately relinquished its monopoly over law making by delegating general policy-making authority to the executive.<sup>119</sup> Indeed, the simple fact that the legislature has authorized the exercise of discretion is true of all administrative action and is not sufficient to immunize an administrative decision from judicial oversight in any other context.

The persistence of the formal conception in the case of regulations presents another problem. Because the formal conception is a product of a practical compromise, there is no principled basis on which to distinguish the kinds of “law making” that attract *vires* review from those that are subject to substantive review or to distinguish those that attract the duty of procedural fairness from “legislative” decisions that do not. While formal regulations may be easy enough to delineate, courts, relying on the formal conception, have concluded that environmental policies are “legislative” and not the proper subject of review.<sup>120</sup> Even in instances in which the executive is delegated authority to make an individual decision, judges have relied on the formal conception to give the decision maker effectively free rein.<sup>121</sup> Moreover, the formal conception ignores the fact that environmental decision makers are often delegated the choice of regulatory instrument; that is, a decision can be taken by way of regulation, informal policy, or ad hoc individual decision.<sup>122</sup> All options have the same effect on the environment and on the authorized individual but are potentially subject to different rule-of-law requirements based on their classification. In short, there is no clear dimension along which the courts can determine which issues are sufficiently political or legislative in nature that they ought to be exempt from substantive judicial review.<sup>123</sup> When faced with complex policy matters, the

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118. Andrew Green, “Regulations and Rule Making: The Dilemma of Delegation” in C Flood & L Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publications, 2013) 125 at 142.

119. Cartier, *supra* note 74 at 238.

120. *MacMillan Bloedel Ltd v British Columbia (Minister of Forests)* (1984), 51 BCLR 105 at 13, 8 DLR (4th) 33 (CA) (review of the stumpage policy). Moreover, the Court’s characterization of what counts as “legislative” seems to have shifted. For a comparison, see *Canadian National Railway v Canada*, 2014 SCC 40 at para 51, [2014] 2 SCR 145; *Attorney General (Canada) v Inuit Tapirisat et al.*, [1980] 2 SCR 735 at para 30, 115 DLR (3d) 1.

121. *Carpenter Fishing Corp v Canada*, [1998] 2 FC 548 at para 37, 155 DLR (4th) 572. This case was reaffirmed in *Association des crevetiers acadiens du Golfe inc c Canada (Attorney General)*, 2011 FC 305, 204 ACWS (3d) 181.

122. See *e.g. Fisheries Act*, RSC 1985, c F-14, s 35(2).

123. Cartier, *supra* note 74 at 233.

courts can revert to *vires* review even at times when the decision lacks the insignia of actual law making.

## 2. LEGAL GREY HOLES: INEFFECTIVE SUBSTANTIVE CONSTRAINTS ON ENVIRONMENTAL DECISIONS

In addition to these black holes, the formal conception also leads judges to create legal grey holes in cases in which the legislature has imposed some, albeit minimal, substantive constraints on environmental decisions. For example, the emergency mountain pine beetle regulation authorized the Minister of Forests to make a designation “if satisfied” that an area was attacked or in danger of being attacked. This language reflects the complex context in which the decision maker is expected to operate: Certain relevant factors may be identified in advance, but what these factors look like in any given situation will vary as will how the decision maker might account for them. Delegating decision-making authority in subjective terms—“if satisfied that” or “of the opinion that”—is common in environmental law. Although the legislature has, in these circumstances, attempted to set out some substantive criteria for guiding a difficult and inevitably discretionary decision, courts are frequently unwilling to give these criteria any rule-of-law teeth.

A striking creation of a legal grey hole arose again in the British Columbia forestry context. In *David Suzuki Foundation et al v The AG for BC*,<sup>124</sup> the David Suzuki Foundation challenged the decision of the LGIC to issue an exemption to a prohibition of the export of timber from northwestern British Columbia. Under the *Forest Act*, the LGIC could grant an exemption “if satisfied” that, among other conditions, the timber was in surplus.<sup>125</sup> The Foundation argued that the surplus condition was not met and therefore the exemption was *ultra vires* the *Forest Act*. The British Columbia Supreme Court disagreed. It found that the provision conferred an “exclusive,”<sup>126</sup> “complete, unfettered, subjective discretion”<sup>127</sup> on the LGIC to issue an exemption. The *Forest Act* only required that the LGIC “be satisfied” that the conditions were met. Since the order itself stated that the LGIC was satisfied as to the existence of the conditions, the court was not entitled to look beyond the order to assess whether the objective evidence supported the decision. The court was content with the fact there was “some evidence” supporting the decision and found that “the conditions which may have

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124. 2004 BCSC 620, 17 Admin LR (4th) 85 [*Suzuki*].

125. *Supra* note 91, s 128(1).

126. *Suzuki*, *supra* note 124 at para 11.

127. *Ibid* at para 12.

motivated the LGIC ... are irrelevant.”<sup>128</sup> The court understood its role in “a basic jurisdictional” sense, meaning that the court’s role was to patrol the boundaries of the legislation, not to second-guess decisions taken within those bounds.<sup>129</sup>

Even when the court purports to conduct substantive review to determine whether a decision is reasonable, it can still create a legal grey hole.<sup>130</sup> In *Sierra Club Canada v Ontario (Ministry of Natural Resources)*,<sup>131</sup> the Sierra Club challenged the Minister of Natural Resources’s decision to permit the disturbance of endangered species habitat for the construction of a new bridge across the Detroit River. The legislation set out the Minister’s authority in purely subjective terms, requiring that the Minister consult with “a person who is considered by the Minister to be an expert ... and to be independent of the person who would be authorized by the permit to engage in the activity.”<sup>132</sup> At issue was the fact that one expert report on which the Minister relied, and which contradicted a second expert, was produced by an employee of the company bidding for the project.<sup>133</sup> While the court expressed reservations about the appearance of a lack of independence, “which the Minister might have been better to avoid,”<sup>134</sup> the court nonetheless found that the Minister complied with the Act in question. It did so in purely formal terms. Since the expert provided the Minister with a statement that declared his independence, the court found that “[s]trictly speaking, it confirm[ed] the independence of the expert”<sup>135</sup> and all that the legislation required was “that the Minister consult and obtain a written report.”<sup>136</sup> In other words, the court created a legal grey hole in which a legislative requirement to consult with independent

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128. *Ibid* at para 145.

129. *Ibid* at para 91.

130. Whether any given application of reasonableness review is underpinned by a formal conception or not is an open question since the application of reasonableness is far from consistent. See *e.g.* Matthew Lewans, “Deference and Reasonableness Since *Dunsmuir*” (2012) 38:1 Queen’s LJ 59; Paul Daly, “The Scope and Meaning of Reasonableness Review” (2015) 52 Alta L Rev [forthcoming]. For another controversial environmental example of how the formal conception persists even under the guise of substantive review, see *Forest Ethics Advocacy Association and Sinclair v National Energy Board*, 2014 FCA 245, 246 ACWS (3d) 191. In this case, the Federal Court of Appeal upheld the National Energy Board’s restrictive interpretation of its mandate (to exclude upstream and downstream greenhouse gas emissions) largely on the grounds that the statutory language does not explicitly require consideration of such large scale effects.

131. 2011 ONSC 4655, 344 DLR (4th) 148 [*Sierra*].

132. *Endangered Species Act, 2007*, SO 2007, c 6, s 17(2).

133. *Sierra*, *supra* note 131 at para 64.

134. *Ibid* at para 68.

135. *Ibid* at para 65.

136. *Ibid* at paras 72, 90.

experts before deciding whether an activity will jeopardize the survival or recovery of an endangered species is no more than an empty reporting exercise that does not receive meaningful scrutiny on review.

Indeed, it seems that only in egregious cases in which the decision completely lacks an evidentiary basis will the court intervene.<sup>137</sup> So long as there is evidence that the decision maker turned his or her mind to the relevant statutory factors—ticked the appropriate boxes—the court will not question the basis for the decision maker’s subjective judgment.<sup>138</sup> Without some examination of the decision maker’s reasons for a decision, however, virtually any outcome is permissible since, as we have seen, environmental legislation is cast in the broadest of terms. Indeed, allegations that a decision maker has been driven by an improper purpose, such as political lobbying<sup>139</sup> or, as we have seen, a potential stake in the outcome, are often skimmed over on the way to the court’s conclusion that the outcome falls easily within the broad perimeters of the legislation.<sup>140</sup>

The court’s justification for focusing on the outcome rather than on the record or reasons for the decision is logical from the perspective of the formal conception of the rule of law. Discretionary environmental decisions involve complex scientific issues and policy-laden considerations, which are typically accompanied by a clear legislative signal that the decision maker ought to have wide room for manoeuvre. For the court to scrutinize the substance of these decisions would pull judges far away from their traditional monopoly of law interpretation. The court is not “an academy of science to arbitrate conflicting

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137. *Alberta Wilderness Association v Minister of Environment*, 2009 FC 710, 94 Admin LR (4th) 81; *Environmental Defence Canada v Ministry of Fisheries and Oceans*, 2009 FC 878, 349 FTR 225.

138. *Sierra*, *supra* note 131 at para 77. See also *Western Canada Wilderness Committee v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2014 BCSC 808, 84 CELR (3d) 85; *David Suzuki Foundation v British Columbia (Minister of Environment)*, 2013 BCSC 874, 240 ACWS (3d) 641; *Pacific Booker Minerals Inc v British Columbia (Minister of Environment)*, 2013 BCSC 2258, 236 ACWS (3d) 641; *Castle-Crown Wilderness Coalition v Alberta (Director of Regulatory Assurance Division, Alberta Environment)*, 2005 ABCA 283, 371 AR 370 (all involving qualified discretion).

139. *Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130 at para 57, 76 Admin LR (5th) 179.

140. Review is often further hampered by courts’ unwillingness to require decision makers to give reasons. See Lorne Sossin, “The Unfinished Project of *Roncarelli v. Duplessis*: Justiciability, Discretion, and the Limits of the Rule of Law” (2010) 55:3 McGill LJ 661 at 684. Indeed, recent developments at the Supreme Court of Canada seem to continually weaken the requirement to offer reasons. See especially *British Columbia (Securities Commission) v McLean*, 2013 SCC 67, 3 SCR 895 (the Court accepts *ex post* rationalizations of the administrative decision).

scientific predictions.”<sup>141</sup> Nor is it in the business of law making, in the sense of making policy determinations about the appropriateness of fishing licences, project approvals, or endangered species protection.

The influence of the formal conception of the rule of law, even in cases of individual environmental decisions, supports the environmental reform position’s concern that judges are not imposing effective constraints on the exercise of discretion. To give meaning to substantive statutory criteria would require them to review matters that fall well outside their traditional monopoly. They thus resort to the creation of legal grey holes, which permit decision makers to claim that they are acting in accordance with the rule of law without being subject to meaningful judicial oversight.

### III. RESPONDING TO THE ENVIRONMENTAL EMERGENCY

The argument so far has been that the environmental emergency reveals both the necessity and desirability of discretion but that the formal conception of the rule of law is incapable of providing meaningful constraints on the exercise of that discretion. In other words, the environmental reform position is right to call attention to the pervasive problem of discretion in Canadian environmental law since the courts seem beholden to the formal conception that leads judges to create legal black and grey holes. Yet, the environmental reform position does not seem to face up to the emergency features inherent in environmental issues. Reformers offer up two possible reforms, both of which follow from a formal conception of the rule of law and thus cannot deliver the rule-of-law constraints that the environmental reform position seeks. This article assesses these two responses and concludes by introducing a competing conception of the rule of law, one that requires an ongoing commitment to public justification and points to the necessity of creative institutional design in environmental law.

#### A. ENVIRONMENTAL REFORM SOLUTIONS

This section focuses on two common solutions that follow from the environmental reform position: stricter legislative rules and delegation to independent decision makers. To be sure, environmental reformers may disagree on the respective strengths and weaknesses of these potential solutions and offer more detailed reform proposals for specific environmental issues. Nevertheless, much of Canadian environmental law scholarship has focused on the potential for either

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141. *Vancouver Island Peace Society v Canada*, [1992] 3 FC 42 at para 12, 53 FTR 300.

legislative reform to create rules or independent decision making to strengthen Canadian environmental law.

For example, Boyd instructs that “[d]iscretionary language in environmental laws and regulations should be replaced by mandatory language; three decades of experience have proven time and again that politicians and bureaucrats will exercise their discretion to the environment’s detriment.”<sup>142</sup> Similarly, Pardy advocates crafting an “environmental rule” that would prohibit non-natural, permanent damage to ecosystems.<sup>143</sup> But for reasons already discussed, neither proposal would solve the problem of discretion. To recapitulate, it is not possible to eliminate discretionary language because it is often impossible to know in advance what actions should be taken to achieve environmental protection objectives. This is the key insight that follows from viewing the environment as an ongoing emergency.

Pardy’s proposal, while considerably more elegant than the current tangle of prohibitions, qualifiers, and exemptions found in Canadian environmental law, simply embeds discretionary judgment calls within its open-textured language.<sup>144</sup> What constitutes non-natural, permanent, or even an ecosystem is a highly contextual and often contentious determination. Under a general environmental rule, discretion would not be eliminated or minimized, merely shuffled around. Schmitt’s challenge cannot be met by simply making fewer, simpler, or better *ex ante* rules. But to see that this solution is inadequate, environmental law has to own up to its unavoidable subjection to Schmitt’s challenge in the first place.

The second solution that follows from the environmental reform position—delegating environmental decision-making authority to independent experts rather than elected members of the executive—raises a similar problem. Independent expert tribunals appeal to the environmental reform position because they promise to remove politics from environmental decision making. For example, the 2012 amendments to the *Canadian Environmental Assessment Act*, which transferred final decision-making authority over energy projects from the National Energy Board to the federal Cabinet, prompted an outcry representative of the reform position. The problem, one commentator observes, is that the Cabinet lacks the “objectivity and expertise” of the Board; “[s]hifting the decision for major energy projects from the Board to Cabinet will politicize what

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142. *Supra* note 57 at 293.

143. Bruce Pardy, “In Search of the Holy Grail of Environmental Law: A Rule to Solve the Problem” (2005) 1:1 JSDLP 29.

144. See also Ruhl, *supra* note 46.

was an otherwise independent regulatory process.”<sup>145</sup> But the Board, just like the Cabinet, necessarily exercises significant policy-making discretion that cannot be eliminated through objective expertise. Simply put, delegating environmental decision-making authority to an independent expert does not, without more, respond to the environmental reform position’s concern about discretion.

Independent expert decision makers play a significant role in environmental decision making. As we have already seen, British Columbia’s Chief Forester implemented one of the province’s key responses to the mountain pine beetle epidemic by increasing the allowable harvest in areas affected by the epidemic. The Chief Forester exercises considerable discretion in determining the allowable annual cut for all regions of the province, and, “[o]f all the decisions facing forest policymakers, [this one is] probably the most critical in terms of its economic importance . . . .”<sup>146</sup> But to reconcile the Chief Forester’s broad discretion with the formal conception of the rule of law, we must assume that objective expertise can provide the constraints on discretion that the legislature is unable to provide.<sup>147</sup> From this perspective, objective expertise means that the decision maker is not exercising discretion in any real sense. Rather, an independent decision maker is simply doing what the legislature, or indeed anyone, would do if they possessed the requisite knowledge.<sup>148</sup>

These assumptions are unsound, but they have a strong footing in the history of Canadian environmental law. Indeed, the office of the Chief Forester was originally conceived on the basis of these assumptions. The Chief Forester was “a first-class, scientific man, thoroughly well qualified, who has had both technical and practical training and experience.”<sup>149</sup> The legislature delegated a task that it

145. Ecojustice, “*Legal Backgrounder: The National Energy Board Act 1985*” (September 2012), online: <[www.ecojjustice.ca/wp-content/uploads/2015/03/SEPT-2012\\_FINAL\\_NEBA-backgrounder.pdf](http://www.ecojjustice.ca/wp-content/uploads/2015/03/SEPT-2012_FINAL_NEBA-backgrounder.pdf)>.

146. The Royal Commission on Forest Resources, *Timber Rights and Forest Policy In British Columbia* (Victoria, BC: The Commission, 1976) vol 1 (Peter H Pearce) at 219, online: <[www.for.gov.bc.ca/hfd/pubs/Docs/Mr/Rc/Rc006/Rc006.pdf](http://www.for.gov.bc.ca/hfd/pubs/Docs/Mr/Rc/Rc006/Rc006.pdf)> [Pearce].

147. James M Landis, *The Administrative Process* (New Haven, Conn: Yale University Press, 1938) at 25-26. See also John Willis, “Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional” (1935) 1:1 UTLJ 53 at 75-81 (Willis’s functionalist approach emphasizes expediency and the role of expertise, though he does not deny the necessity of administrative discretion).

148. Richard B Stewart, “The Reformation of American Administrative Law” (1975) 88:8 Harv L Rev 1667 at 1678; Mark Seidenfeld, “The Role of Politics in a Deliberative Model of the Administrative State” (2013) 81:5 Geo Wash L Rev 1397 at 1404.

149. British Columbia, *Final Report of the Royal Commission of Inquiry on Timber and Forestry 1909-1910* (Victoria, BC: Richard Wolfenden, King’s Printer, 1910) (Fred J Fulton) at 67, online: <[www.for.gov.bc.ca/hfd/pubs/Docs/Mr/Rc/Rc002/Rc002.pdf](http://www.for.gov.bc.ca/hfd/pubs/Docs/Mr/Rc/Rc002/Rc002.pdf)>.

could not do itself: The Chief Forester was to consolidate and synthesize the vast information on the province's forests in order to act "in all matters affecting the forest interests of the Province."<sup>150</sup> The Chief Forester applied this expertise to determine the rate of harvesting that would maximize long-term timber yield through a technical process known as the Hanzlik formula.<sup>151</sup> The determination appeared to turn on purely factual questions—the rate of forest growth, the amount of forest mature enough to harvest, and the area accessible to loggers for harvesting.<sup>152</sup> The decision-making authority of the Chief Forester, therefore, appeared consistent with the formal conception of the rule of law because the Chief Forester retained a purely instrumental and technical role in using objective expertise to carry out the democratic mandate of the legislature.

The assumption that the independent expert applies solely objective expertise contains two further assumptions: first, that independent decision makers deal only with factual matters<sup>153</sup>—not political or policy judgments—and second, that these factual matters can be resolved in a way that points to one objective outcome. The latter assumption is flatly refuted by the environmental emergency, as we have seen with the mountain pine beetle example. Moreover, there is no objective way to deal with this kind of uncertainty<sup>154</sup> because complex, adaptive systems are replete with poorly understood relationships and incomplete data, often making their management more an exercise of "speculation"<sup>155</sup> than objective analysis. Even seemingly factual issues, such as determining the rotation

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150. *Ibid* at 68.

151. Larry Pedersen, "Allowable Annual Cuts in British Columbia: The Agony and the Ecstasy" (UBC Faculty of Forestry Jubilee Lecture delivered at the Faculty of Forestry, University of British Columbia, 20 March 2003) at 4, online: <[www.for.gov.bc.ca/hts/pubs/jubilee\\_abc.pdf](http://www.for.gov.bc.ca/hts/pubs/jubilee_abc.pdf)>. The Hanzlik formula is as follows: sustained annual yield = mature timber above rotation age/rotation age + mean annual increment for immature timber.

152. Lois H Dellert, "Sustained Yield: Why Has it Failed to Achieve Sustainability?" in Chris Tollefson, ed, *The Wealth of Forests: Markets, Regulation, and Sustainable Forestry* (Vancouver: UBC Press, 1998) 255 at 257.

153. Henry S Richardson, *Democratic Autonomy: Public Reasoning About the Ends of Policy* (Oxford: Oxford University Press, 2002) at 115.

154. This is the main thesis of Kysar. See Kysar, *Regulating*, *supra* note 50.

155. Pearse, *supra* note 146 at 232.

age for harvesting, in fact turn on further assumptions about the future.<sup>156</sup> In short, accurate forestry inventories are necessary but not sufficient to determine the desired rate of timber harvest since the Chief Forester will have to make discretionary judgments on a whole host of uncertain factors.

The Chief Forester's prominent position in directing British Columbian forest policy further undermines the assumption that independent experts deal only with factual matters and not political judgments. In this respect, the Chief Forester's determination of the allowable annual cut is significant for what it *does not* include. Even now, long after the Hanzlik formula has faded into the background, the allowable annual cut is still dictated by a policy of maximizing sustained yield. Maximum sustainable yield includes the value of timber; it does not account for the myriad other benefits that forests provide—for example, hunting, grazing, water quality regulation, biodiversity, and carbon sequestration. Calls to incorporate these non-timber values into the maximum sustained yield model have gone largely unheeded,<sup>157</sup> evidencing the difficulty of incorporating inherently discretionary decisions involving incommensurable trade-offs into a technical model of decision-making premised on an assumption of objective expertise.

In short, delegating environmental decisions to independent experts does not resolve the challenge that environmental issues pose to governing through law. Independent expert decision makers exercise considerable discretion that cannot be fully constrained by objective expertise. Moreover, an assumption of objective expertise risks creating a similar kind of façade that Schmitt argues exists in the emergency context. Layers of technical analysis that appear to constrain the substantive outcomes of decision making in fact require the exercise of significant discretion over what inputs to include in the technocratic calculation.<sup>158</sup> Indeed,

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156. In a royal commission on the regulation of timber harvest, three experts disagreed on the rotation age, with proposals ranging from 60 to 120 years. See *Report of the Commissioner relating to The Forest Resources of British Columbia* (Victoria, BC: Don McDiarmid, Queen's Printer, 1956) vol 1 (Gordon McG Sloan) at 236, 241, online: <[www.for.gov.bc.ca/hfd/pubs/Docs/Mr/Rc/Rc004/Rc004.pdf](http://www.for.gov.bc.ca/hfd/pubs/Docs/Mr/Rc/Rc004/Rc004.pdf)>. Moreover, a recent groundbreaking scientific study challenges the long held assumption that aging trees have slower growth rates. See NL Stephenson et al, "Rate of tree carbon accumulation increases continuously with tree size," *Letter*, (2014) 507:7490 *Nature* 90.

157. Dellert, *supra* note 152. There has always been unwavering faith that better modelling techniques and more data will respond to criticism. See Pearse, *supra* note 146 at 233. See also British Columbia, Forest Resources Commission, *The Future of Our Forests* (Victoria, BC: Forest Resources Commission, 1991) (AL (Sandy) Peel) at 75, online: <[www.for.gov.bc.ca/hfd/pubs/Docs/Mr/Rc/Rc001/Rc001.pdf](http://www.for.gov.bc.ca/hfd/pubs/Docs/Mr/Rc/Rc001/Rc001.pdf)>.

158. Kysar, *Regulating*, *supra* note 50 at 72.

the Chief Forester's approach to determining the annual harvest was criticized on this very basis by forest commentators who observed that "[r]egardless of which formula or model was used, from the 1950s to the 1990s, economic forces caused the annual harvest to increase, in spite of the original expectation of reductions in the harvest."<sup>159</sup> Far from constraining administrative discretion, in other words, technical forest analyses were in fact capacious frameworks in which decision makers could covertly succumb to industry pressure. Independent expert decision makers alone cannot, therefore, provide an answer to the environmental reform position's problem with discretion.

## B. AN ALTERNATIVE CONCEPTION OF THE RULE OF LAW

Understanding environmental issues as an ongoing emergency reveals the limits of the formal conception of the rule of law. It also directs us to an alternative understanding of the rule of law, one that accounts for the inevitability and desirability of administrative discretion and has the potential to ensure that discretionary environmental decisions are subject to rule-of-law constraints. This section turns to the theory of common law constitutionalism, which understands "the constraints of law as the constraints of adequate justification"<sup>160</sup> and requires that public officials justify their decisions on the basis of fundamental constitutional principles. As we will see, the requirement of public justification can be maintained in emergencies and thus holds great potential for responding to the environmental emergency. Moreover, the environmental emergency contains important insights for common law constitutionalism because it highlights the need for significant institutional innovation across a broad range of administrative contexts to ensure that the requirement of public justification can be fulfilled.

### 1. THE REQUIREMENT OF PUBLIC JUSTIFICATION

The observation that discretionary environmental decisions still seem to be governed by the formal conception of the rule of law is significant not only for environmental protection but also because Canadian judges have largely moved away from a formal conception of the rule of law. This transition, usually marked

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159. GF Utzig & DL Macdonald, *Citizens' Guide to Allowable Annual Cut Determinations: How to Make a Difference* (Vancouver: Kutenai Nature Investigations for BC Environmental Network Educational Foundation, 2000) at 6.

160. Dyzenhaus, "Justification," *supra* note 16.

by the watershed Supreme Court of Canada decisions in *CUPE*<sup>161</sup> and *Nicholson*<sup>162</sup> in 1979 and continuing to this day, has been a product of the judiciary's growing acceptance of the legitimacy of the administrative state. The strongest signal of this move is the Court's repeated endorsement of a concept of deference as respect, which first appeared in *Baker*,<sup>163</sup> in which the majority effectively articulated a requirement of public justification.

*Baker* concerned the Minister of Citizenship and Immigration's refusal to exempt from deportation a woman who had illegally overstayed in Canada. The legislation and regulations delegated seemingly unfettered discretion to the Minister to grant an exemption "if satisfied" that one should be granted on humanitarian and compassionate grounds. For the majority, however, this language did not mean that the Minister operated in a space uncontrolled by law. Rather, the majority found that the Minister's "discretion must be exercised with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*."<sup>164</sup>

But to determine whether discretion was exercised in this manner, the majority had to impose a requirement to give reasons,<sup>165</sup> which allowed the Court to meaningfully assess whether the decision was reasonable in the sense of reflecting these fundamental legal principles. Under this understanding of the rule of law, decision makers were not owed deference simply because of their institutional expertise or because they complied with the formal requirements of their enabling statute. Rather, they were owed deference when their decisions were justified. In other words, deference "requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision."<sup>166</sup> On this view, administrative discretion is not an illegitimate space uncontrolled by law but is rather legitimate and worthy of judicial respect when exercised in a manner that reflects the fundamental legal principles alluded to in *Baker*.

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161. *CUPE v NB Liquor Corporation*, [1979] 2 SCR 227, 97 DLR (3d) 417 [*CUPE*].

162. *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311, 88 DLR (3d) 671 [*Nicholson*].

163. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 65, 1 Imm LR (3d) 1 [*Baker*], citing David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy," in M Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 286 [Dyzenhaus, "Politics"].

164. *Baker*, *supra* note 163 at para 56.

165. *Ibid* at para 43.

166. *Ibid* at para 65, citing Dyzenhaus, "Politics," *supra* note 163 at 286.

The majority's reasons in *Baker* reflect a competing conception of the rule of law that imposes a requirement on public officials to publicly justify their decisions.<sup>167</sup> From this perspective, the rule of law is not "the rule of rules,"<sup>168</sup> as Schmitt would understand it, but is rather, first and foremost, the realization of constitutional *principles*. Administrative decisions have legal authority when they reflect these constitutional principles.<sup>169</sup> Dyzenhaus argues that these constitutional principles are those that form the foundation of administrative law exemplified in *Baker*—fairness, equality, and reasonableness<sup>170</sup>—and that are necessary to "protect the individual from arbitrary state action."<sup>171</sup> Reason-giving is essential to this conception of the rule of law because decision makers discharge their duty of justification by offering public reasons.<sup>172</sup> Reasons ensure that the individual knows that he or she has not been treated arbitrarily by the state. They also ensure that the institutions of government can hold one another to account when they fall short in their commitment to the rule of law. Judicial review is one way to ensure that administrative decision makers meet their requirement of public justification. But it also requires that judges defer—that is, not substitute their own views—when the decision is justified on the basis of fairness, of equality, and of reasonableness.<sup>173</sup>

The Supreme Court of Canada's commitment to the requirement of public justification has been imperfect, to be sure. As we have seen, the formal conception still emerges and often conflicts with the common law constitutional conception of the rule of law. Even in the immigration context, the court has retreated from the majority's decision in *Baker*. In both *Suresh*,<sup>174</sup> a post-9/11 national security decision, and more recently *Khosa*,<sup>175</sup> it stated that reviewing courts should only ensure that the Minister of Citizenship and Immigration considered the correct factors when assessing whether an individual should be granted "special relief" from a removal order on humanitarian and compassionate grounds and "should not reweigh them."<sup>176</sup> In other words, the Court allowed the Minister free rein in

167. Dyzenhaus, "Justification," *supra* note 16 at 30.

168. Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010) at 336.

169. Dyzenhaus, *Constitution*, *supra* note 14 at 7.

170. *Ibid* at 12-13; Evan J Criddle, "Mending Holes in the Rule of (Administrative) Law" (2010) 104:3 Nw UL Rev 1271 at 1276.

171. Dyzenhaus, *Constitution*, *supra* note 14 at 2. See also TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (New York: Oxford University Press, 2001) at 38-39.

172. Dyzenhaus, *Constitution*, *supra* note 14 at 139.

173. *Ibid* at 147.

174. *Suresh*, *supra* note 81.

175. *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*].

176. *Suresh*, *supra* note 81 at para 41. See also *Khosa*, *supra* note 175 at para 61.

how to account for these factors. So long as the Minister ticked the appropriate boxes, the Court refused to second-guess the Minister's exercise of discretion.<sup>177</sup> Moreover, there was no hint in either decision of the non-statutory principles identified by the majority in *Baker*.<sup>178</sup>

The Court's important attempt in *Dunsmuir*<sup>179</sup> to set straight the principles of administrative law also reflected conflicting conceptions of the rule of law.<sup>180</sup> The majority reasserted its monopoly over some formal categories of decisions: constitutional questions and true questions of *vires*, for example.<sup>181</sup> But it still urged courts to take a contextual approach to determining the appropriate standard of review<sup>182</sup> and reiterated that, in cases in which deference was owed, the court's role was to ensure "the existence of justification, transparency and intelligibility within the decision-making process."<sup>183</sup> Since *Dunsmuir*, however, the Court's formalistic inclinations have waned again in some respects. The Court has since deferred to administrative decision makers on issues that fall squarely within traditional judicial strongholds, including a constitutional question,<sup>184</sup> the application of the common law doctrine of estoppel,<sup>185</sup> and the breach of a statutory deadline, which would have conventionally been labelled a true question of *vires*.<sup>186</sup> Indeed, the Court has suggested that the concept of a true question of *vires*, the very basis on which a formalist judge justifies judicial review, may have been a fiction after all,<sup>187</sup> thus sending the clear message that the Court has accepted the legitimacy of the administrative state.

Moreover, the Court has recently restated its position in *Baker* that there is no such thing as unfettered discretion.<sup>188</sup> It is noteworthy that this clear statement was made with respect to a municipal by-law—delegated legislation issued by a

177. Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (New York: Oxford University Press, 2011) at 228-29, n 95.

178. *Ibid.*

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

180. Lewans, *supra* note 130 at 74.

181. *Dunsmuir*, *supra* note 179 at paras 58-59.

182. *Ibid* at para 64.

183. *Ibid* at para 47.

184. *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395.

185. *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 SCR 616.

186. *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Teachers*]. See also *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364 (where the Court again distanced itself from the concept of a jurisdictional question).

187. *Teachers*, *supra* note 186 at para 34.

188. *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 24, [2012] 1 SCR 5.

democratically elected decision maker. Yet a unanimous Supreme Court of Canada found that this decision was subject to the supervision of the courts because “[t]he fact that wide deference is owed to municipal councils does not mean they have *carte blanche*.”<sup>189</sup> In fact, the Court observed that the “attempt to maintain a clear line between policy and legality has not prevailed.”<sup>190</sup> The Court reasserted its supervisory role to ensure that, in passing delegated legislation, a municipality adheres to both procedural and substantive requirements of legality.<sup>191</sup>

While there is much work to be done to elaborate upon the requirements of public justification in environmental law, a “symbolic”<sup>192</sup> Federal Court decision offers some hope that this conception of the rule of law is taking root in Canadian environmental assessment. In finding the environmental assessment of the proposed Darlington nuclear power project unreasonable, the court in *Greenpeace Canada v Canada (Attorney General)* reasoned that the *Canadian Environmental Assessment Act* sets out a process “that is, when it functions properly, both evidence-based and democratically accountable.”<sup>193</sup> The court held that it must pay particular attention to the reasons offered by the review panel because “the element of ‘justification, transparency and intelligibility within the decision-making process’ takes on a heightened importance” in the context of environmental assessment.<sup>194</sup> It thus imposed a robust requirement of public justification on the review panel.

Martin Olszynski describes this decision as a welcome, albeit belated, acknowledgment of the proper role of environmental assessment. Properly understood, environmental assessment enables democratic accountability by informing the public whether a project will result in significant adverse

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189. *Ibid.*

190. *Ibid.* at para 14.

191. *Ibid.* at para 16. Remarkably, the Court seems to impose a requirement of procedural fairness without addressing the category of “legislative functions.” This decision is difficult to square with its later decision in *Katz*, which affirms that regulations can only be reviewed for *vires*. See *Katz*, *supra* note 108.

192. Martin Olszynski, “Environmental Assessment as Planning and Disclosure Tool: *Greenpeace Canada v Canada (Attorney General)* 2014 FC 463” (2015) Dal L J [forthcoming].

193. 2014 FC 463 at para 237, 87 CELR (3d) 173 [*Greenpeace*]. Unfortunately, a majority of the Federal Court of Appeal overturned this decision in *Ontario Power Generation Inc. v Greenpeace Canada*, 2015 FCA 186. It reverted to the formal conception of the rule of law, which upheld the environmental assessment as reasonable because there was “some consideration” of the project’s environmental effects (at para 130). The dissenting judge would have upheld the Federal Court’s approach.

194. *Greenpeace*, *supra* note 193 at para 272, citing *Dunsmuir*, *supra* note 179 at para 47; *Khosa*, *supra* note 175 at para 59 [citations omitted].

environmental effects. The electorate is then equipped with the information needed to hold the elected officials of Cabinet to account for approving the project.<sup>195</sup> Olszynski rightly points out that the direction of the reasons in an environmental assessment is to the public (rather than simply to the Cabinet).<sup>196</sup> Indeed, environmental assessment, understood in this sense, exemplifies how compliance with the rule of law goes hand-in-hand with democratic accountability. In contrast to the formal conception of the rule of law, the requirement of public justification makes democratic values internal to the rule of law itself.<sup>197</sup> It embodies the democratic values of participation and accountability and enables citizens to understand, deliberate about, and contest public decisions.

## 2. INSTITUTIONAL EXPERIMENTATION

Common law constitutionalism frees the rule of law from the confines of a strict doctrine of the separation of powers. The separation of powers, like any institutional design, is only useful to the extent that it enables the realization of foundational constitutional principles.<sup>198</sup> This purposive understanding of the separation of powers, Dyzenhaus argues, allows the requirement of justification to be fulfilled even in times of crisis when government claims of secrecy and national security interfere with judicial scrutiny of emergency response decisions.<sup>199</sup> For example, Dyzenhaus points to a special immigration appeals tribunal in the United Kingdom in charge of reviewing deportation decisions that, but for sensitive information pertaining to national security, would be reviewed by the court.<sup>200</sup> The tribunal has expertise in national security, in immigration, and in law and has special powers to allow government claims of secrecy to be tested in

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195. Olszynski, *supra* note 192.

196. This would also be the case for the “justification” for a project approval in the face of significant adverse environmental effects. See *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52. See also *Canadian Environmental Assessment Act*, SC 1992, c 37, s 37. This act was at issue in *Greenpeace*. See *Greenpeace*, *supra* note 193. To be clear, however, from the perspective of common law constitutionalism, the direction of the reasons is to the public, not because of the statutory language, but because it is the public that will be affected by the decision, and therefore its interests need to be reflected in the decision.

197. Dyzenhaus, “Justification,” *supra* note 16 at 34.

198. David Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2002) 27:2 *Queen’s LJ* 445 at 451 [Dyzenhaus, “Values”].

199. Dyzenhaus, *Constitution*, *supra* note 14 at 174-90.

200. *Special Immigration Appeals Commission Act 1997* (UK), c 68, s 2.

closed proceedings.<sup>201</sup> To be sure, the procedures are far from perfect,<sup>202</sup> but they can be understood as a commitment to public justification. The tribunal ensures that the executive's deportation decision is justified, and in turn the court ensures that the tribunal's decision is justified.<sup>203</sup> The court must also justify its decision on the basis of fundamental common law principles.<sup>204</sup> Thus, judicial review need not be conceived of as an all-or-nothing endeavour in which judges are torn between abdicating their role or second-guessing national security decisions. Rather, it can be understood as playing a more nuanced role in which the court ensures that other institutions of government are maintaining their commitment to the rule of law,<sup>205</sup> understood as a requirement to justify decisions publicly on the basis of core constitutional principles.

Dyzenhaus's example of how institutional experimentation can ensure that the requirement of justification can be fulfilled in emergencies holds important potential for understanding how the rule of law can respond to the environmental emergency. While analogous environmental appeal tribunals are common in Canadian environmental law,<sup>206</sup> there is much potential for environmental issues to contribute to a far-reaching elaboration of common law constitutionalism. Outside the adjudicative context, Dyzenhaus gestures towards the American

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201. Dyzenhaus, *Constitution*, *supra* note 14 at 163.

202. *Secretary of State for the Home Department v MB*, [2006] EWCA Civ 1140. Sullivan J (overturned by the Court of Appeal) described the special advocates procedure as creating a "thin veneer of legality." See *Re MB*, Admin, *supra* note 87 at para 103. Numerous lawyers acting as special advocates and representing the claimant's interests in the closed proceedings have quit because of the inadequacy of the process. See Clare Dyer, "Terror QC: more will quit special court," *The Guardian* (20 December 2004), online: <[www.theguardian.com/politics/2004/dec/20/terrorism.humanrights](http://www.theguardian.com/politics/2004/dec/20/terrorism.humanrights)>.

203. Dyzenhaus, *Constitution*, *supra* note 14 at 178. Dyzenhaus makes clear that his is an aspirational account, since the role of judicial review that he describes is one with which judges tend to struggle.

204. Dyzenhaus, "Values," *supra* note 198 at 501-502.

205. See also Sossin, *supra* note 140 at 687.

206. See e.g. Jerry V DeMarco & Paul Muldoon, *Environmental Boards and Tribunals in Canada: A Practical Guide* (Markham, ON: LexisNexis Canada, 2011); Mark Haddock, "Environmental Tribunals in British Columbia" (January 2011), online: Environmental Law Centre <[www.elc.uvic.ca/wordpress/wp-content/uploads/2014/12/Environmental-Tribunals-in-BC\\_Feb2011.pdf](http://www.elc.uvic.ca/wordpress/wp-content/uploads/2014/12/Environmental-Tribunals-in-BC_Feb2011.pdf)>. Their mandates, procedures, and functions are diverse; thus, the extent to which any given tribunal is capable of fulfilling the requirement of justification depends on its specific context. Common criticisms include: there is limited standing for parties that are not the regulated party; licensing decisions are only appealable at time of initial issue, not when licences are amended or renewed; and entire environmental statutes or public interest perspectives fall outside the scope of existing institutions (*ibid* at 23, 26-27).

example of the notice-and-comment process for administrative rule making<sup>207</sup> as an illustration of procedures that promote the culture of justification.<sup>208</sup> Notice-and-comment procedures require administrative agencies to provide public notice of proposed regulations, solicit public comment, and issue a rationale statement that reflects consideration of public comments and offers a public-regarding justification for the decision.<sup>209</sup> The procedure embodies the values of participation and accountability by ensuring that the decision-making process is both open and responsive to the broader political community, not simply the narrower range of parties and interests that would be represented in an adjudication.

Despite its technocratic origins, the Chief Forester's process for determining the allowable harvest now incorporates notice-and-comment requirements. The results of a technical review are made accessible to the public and form the basis for public comment.<sup>210</sup> After two rounds of public comment and Aboriginal consultation, the Chief Forester makes the final determination<sup>211</sup> and publishes a rationale statement detailing his or her reasons for the decision.<sup>212</sup> Although the process was abridged in some cases at the height of the mountain pine beetle epidemic, the basic elements of notice, of public comment, and of reasons for the Chief Forester's decision remained intact.<sup>213</sup>

Perhaps a more interesting example of how institutional design can maintain public justification in the complex environmental context is British

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207. 5 USC § 553 (2011).

208. Dyzenhaus, "Justification," *supra* note 16 at 35; Criddle, *supra* note 170 at 1276.

209. Dyzenhaus, "Justification," *supra* note 16.

210. British Columbia, Ministry of Forests, Lands and Natural Resource Operations, *Timber Supply Review Backgrounder*, (November 2013), online: <[www.for.gov.bc.ca/hts/pubs/tsr/Timber%20Supply%20Review%20Backgrounder\\_Nov\\_2013.pdf](http://www.for.gov.bc.ca/hts/pubs/tsr/Timber%20Supply%20Review%20Backgrounder_Nov_2013.pdf)>.

211. *Ibid* at 2-3.

212. *Ibid* at 3.

213. British Columbia, Ministry of Forests, *Prince George Timber Supply Area: Rationale for Allowable Annual Cut (AAC) Determination*, by Larry Pederson, Chief Forester (September 2004), online: <[www.for.gov.bc.ca/hts/tsa/tsa24/tsr3/rationale.pdf](http://www.for.gov.bc.ca/hts/tsa/tsa24/tsr3/rationale.pdf)>; British Columbia, Ministry of Forests and Range, *Morice Timber Supply Area: Rationale for Allowable Annual Cut (AAC) Determination*, by Jim Snetsinger, Chief Forester (31 January 2008), online: <[www.for.gov.bc.ca/hts/tsa/tsa20/tsr3/20ts08ra.pdf](http://www.for.gov.bc.ca/hts/tsa/tsa20/tsr3/20ts08ra.pdf)>; British Columbia, Ministry of Forests and Range, *Williams Lake Timber Supply Area: Rationale for Allowable Annual Cut (AAC) Determination*, by Jim Snetsinger, Chief Forester (April 2007), online: <[www.for.gov.bc.ca/hts/tsa/tsa29/tsr3/29ts07ra.pdf](http://www.for.gov.bc.ca/hts/tsa/tsa29/tsr3/29ts07ra.pdf)>; British Columbia, Ministry of Forests and Range, *100 Mile House Timber Supply Area: Rationale for Allowable Annual Cut (AAC) Determination*, by Jim Snetsinger, Chief Forester (September 2006), online: <[www.for.gov.bc.ca/hts/tsa/tsa23/tsr3/23ts06ra.pdf](http://www.for.gov.bc.ca/hts/tsa/tsa23/tsr3/23ts06ra.pdf)>.

Columbia's Forest Practices Board. The Board is the province's independent "forestry watchdog."<sup>214</sup> It exercises a range of specialized functions including the execution of comprehensive and systematic reviews of broader issues of forest policy. Its scope of review is therefore not limited by the typical constraints of an adjudicatory hearing in which the decision maker resolves a narrow dispute between two adversarial parties. Its members have expertise in forestry, in biology, and in law and the Board's purpose is to promote accountability within the forest sector by overseeing both government enforcement of and industry compliance with the *Forest and Range Practices Act*.<sup>215</sup> The Board has a variety of statutory powers including auditing, responding to complaints, and initiating internal reviews or appeals of government decisions.<sup>216</sup> In addition, the Board is charged with the task of conducting comprehensive special investigations into matters of public importance.<sup>217</sup>

The Forest Practices Board conducted a series of special investigations of the government's response to the mountain pine beetle epidemic and, in doing so, demonstrated its ability to thoroughly vet the government's claims that exceptional emergency response actions were necessary to respond to the epidemic. For example, the government based its initial response to the beetle epidemic on the assumption that aggressively clear-cutting infested stands and the surrounding area could control and suppress the epidemic. The Board reviewed this assumption and determined that, although it was reasonable and did have a modest effect on the epidemic, the better approach in heavily-attacked forests was to switch to salvage harvesting.<sup>218</sup> The government changed its harvest strategy in accordance with the Board's recommendation.<sup>219</sup> Moreover, the Board has played an important role in exposing the many ecological impacts of the mountain pine beetle response, such as the effects of heavy salvage logging on stream flows and

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214. British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, 35th Parl, 3rd Sess, Vol 15, No 21 (30 May 1994) at 11172.

215. *Forest and Range Practices Act*, SBC 2002, c 69, s 136 [FRPA].

216. *Ibid*, ss 81, 83, 122-25.

217. *Ibid*, s 122(1)(b).

218. Forest Practices Board, *Evaluating*, *supra* note 38 at 33.

219. Nelson, *supra* note 40 at 464.

biodiversity.<sup>220</sup> It has also contributed to assuaging public concerns that industry had opportunistically over-harvested unaffected tree species.<sup>221</sup>

In short, a common law constitutional conception of the rule of law emphasizes creative institutional design to ensure that all government decisions can be publicly justified. Many examples of creative institutional design are already in place in Canadian environmental law, but assessing the extent to which they can—and do—fulfill this conception of the rule of law is a pressing and much larger task. The fact that environmental law remains mired in the formal conception suggests that these aspects of institutional design have been largely undervalued from the perspective of maintaining the rule of law.<sup>222</sup>

#### IV. CONCLUSION

This article has argued that understanding the nature of the relationship between law and the environment requires viewing environmental issues as an ongoing emergency. It argued that environmental issues possess the constitutive features of an emergency: They contain the ineliminable possibility of an unforeseeable, catastrophic threat. The environmental emergency does not offer a solution to any or all environmental issues, perhaps least of all the mountain pine beetle epidemic. Rather, it is a way of understanding how environmental decision making can better align with our commitment to democratic values and the rule of law.

This framework of the environmental emergency no doubt raises more questions than it answers. Acknowledging the potential of institutional design is only the first step in articulating how the common law constitutional conception of the rule of law can be fulfilled in environmental law. With common law constitutionalism's focus on the adjudicative context, it is not immediately clear that its core principles of fairness, equality, and reasonableness can find

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220. Forest Practices Board, *The Effect of Mountain Pine Beetle Attack and Salvage Harvesting on Streamflows: Special Investigation* (March 2007), online: <[www.for.gov.bc.ca/hfd/library/documents/bib106689.pdf](http://www.for.gov.bc.ca/hfd/library/documents/bib106689.pdf)>; Forest Practices Board, *Biodiversity Conservation during Salvage Logging in the Central Interior of BC: Special Report* (November 2009), online: <[www.bcfpb.ca/sites/default/files/reports/SR35%20-%20Salvage%20Logging%20v3FINAL.pdf](http://www.bcfpb.ca/sites/default/files/reports/SR35%20-%20Salvage%20Logging%20v3FINAL.pdf)>.

221. Forest Practices Board, *Tree Species Harvested In Areas Affected By Mountain Pine Beetles: Special Report* (November 2007), online: <[www.bcfpb.ca/sites/default/files/reports/SR33.pdf](http://www.bcfpb.ca/sites/default/files/reports/SR33.pdf)>.

222. See e.g. *Western Canada Wilderness Committee v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 808, 240 ACWS (3d) 745. Despite concluding that the Forest Practices Board is the appropriate forum for review, it was held that the Minister's decision was legally valid. The court, in other words, completely undermines the distinctive role that the Board plays in upholding the requirement of public justification.

the same expression in the primarily administrative context of environmental decision making.<sup>223</sup> The environmental emergency highlights the importance of this next task of determining what common law constitutionalism requires in the policy-laden context of environmental law.<sup>224</sup> One promising avenue is the overlap between Dyzenhaus's requirement of public justification and the right to justification derived from theories of deliberative democracy.<sup>225</sup> Indeed, the central tenets of deliberative democracy—including consensus, reason, and equality—serve the same underlying democratic values of participation and accountability as the common law constitutional conception of the rule of law.<sup>226</sup> And the potential for theories of deliberative democracy to better orient administrative policy making towards these democratic values has already been noted in other contexts.<sup>227</sup> Redefining environmental law through the framework of the environmental emergency opens up these new avenues for understanding the role of law in the governance of environmental decision making while, at the same time, keeping in plain sight the profound challenges that serious environmental issues pose for the rule of law.

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223. Cartier, *supra* note 74 at 245; Alice Woolley, "Legitimizing Public Policy" (2008) 58:2 UTLJ 153 at 176.

224. It remains to be fully argued that the conceptual shift offered by Dyzenhaus can lead to a change in practice that remedies the democratic deficit in administrative decision making made apparent by the environmental emergency.

225. Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice*, translated by Jeffrey Flynn (New York: Columbia University Press, 2012).

226. For a concise summary, see Ron Levy, "The Law of Deliberative Democracy: Seeding the Field" (2013) 12:4 Election LJ 355 at 358.

227. Woolley, *supra* note 223; Hoi Kong, "The Deliberative City" (2010) 28:2 Windsor YB Access Just 411.