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## The Deliberative Dimensions of Modern Environmental Assessment Law

Jocelyn Stacey

*Peter A. Allard School of Law, University of British Columbia*

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*Environmental assessment (EA) is a cornerstone of environmental law. It provides a legal framework for public decision-making about major development projects with implications for environmental protection and the rights and title of Indigenous Peoples. Despite significant literature supporting deliberation as the preferred mode of engagement with those affected by EA decisions, the specific legal demands of EA legislation remain undeveloped. This article suggests a legal foundation for deliberative environmental assessment. It argues that modern EA can be understood through three public law frames: procedural fairness, public inquiry, and the framework for the duty to consult and accommodate. It further argues that these three public law frames share features of deliberative decision-making that can and should inform the implementation and interpretation of new design features in British Columbia and Canada's reformed EA legislation.*

*L'évaluation environnementale est une pierre angulaire du droit de l'environnement. Elle fournit un cadre juridique pour la prise de décisions par les instances publiques relatives aux grands projets de développement ayant des conséquences pour la protection de l'environnement et les droits et titres des peuples autochtones. Malgré l'existence d'une importante littérature soutenant que la consultation et la délibération constituent le mode d'engagement privilégié avec les personnes visées par les décisions touchant les évaluations environnementales, les exigences juridiques spécifiques de la législation en matière d'évaluation environnementale restent peu développées. Le présent article propose un fondement juridique pour l'évaluation environnementale délibérative. Il fait valoir que l'évaluation environnementale moderne peut être comprise à la lumière de trois cadres de droit public : l'équité procédurale, l'enquête publique et l'obligation de consulter et d'accueillir. Il fait également valoir que ces trois cadres de droit public partagent des caractéristiques de la prise de décision délibérative qui peuvent et doivent éclairer la mise en œuvre et l'interprétation des nouvelles caractéristiques de la législation sur l'évaluation environnementale en Colombie-Britannique et au Canada.*

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\* Assistant Professor, Peter A. Allard School of Law, University of British Columbia. Thanks to Imalka Nilmalgoda and Tristan Packwood-Greaves (Allard JD '21) for excellent research assistance; Neil Craik, Andrew Martin, Camden Hutchison, Li-Wen Lin, and Hoi Kong for helpful comments on an early draft; and the excellent feedback from the anonymous reviewers. This article benefited from feedback at the Allard faculty colloquium and the 2019 Canadian Law and Society Association Conference. This research was supported by the Law Foundation of British Columbia.

*Introduction*

- I. *Environmental assessment law and the duty to consult and accommodate in Canada*
  1. *The basics of EA and the DCA*
  2. *Deliberative EA and public authority*
- II. *Environmental law's public law frames and their deliberative dimensions*
  1. *Administrative law: The duty of fairness*
    - a. *EA as procedural fairness for the public*
    - b. *Deliberative conditions in the duty of fairness*
  2. *Regulation: Early Canadian EA*
    - a. *EA as public inquiry in miniature*
    - b. *The deliberative features of the inquiry and its influence*
  3. *Constitutional law: The duty to consult and accommodate*
    - a. *EA as framework for the duty to consult and accommodate*
    - b. *The deliberative features of the duty to consult and accommodate*

*III. Modern environmental assessment law reform*

*Conclusion*

*Introduction*

Environmental assessment (EA) law provides the legal framework for deciding whether, and how, controversial development projects proceed in light of their anticipated impacts on the environment and constitutionally-protected Aboriginal and treaty rights. The social, environmental, and economic stakes of decisions about pipelines, hydroelectric dams, or heavy metal mines, for example, are identified, assessed, and adjudicated through EA law.

The stakes of most EA decisions are enormous. The enduring challenge of EA legislation is to provide a framework that allows for these stakes to be assessed, understood, and addressed in a democratically legitimate manner. Environmental law scholars have analogized EA to

Magna Carta<sup>1</sup> for the environment and argued it is “quasi-constitutional” in nature because of the vital role it plays in generating publicly justified decisions.<sup>2</sup> EA scholarship, by and large, resolves this challenge in favour of a deliberative model of EA<sup>3</sup>; that is, a set of requirements that fosters robust exchange and mutual learning amongst those affected by the project proposal (industry proponents, government agencies, local communities, Indigenous Nations, the public generally).

The model of deliberative EA has not, however, translated to the implementation and interpretation of Canadian EA legislation. Perhaps because of the unique, technical, and complex structure of EA legislation, its deliberative potential remains unfulfilled. As explained below, when decisions are judicially reviewed, the courts seem to understand EA legislation as requiring a wholly technical process and/or generating a wholly political decision. Case law has yet to elucidate the deliberative qualities latent in EA law, missing the connection between deliberation and the rule of law and the potential for deliberation to better achieve EA’s legislated objectives of sustainable development and environmental protection. In other words, deliberative EA in the Canadian context is largely understood as an aspirational policy goal. This understanding misses its essential Canadian public law context, namely, the duty of fairness, public inquiries, and the duty to consult and accommodate Aboriginal Peoples (DCA).

Recent legislative changes to EA provide a timely illustration of the need to clarify the public law dimensions of modern EA law. Both BC and Canada have undertaken significant law reform efforts to “revitalize”<sup>4</sup> EA legislation and “restore public trust.”<sup>5</sup> Both governments have committed to implement the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which contains an obligation on States to “consult

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1. Elizabeth Fisher, “Environmental Impact Assessment: ‘Setting the Law Ablaze’” in Douglas Fisher, ed, *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar Publishing, 2016) 422 at 422, 426 [Fisher, “Setting the Law Ablaze”] (citing to William H Rodgers, “The Most Creative Moments in the History of US Environmental Law: ‘The Whats’” [2000] U III L Rev 1 at 31).

2. Jocelyn Stacey, “The Environmental, Democratic, and Rule-of-Law Implications of Harper’s Environmental Assessment Legacy” (2016) 21:2 Rev Const Stud 165 [Stacey, “Legacy”].

3. See Part I-2, *infra*.

4. Environmental Assessment Revitalization Intentions Paper (Victoria: Government of British Columbia, 2018), Government of British Columbia at 3, online (pdf): <[https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/ea\\_revitalization\\_intentions\\_paper.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/ea_revitalization_intentions_paper.pdf)> [<https://perma.cc/T25J-4FSD>] [BC Intentions Paper].

5. Minister of Environment and Climate Change Mandate Letter (12 November 2015), Government of Canada, online: <<https://pm.gc.ca/eng/minister-environment-and-climate-change-mandate-letter>>.

and cooperate in good faith with the [I]ndigenous [P]eoples concerned ...in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources.”<sup>6</sup> In line with these commitments, BC and Canada’s reformed statutes contain new design features: opportunities for early public involvement, the incorporation of community knowledge, and a recognition of Indigenous jurisdiction, which, in BC, includes consensus-seeking obligations on provincial officials. These are laudable developments. But they increase the complexity of EA regimes, further compounding the risk that EA’s connections to more familiar public law frames will remain obscured.

This article defends a legal foundation for deliberative EA. It argues that modern EA can be understood through three public law frames: procedural fairness, public inquiry, and the DCA. It shows how these public law frames contain essential conditions for deliberation. The article argues that each frame—albeit implicitly and incompletely—recognizes the responsible agency of those affected, fosters mutual respect through participatory processes, and requires decision-makers to be reflexive in their decisions. In other words, each frame contains conditions that, when fulfilled, can generate publicly justified decisions in accordance with the rule of law.

Before outlining the article’s structure, a caveat is needed on its approach to the DCA. The DCA is a constitutional obligation that exists independently of EA law. Yet, as this article details, EA law plays a significant role in implementing the DCA. Moreover, the Supreme Court of Canada (SCC) has furnished the DCA with the contents of Canadian administrative law, drawing on common law notions of participatory rights.<sup>7</sup> The article’s purpose is not to propose incremental reforms to the DCA, although that may be one effect. Reforms to the DCA must address the concerns of Indigenous communities, Indigenous scholars, and their allies who are clear that, as currently conceived and implemented, the DCA fails to meet international norms and continues the project of colonization.<sup>8</sup> This article takes an internal approach to the DCA to show

6. *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, UNGA A/RES/61/295 at Article 32(2), subject to the limitations in Article 46; BC Intentions Paper, *supra* note 4 at 8.

7. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 41 [*Haida*]; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paras 46-47.

8. Gordon Christie, “Developing Case Law: The Future of Consultation and Accommodation” (2006) 39:1 UBC L Rev 139; Robert Hamilton & Joshua Nichols, “The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult” (2019) 56:3 Alta L Rev 729; Bruce McIvor, *First Peoples Law: Essays on Canadian Law and Decolonization*, 3rd ed (First Peoples Law, 2018) at 69-77; Erin Hanson, *Coast Salish Law and Jurisdiction over Natural Resources: A Case Study with the*

that it is an instance in which Canadian courts have actively developed deliberative conditions within a Canadian public law framework, even if courts are unwilling to give those conditions their full effect.

This article proceeds in three parts. Part I introduces the basic structure of EA law in BC and Canada, identifying the legal challenge posed by existing judicial interpretation of EA legislation. It then turns to the case for deliberative EA and explains why this theoretical framing enjoys such support in the EA literature. Drawing from existing scholarship on the relationship between law and deliberative democracy, it highlights three conditions that must be in place for the law to support deliberative decision-making: recognition of the responsible agency of those affected, mutual respect, and reflexivity. Part II explains modern EA practice through three public law frames: (1) EA as procedural fairness for the public, (2) EA as public inquiry in miniature, and (3) EA as statutory framework for the DCA. Part II takes each of these public law frames and identifies within them the three essential conditions for deliberative decision-making. Part III of the article offers an example of how a deliberative understanding of these three frames can elucidate a new feature in BC and Canada's reformed EA legislation. Using the planning phase/early engagement stage as an example, it highlights how this reform blends and extends upon the three public law frames. It then identifies how the three deliberative conditions can guide its implementation and interpretation going forward.

I. *Environmental assessment law and the duty to consult and accommodate in Canada*

1. *The basics of EA and the DCA*

EA is a decision-making procedure that requires the identification, consideration, and prevention of environmental harm before it happens. EA has a planning function in that it involves the assessment of interconnected environmental issues as well as economic, social, and cultural concerns. The SCC has described EA as “a planning tool that is now generally regarded as an integral component of sound decision-making.”<sup>9</sup> EA legislation is a central feature of Canadian environmental law. EAs are a

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*Tsleil-Waututh Nation* (MA Thesis, University of British Columbia, 2018) [unpublished]; Bryn Gray, “Building Relationships and Advancing Reconciliation through Meaningful Consultation: Report to the Minister of Indigenous and Northern Affairs (30 May 2016), online: <<https://www.aadnc-aandc.gc.ca/eng/1498765671013/1498765827601>> [https://perma.cc/3NZC-XPFW].

9. *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 71, 88 DLR (4th) 1 [*Oldman*].

legal prerequisite to government approval of major development projects and are also used to inform policy formation and regional development.<sup>10</sup>

In Canada, EA is one of the few sites in which the risks and benefits of environmental and social impacts inform environmental decision-making in a transparent manner.<sup>11</sup> The assessment of these risks and benefits can sometimes lead to project proposals being rejected; however, the focus is typically on alterations, mitigation measures, and conditions that can prevent some environmental harms while still allowing the project to proceed.<sup>12</sup> Once project proposals receive an EA approval, they must be constructed, operated, and decommissioned in accordance with applicable regulatory regimes (eg mining law, fisheries law).

The DCA is also an integral component of Crown decision-making in Canada. The DCA flows from the honour of the Crown, which requires that the Crown act honourably in all its dealings with Indigenous Peoples.<sup>13</sup> As articulated by the SCC in *Haida* and subsequent decisions, the DCA is engaged when the Crown contemplates action that may adversely impact Aboriginal or treaty rights.<sup>14</sup> Approving a development project by granting an EA permit is Crown conduct that virtually always engages the DCA, given the geography of Canada, traditional and ongoing land use and governance, and the interconnected nature of environmental impacts. As explained in Part II-3 below, EA and the DCA have been intertwined in practice for some time.

The SCC has recognized that both EA and the DCA have a vital role in ensuring decisions are made in the public interest. In *Clyde River*, the Court stated that “the duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns.”<sup>15</sup> The Court has also identified environmental protection as a “public purpose of

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10. Though these latter EA tools are better developed elsewhere: see, eg, Barry Dalal-Clayton & Barry Sadler, *Strategic Environmental Assessment: A Sourcebook and Reference Guide to International Experience* (London: Earthscan, 2005).

11. Stacey, “Legacy,” *supra* note 2 at 171; David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 233, 244-248.

12. Meinhard Doelle, *The Federal Environmental Assessment Process—A Guide and Critique* (Toronto: LexisNexis Canada, 2008) at 25 (summarizing effective, efficient and fair EA).

13. *Haida*, *supra* note 7 at paras 16-17.

14. *Ibid* at para 35; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at paras 25, 29 [CR].

15. *CR*, *supra* note 14 at para 40 (citing to *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 70 [CS]).

superordinate importance”<sup>16</sup> and that understanding the “consequences... from environmental change are integral to decision-making.”<sup>17</sup>

EA is thus a crucial point for government decision-makers to engage with individuals and communities who will be affected by major development decisions. This engagement is essential to making decisions about land, water, resources, etc, that not only comply with legislative requirements in a formal sense but also have the qualities of democratic and legal authority. Some have described EA as something like Magna Carta for the environmental context, observing that “just like that document, it is an official statement of the principles of governance, and accordingly it is an articulation of a good society.”<sup>18</sup>

Recent legislative reform to EA in BC and at the federal level enhance the obligations of decision-makers to engage meaningfully with those affected. For example, the reformed legislation contains three design features that do not easily map onto pre-existing modes of engagement. Both statutes contain a planning stage, which creates a process for engagement to determine the plan for the subsequent EA.<sup>19</sup> Both statutes require inclusion of community knowledge,<sup>20</sup> blurring the lines between process and substance and citizen and expert. Both statutes recognize Indigenous jurisdiction,<sup>21</sup> and BC’s legislation recognizes a consensus-seeking obligation on the agency and ministers who implement the Act.<sup>22</sup>

These are all laudable reforms with the potential to significantly improve or rectify failures of their predecessors.<sup>23</sup> The challenge is that the specific legal contours of EA’s requirements for engaging with those affected are undeveloped. Despite detailed legislation setting out EA requirements and standards, the dominant judicial characterization of EA decisions is as either “essentially political in nature”<sup>24</sup> or as scientific

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16. *R v HydroQuébec*, [1997] 3 SCR 213 at para 85. See also *Ontario v Canadian Pacific Ltd*, [1995] SCR 1031 at para 55.

17. *Oldman*, *supra* note 9 at 37.

18. *Supra* note 1.

19. The “planning phase” at the federal level: *Impact Assessment Act*, SC 2019, c 28, ss 10-15 [IAA]. Early engagement under the BC legislation: *Environmental Assessment Act*, SBC 2018, c 51, ss 13-18 [EAA].

20. IAA, *supra* note 19, ss 6((1)(j)), 22(1)(m); EAA, *supra* note 19, s 2(2)(a).

21. IAA, *supra* note 19, s 2; EAA, *supra* note 19, s 2(2)(b)(ii)(b).

22. EAA, *supra* note 19, ss 16(1), 19(1), 27(5), 28(3), 29(3).

23. For critique of the past iteration of federal EA see eg Meinhard Doelle, “CEAA 2012: The End of Federal EA as We Know it?” (2012) 24:1 J Env’t L & Prac 1; Robert B Gibson, “In Full Retreat: The Canadian Government’s New Environmental Assessment Law Undoes Decades of Progress” (2012) 30:3 Impact Assessment & Project Appraisal 179 [Gibson, “In Full Retreat”].

24. *Peace Valley Landowner Assn v British Columbia (Minister of Environment)*, 2016 BCCA 377 at para 29; *RK Heli-Ski Panorama Inc v Jumbo Glacier Resort Project (Project Assessment Director)*, 2007 BCCA 9 at para 30; *Gitxaala Nation v Canada*, 2016 FCA 187 at para 154 [Gitxaala]; *Peace*



exercises not subject to review by the court.<sup>25</sup> Despite judicial assurances that fair procedure is the “handmaiden of justice,”<sup>26</sup> Canadian courts have been reluctant to supervise the implementation of statutory EA procedures in a way that furthers the access to justice objectives of EA legislation.<sup>27</sup>

These dominant judicial stances on EA legislative requirements belie the deliberative features immanent in EA schemes. As the next part argues, deliberative EA is not simply a policy aspiration or best practice. Deliberative EA is, rather, the model for exercising public authority over the environment in a way that accords with both democratic and rule of law requirements.

## 2. *Deliberative EA and public authority*

Deliberation is defined as “debate and discussion aimed at producing reasonable, well-informed opinions in which participants are willing to revise preferences in light of discussion, new information, and claims made by fellow participants.”<sup>28</sup> Deliberation as a mode of exchange differs from bargaining (in which parties advance purely self-interested positions) and rhetoric, though it may involve bits of both.<sup>29</sup> As described below, deliberation is the manner of interaction supported by theories of deliberative democracy.<sup>30</sup> Deliberative democrats champion the capacity of citizens to contribute to collective decisions “at every stage of policy formation.”<sup>31</sup>

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*Valley Landowner Assn v Canada (Attorney General)*, 2015 FC 1027 at para 68.

25. The Federal Court and Federal Court of Appeal’s platitude about courts not being academies of science is particularly relevant here: *Ontario Power Generation Inc v Greenpeace Canada*, 2015 FCA 186 at paras 126-130; *Inverhuron & District Ratepayers’ Assn v Canada (Minister of the Environment)*, [2000] FCJ No 682, 2000 CarswellNat 5474 at para 47. But see *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302 at paras 72-73.

26. See eg *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 129; *Gagne v British Columbia (Director, Environmental Management)*, 2014 BCSC 2077 at para 46; *Clifford v Ontario (Attorney General)*, 2009 ONCA 670 at para 23; *Maritime Broadcasting System Ltd v Canadian Media Guild*, 2014 FCA 59 at para 129.

27. *VAPOR v British Columbia (Environment)*, 2015 BCSC 1086 at para 93; Mary Liston, “Expanding the Parameters of Participatory Public Law: A Democratic Right to Public Participation and the State’s Duty of Public Consultation” (2017) 63:2 McGill LJ 375 at 411-415 [Liston, “Democracy”].

28. Simone Chambers, “Deliberative Democratic Theory” (2003) 6:1 Annual Rev Political Science 307 at 309 [Chambers].

29. Francesca Polletta & Beth Gharrity Gardner, “The Forms of Deliberative Communication” in André Bächtiger, John S Dryzek, Jane Mansbridge & Mark E Warren, eds, *The Oxford Handbook of Deliberative Democracy* (Oxford: Oxford University Press, 2018) 70 at 71-72.

30. Note that the focus of this article is on the potential for government-led decisions to be more in line with the conditions of deliberative democracy. This frame of state decision-making narrows the range of deliberative possibilities. Deliberative democrats note that the radical and critical potential in deliberative democracy typically lies outside state institutions in the public sphere.

31. Chambers, *supra* note 28 at 317.

EA scholarship contains much support for deliberative EA. Neil Craik, for example, describes deliberative EA as:

developing and inculcating shared values around environmental decisions....The substantive goals that underlie EIA [environmental impact assessment] are understood to be more than symbolic and of instrumental value, since the participants are required to justify their positions considering the available information, public comments and the environmental objectives of EIA.<sup>32</sup>

On this view, through the integration of community participation and technical expertise, participants come to understand the significance of anticipated effects and they “may reconsider their interests in light of both factual and normative information.”<sup>33</sup> Many scholars see deliberation as essential for sustainable decision-making because it provides for social learning that can dislodge unsustainable assumptions.<sup>34</sup> Moreover, deliberative participation in EA is understood as an exercise in citizenship, which both builds democratic capacity and provides democratic authority to decisions with significant public impacts.<sup>35</sup>

Deliberative decision-making is typically situated within theories of deliberative democracy, which foreground public reason (rather than preference-aggregation) in democracies.<sup>36</sup> A key marker of deliberative

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32. Neil Craik, “The Assessment of Environmental Impact” in Emma Lees & Jorge E Viñuales, eds, *Oxford Handbook of Comparative Environmental Law* (Oxford: Oxford University Press, 2019) 876 at 882 [Craik, “Assessment”]. Writing about Australia, Fisher observes: “EIA was one of the tools developed to ensure that ‘the deliberative obligation’ is discharged.” Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Oxford and Portland OR: Hart Publishing, 2007) at 129 (footnotes omitted); see also Hans Wiklund “In Search of Arenas for Democratic Deliberation: a Habermasian Review of Environmental Assessment” (2005) 23:4 *Impact Assessment & Project Appraisal* 281; A John Sinclair & Alan P Diduck, “Reconceptualizing Public Participation in Environmental Assessment as EA Civics” (2017) 62 *Environmental Impact Assessment Rev* 174; Neil Craik, “Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment” (2016) 53:2 *Osgoode Hall LJ* 632 at 673-674 [Craik “Reconciliation”]; Jane Holder, *Environmental Assessment: The Regulation of Decision Making* (New York: Oxford University Press, 2004) at 27-29; John R Parkins, “Deliberative Democracy, Institution Building, and the Pragmatics of Cumulative Effects Assessment” (2011) 16:3 *Ecology & Society* 30.

33. Craik, “Assessment,” *supra* note 32 at 882; Holder, *supra* note 32 at 28.

34. A John Sinclair, Alan Diduck & Patricia Fitzpatrick, “Conceptualizing Learning for Sustainability Through Environmental Assessment: Critical Reflections on 15 Years of Research” (2008) 28:7 *Environmental Impact Assessment Rev* 415 at 425. Deliberative environmental decision-making outside the EA context also has significant support: see eg John S Dryzek & Jonathan Pickering, “Deliberation as a Catalyst for Reflexive Environmental Governance” (2017) 131 *Ecological Economics* 353; Jenny Steele, “Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach” (2001) 21:3 *Oxford J Leg Stud* 415.

35. Ciaran O’Faircheallaigh, “Public Participation and Environmental Impact Assessment: Purposes, Implications, and Lessons for Public Policy Making” (2010) 30:1 *Environmental Impact Assessment Rev* 19 at 22.

36. It contrasts with aggregative democracy, through which public decisions gain legitimacy through

democratic decision-making is the giving and receiving of public-regarding reasons for public decisions.<sup>37</sup> Thus a good outcome for public decision-making, from this perspective, is a decision that is justified through accessible and reasonable reasons to those who are subject to its effects.<sup>38</sup> Deliberation is a mode of decision-making in which process and substance are fused. As leading scholars of deliberative democracy put it: “What reasons count as such a justification is inescapably a substantive question.”<sup>39</sup>

Deliberative democrats argue that deliberation enhances legitimacy, encourages public-regarding perspectives by participants, promotes mutual respect, and improves the quality of decisions.<sup>40</sup> Building on these insights, public law scholars argue that the exercise of public authority in a manner that accords with deliberative-democratic principles is tied to legality.<sup>41</sup> Deliberative decision-making thus explains how the administrative state can operate with both democratic and legal authority.

From the scholarship on deliberative democracy, we can identify three conditions that must be met to foster deliberative decision-making.<sup>42</sup> The first is recognition that those affected have the capacity to contribute to decisions affecting their interests; in other words, it is recognition of their *responsible agency*.<sup>43</sup> Individuals and communities are not passive recipients of commands, rather they have agency with respect to collective decisions. Their agency is respected when they can participate in the debate and discussion about decisions that impact their interests. It is further recognized when they have opportunities to contest (or accept) those decisions.

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vote-taking or other forms of aggregating individual preferences: Hoi L Kong, “Election Law and Deliberative Democracy: Against Deflation” (2015) 9 JPPL 35 [Kong, “Election”].

37. Jocelyn Stacey, *The Constitution of the Environmental Emergency* (Oxford and Portland OR: Hart Publishing, 2018), Chapter 4 [Stacey, *Emergency*].

38. A consensus-based outcome is always welcomed, but is not understood as a necessary or even likely outcome of democratic deliberation: Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004) at 26-29.

39. Amy Gutmann & Dennis Thompson, “Deliberative Democracy Beyond Process” (2002) 10:2 J Political Philosophy 153 at 156 [Gutmann & Thompson, “Beyond Process”].

40. Chambers, *supra* note 28 at 316.

41. David Dyzenhaus, “Deliberative Constitutionalism Through the Lens of the Administrative State” in Ron Levy, Hoi Kong & Jeff King, eds, *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press, 2017) 44; Liston “Democracy,” *supra* note 27; Stacey, *Emergency*, *supra* note 37.

42. From a design perspective these three conditions roughly map onto Fung’s cube of participation: Archon Fung, “Varieties of Participation in Complex Governance” (2006) 66 Public Administrative Rev 66.

43. Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford and Portland OR: Hart Publishing, 2012); Kong, “Election,” *supra* note 36 at 40. And building off these sources: Stacey, *Emergency*, *supra* note 37 at 106-107.

Second, deliberative decision-making requires an understanding of *mutual respect* that flows from the act of deliberation. “To deliberate with another is to understand the other as a self-authoring source of reasons and claims.”<sup>44</sup> Deliberation requires participants to be recognized and respected as free and equal participants who ought to give and are entitled to receive public-regarding reasons, not entirely self-interested claims.<sup>45</sup> Mutual respect demands that deliberative forums are designed to foster free and equal participation. Scholars have written extensively about these conditions both in an ideal form<sup>46</sup> and in specific cases (eg the design of citizen assemblies).<sup>47</sup> Mutual respect also requires that participants conduct themselves as responsible agents by bringing relevant, public-regarding claims. This is how discussion remains “aimed at producing reasonable, well-informed opinions.”<sup>48</sup>

Finally, deliberative decision-making is *reflexive*.<sup>49</sup> Responsible agents who respect each other as such are willing to revise preferences. New information and different perspectives ought to prompt participants—including decision-makers—to reconsider and perhaps revise their own opinions. The reason-giving requirement means that participants ought to be able to articulate how they took that information into account to justify their ultimate position. This requirement of reflexivity attaches to all participants, but it has a particular importance when dealing with the exercise of public authority. Public officials must give reasons to respond to the claims made by those affected. Reflexivity respects the responsible agency of those subject to the decision.<sup>50</sup>

These conditions of deliberation thus provide an internal structure for publicly justified decisions. In a deliberative democracy, public decision-makers must seek to fulfill these conditions in the first instance because

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44. Jane Mansbridge et al, “A systemic approach to deliberative democracy” in John Parkinson & Jane Mansbridge, eds, *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge, Cambridge University Press, 2012) 1 at 11.

45. For a summary of the literature on this point, see Polletta & Gardner, *supra* note 29 at 71-72. On the relevance of this to Canadian public law see Liston “Democracy,” *supra* note 27 and Stacey, *Emergency*, *supra* note 37.

46. Alice Woolley, “Legitimizing Public Policy” (2008) 58:2 UTLJ 153; Henry S Richardson, *Democratic Autonomy: Public Reasoning About the Ends of Policy* (Oxford: Oxford University Press, 2002); Joshua Cohen, “Deliberation and Democratic Legitimacy” in James Bohman & William Rehg, eds, *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press, 1997) 73.

47. Chambers, *supra* note 28 at 316 (and citations therein).

48. Chambers, *supra* note 28 at 309.

49. *Ibid* at 308-309; Dryzek & Pickering, *supra* note 34.

50. Chambers, *supra* note 28 at 308 and 317; Gutmann & Thompson, “Beyond Process,” *supra* note 39 at 156. See also Genevieve Cartier, “Deliberative Ideals and Constitutionalism in the Administrative State” in Ron Levy, Hoi Kong, Graeme Orr & Jeff King eds, *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press, 2018) 57 at 62-63.

this is the source of their democratic and legal authority. When subject to review, courts too must attend to these conditions.<sup>51</sup> This reconciles democratic authority with the rule of law.<sup>52</sup>

In sum, deliberative decision-making is supported as a form of best practices for EA to improve both the legitimacy and quality of EA decisions. Deliberative EA is grounded in a theory of public authority that explains how EA decisions made by the administrative state can fulfill both democratic and legal requirements. Moreover, this theory can be distilled into three conditions that are essential to allow deliberative decision-making to unfold.

## II. *Environmental law's public law frames and their deliberative dimensions*

The duty of fairness, early Canadian EA regulation, and the DCA have independent origins but all three inform the legislative structure and operation of modern EA law. This part explains the connection between modern EA and the common law duty of fairness, early EA as public inquiry, and the DCA. For each public law frame, it highlights how the existing doctrine has recognized the three conditions of deliberation. While this recognition is both implicit and incomplete, it nonetheless provides a coherent explanation of modern EA and has the potential to significantly, and explicitly, inform the implementation and interpretation of modern EA law.

### 1. *Administrative law: The duty of fairness*

#### a. *EA as procedural fairness for the public*

The first public law frame is the common law duty of fairness. The duty of fairness guarantees those affected by a public decision a right to be heard by an impartial decision-maker. Elizabeth Fisher writes that EA can be understood as ensuring procedural fairness for the public:

The fact that EIA [environmental impact assessment] is a legal procedure makes it both legally familiar and legally alien. It is familiar because lawyers, particularly administrative lawyers, are well acquainted with procedural obligations in the form of natural justice and procedural fairness. It is alien because most such procedural obligations are focused on protecting individual rights while EIA is a procedure in the public

51. This is reflected in current Canadian administrative law and its emphasis on justified administrative decision-making: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. See especially paras 2, 14, 74.

52. David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14:1 SAJHR 11 at 36-37.

interest.<sup>53</sup>

Fisher's characterization applies in the Canadian context. While in Canada the common law duty of fairness has not been extended to the public generally,<sup>54</sup> the public's right to be heard has been a defining feature of Canadian EA since its inception.<sup>55</sup> Canada's first EA legislation not only allowed for public participation, but it also committed the government to *actively facilitating* such input.<sup>56</sup> Every version of federal EA legislation has included "meaningful public participation" as one of its purposes.<sup>57</sup> For major project EAs, public participation has occurred through opportunities for written comment at multiple points in the EA process and through intervenor status at hearings. The importance of public participation to EA is underscored by the significant backlash to 2012 legislative changes, which for the first time curtailed the role of public input.<sup>58</sup>

Like the common law duty of fairness, the role of the public in EA is two-fold: instrumental and intrinsic.<sup>59</sup> First, members of the public are often the source of relevant information about the environment and the possible impacts of an approval decision. This information can enhance, contest, or clarify the information presented by the project proponent. NGOs and members of the public play an essential role in contesting proponent evidence and thus provide the decision-maker with a much

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53. Fisher, "Setting the Law Ablaze," *supra* note 1 at 425.

54. Liston, "Democracy," *supra* note 27. Compare with developments in the UK: *R (on the application of Moseley) v London Borough of Haringey*, [2014] UKSC 56, especially Lord Wilson; John Morison, "Citizen Participation: A Critical Look at the Democratic Adequacy of Government Consultations" (2017) 37:3 Oxford J Leg Stud 636.

55. A John Sinclair & Alan P Diduck, "Public Participation in Canadian Environmental Assessment: Enduring Challenges and Future Directions" in Kevin S Hanna, ed, *Environmental Impact Assessment: Practice and Participation*, 3rd ed (Don Mills, Ont: Oxford University Press, 2016) 65. Though it has consistently fallen short of expectations. See Meinhard Doelle & A John Sinclair "Time for a New Approach to Public Participation in EA: Promoting Cooperation and Consensus for Sustainability" (2006) 26:2 Environmental Impact Assessment Rev 185 at 186-187. For a detailed literature review of the meaning and role of public participation in EA see: Anne N Glucker et al, "Public Participation in Environmental Impact Assessment: Why, Who and How?" (2013) 43 Environmental Impact Assessment Rev 104.

56. *Canadian Environmental Assessment Act*, SC 1992, c 37, Preamble, ss 4(1)(d), 62(g) [CEAA 1995].

57. *Ibid*, s 4(1)(d); *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 52, s 4(e); IAA, *supra* note 19, s 6(1)(h).

58. Gibson, "In Full Retreat," *supra* note 23 at 180, 183-184; Geoffrey H Salomons & George Hoberg, "Setting Boundaries of Participation in Environmental Impact Assessment" (2014) 45 Environmental Impact Assessment Rev 69; Kirsten Mikadze, "Pipelines and the Changing Face of Public Participation" (2016) 29 J Envtl L & Prac 83.

59. See eg *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 659-660, 24 DLR (4th) 44 [Cardinal].

fuller picture of the assessment.<sup>60</sup> Second, the scale of the projects subject to EA means that members of the public are affected either directly or indirectly by these public decisions. Accordingly, EA affords them a right to be heard before a decision is made that affects their interests. This is the intrinsic justification for public participation—it recognizes the autonomy and agency of those affected.<sup>61</sup> The instrumental and intrinsic justifications for participation are often captured by the language of legitimacy.<sup>62</sup> When EA functions well through a fair process, it contributes to the legitimacy of development project decisions. Similarly, and independent of any effect on the substantive outcome, the duty of fairness contributes to the legitimacy of the administrative process.<sup>63</sup>

These similarities suggest that understanding EA as procedural fairness for the public is an apt way of explaining the unusual structure of EA and the elusive content of legislative provisions prescribing engagement with affected communities. As the next section shows, watershed judicial decisions on the common law duty of fairness contain the deliberative conditions delineated above.

#### b. *Deliberative conditions in the duty of fairness*

This part examines the common law duty of fairness exemplified in the UK decision in *Cooper v Board of Works*<sup>64</sup> and the leading SCC decision in *Baker v Canada (Minister of Citizenship and Immigration)*.<sup>65</sup> *Cooper* is an 1863 Court of Common Pleas decision that is said to foreshadow the Canadian duty of fairness by over a century.<sup>66</sup> In *Baker*, the SCC solidified the doctrine of the duty of fairness and, in doing so, supplied a remarkably stable precedent for this area of administrative law.

The facts of *Cooper* are simple. The Board of Works ordered the demolition of Cooper's partially-built home without affording Cooper any notice or opportunity to be heard before making the decision. Cooper was notified of the decision only upon discovering his demolished home. The

60. Susan Rutherford & Karen Campbell, "Time Well Spent? A Survey of Public Participation in Federal Environmental Assessment Panels" (2004) 15:1 J Envtl L & Prac 71.

61. Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2011) at 185-186.

62. Sinclair & Diduck, *supra* note 55 at 65; Mark Winfield, "Decision-Making, Governance and Sustainability: Beyond the Age of 'Responsible Resource Development'" (2016) 29 J Envtl L & Prac 129.

63. *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699 at para 22, 174 DLR (4th) 193 [*Baker*]; *Cardinal*, *supra* note 59 at 661.

64. *Cooper v Wandsworth Board of Works (1863)*, 14 CB (NS) 180, 143 ER 414 [*Cooper*].

65. *Baker*, *supra* note 63.

66. Gus Van Harten, Gerald Heckman, David Mullan & Janna Promislow eds, *Administrative Law: Cases, Text, and Materials* 7th ed (Toronto: Emond Publishing, 2015) at 74.

relevant legislation required that persons provide the Board notice before building a new home; Cooper claimed he provided notice. The Board claimed that Cooper did not and, accordingly, the legislation authorized the demolition of his home. The Court unanimously held that Cooper was entitled to notice and an opportunity to be heard prior to the Board's demolition decision, notwithstanding the fact that the legislation was silent on the process to be afforded to individuals. Notably, Chief Justice Erle refused to rest his judgment solely on a characterization of the decision as "judicial."<sup>67</sup> It is this rejection of categorization and embrace of a broader notion of fairness that is said to be the precursor to the contemporary Canadian duty of fairness.

The Chief Justice's reasons focus on the significant power exercised by the Board and the lack of harm that would come from the Board "hearing the party before they subjected him to a loss so serious."<sup>68</sup> There is a clear connection here with the first deliberative condition: respect for Cooper's responsible agency. None of the judges viewed the requirement of fairness as a mere procedural formality. Justices Willes and Byles added that the absence of notice thwarted entirely Cooper's ability to contest the adverse decision (before demolition) using the appeals mechanisms set out in the statute.<sup>69</sup> By denying him the opportunity to actively accept or contest the decision, Cooper was treated as a recipient of a command and not a responsible agent capable of participating in the decision-making process.

A closer reading of *Cooper* reveals the Court's commitment to the two further conditions for deliberation. Cooper was owed a duty of fairness because of his interests at stake *and also* because he might have had something relevant and useful to contribute to the decision to be made. The judges had in mind an administrative process that fosters mutual respect. That is, they had an expectation that both the Board and Cooper would approach the process as an opportunity for forming reasonable positions in light of the statutory scheme. For example, the Chief Justice speculated that perhaps "[t]he default in sending notice... is a default which may be explained."<sup>70</sup> It is not simply that Cooper will assert his right or interest in his private property, but rather that he might put forth good reasons for avoiding the demolition that are relevant to the statutory scheme.

Justice Krating states this expectation even more strongly and connects it to an obligation on the part of the Board. He suggests that if Cooper

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67. *Cooper*, *supra* note 64 at 418.

68. *Ibid* at 417-418.

69. *Ibid* at 419-420.

70. *Ibid* at 417.



had the opportunity to assure the Board that construction proceeded in a manner that protected the public interest, “can any one suppose for a moment that the board would have proceeded to inflict upon the man the grievous injury of demolishing his house[?]”<sup>71</sup> Justice Krating articulates a commitment to reflexivity. That is, requiring Cooper’s participation in the process implies that the Board would be willing to adjust its decision in accordance with the information and views presented by Cooper.

This closer read of *Cooper* suggests that the duty of fairness is not simply concerned with protecting private rights from state interference. Rather, the duty of fairness is concerned with good administration. The Chief Justice reasons that a common law duty of fairness is “required by a due consideration for the public interest” and that it provides “a great many advantages which might arise in the way of public order.”<sup>72</sup> While Chief Justice Erle does not explicate his meaning here, the reasons as a whole suggest that the public interest and public order is best served through commitments to responsible agency, mutual respect, and reflexivity. On this view, the private interests of Cooper are not pitted against the public interest in proper sewage management and urban development. Rather, a fair process is one in which affected parties offer public-regarding reasons to a respectful and open-minded decision-maker. This interpretation—one that contains the deliberative conditions—plausibly supplies a theory that underpins the decision’s undefined objective of “substantial justice.”<sup>73</sup>

The principles of fairness articulated in *Cooper* laid largely dormant in Canadian administrative law until the 1979 SCC decision in *Nicholson v Haldimand-Norfolk Regional Police Commission*,<sup>74</sup> in which a majority of the Court supplemented the narrow common law doctrine of natural justice with a broader duty of fairness. The Supreme Court unanimously affirmed *Nicholson*, and the existence of the broader duty of fairness, six years later in *Cardinal v Director of Kent Institution*.<sup>75</sup>

But it is the Court’s 1999 decision in *Baker* that is widely understood to unlock the potential of the duty of fairness and that brings Canadian law full circle to *Cooper*.<sup>76</sup> The decision at issue was the denial of Baker’s exemption from deportation requirements. Baker had been allowed to make full written submissions to the decision-maker, with supporting

71. *Ibid* at 420.

72. *Ibid* at 418.

73. *Ibid*.

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

75. *Cardinal*, *supra* note 59.

76. David Dyzenhaus & Evan Fox-Decent, “Rethinking the Process/Substance Distinction: Baker v. Canada” (2001) 51:3 UTLJ 193 at 195.

documentation and assistance from legal counsel. After receiving the adverse decision, Baker's counsel requested reasons and received the notes of a junior immigration officer involved in the decision-making process. The notes were riddled with stereotypes and prejudice against Baker, a Jamaican woman with a mental health condition and children in care. The Court unanimously held that the participatory rights afforded to Baker and her children were adequate, but that the decision was biased.<sup>77</sup> A majority of the Court also found the decision substantively unreasonable.<sup>78</sup>

There is abundant scholarship noting the remarkable features of *Baker*.<sup>79</sup> Here, I note only two of the striking features of the majority's reasons. First, the decision extends procedural protections to those whose interests are affected by the decision. The Court is clear that the duty is not solely about protecting the individual rights and liberties of those directly subject to state action. Baker, the subject of the decision, was owed a duty of fairness, but so were her children.<sup>80</sup> The children's best interests were at stake and those interests were entitled to full and fair consideration. Thus the decision-maker was required to provide an opportunity for the children's views to be fully and fairly presented and to consider these submissions in making the decision.<sup>81</sup> In this way, there are echoes of *Cooper*, in that the duty of fairness is not simply about mediating the conflict between individual and state, but rather, it is about ensuring a broader notion of substantial justice. The duty of fairness goes hand-in-hand with public order because it ensures that the interests of those impacted—whether the subject of the decision or not—are considered and taken into account. In this way, the Court inched the common law doctrine closer to the public's right to be heard, which is codified in EA statutes.

Second, *Baker* recognizes that the duty of fairness requires decision-makers to offer reasons for their decisions in a wide range of instances.<sup>82</sup> This reason-giving requirement encapsulates the conditions of mutual respect, responsible agency, and reflexivity. It is through giving reasons that the decision-maker shows respect for those affected by the decision; it shows that the decision-maker has taken seriously their interests; and it

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77. *Baker*, *supra* note 63 at paras 34, 78.

78. *Ibid* at para 76.

79. See eg David Dyzenhaus & Evan Fox-Decent, *supra* note 76; David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart Publishing, 2004); Alyssa Clutterbuck, "Rethinking Baker: A Critical Race Feminist Theory of Disability" (2015) 20 Appeal 51.

80. *Baker*, *supra* note 63 at paras 30, 34.

81. *Ibid* at para 22.

82. *Ibid* at para 43.

provides those affected the opportunity to exercise their agency in either accepting or contesting the decision.

The reason-giving requirement erodes the distinction between procedural and substantive justice.<sup>83</sup> The obligation to provide reasons is a matter of procedural fairness, but is closely linked to concerns about the substance, or contents, of the reasons offered in support of a decision. The *Baker* majority observed that reasons can lead to better decisions by forcing the decision-maker to think through the rationale. In addition, the majority noted that reasons facilitate judicial scrutiny.<sup>84</sup> This proved true in *Baker*: the decision was found unreasonable because the notes revealed the decision was “completely dismissive of the interests of Ms. Baker’s children,” contrary to the statutory scheme.<sup>85</sup>

Implicit in the majority’s reasoning is concern for deliberative conditions. *Baker* may have made submissions, as a responsible agent, but she was not treated with respect by the decision-maker. The notes demonstrated that the decision was influenced by the immigration officer’s prejudice. Moreover, the notes revealed the absence of reflexivity, or, a willingness on the part of the decision-maker to be persuaded by better reason. Here, the decision advanced a preconceived position, riddled as it was with stereotypes and prejudice. It was not responsive to the concerns advanced by those affected.

This part has highlighted that, among many important features of *Baker*, the decision re-articulates a robust understanding of fairness seen in the much earlier decision in *Cooper*. The duty of fairness relied upon by both courts implicitly contains conditions for deliberative decision-making. The duty of fairness requires that those impacted by the decision be treated as responsible agents capable of participating in the decision-making and law-making process. Respect for those affected means a “meaningful opportunity” to be heard and to have their claims “fully and fairly considered.”<sup>86</sup> It also means that participants have a reciprocal obligation to provide relevant, public-regarding reasons for their claims. Finally, respect for the agency of those affected requires the decision-maker to be reflexive, that is, open to persuasion and responsive to the reasons advanced by those affected.

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83. Dyzenhaus & Fox-Decent, *supra* note 76.

84. *Baker*, *supra* note 63 at para 39.

85. *Ibid* at para 65.

86. *Ibid* at para 32.

## 2. *Regulation: early Canadian EA*

### a. *EA as public inquiry in miniature*

Along with the common law duty of fairness, early EA regulation and practice informs our understanding of modern EA law. One of the most significant assessments in Canadian history is the Mackenzie Valley Pipeline Inquiry. Transformative both domestically<sup>87</sup> and internationally,<sup>88</sup> and an early precursor to modern EA and the DCA, the 1974–1977 inquiry assessed the impacts of a proposed oil and gas corridor in Canada’s north. Justice Thomas Berger led the inquiry. As this part shows, his innovative implementation of the inquiry influenced early Canadian EA regulation and fulfilled the three deliberative conditions of responsible agency, mutual respect, and reflexivity.

The Inquiry’s terms of reference mirrored the set of considerations now associated with EA.<sup>89</sup> Berger grasped the stakes of this proposal and his mandate in leading the inquiry. “[I]mplicit in this mandate,” Berger wrote, is that the inquiry “is not simply a debate about a gas pipeline and an energy corridor, it is a debate about the future of the North and its peoples.”<sup>90</sup> Given these stakes, he described his “anxiety” to ensure “that the people of the North and all other Canadians with an interest in the work of the Inquiry should have every opportunity to be heard.”<sup>91</sup> He wrote, “[w]e wished to create an Inquiry without walls.”<sup>92</sup>

Berger was empowered to hold hearings, summon witnesses, compel the production of documents, and “to adopt such practices and procedures for all purposes of the inquiry as he from time to time deems expedient for the proper conduct thereof.”<sup>93</sup> But there was no specific legislated requirement or judicial precedent for the practices and procedures that Berger adopted. Instead, Berger adopted innovative and celebrated methods<sup>94</sup> following the lead of northern communities.

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87. Frances Abele, “The Lasting Impact of the Berger Inquiry into the Construction of a Pipeline in the Mackenzie Valley” in Gregory J Inwood & Carolyn M Johns, eds, *Commissions of Inquiry and Policy Change: A Comparative Analysis* (Toronto: University of Toronto Press, 2014) 88 at 90.

88. Notably its influence on the design and operation of the Waitangi Tribunal in New Zealand/Aotearoa: Kim Stanton, *Truth Commissions and Public Inquiries: Addressing Historical Injustices in Established Democracies* (SJD Dissertation, University of Toronto, 2010) at 212–213.

89. *Mandate Letter*, PC 1974-641, (21 March 1974), C Gaz II [*Mandate Letter*].

90. Thomas R Berger, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry* (Ottawa, ON: Government of Canada, 1977) at 1 [*Inquiry*].

91. *Ibid* at 241.

92. *Ibid* at 228.

93. *Mandate Letter*, *supra* note 89.

94. Stanton, *supra* note 88 at 151; Robert Page, *Northern Development: The Canadian Dilemma* (Toronto: McClelland & Stewart, 1986), Chapter 5; Abele, *supra* note 87 at 89; Alastair R Lucas, “The Berger Inquiry and the Committee for Justice and Liberty Case” in William A Tilleman &

In particular, the Inquiry made community participation central to the entire endeavour. The inquiry was structured with both community hearings and formal hearings with technical experts, and with mechanisms to ensure participants all had access to the same information.<sup>95</sup> The two sets of hearings were run as complementary processes and given an equal role in the inquiry.<sup>96</sup> Berger successfully sought and implemented a funding program for those who would make a “necessary and substantial contribution” and who would not otherwise have the financial resources to participate.<sup>97</sup> Moreover, the hearings travelled to the communities and adopted informal and flexible procedures that avoided unnecessary adversarial, legal techniques.<sup>98</sup>

The Inquiry attained another distinctive achievement: it produced a best-selling final report.<sup>99</sup> The report details the careful attention to process and it arrives at a creative compromise in its recommendation—the clear product of the process. Berger recommended that no pipeline should be built across the uniquely vulnerable Northern Yukon and, while it was environmentally feasible to build a pipeline through the Mackenzie Valley, it should be postponed for ten years to allow for the government to negotiate land claims with the Indigenous Peoples in the north.<sup>100</sup>

The Mackenzie Valley Pipeline Inquiry remains the gold standard for assessment that many have relied on to advocate for more inclusive and comprehensive planning processes for land and resource decision-making.<sup>101</sup> Despite never being fully replicated, the Inquiry influenced the structure of early Canadian EA regulation. The first federal policy on EA, the Environmental Assessment Review Process (EARP), was issued the same year that Berger was given his mandate. The 1974 EARP contained the objective of “giving environmental problems the same degree of consideration as that given to economic, social, engineering and other concerns,” but it did not incorporate a significant role for public participation.<sup>102</sup> The Inquiry, however, galvanized public interest in EA,

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Alastair R Lucas, eds, *Litigating Canada's Environment: Leading Canadian Environmental Cases by the Lawyers Involved* (Toronto: Thomson Reuters, 2017) 69.

95. Inquiry, *supra* note 90 at 224.

96. Stanton, *supra* note 88 at 167.

97. Inquiry, *supra* note 90 at 225-226.

98. *Ibid* at 226-227.

99. Stanton, *supra* note 88 at 182 (and footnotes therein).

100. Inquiry, *supra* note 90 at xxvi-xxvii (Letter to the Minister).

101. Robert B Gibson & Kevin S Hanna, “Progress and Uncertainty: The Evolution of Federal Environmental Assessment in Canada” in Kevin S Hanna, ed, *Environmental Impact Assessment: Practice and Participation*, 3rd ed (Don Mills, Ont: Oxford University Press, 2016) 15 at 19.

102. *Provisions of the Policy of the Government of Canada Establishing the Federal Environmental Assessment and Review Process* (Ottawa: Federal Environmental Assessment and Review Office,

generated criticism of the original EARP, and resulted in policy changes. These changes emphasized the role of public participation throughout the assessment process and strengthened the independence of public panel reviews.<sup>103</sup>

Implementation of the EARP was uneven, but updates continued to strengthen its language. By 1984, when the EARP was formalized as a “Guidelines Order” (EARPGO), a legally-binding regulation,<sup>104</sup> it included several of Berger’s participatory innovations. EARPGO documents emphasized the role of public participation at all stages of environmental assessment.<sup>105</sup> Panel reviews (what were and remain the most comprehensive form of assessment for larger projects) were designed to make public participation central to the exercise.<sup>106</sup> Emulating the Inquiry’s community hearings, and the understanding that public participation must be actively facilitated, the EARPGO required that “[a]ll hearings of a Panel shall be public hearings conducted in a non-judicial and informal but structured manner”<sup>107</sup> with the goal to “encourage the broadest public participation.”<sup>108</sup> Multiple community hearings were the norm for panel reviews, with separate “issue meetings” convened for interested parties to address specific, controversial issues.<sup>109</sup> Beginning in 1990, EA implementation was supported by a formalized participant funding program with criteria for eligibility similar to the those used by Berger.<sup>110</sup>

The EARPGO, in some ways, seemed to conceive of panel reviews as miniature public inquiries. The courts agreed that facilitating public participation was a central objective of the EA process.<sup>111</sup> As noted above, once federal EA was enacted as legislation, public participation was

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1974), ss 1(d), 5(b)(vi).

103. Doelle, *supra* note 12 at 8; Robert Gibson, “From Wreck Cove to Voisey’s Bay: The Evolution of Federal Environmental Assessment in Canada” (2002) 20:3 *Impact Assessment & Project Appraisal* 151 at 154.

104. *Can Wildlife Fed Inc v Can (Minister of the Environment)*, [1989] 3 FC 309, [1989] 4 WWR 526 at 537-538; Oldman, *supra* note 9.

105. See eg *The Federal Environmental Assessment and Review Process* (Ottawa: Federal Environmental Assessment Review Office, 1987) at 2-3 [Guideline 1987].

106. Oldman, *supra* note 9.

107. Environmental Assessment and Review Process Guidelines Order, s 27(1) in Rodney Northey, *The 1995 Annotated Canada Environmental Assessment Act and EARP Guidelines Order* (Toronto: Thomson Canada, 1994).

108. *Ibid* at 4.

109. *Environmental Assessment Panels: What they are and What they do* (Ottawa, Government of Canada, Environmental Assessment Review, 1980) at 7; Guideline 1987, *supra* note 105 at 4.

110. Northey, *supra* note 107 at 577.

111. *Ibid*.

entrenched as one of its core purposes.<sup>112</sup> The Inquiry had made its imprint on early EA regulation. As the next section argues, the Inquiry's design met the three conditions of deliberative decision-making.

b. *The deliberative features of the inquiry and its influence*

Berger understood the Inquiry as an exercise in deliberative democracy, one that cultivated social learning and shared values through the integration of robust participation and formal expertise. In the report, he wrote: "Commissions of Inquiry have begun to take on a new function: that of opening up issues to public discussion, of providing a forum for the exchange of ideas."<sup>113</sup> For Berger, proper process flowed from this understanding:

If commissions of inquiry have become an important means for public participation in democratic decision-making as well as an instrument to supply informed advice to government, it is important to consider the way in which inquiries are conducted and whether they have the means to fulfill their perceived functions.<sup>114</sup>

Indeed, the Inquiry fulfilled the three deliberative conditions introduced above. It was a process that treated those affected as responsible, self-determining agents, it afforded them respect and cultivated mutual respect amongst participants, and it demonstrated reflexivity.

First, Berger's understanding of those affected as responsible agents is demonstrated by how he included their input. The Inquiry did not passively create an opportunity for northern participation, rather it actively facilitated that participation. It sought to meet those affected on *their* terms.<sup>115</sup> "We tried to bring the Inquiry to the people. This meant it was the Inquiry, and the representatives of the media accompanying it—not the people of the North—that were obliged to travel."<sup>116</sup> The travelling Inquiry heard anyone who wanted to be heard and stayed in the northern communities as long as it needed to stay. The Inquiry allowed those impacted to make submissions in their own way. It employed translators so that Indigenous Peoples could speak in their own languages. It shed unnecessarily formal and legalistic procedures.<sup>117</sup>

Notably, this did not come at the expense of others affected by the decision. Berger recognized the responsible agency of those in southern

112. CEEA 1995, *supra* note 56, s 4(d).

113. Inquiry, *supra* note 90 at 223.

114. *Ibid* at 224.

115. *Ibid* at 227.

116. *Ibid* at 228.

117. Stanton, *supra* note 88 at 189.

Canada as well. He took the view that those in the south deserved to hear and understand the anticipated impacts on the north.<sup>118</sup> Berger observed, “this was a public inquiry. The things that were said were the public’s business....”<sup>119</sup> He held hearings in the south.<sup>120</sup> These hearings were accompanied by a sophisticated media strategy for disseminating information about the Inquiry.<sup>121</sup>

Berger’s commitment to mutual respect was clear through his careful attentiveness to how a “fair and complete” inquiry must enable the participation of those affected and those interests that might not otherwise be represented.<sup>122</sup> He sought, in other words, to ensure that those affected were treated as free and equal. An independent committee provided scientific evidence that was available to all.<sup>123</sup> Berger deployed non-adversarial mechanisms for disclosure of documents so they were available to all participants.<sup>124</sup> He provided participant funding.<sup>125</sup> These procedures were all essential to ensure that lay participants were on equal terms with professionals and technical experts and to enable mutual exchange.

Berger’s insistence that “the formal hearings and the community hearings should be regarded as equally important parts of the same process”<sup>126</sup> nicely illustrates the Inquiry’s commitment to mutual respect. While the procedures for each set of hearings were tailored to the particular focus (community knowledge and experience versus technical expertise), the two were held concurrently and were mutually informing. Berger noted “[t]he contributions of ordinary people were... important in the assessment of even the most technical subjects.”<sup>127</sup> Indigenous knowledge of the land was integral to assessing impacts on caribou, the vulnerability of the Beaufort Sea to oil spills, and the effect of frost heave on pipeline construction and operation.<sup>128</sup> Reflecting the generative potential of deliberation, Berger concluded: “It became increasingly obvious that the issue of impact assessment is much greater than the sum of its constituent parts.”<sup>129</sup>

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118. *Ibid* at 172.

119. Inquiry, *supra* note 90 at 228.

120. *Ibid*.

121. Stanton, *supra* note 88 at 172.

122. Inquiry, *supra* note 90 at 225.

123. *Ibid* at 224-225.

124. *Ibid* at 225.

125. *Ibid* at 225-226.

126. *Ibid* at 243.

127. *Ibid*.

128. *Ibid* at 227.

129. *Ibid*.



Finally, Berger's commitment to reflexivity was demonstrated throughout his detailed report, which captured distinctive perspectives of the north as "homeland" and as "frontier." Reflexivity was also demonstrated through Berger's interpretation of the Inquiry mandate to allow for the consideration of Indigenous land claims. Early in the process the Inuit, Métis, and Dene advanced the position that there could be no approval of a pipeline right-of-way until land settlement agreements were concluded with the Crown.<sup>130</sup> Berger understood this claim to be "an essential focus for the natives' case regarding the impact of the pipeline and their way of life."<sup>131</sup> The process that he adopted was responsive to this central concern. He interpreted his mandate to allow for consideration of whether the pipeline could be "built without prejudice to the settlement of native land claims."<sup>132</sup> After hearing all the evidence, Berger concluded that it could not and, thus, recommended a 10-year moratorium on pipeline development in the Mackenzie Valley to allow for settlement negotiations.<sup>133</sup>

While EA legislation has changed considerably over time, the historical context of the Mackenzie Valley Pipeline Inquiry and its influence on early EA regulatory structure helps explain the centrality of public participation to EA and the unwavering public expectation and demand for robust inclusion in these processes. Moreover, as we have seen, this early history demonstrates a real attention to the deliberative conditions of responsible agency, mutual respect, and reflexivity through innovative regulatory design.

### 3. *Constitutional law: The duty to consult and accommodate*

#### a. *EA as framework for the duty to consult and accommodate*

The third public law frame that clarifies EA legislation is its role as one of the main statutory regimes for implementing the DCA. While the DCA is a constitutional obligation owed by the Crown, the SCC has readily and repeatedly endorsed the use of statutory regimes, such as EA legislation, to fulfill this obligation to Indigenous Peoples.<sup>134</sup> This section explains how EA and the DCA are connected legally and in implementation.

130. *Ibid* at 244.

131. *Ibid*.

132. *Ibid*.

133. *Ibid* at 198.

134. *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 2 [*TRTFN*]; *CR*, *supra* note 14 at paras 30-33 (addressing the related statutory process for assessment under the *Canadian Oil and Gas Operations Act*); *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at paras 32-34 [*Chippewas*].

The DCA doctrine is highly contextual, tailored to the specific impacts of specific Crown action on specific Aboriginal groups. It therefore has multiple legal steps. First, the Crown must determine if the DCA is triggered. The duty is engaged “when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”<sup>135</sup> When engaged, the Crown must next determine the scope of the duty owed. The Court describes “the scope of the duty [as] proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.”<sup>136</sup> This second step requires the Crown to conduct a strength of claim analysis and share this information with the affected Aboriginal group.<sup>137</sup> The third step is consultation itself, discussed in more depth below. A minimal DCA involves Crown notice and disclosure of information. Deep consultation, however, involves robust engagement “aimed at finding a satisfactory interim solution.”<sup>138</sup> Finally, the Court states that in some circumstances consultation will lead to accommodation, which requires the Crown to “[take] steps to avoid irreparable harm or to minimize the effects of infringement.”<sup>139</sup>

Craik observes that there is a “pragmatic attractiveness” to treating EA and the DCA as complementary, “since much of the information and analysis of the environmental effects of a proposed activity will be required to assess the impacts of that same activity on Aboriginal rights and interests.”<sup>140</sup> Information collected through the EA informs the Crown’s determination of the scope of the duty, forms the basis for discussions with Aboriginal groups during the consultation and suggests possibilities for accommodation (usually in the form of mitigation measures.)<sup>141</sup> Conversely, the sharing of Indigenous knowledge and expertise through the consultation should inform the Crown’s understanding of the environmental and social impacts of the proposed project and the application of the legal tests required under EA legislation.<sup>142</sup>

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135. *Haida*, *supra* note 7 at para 35.

136. *Ibid* at para 39.

137. *Wii'litswx v British Columbia (Minister of Forests)*, 2008 BCSC 1139; *Saugeen First Nation v Ontario (MNR)*, 2017 ONSC 3456 at para 61; *Gitxaala*, *supra* note 24 at paras 305-308.

138. *Haida*, *supra* note 7 at paras 43-44.

139. *Ibid* at para 47. For a detailed analysis of the DCA see Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon, SK: Purich Publishing Ltd, 2014) at 27-28.

140. Craik “Reconciliation,” *supra* note 32 at 633.

141. See eg the phased approach used for the Trans Mountain Pipeline assessment: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at paras 74-75 [*TWN*].

142. See *TRTFN*, *supra* note 134.

In addition to practical overlap, EAs are themselves Crown conduct that trigger the DCA. This is true of decisions made throughout the EA process, from high-level scoping EA decisions<sup>143</sup> to final decisions on project approval. It is also true of decisions made by government agencies<sup>144</sup> as well as Ministers and Governor in Council.<sup>145</sup> Moreover, the BC Court of Appeal has held that, given the significance of EA decision-making for land and resource management, EA *must* include Aboriginal consultation, even if there is a separate process for engaging with affected Aboriginal groups.<sup>146</sup> EA and the DCA are legally intertwined.<sup>147</sup>

The Crown also views these processes as necessarily interconnected, which is reflected in federal and provincial policy guidance: “since 2006, the Government of Canada has relied, to the extent possible, on the federal environmental assessment process to fulfill the duty to consult and accommodate, as appropriate.”<sup>148</sup> Canada has produced numerous policy documents to guide Indigenous “participation” in EA.<sup>149</sup> Similarly, BC policy documents presume integration between EA and the DCA.<sup>150</sup>

143. *CS*, *supra* note 15 at paras 44, 47; *Kwikwetlem First Nation v British Columbia (Utilities Commission)*, 2009 BCCA 68 at para 70.

144. *CR*, *supra* note 14 at para 29; *Nova Scotia (Attorney General) v Nova Scotia (Utility and Review Board)*, 2019 NSCA 66 at paras 101-103.

145. See eg *Gitxaala*, *supra* note 24.

146. *Nlaka’pamux Nation Tribal Council v British Columbia (Environmental Assessment Office)*, 2011 BCCA 78 at paras 97-98.

147. See Craik “Reconciliation,” *supra* note 32 for a detailed analysis of these interconnections.

148. Canada, Impact Assessment Agency, “Policy Context: Assessment of Potential Impacts on the Rights of Indigenous Peoples” (Ottawa: Impact Assessment Agency, 15 January 2020), online: *Government of Canada* <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/assessment-potential-impacts-rights-indigenous-peoples.html>> [<https://perma.cc/LT8M-DNQ9>].

149. Canada, Impact Assessment Agency, “Interim Guidance: Indigenous Participation in Impact Assessment” (Ottawa: Impact Assessment Agency, 16 December 2019), online: *Government of Canada* <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-guidance-indigenous-participation-ia.html>> [<https://perma.cc/DCP7-56Q5>] [“Indigenous Participation”]; Canada, Impact Assessment Agency, “Interim Policy Context: Indigenous Participation in Impact Assessment” (Ottawa: Impact Assessment Agency, 27 August 2019), online: *Government of Canada* <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-policy-indigenous-participation-ia.html>> [<https://perma.cc/US6L-R2V7>]; Canada, Impact Assessment Agency, “Interim Guidance: Collaboration with Indigenous Peoples in Impact Assessments” (Ottawa: Impact Assessment Agency, 16 January 2020), online: *Government of Canada* <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/collaboration-indigenous-peoples-ia.html>> [<https://perma.cc/PJ5W-S3HQ>] [“Indigenous Collaboration”]; Canada, Impact Assessment Agency, “Interim Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples” (Ottawa: Impact Assessment Agency, 16 January 2020), online: *Government of Canada* <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-guidance-assessment-potential-impacts-rights-indigenous-peoples.html>> [<https://perma.cc/B6RE-MBTP>].

150. British Columbia, Environmental Assessment Office, *Guide to Involving Proponents when*

The apparent complementarity between EA and the DCA often breaks down in practice, however, giving rise to complex and highly contextual disputes and legal issues. For example, despite the Crown's reliance on EA for DCA purposes, the process of the EA is often defined to exclude matters of crucial import to Indigenous Peoples and the exercise of Aboriginal and treaty rights.<sup>151</sup> Aspects of the DCA get parcelled out across government actors,<sup>152</sup> creating tension with Aboriginal groups who are prevented from effectively conversing with decision-makers about their concerns.<sup>153</sup> Government agencies fail to fulfill the DCA because they confuse essential distinctions between environmental impacts and impacts on Aboriginal rights.<sup>154</sup> And ambiguity remains over whether Aboriginal groups, government, or industry proponents bear the onus of substantiating concerns about anticipated environmental impacts that impinge proven or claimed Aboriginal or treaty rights.<sup>155</sup>

The on-the-ground operation of EA as a framework for the DCA is highly complex and often fraught. As described in next section, the courts have nonetheless developed and enforced a set of legal obligations governing the exercise of public authority in these contexts. Moreover, the judicially-developed DCA recognizes—albeit incompletely—the three conditions of deliberative decision-making.

b. *The deliberative features of the duty to consult and accommodate*

This section identifies the strongest attributes of the DCA and their deliberative potential, while recognizing that, even in its best light, the DCA is highly constrained.<sup>156</sup> Indeed the close connection between EA and the DCA in practice may contribute to the DCA's narrowness. When combined with EA, affected Aboriginal and treaty rights are framed as simply another set of inputs for the assessment, rather than the impetus for coproduction of knowledge and shared decision-making. EA thus helps to

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*Consulting First Nations in the Environmental Assessment Process* (Victoria: Environmental Assessment Office, December 2013), online (pdf): <[https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/proponents\\_guide\\_fn\\_consultation\\_environmental\\_assessment\\_process\\_dec2013.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/proponents_guide_fn_consultation_environmental_assessment_process_dec2013.pdf)> [<https://perma.cc/WP8M-ZKWR>]; British Columbia, Ministry of Indigenous Relations and Reconciliation, *Guide to Involving Proponents when Consulting First Nations* (Victoria: Ministry of Indigenous Relations and Reconciliation, December 2014), online (pdf): <[https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/involving\\_proponents\\_guide\\_when\\_consulting\\_with\\_first\\_nations.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/involving_proponents_guide_when_consulting_with_first_nations.pdf)> [<https://perma.cc/P5H8-SEYP>].

151. See eg *TWN*, *supra* note 141 (on the exclusion of marine shipping).

152. See Craik "Reconciliation," *supra* note 32 at 665.

153. See eg *Gitxaala*, *supra* note 24 at para 279; *TWN*, *supra* note 141 at para 562.

154. *CR*, *supra* note 14 at para 45.

155. Jack Woodward, *Native Law* (Toronto: Carswell, 1990) at 5§2020-2030.

156. Christie, *supra* note 8 at 154; Hanson, *supra* note 8 at 12-13.

position the DCA alongside the other two public law frames as a decision-making procedure within Canadian public law, rather than as a rights-affirming doctrine with the potential to mediate across legal orders.<sup>157</sup>

It is possible, nonetheless, to see the courts articulating and actively developing deliberative conditions in the DCA doctrine, even though they often stop well short of giving them full effect. This section draws out those deliberative conditions from the SCC's formative decision in *Haida* and surrounding DCA jurisprudence. In addition, it highlights an example of how these deliberative conditions have been *misunderstood* by the courts. This example underscores the importance of making explicit the conditions on which the court relies to guide its understanding of DCA.

The Court's description of consultation shares the basic features of deliberation introduced in Part I. *Haida* defines consultation in the following terms: "[C]onsultation' in its least technical definition is talking together for mutual understanding."<sup>158</sup> The Court adopts from New Zealand policy the idea that "[c]onsultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback."<sup>159</sup> It describes a reciprocal relationship in which participants engage in a search for a reasonable outcome that takes into account the reasons and views of each other. Consultation, as described in *Haida*, is not a one-way transfer of information from one party to another. Nor is it a straight-forward balancing of fixed preferences of the participants. Rather consultation, on this view, is potentially transformative, where the outcomes generated from the consultation are a unique product of the process.<sup>160</sup>

The deliberative condition of responsible agency is encapsulated by the Crown's obligation to consult with Indigenous Peoples in their unique capacity as claimants of Aboriginal and treaty rights.<sup>161</sup> The DCA cannot be fulfilled by treating Indigenous Peoples simply as another stakeholder in a decision with broader public consequences. *Haida* clarifies that Indigenous Peoples are entitled to a decision-making process that is distinctive from what the ordinary duty of fairness requires and that may generate different

157. See Hamilton & Nichols, *supra* note 8 for a proposal on how the DCA could transform into this.

158. *Haida*, *supra* note 7 at para 43, quoting Thomas Isaac & Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41:1 *Alta L Rev* 49 at 61; CR, *supra* note 14 at para 49.

159. *Haida*, *supra* note 7 at para 46, quoting New Zealand, Ministry of Justice, *A Guide for Consultation with Māori* (Wellington: The Ministry, 1997).

160. Craik "Reconciliation," *supra* note 32 at 673.

161. *Haida*, *supra* note 7 at para 51; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 64 [*Mikisew*].

outcomes than ordinary equitable remedies such as interim injunctions.<sup>162</sup> This flows from the distinctive stakes in land and resource decisions for Indigenous Peoples.<sup>163</sup> This distinctiveness is again recognized by the Court when it holds that fulfilling the duty to consult is “a special public interest that supersedes other concerns.”<sup>164</sup>

The commitment to mutual respect between Crown and Indigenous Peoples flows from the honour of the Crown.<sup>165</sup> At its core, the honour of the Crown seems to entail a stance of respect for Indigenous Peoples in Canada.<sup>166</sup> For example, communication by the Crown to Indigenous Peoples must foster mutual understanding.<sup>167</sup> Respect is also required in that the Crown has a clear and legally-enforceable obligation to conduct a strength of claim analysis and to share that information with the affected Aboriginal group.<sup>168</sup> The strength of claim analysis ensures that Crown consultation is tailored to the specific impacts on the individual Aboriginal group. Sharing that information creates the platform for fostering dialogue, recognized within the existing doctrinal frame.<sup>169</sup>

Moreover, *Haida* is clear that this respect must be mutual: “At all stages, good faith on both sides is required.”<sup>170</sup> Hard bargaining is acceptable, according to the Court, when it takes place within the broader understanding of reconciliation and the honour of the Crown. The vision presented by the Court reflects deliberative theories that value plural modes of reason giving and moments of bargaining or rhetoric, provided they take place within a broader commitment of the parties to deliberative democracy.<sup>171</sup>

Implicit in the *Haida* definition of consultation is the condition of reflexivity. Because consultation is not simply the exchange of information or, as the Court later states, “an opportunity to blow off steam,”<sup>172</sup> Crown decision-makers have an obligation to revise decisions in light of the consultation process. For deep consultation, the Federal Court of Appeal has stated that “a dialogue must ensue and the dialogue should lead to a demonstrably serious consideration of accommodation. The Crown must

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162. *Haida*, *supra* note 7 at para 13.

163. *Ibid* at para 7.

164. *CR*, *supra* note 14 at para 40.

165. Newman, *supra* note 139 at 27-28.

166. *Ibid* at 167.

167. *CR*, *supra* note 14 at para 49.

168. *Supra* note 137.

169. *Gitxaala*, *supra* note 24 at paras 308-309.

170. *Haida*, *supra* note 7 at para 42.

171. Chambers, *supra* note 28 at 309, 322.

172. *Mikisew*, *supra* note 161 at para 54; *West Moberly First Nation v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at para 149 [WMFN].

be prepared to make changes to its proposed actions.”<sup>173</sup> While *Haida* is clear that consultative obligations are varied and that the requirement of accommodation may not always arise, it is equally clear that the “common thread on the Crown’s part must be ‘the intention of substantially addressing [Aboriginal] concerns’ as they are raised...through a meaningful process of consultation.”<sup>174</sup>

Reflexivity is further presumed by the requirement that consultation occur at the stage that can actually influence the outcome. In *Haida*, the Court determined that “to be meaningful,” consultation must take place on higher-level, strategic decisions which set the course for subsequent operational decisions.<sup>175</sup> At least for major projects, this has been extended to consultation on the macro-level design of the EA process itself.<sup>176</sup> Furthermore, the Court has recognized that early consultation is essential, otherwise “there is clear momentum to allow a project.”<sup>177</sup>

The condition of reflexivity is enforced through the obligation to give reasons for the decision. Reason giving is a crucial expression of respect for the receiving party, which has added significance in the Crown’s process of reconciliation. As the SCC has stated:

Written reasons foster reconciliation by showing affected Indigenous [P]eoples that their rights were considered and addressed... Reasons are ‘a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying [N]ation’... Written reasons also promote better decision making.<sup>178</sup>

The Court ends this passage with a nod to the internal substantive constraints of reason giving. Not just any reasons will fulfill the Crown’s obligations. The courts have held in this context that reasons must show that “representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.”<sup>179</sup>

173. *TWN*, *supra* note 141 at para 564.

174. *Haida*, *supra* note 7 at para 42, quoting *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168, 153 DLR (4th) 193.

175. *Haida*, *supra* note 7 at para 76.

176. *Dene Tha’ First Nation v Canada (Minister of Environment)*, 2006 FC 1354 at para 107.

177. *The Squamish Nation et al v The Minister of Sustainable Resource Management et al*, 2004 BCSC 1320 at para 74.

178. *CR*, *supra* note 14 at para 41, citing to *Haida*, *supra* note 7 at para 44; *Kainaiwa/Blood Tribe v Alberta (Energy)*, 2017 ABQB 107 at para 117 and *Baker*, *supra* note 63 at para 39. See also *WMFN*, *supra* note 172 at para 148, where the BCCA puts it a bit more plainly, stating *WMFN* was entitled to “a satisfactory, reasoned explanation as to why their position was not accepted”; *Squamish First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 216 at paras 64, 75-79 [*Squamish* 2019].

179. *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para 160, adopted in *Mikisew 2005*, *supra* note 161 at 64; applied in *WMFN*, *supra* note 172 at paras 145-146.

An obligation to show that the concerns of Aboriginal groups have been integrated into the decision provides at least a baseline substantive test for the DCA.<sup>180</sup> Demonstrable integration is consistent with the dialogic nature of consultation that the Court in *Haida* seems to have in mind and that is picked up explicitly in later decisions by the Federal Court of Appeal, which demand of the Crown responsive reasons.<sup>181</sup> At its best, the DCA encapsulates the three deliberative conditions and, like deliberative decision-making, fuses procedural and substantive demands.<sup>182</sup>

While the three deliberative conditions are immanent in DCA jurisprudence, they are imperfectly realized.<sup>183</sup> For example, the courts repeatedly invoke the statement that consultation does not create “a veto over what can be done with land.”<sup>184</sup> In this way the DCA mirrors the common law duty of fairness and the distinction between process and substance sustained in the common law.<sup>185</sup>

The deliberative conditions indicate that the veto language is inappropriate. While it is true that deliberative decision-making means no one substantive outcome can be presupposed in advance,<sup>186</sup> it is inaccurate to describe this as a veto. Rather it is a deliberative constraint that applies to all participants in the decision-making process, including the Crown. Thus the Courts must distinguish between general deliberative conditions and the specific case. A deliberative understanding of the DCA likely requires the outcome in *some specific* instances to resemble a veto in that the deliberative process results in the Crown adopting an Aboriginal group’s position whole cloth. In such a case, as Christie puts it, this “may appear

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180. Nigel Bankes, “Little Salmon and the Juridical Nature of the Duty to Consult and Accommodate” (10 December 2010), online (blog): *ABlawg* <<https://ablawg.ca/2010/12/10/little-salmon-and-the-juridical-nature-of-the-duty-to-consult-and-accommodate/>> [<https://perma.cc/6UBY-5EPH>].

181. *Gitxaala*, *supra* note 24 at para 279; *TWN*, *supra* note 141 at paras 502, 559, 563; *Squamish 2019*, *supra* note 178 at paras 63-64. But see Hanson, *supra* note 8 at 22-23.

182. Mary Liston, “Transubstantiation in Canadian Public Law: Processing Substance and Instantiating Process” in John Bell, Mark Elliot, Jason NE Varuhas & Philip Murray, eds, *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart Publishing, 2016) 213. The requirement of accommodation, articulated by the Supreme Court as arising only in some instances, is hard to square with the more deliberative aspects of the Court’s reasons. If consultation is a dialogue conducted in good faith, as the Court states, then accommodation should be part-and-parcel of that dialogue.

183. As opposed to the incoherence that arises from the assertion of Crown sovereignty over pre-existing legal systems, which is nicely illustrated by Christie’s retelling (Christie, *supra* note 8 at 155-157).

184. *Haida*, *supra* note 7 at para 48. This language is repeated in numerous cases. See eg: *Gitxaala*, *supra* note 24 at para 179; *Chippewas*, *supra* note 134 at para 59; *Prophet River First Nation v British Columbia (Environment)*, 2017 BCCA 58 at para 65.

185. Craik “Reconciliation,” *supra* note 32 at 674.

186. See, eg, Chambers, *supra* note 28 at 309 (willingness to revise preference is a key distinction between deliberation and other forms of talk).



to the observer that Aboriginal [N]ations are exercising veto powers, [but] what is actually transpiring is the restraint of Crown power.”<sup>187</sup> Attending to these deliberative conditions means that the Crown must be prepared to reject some major projects, at least in some instances, where the concerns of Aboriginal groups are so serious as to persuade the Crown to change its position. And the Crown must be open to such persuasion.<sup>188</sup>

This part has shown that this restraint of Crown power flows from the deliberative conditions contained elsewhere in the DCA. As discussed in Part I, these deliberative conditions are grounded in a theory that explains how the exercise of public power can have legal and democratic authority within the Canadian legal system.<sup>189</sup> Making explicit the implicit deliberative conditions contained in the DCA would allow courts to give full effect to the DCA.

This part has clarified EA law using three public law frames: EA as procedural fairness for the public, EA as public inquiry and EA as framework for the DCA. In addition, it has argued that these three public law frames contain three essential conditions for deliberative decision-making. While implicit and not always fully realized, each of these areas of public law nonetheless recognizes the responsible agency of those affected, seeks to foster mutual respect, and requires reflexivity. Elucidating these three shared deliberative conditions explains how the deliberative aspirations of EA are immanent in the public law backdrop which informs its modern legislative form.

### 3. *Modern environmental assessment law reform*

Reforms to BC and Canada’s EA legislation underscore the need to clarify the public law context of EA law. Features such as a planning phase, incorporation of community knowledge, and the recognition of Indigenous jurisdiction all have the potential to move EA in Canada toward the deliberative model long supported by EA research. However,

187. Christie, *supra* note 8 at 178.

188. As the BC Court of Appeal has observed, “consultation must begin with “the full range of possible outcomes” (*WMFN, supra* note 174 at para 149.) See also *Blaney et al v British Columbia (The Minister of Agriculture Food and Fisheries) et al*, 2005 BCSC 283 at para 127: “The Ministry is to approach this consultation with an open mind and be prepared to withdraw its approval of the amendment if, after reasonable consultation, it determines that it is necessary to do so...” Rejecting a project is noted as within the range of options in *CR, supra* note 14 para 32.

189. To be clear, however, this is not sufficient to bring the DCA in light with international commitments under the UN Declaration on the Rights of Indigenous Peoples nor is does it reflect nation-to-nation relationships between Canadian jurisdictions and Indigenous nations. See eg Brenda Gunn et al, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, Special Report (Centre for International Governance Innovation, 2017), online: CIGI: <<https://www.cigionline.org/publications/undrip-implementation-braiding-international-domestic-and-indigenous-laws>>.

these legislative reforms are not straight-forward; they do not simply codify pre-existing government obligations to engage with those affected by EA decisions. There is a risk that the public law connections detailed in Part II will remain obscured. To counter this risk, this part provides a brief example of a new EA reform to show how EA as procedural fairness, EA as public inquiry in miniature, and EA as DCA framework are merged and extended through this reform. It then identifies the role that shared deliberative conditions can and should play in providing a clear and coherent baseline for the implementation and interpretation of EA reforms.

BC and Canada's EA legislation now contain a "planning phase"<sup>190</sup> or "early engagement stage,"<sup>191</sup> which begins when the EA requirements of the legislation are triggered by the proponent's application. Planning or early engagement effectively creates a participatory process for determining the process. That is, it provides for input from local communities, other jurisdictions (Indigenous and non-Indigenous), and the public broadly on both the project design and the content of the EA before the assessment is undertaken. It precedes the assessment and ends with a determination of whether the proposed project should be exempted from an EA, rejected outright, or subject to an EA. In BC, this is one of two points in the EA regime in which the Agency is required to seek the consent of participating Indigenous Nations.<sup>192</sup>

The inclusion of mandatory planning and early engagement is a move toward best practices.<sup>193</sup> Early input allows those affected to shape the substantive concerns to be addressed in the assessment as well as how they will be addressed (eg modes of continued engagement through the EA process and monitoring). Planning and early engagement allow for mutual learning between proponent, communities, and government before positions on specific issues become entrenched. They create opportunities for both the EA and the final decision to respond fully to concerns that are brought forward early in the process.

In addition to EA best practice, planning and early engagement can also be understood as an instantiation of the three public law frames described above. First, like the common law duty of fairness, planning and early engagement guarantees those affected a right to be heard with "full and fair consideration"<sup>194</sup> of their concerns. But it also extends on

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190. IAA, *supra* note 19 ss 10-15.

191. EAA, *supra* note 19 ss 13-18.

192. *Ibid*, s 16(1). Note that the Minister does retain ultimate decision-making power to move ahead even in the absence of consensus.

193. See Part I.B. *supra* text surrounding notes 32 to 35.

194. *Baker*, *supra* note 63 at para 32.

the *Baker* requirement of “full and fair consideration” by ensuring that concerns are heard well before the EA and its final decision gain too much momentum for those concerns to be taken seriously.

Second, the planning and early engagement reforms emulate the model of the Mackenzie Valley Pipeline Inquiry, which included early engagement while also being flexible in the form of that engagement. Canada and BC’s reforms require this early stage of EA without mandating the specific content of planning or engagement. While this creates a risk of minimalist implementation, it also creates the opportunity for Agency leadership to require creative and deliberative early engagement that is responsive to local needs. As the Inquiry demonstrates, early engagement allows decision-makers to craft an assessment process that is responsive to the pressing concerns of local communities both in terms of substance (eg title and land negotiations) and process (eg informal and inclusive community hearings).

Finally, planning and early engagement are crucial parts of how the DCA will be operationalized for major project decisions. Canada’s interim guidelines outline a collaborative and consent-seeking approach with Indigenous Nations for the planning phase. One outcome of this stage is a collaboratively-designed Indigenous Engagement and Partnership Plan, which outlines participation, collaboration, and partnership arrangements between Canada and affected Indigenous Peoples.<sup>195</sup> BC’s EAA also empowers the Agency to conclude partnership agreements with affected Indigenous Nations.<sup>196</sup> But the provincial legislation also moves the Agency beyond the constitutional minimum set out in the DCA with its consent-seeking mandate and specific requirements to secure the consent of participating Indigenous Nations.<sup>197</sup> Planning and early engagement thus seem to incorporate and potentially surpass the strongest aspects of the existing DCA by requiring dialogue and meaningful engagement on these strategic decisions about the nature of consultation itself. Moreover, the outcome of the planning and early engagement stage is a set of reasons that demonstrates how consensus was sought, and ideally achieved, for the EA process going forward.

In sum, planning and early engagement features in the reformed EA legislation extend and merge aspects of the duty of fairness, regulatory practice, and the DCA. This means that each of these public law frames is, on its own, inadequate for interpreting the legal scope of the new design

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195. “Indigenous Participation,” *supra* note 149. See also “Indigenous collaboration,” *supra* note 149.

196. EAA, *supra* note 19 ss 41, 43-44.

197. *Ibid*, s 7.

features. Yet the deliberative conditions shared across these three public law frames have the potential to guide interpretation and implementation in a way that helps modern EA law better achieve its deliberative potential.

The specific, nuanced requirements of these conditions must be worked out in light of the particularities of each case. But the deliberative conditions ought to prompt several questions about the administration of the planning or early engagement stage. For example, did this stage provide an inclusive opportunity for those who are affected to exercise their agency? As the three public law frames demonstrate, recognizing the responsible agency of those affected means treating engagement as a central part of the public decision-making process, not a formality or one of many inputs in a decision-making calculus.

Second, was this a planning process that was appropriately facilitative of the agency of those affected? That is, did it create fair and equal conditions for engagement by those affected? The three public law frames demonstrate attention to the conditions for participation. Mutual respect means participants and decision-makers alike must approach the process in the spirit of understanding, free from bias and stereotypes.<sup>198</sup> It means attention to the different abilities of those affected to engage (eg timing and funding needs) and the different ways in which concerns will be communicated.

Finally, did planning and early engagement culminate in a decision that was responsive to reasons presented during this stage? Again, the three public law frames demonstrate that reflexivity and, in particular, the provision of responsive and public-regarding reasons by the decision-maker are a condition of the legitimate exercise of public authority. Reflexive reasons have particular importance early in the EA since their absence is likely to brew resentment and a lack of trust for those affected by the final decision.

### *Conclusion*

This article has argued that the deliberative aspirations for EA are sourced in law. Contrary to dominant legal characterizations as essentially technical

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198. Two recent examples provide some context: eg, the use of security or police action to chill peaceful and legitimate public questioning of proposals (Frances Willick, "Province Won't Investigate Rough Arrest at Gold Mine Meeting," *CBC* (30 May 2019), online: <<https://www.cbc.ca/news/canada/nova-scotia/john-perkins-arrest-atlantic-gold-investigation-complaint-1.5155883>> [<https://perma.cc/XGX2-NWNS>]), and racist backlash directed at First Nations during provincial and federal planning decisions on protecting caribou (Andrew Kurjata, West Moberly First Nations Chief Denounces 'Fear Mongering' Over Caribou Protection Plan," *CBC* (18 April 2019), online: <<https://www.cbc.ca/news/canada/british-columbia/caribou-draft-plan-west-moberly-chief-racism-jobs-1.5102961>> [<https://perma.cc/D2J2-4YKK>]).

or essentially political, this article has clarified that EA legislation can be explained through three public law frames. Understanding EA as procedural fairness for the public, public inquiry in miniature, and as a framework for implementing the DCA clarifies its long-standing objective of ensuring meaningful engagement with those affected by EA decisions. Moreover, a close analysis of the duty of fairness, the influence of the Mackenzie Valley Pipeline Inquiry, and the DCA has revealed they contain three essential deliberative conditions. Each recognizes the responsible agency of those affected by public decisions, fosters mutual respect, and commits participants and decision-makers to reflexivity. These conditions are part of a broader theory of public authority that is realized (in part) through these three areas of public law.

The general contribution of this article is to show that there is a mutually-informing potential of environmental law and public law theory and doctrine. As a pillar of environmental law and the only consistent point of transparent and participatory environmental decision-making across Canada, EA law must be informed by general public law requirements. Conversely, as a site of recent and innovative law reform, the novel design features of EA legislation ought to illuminate the creative and deliberative potential laden in the public law doctrine.

The article's specific contributions have been to clarify the complex characteristics of EA law through the use of three more familiar public law frames and to show that these public law frameworks support deliberative EA in *law*, not just as policy aspiration. This public law clarification of EA further helps to supply an interpretive framework for novel design features enacted by Canada and BC. This article argues that modern EA provisions must be implemented and interpreted in a manner that attends to the responsible agency of those affected, the conditions for mutual respect, and the obligation of reflexivity. In this way, EA law can ensure that consequential decisions about the future of human and ecological communities fulfill the deliberative commitments immanent in Canadian public law.