

Lessons from Northern Gateway:  
A Case for Improving Public Participation in the Federal Environmental Assessment Process

by

William Connor Cepella

Submitted in partial fulfilment of the requirements  
for the degree of Combined Honours in Environment, Sustainability & Society and  
Environmental Science

at

Dalhousie University

Halifax, Nova Scotia

April 2017

© Copyright by William Connor Cepella, 2017

## DALHOUSIE UNIVERSITY

DATE: April 17, 2017

AUTHOR: William Connor Cepella

TITLE: Lessons from the Northern Gateway Project: A Case for Improving Public Participation in the Federal Environmental Assessment Process

DEPARTMENT OR SCHOOL: College of Sustainability

DEGREE: Bachelor of Arts Convocation: June 2017

Environment,  
Sustainability and Society and  
Environmental Science

Permission is herewith granted to Dalhousie University to circulate and to have copied for non-commercial purposes, at its discretion, the above title upon the request of individuals or institutions. I understand that my thesis will be electronically available to the public.

The author reserves other publication rights, and neither the thesis nor extensive extracts from it may be printed or otherwise reproduced without the author's written permission.

The author attests that permission has been obtained for the use of any copyrighted material appearing in the thesis (other than the brief excerpts requiring only proper acknowledgement in scholarly writing), and that all such use is clearly acknowledged.

\_\_\_\_\_ Signature of Author

Dedicated to:

The forest and the trees,

My family and friends,

And all those working for a sustainable future.

## **Table of Contents**

Abstract: .....	5
Acknowledgements: .....	6
Introduction: .....	7
Literature Review: .....	10
Meaningful Public Participation in Environmental Assessment: .....	10
Process for Meaningful Environmental Assessment: .....	12
Pipeline History and Environmental Assessment: .....	15
The <i>Canadian Environmental Assessment Act</i> , 1995: .....	19
The <i>Canadian Environmental Assessment Act</i> , 2012: .....	20
Barriers to Meaningful Public Participation in Environmental Assessment: .....	17
The Joint Review Panel and Public Participation: .....	19
The National Energy Board and Public Participation: .....	23
Methods: .....	27
Results: .....	29
Scoping of the Northern Gateway Project: .....	32
The Process of the Environmental Assessment: .....	35
Discussion: .....	37
Conclusion: .....	41
Bibliography: .....	43

**Abstract:**

This thesis explores whether public participation in the federal environmental assessment process is meaningful in practice. Public participation in the Enbridge Northern Gateway Project (Northern Gateway Project) is used as a case study to evaluate the meaningfulness of public participation in environmental assessment.

Academic literature is used to characterize meaningful public participation and barriers to meaningful public participation. The concluding documents of the environmental assessment for the Northern Gateway Project are analyzed to determine whether public participation in the environmental assessment was meaningful.

Public participation in the Northern Gateway Project was not meaningful in relation to scoping and the process that was used. The lessons learned from the Northern Gateway Project point to a need to improve public participation in the federal environmental assessment process in the future. The continued review of the federal environmental assessment process is critical given the 2012 amendments to the *Canadian Environmental Assessment Act*.

**Acknowledgements:**

The author would like to thank Dr. M. Doelle for his generous support, patience, and insight throughout the writing process. The author would also like to thank Dr. S. Mannell, Dr. D. Turk, and Professor A. Bergel for their critical review and insight throughout the writing process. Finally, the author would like to thank Dalhousie University, the College of Sustainability, and those who are working tirelessly to improve environmental assessment.

## **Introduction:**

Oil and gas pipelines are viewed as a key component of hydrocarbon transmission around the world (Kandiyoti, 2012). Pipeline projects have been the subject of increasing public commentary, regarding the range of environmental, social, and economic impacts caused by their construction and use (Laxer, 2015). Pipeline projects are often viewed by the public as having an adverse impact on sustainability (Laxer, 2015). In Canada, pipeline projects are evaluated using an environmental assessment process (EA). This thesis evaluates whether public participation in the federal EA process is meaningful in practice. This thesis explores this question using the EA for the Enbridge Northern Gateway Project (the Northern Gateway Project), as a case study.

The Northern Gateway Pipelines Limited Partnership (the Proponent) was formed in 2004 to build and operate the Northern Gateway Project. Enbridge Inc., a major pipeline company, led the development of the project with ten other energy companies, investing more than \$450 million to develop the proposal for the EA (National Energy Board, 2013). On the recommendation of the Minister of Natural Resources, the Governor General in Council decided that the Northern Gateway Project was likely to cause significant adverse environmental effects, and that these effects were not justified in the circumstances (National Energy Board, December 6, 2016). The Northern Gateway Project will not be proceeding.

The rejection of the Northern Gateway Project occurred despite the project's approval by a Joint Review Panel (the Panel). The Panel was established by the Minister of the Environment and the Chair of the National Energy Board under the *Canadian Environmental Assessment Act* and the *National Energy Board Act* (Canadian Environmental Assessment Agency, 2009). In December 2013, the Panel recommended that the federal government approve the Northern Gateway Project subject to 209 conditions. Accordingly, in June 2014, the federal cabinet

approved the Northern Gateway Project, subject to the 209 conditions, and ordered the National Energy Board to issue Certificates of Public Convenience and Necessity.

On June 20, 2016, the Federal Court of Appeal quashed the order-in-council requiring the National Energy Board to issue Certificates of Public Convenience and Necessity (Lucas and Thompson, 2016). The Federal Court of Appeal quashed the order-in-council due to inadequate consultation with Aboriginal people (Lucas and Thompson, 2016). Despite the rejection, the Northern Gateway Project is an ideal case study for evaluating meaningful public participation in EA. The Northern Gateway Project drew considerable public participation (West Coast Environmental Law, 2016), which is examined retrospectively in this thesis to evaluate whether the public's participation in the EA was meaningful.

The Northern Gateway Project was planned to cross through the provincial jurisdictions of British Columbia and Alberta, spanning approximately 1,178km of transmission line (National Energy Board, 2016). The cost of the Northern Gateway Project was estimated to be \$7.9 billion and was to be completed by 2018 (National Energy Board, 2016). Three major components of the Northern Gateway Project are: an export pipeline that would carry an average of 525,000 barrels per day of oil products west from Bruderheim, Alberta to Kitimat, British Columbia; a parallel import pipeline that would carry an average of 193,000 barrels of condensate per day east from Kitimat to Bruderheim; and a coastal terminal in Kitimat with two tanker berths, three condensate storage tanks, and 16 oil storage tanks (National Energy Board, 2016).

The purpose of the Northern Gateway Project was to increase profits to the Proponent by providing efficient access for Canadian oil resources to international markets, including existing and future refiners in Asia and the United States. Additionally, the Northern Gateway Project

would have provided greater diversification in the supply of condensate used for diluting heavy oil in the Alberta oil sands (National Energy Board, 2016, Lucas and Thompson, 2016).

Academic literature is used to characterize meaningful public participation in EA. The literature is used to identify both the process and substantive aspects of meaningful public participation. This thesis examines public participation in the Northern Gateway Project at the project-level of EA. Project-level EA has become the main decision-making tool and primary forum for evaluating projects such as pipelines (Doelle, 2016).

Wrong decisions about energy infrastructure, such as pipelines, which are often built to last for decades, can lead to continuous environmental degradation as well as a host of other social and economic problems at the local, regional, and international scales (Doelle, 2016). Wrong decisions about energy infrastructure have shed light on the need to improve the tools used for making decisions about energy infrastructure (Doelle, 2016). This thesis contributes to improving EA as a decision-making tool by examining the process's application in practice.

## **Literature Review:**

Academic comment and critique of public participation in environmental assessment (EA) offers insight into the characteristics of meaningful public participation. This literature review outlines what constitutes meaningful public participation in EA and outlines barriers to meaningful public participation in EA.

The first section of the literature review sets out key elements for meaningful public participation in EA. The second section addresses barriers to meaningful public participation in EA, including the *Canadian Environmental Assessment Act, 1995*, and the *Canadian Environmental Assessment Act, 2012*. Both sections include content intended to provide context for the case-study.

## **Meaningful Public Participation in Environmental Assessment:**

EA is viewed as the key channel for participating in the decision-making of resource development (Sinclair and Diduck, 2015). Meaningful public participation is fundamental to effective EA (Sinclair and Diduck, 2015). The basic legitimacy of EA is questionable if there is no meaningful public participation (Robert, 1998, Gibson, 2012 in Sinclair and Diduck, 2015). Meaningful public participation has strong theoretical underpinnings, such as deliberative democracy, collaborative rationality, and environmental justice, which seek to strengthen the democratic fibre of society (Sinclair and Diduck, 1995, Shepard and Bowler, 1997, Wiklund, 2005, Forester, 2006, Morgan, 2012, Lawrence, 2013, in Sinclair and Diduck, 2015). Public participation has been cited as part of a tri-fold principle of international environmental law: the right to participate in decision-making processes, the right to information, and the right of access to justice (Mikadze, 2016).

Meaningful participation is described in the literature as being the active involvement of the public in the EA process through various means (Sinclair and Diduck, 2015). Sinclair and Diduck (2015) describe meaningful public participation as, "...a process that incorporates all of the essential components of participation, from the opportunity to provide input to active and critical exchange of ideas among proponents, regulators, and participants." Gibson et al. (2015) explains meaningful participation to be the encouragement and facilitation of active involvement of the public with the aim to enhance the quality and credibility of the EA. Public participation must be meaningful in order for the EA to be considered effective (Gibson, 2012).

Another component of meaningfulness is the concept of fairness. The literature indicates that fairness includes both process fairness and substantive fairness (Gibson et al., 2015). Process fairness refers to individuals having effective opportunity for able and influential engagement in deliberations and impartiality in decision-making (Gibson et al., 2015). Substantive fairness refers to the enhancement of equity in the distribution of the positive and adverse effects of decisions, within and among generations (Gibson et al., 2015).

There are considerable benefits of an EA process that has meaningful public participation. The benefits of meaningful public participation include: enhancing the legitimacy of a proposed project, contributing to a comprehensive base for decision-making, ensuring the public's needs are met in terms of both purpose and design, diversifying decision-making by including a range of ethical perspectives, broadening the range of potential solutions considered, preventing "regulatory capture" by project proponents, encouraging more balanced decision-making, increasing accountability in decision-making, highlighting goals and objectives to work through value or normative conflict, helping to avoid resource-intensive litigation, and reducing controversy associated with a problem or issue (Sinclair and Diduck, 2015). More broadly,

meaningful public participation is considered by many to contribute to transitioning to sustainability by increasing learning at multiple levels of social organization (Webler et al., 1995, Diduck and Mitchell, 2003, Fitzpatrick and Sinclair, 2003, Sinclair et al., 2008a, Sims and Sinclair, 2008, Jha-Thakur et al., 2009, Diduck and Sinclair, 2012, in Sinclair and Diduck, 2015). The benefits of public participation are only achieved if participation is meaningful, which depends to a large extent on the application of the legislation in each case (Sinclair and Diduck, 2015).

Meaningful public participation is recognized as a critical part of sound decision-making due to the potential to influence the outcome of the decision, and has the potential to enhance the benefits of a proposed project as a result of public input (Doelle and Tollefson, 2013, Benidickson, 2013). Meaningful public participation requires early and adequate notice of opportunities to engage, and support (often financial), to ensure that participation can occur (Muldoon et al., 2015, Doelle and Tollefson, 2013). The public can be a potential source of wisdom and can contribute to a meaningful outcome of the EA (West Coast Environmental Law, 2016). Further, meaningful public participation ensures that concerns of the public are not only heard, but fostered and encouraged, then addressed and incorporated into the proposed project (Gibson et al., 2015).

**Process for Meaningful Environmental Assessment:**

Meaningful public participation requires a variety of considerations. Key process features of meaningful public participation include: provisions to ensure adequate public notice, timely and convenient access to information, participant assistance, opportunities for public comment, public hearings, deliberative forums, early and ongoing participation, deliberations on the purpose and need of alternatives, input on criteria specification, input on consultant selection,

input on the determination of effects assessment priorities, input on the design of effects studies, input on the review of initial effects findings, input on the relative merits of alternatives, input during the formation of recommendations, and input and participation in monitoring programmes (West Coast Environmental Law, 2016). Chalifour (2010) suggests that using these process features of EA can be characterized as a tool for procedural justice.

The earlier the public participates in the EA process, the more influence the public will likely have, creating a more meaningful EA (Sinclair and Diduck, 2015). West Coast Environmental Law (2016) suggests that the public should be involved in designing the process for participation. Doelle and Tollefson (2013) suggest that EAs should be designed to be flexible in order to accommodate the range of activities to be assessed in the EA. Designing a process that identifies appropriate roles for all those involved, or all those who should be involved, remains a challenge (Doelle and Tollefson, 2013).

Adequate notice is considered fundamental to fair and meaningful participation (Sinclair and Diduck, 2015). Meaningful notice provides the public with notification of the proposal, where further information can be obtained, and to whom they can provide their comments (Sinclair and Diduck, 2015). In principle, notice should be provided in such a way that it reaches the public well before decisions are made (Sinclair and Diduck, 2015). Meaningful notice requires access to information in a manner that is convenient for the public (Sinclair and Diduck, 2015). All relevant information to the public, such as the exchange of comments between proponents, participants, and the regulator, must be provided in a timely and efficient manner in order for the public to participate meaningfully (Sinclair and Diduck, 2015). One step toward meaningful participation is the Canadian Environmental Assessment Agency's electronic

registry, which provides public access to notices and documents related to proposed projects (Chalifour, 2010).

The scoping stage of the EA has received much scrutiny over time (Muldoon et al., 2015). Meaningful EA scoping should apply a broad determination of the scope where necessary to ensure that their total effect and viability may be evaluated (Benidickson, 2013, Rutherford and Campbell, 2004). Financial resources must be provided wherever necessary so that the public can contribute to scoping meetings (Sinclair and Diduck, 2015). Meaningful EA scoping should incorporate different kinds of knowledge beyond conventional science (Muldoon et al., 2015). It is key that the scope of the EA offers a sound basis for decision-making at the conclusion of the EA (Doelle, 2016). This may include an evaluation of upstream or downstream emissions depending on the scale of the proposed project (Doelle, 2016). In the end, scoping should identify options, designs and implementation practices, to ensure a practical undertaking is reviewed that reflects the long-term public interest (Gibson et al., 2015).

For panel EAs, Rutherford and Campbell (2004) note that when making recommendations panels need not limit themselves to ‘bottom-level’ regulatory compliance. Rather, panels have the opportunity of being creative with recommendations (Rutherford and Campbell, 2004).

Doelle and Tollefson (2013) suggest that those who are regulating EAs may have a conflict of interest with some proposed projects. In relation to the public, even the perception of conflicting interests for regulators and the proponent may undermine the credibility of the EA more generally, in particular, in the eyes of the general public (Doelle and Tollefson, 2013). Muldoon et al. (2015) suggests to avoid this problem, the proponent’s work must be checked by individuals, either public or private, who have some motivation for careful and critical review.

Meaningful public participation includes reasonable opportunities for the public to comment on the proposed project, and respond to the input and position of the proponent and other participants (Sinclair and Diduck, 2015).

For hearing participation, the right to cross-examine is critical and must be included at some stage (Sinclair and Diduck, 2015). Depending on the context, a hearing process may not be suitable for the public, and a more informal process should be used especially for the earlier stages of the EA (West Coast Environmental Law, 2016).

### **Pipeline History and Environmental Assessment:**

Lucas and Thompson (2016) suggest that pipeline projects being built in the early 1950s were about economic expansion and nation building. In this sense, analogies can be made to the public sentiments surrounding the construction of the railways that connected the country in the 19<sup>th</sup> century (Lucas and Thompson, 2016). The 1950s had considerable public resistance to these large-scale infrastructure projects. Lucas and Thompson (2016) suggest that the concerns voiced by the public regarding the environmental and social harm caused by pipelines, during their construction and operation, were present in the past and are undoubtedly present today. The current magnitude of pipeline projects has increased the potential for environmental and social harm (Lucas and Thompson, 2016). The concerns voiced by the public relating to these potential harms have grown accordingly (Lucas and Thompson, 2016).

EA has been used in the past as a tool to address the concerns of the public. One of the most well-known EAs in Canada to meaningfully address the public's concerns, taking place between 1974 and 1977, is the Mackenzie Valley Pipeline Inquiry. The proposed pipeline was 1, 200km in length, running along the Mackenzie River Valley from the Beaufort Sea to Alberta.

The pipeline was considered the largest private construction project to be proposed in the world at the time (Hazell, 2010).

The federal government established a public inquiry chaired by Justice Thomas Berger, due to the massive scope of the project, which culminated in a final document titled Northern Frontiers, Northern Homeland, or commonly referred to as the Berger Inquiry (Fluker and Srivastava, 2016). The public inquiry was established to examine the pipeline's potential environmental, social, cultural, and economic impacts on Northern communities (Hazell, 2010). The hearings for the EA lasted for three years and included participation from every effected community (Hazell, 2010). The conclusion of the report was a recommendation against the construction of the pipeline due to its potential for adverse socio-ecological effects in the Yukon and Northwest Territories (Fluker and Srivastava, 2016). The federal government conceded to the recommendations of the Berger Inquiry and no pipeline was constructed (Hazell, 2010).

There are several reasons why the Berger Inquiry has been lauded as an example of meaningful public participation in EA. The EA was scoped in the broadest possible terms, including consideration for increased oil and gas exploration as a result of the pipeline's construction (Hazell, 2010). Sinclair and Diduck (2015) describe the Berger Inquiry as groundbreaking in the way it engaged potentially affected communities early. Communities were empowered to speak in their own ways, in their own communities, and were supported by resources to ensure participation was meaningful (Hazell, 2010). Everyone was invited to participate, not just lawyers and experts (Hazell, 2010). As the Berger Inquiry showed, through early and ongoing participation, basic choices in EA can be evaluated before political momentum builds and substantial amounts of resources have been invested (Sinclair and Diduck, 2015). Currently, the lessons learned from the Berger Inquiry, such as a consideration of the broad

implications of a project, are not being considered in the federal environmental assessment legislation (West Coast Environmental Law, 2009).

### Barriers to Meaningful Public Participation in Environmental Assessment:

Ensuring meaningful public participation can be challenging. There are long-standing concerns regarding public participation in EA, ranging from substantive matters, such as lack of shared decision-making, to procedural issues, such as inadequate notice (Sinclair and Doelle, 2003, in Sinclair and Diduck, 2015). Before the EA process begins, the proponent is encouraged to complete and defend the design of the proposed project reducing input from the public in this key planning stage (Sinclair and Diduck, 2015). This process contributes to an EA that is adversarial, rather than intended to build consensus for a proposed project (Sinclair and Diduck, 2015).

A host of information and communication deficiencies create barriers to meaningful public participation. These include insufficient notice, inaccessibility of documents, and lack of interactive participation opportunities (Sinclair and Diduck, 2015). These barriers occur despite improvements to public registry systems and access-to-information legislation (Sinclair and Diduck, 2015). Sinclair and Diduck (2015) suggest there are both physical and cognitive barriers to meaningful public participation.

Overly technical language and the general lack of readability of project documents and the legislation itself contribute to cognitive barriers. There is often a lack of clarity over the purpose of the public's participation in the EA. This leads to further cognitive barriers regarding the perceived success of participation, and a physical barrier by deterring future participation (Sinclair and Diduck, 2015).

Physical barriers have been widely discussed in the literature. Physical barriers include tight timing in the EA, leading to insufficient preparation time for the public (Rutherford and Campbell, 2004). All EA legislation in Canada restricts the time given to the public to review and respond to developments during the EA (Sinclair and Diduck, 2015). This leads to an accelerated process that does not allow the public or the regulator to form the basis for effective decision-making (Doelle, 2012, Gibson, 2012, Petts, 2003, Sinclair and Diduck, 2001, in Sinclair and Diduck, 2015).

Physical barriers are compounded by many participants being unpaid and having few resources at their disposal (Rutherford and Campbell, 2004). Public participation can be costly (Benidickson, 2013). No funding, or inadequate funding for hearing participants is not uncommon (Rutherford and Campbell, 2004). The public must have access to funding so that they may hire a third-party to verify the quality of the proponent's submissions, and meet expert opinion with expert opinion (Rutherford and Campbell, 2004). Sinclair and Diduck (2015) argue that important voices, reflecting critical yet valid points of view, are often silenced due to a lack of resources. Petts (1999) suggests project proponents exacerbate the lack of funding by expressing concerns that public participation is too expensive to begin with (in Sinclair and Diduck, 2015). Beyond concerns such as available funding, Rutherford and Campbell (2004) argue that funding should be provided, and specifically advertised, for the participation of those otherwise not likely to be included in the EA, such as disadvantaged populations.

Founded in the federal government's duty to consult and accommodate, EA often faces critiques regarding the participation of Indigenous peoples (Doelle and Tollefson, 2013). Specifically, there is debate over whether EA should be used to satisfy these duties, whether EA is insufficient in this regard and if an independent process is required, or whether a hybrid of the

two would be the best option (Doelle and Tollefson, 2013). An in-depth discussion regarding the efficacy of EA in relation to Indigenous participation is outside the scope of this thesis.

Upon the completion of the EA the decision-makers must provide written reasons and explanations of how comments were received, considered and reflected in the decisions (West Coast Environmental Law, 2016). To be meaningful, however, the decision-maker must have used a scope broad enough throughout the EA that reasonably includes the comments of the public (West Coast Environmental Law, 2016). Rutherford and Campbell (2004) note a general lack of engagement of the public during scoping. This may be due to a lack of funding, or because those who are interested in participating in this stage of the EA are still in the capacity-building process. Once participation in the EA becomes accessible, scoping decisions may have been finalized, leaving important issues “scoped out” of the EA (Rutherford and Campbell, 2004).

As Doelle and Tollefson (2013) explain, these barriers in EA can lead to a lack of public capacity and a lack of public confidence that participation will have influence on the decision-making. Related to this barrier, Doelle and Sinclair (2006) suggest that a major source of the problem with public participation in EA is not process or access, rather, the problem is insufficient focus on outcomes. Consensus reached upon the completion of the EA should serve as a key determinant of whether public participation was meaningful (Doelle and Sinclair, 2006).

**The Canadian Environmental Assessment Act, 1995:**

In 1995, the *Canadian Environmental Assessment Act* (CEAA 1995) was proclaimed in force along with regulations for the Act (Muldoon et al., 2015). CEAA 1995 differed from past EA processes because it was set out in legislation for the first time, making the process less susceptible to interference by government without parliamentary approval, but also more

difficult to update (Doelle and Tollefson, 2013). CEAA 1995 resulted in many court battles, often regarding the scope of the EAs, reforming the Act from 1995 onward (Doelle and Tollefson, 2013, Benidickson, 2013). Doelle and Tollefson (2013), suggest these court battles were central to the effectiveness, efficiency and fairness of EA. Although CEAA 1995 was amended over the years, critics maintained that many major deficiencies remained (Gibson 2012). These deficiencies included: unwieldy and sometimes late triggering; an exclusive focus on projects (neglecting strategic-level undertakings); a confusing and incomplete approach to the scope of ‘environmental’ considerations to be addressed; merely discretionary requirements to examine purposes and alternatives; and ineffective mechanisms for ensuring adequate follow-up, monitoring, and enforcement (Gibson, 2012). Despite the shortcomings of CEAA 1995, the transparency provisions present in the Act enabled environmental justice to some extent, through opportunities for meaningful public participation (Chalifour, 2010, Gibson, 2012).

***The Canadian Environmental Assessment Act, 2012:***

In March 2012, the federal government announced changes to CEAA 1995 were to be introduced as part of the 2012 Budget Implementation Bill, or Bill C-38 (Doelle, 2012). In June, as a component of the Bill, the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) was proclaimed in force along with regulations for the Act (Muldoon et al., 2015).

Critics of CEAA 2012 commented that the Act marked the end of federal EA as it was previously practiced (Doelle, 2012, Gibson, 2012). Doelle and Tollefson (2013) claim that CEAA 2012 is merely a process of routine information gathering rather than planning.

The regulations under CEAA 2012 are more prescriptive than CEAA 1995, by specifically listing all proposed projects that require registration for an EA, rather than offering a legal test to determine whether a project requires an EA (Doelle and Tollefson, 2013). Scoping

of EAs shifted from an ‘all in unless exempted out’ approach used with CEAA 1995, to an ‘all out unless specifically included’ approach used in CEAA 2012 (Gibson, 2012). Under CEAA 1995, environmental effects consisted of any effect a project had on the biophysical environment, including the social, economic, and cultural effects of those biophysical changes (Doelle, 2012). CEAA 2012 limits environmental effects to issues such as fisheries, aquatic species, migratory birds, and aboriginal peoples- issues related directly to federal jurisdiction (Doelle, 2012). There is no provision in CEAA 2012 requiring notice of, and public comment on, the results of follow-up measures (Sinclair and Diduck, 2015).

There are only two process options under CEAA 2012: a standard EA by the responsible authority, or a panel review assessment. For EAs carried out by the National Energy Board (NEB), a potential responsible authority, the NEB regulatory process is to be used (Doelle and Tollefson, 2013). Doelle and Tollefson (2013), comment that this does not mean the NEB is well situated as a regulator to engage the public in a true planning process.

For a panel review assessments, the Minister has a limited time window to determine whether a panel review is warranted. The time window limits the public’s ability to gain a comprehensive understanding of the proposed project (Doelle, 2012). Public participation in panel reviews under CEAA 2012, no matter how meaningful, can only serve to influence the panel or the proponent. The report of the panel is given to the Minister, who ultimately makes the decision- leaving the public’s influence as indirect (West Coast Environmental Law, 2016).

One of the purposes of CEAA 2012 is to ensure there are opportunities for meaningful public participation (Sinclair and Diduck, 2015). Despite this purpose, many critics have suggested that CEAA 2012 limits meaningful participation. CEAA 2012 enforces discretionary participation that limits participation to “interested parties”, who are determined upon application

by the responsible authority (Doelle and Tollefson, 2013). Parties may have an ‘interest’ in the proposed project only if they are directly affected or have relevant information and expertise to offer (Benidickson, 2013). The limitations on participation comes at a significant cost because, historically, the public has been the most motivated and effective in ensuring a careful review during the EA (Gibson, 2012). A more in-depth discussion of ‘interested parties’ can be found in the section, The National Energy Board and Public Participation.

**The Joint Review Panel and Public Participation:**

Rutherford and Campbell (2004) suggest panel EAs are not utilized enough. Panels tend to be the best process for exchanging ideas about a proposed project (Rutherford and Campbell, 2004). Similarly, Doelle (2012) considers the only sufficiently comprehensive process option to serve as a planning tool under the *Canadian Environmental Assessment Act*, 2012, to be a joint panel review.

The composition of a panel can raise concerns. Despite the presumption that panels are comprised of intelligent and well-meaning individuals, there is still a potential for interpretation bias due to perspective, lack of representation from marginalized communities, and other systemic biases (Chalifour, 2010). A diverse panel is consistent with leading EA practice and with promoting environmental justice (Chalifour, 2010). Rutherford and Campbell (2004) conclude that a panel cannot appear predisposed to a particular outcome- “Justice demands an impartial and open hearing.”

The panel is restricted to providing advice to government decision-makers at the end of the panel process (Sinclair and Diduck, 2015). The rationale, conclusion and recommendations of a panel for a proposed project tend to hold significant political sway with the Minister of the Environment due their perceived open and transparent processes (Rutherford and Campbell,

2004). In light of the significance of a panel review process, the decision-makers must provide a detailed rationale for dismissing any concerns raised by the public and in relation to the ‘significance’ of a proposed project, as not being meritorious (Chalifour, 2010).

**The National Energy Board and Public Participation:**

The National Energy Board (NEB) was established by the federal government in 1959 as an independent federal agency responsible for regulating energy infrastructure, such as pipelines, in the Canadian public interest (DeMarco and Muldoon, 2016). In the context of EA, the NEB is now the sole authority for carrying out, and approving or denying, the application for proposed projects that it regulates (Mikadze, 2016). Due to overlapping jurisdiction between the NEB and the Canadian Environmental Assessment Agency (CEAA), it is common for CEAA to authorize the two agencies to conduct a joint review process (Rutherford and Campbell, 2004). While the NEB uses permitting differently than CEAA, to grant ‘Certificates of Public Convenience and Necessity’, a process that also considers environmental effects, it is recognized that there is a need to avoid duplication of the two permitting processes (Rutherford and Campbell, 2004). Several concerns have been raised regarding the NEB’s process in relation to public participation in EA.

On the surface, there are concerns that the NEB may be captured by industry, which may degrade the regulators ability to conduct a meaningful EA, and undermines the credibility of the EA in the view of the general public (Doelle, 2012).

As a court of record, the NEB has the authority to consider a wide range of evidence, can delay or refuse an approval until any outstanding legal requirements are fulfilled, and can determine matters of both fact and law (Graben and Sinclair in Macklem, P., & Sanderson, D. (Eds.), 2016). These attributes of the NEBs enabling statute contribute to the NEB acting in a

quasi-judicial capacity when reviewing applications (Graben and Sinclair in Macklem, P., & Sanderson, D. (Eds.), 2016). The NEB follows an adversarial process that allows parties to question information and request supplementary information (Sinclair and Diduck, 2015).

Unfortunately, Rutherford and Campbell (2004) view these attributes of the NEB as potential barriers to effective public participation in EA. Quasi-judicial hearings make meaningful public participation very difficult (Sinclair et al., 2012 in Sinclair and Diduck, 2015). A quasi-judicial process can be overly-formal, intimidating, and make participation seem more expensive due to the legal formalities and presence of legal counsel (Rutherford and Campbell, 2004). The formality of a proceeding impacts the public's level of comfort, willingness to participate, and ability to comprehensively interact with information and discussion (Sinclair and Diduck, 2015).

Another concern relates to the concept of 'interested party', introduced under CEAA 2012 (Mikadze, 2016). The determination of who will be an 'interested party' in the EA is made by the responsible authority or a panel. The 'interested party' clause creates two classes of public: those with a direct interest in a proposed project, and those without (Doelle, 2012). The determination of who qualifies as an 'interested party' is not explicitly defined (Doelle, 2012). Only those who are an 'interested party' have the right to fully participate in the EA (Doelle, 2012). As a result, it matters whether a member of the public is an interested party, otherwise, they will be excluded from the EA (Doelle, 2012).

For the NEB, participation opportunities are ensured for 'interested parties', however, the standard for who qualifies as an 'interested party' is much more narrow (Mikadze, 2016). The right to participate in an NEB hearing is limited to those who are 'directly affected' by the NEB granting or refusing an application for a proposed project (Mikadze, 2016). Decisions made by

the NEB regarding those who qualify or do not qualify as ‘directly affected’ are conclusive (Mikadze, 2016). There is some guidance published by the NEB on the ‘directly affected’ clause. A person seeking to participate in an NEB hearing must establish a personal impact and a measure of proximity or connection to the proposed project, or demonstrate that they have relevant information or expertise to contribute (Fluker and Srivastava, 2016). The Federal Court of Appeal endorsed the application of these factors as being reasonable in *Forest Ethics Advocacy Assn. v. National Energy Board* (Fluker and Srivastava, 2016). Given the court ruling, the ‘directly affected’ clause will likely continue to remain a key feature of public participation in an NEB review, despite being restrictive (Fluker and Srivastava, 2016).

There are other limitations to public participation in the NEB process. The ‘List of Issues’ precludes intervenors and commentators from addressing broader environmental and socio-economic concerns not listed within the ‘List of Issues’ (Mikadze, 2016). Whether the NEB decision-makers ultimately meaningfully considers the concerns and comments voiced within the bounds of the ‘List of Issues’ raises further concerns (Mikadze, 2016).

Relating to the ‘List of Issues’, the NEB has established a precedent in decisions on other pipeline projects declining to consider the adverse effects of upstream oil sands production or downstream refining facilities (Lucas and Thompson, 2016). The conclusion of the NEB relating to this scoping issue is that there is nothing to compel, “a project specific [EA] to require a broad assessment of a whole industry sector even if aspects of it are indirectly related to the project in some fashion.” (Lucas and Thompson, 2016). The case law surrounding the NEBs decision on this scoping issue has been settled in favour of the NEB. *Quebec (Attorney General) v. Canada (National Energy Board)* and *Forest Ethics Advocacy Assn. v. National Energy Board* are examples that support the NEBs decision-making (Lucas and Thompson, 2016). According to

Lucas and Thompson (2016), there are numerous adverse environmental and socio-economic effects associated with these rulings.

In general, having the NEB as the key decision-maker in an EA raises the concern of whether the agency is well positioned to meet the needs of public participation in EA, despite being deemed adequate to meet the requirements of CEAA 2012 (Doelle, 2012, Mikadze, 2016). Regulatory agencies, such as the NEB, are more focused on technical issues, rather than the broader planning issues fundamental to EA (Doelle, 2012).

**Methods:**

A qualitative literature review was used to explore meaningful public participation in project-level environmental assessment (EA). Literature was selected based on two criteria: the academic content was peer-reviewed, and the content was related to the practice of EA at the project-level. The academic literature was divided into two sections: (1) Meaningful Public Participation in Environmental Assessment, and (2) Barriers to Meaningful Public Participation in Environmental Assessment. The literature in the section, Meaningful Public Participation in Environmental Assessment, provides the process and substantive features of meaningful public participation in EA. The literature in the section, Barriers to Meaningful Public Participation in Environmental Assessment, highlights potential barriers to meaningful public participation in EA. The academic literature for each of these categories focused on EA at the project-level. These categories emerged inductively as the literature review progressed as the most convenient way to categorize the literature for the analysis.

Following the literature review, the documents published on the Canadian Environmental Assessment Agency's online Registry (the Registry) for the Enbridge Northern Gateway Project (the Northern Gateway Project) were reviewed (Reference Number: 21799, Canadian Environmental Assessment Agency, 2016). The documents on the Registry provided the materials to use the Northern Gateway Project as a case-study. The Northern Gateway Project was selected as a case study to evaluate meaningful public participation in EA for two reasons: (1) the Northern Gateway Project was reviewed using a project-level EA, and (2) there was considerable public participation, providing sufficient material for analysis (West Coast Environmental Law, 2016).

The documents were reviewed to evaluate the meaningfulness of public participation in the EA for the Northern Gateway Project. The final reports, *Connections* and *Considerations*, published by the Joint Review Panel, were the main documents used to evaluate public participation (Canadian Environmental Assessment Agency, 2016). These reports were reviewed to gather information on public participation in the EA from the commencement of the EA to the completion of the EA. These reports were used to evaluate public participation in the EA because they offered the most insight into the EA process used by the Joint Review Panel in an accessible way. These documents also included the Joint Review Panel's discussion and conclusions regarding many aspects of public participation in the EA.

Public participation in the EA was compared to the process and substantive requirements of meaningful public participation as described in the academic literature. The barriers to meaningful public participation identified in the literature review were used as a guide to identify potential areas where public participation may not have been meaningful.

**Results:**

This section provides an overview of the Joint Review Panel's (the Panel) process and evaluation of the Enbridge Northern Gateway Project (the Northern Gateway Project). The overview includes an outline of the Panel's approach to public participation in the environmental assessment (EA) and the key findings of the case-study.

In both of the Panel's final reports, *Connections* and *Considerations*, the Panel outlined the processes used to evaluate the Northern Gateway Project. The Panel was established through the Joint Review Panel Agreement, which was amended in August 2012 to comply with the *Canadian Environmental Assessment Act, 2012* (Connections, 2013). The Panel's purpose was to assess the environmental effects of the Northern Gateway Project and consider the application under both the *Canadian Environmental Assessment Act* (initially, 1995) and the *National Energy Board Act* (Considerations, 2013).

The Panel indicated that the public shared knowledge in many areas, which guided the evaluation of the Northern Gateway Project. These areas included information regarding traditional land use activities, information about community structure and health, information about the potential economic contribution from the proposed project, and other information about how the project would interact with the physical, social, and economic environment (Connections, 2013). The Panel indicated that there was a high level of participation by members of the public who had never before participated in an EA (Considerations, 2013).

In *Considerations* (2013) the Panel outlined what it believed to be the principles of meaningful public participation. For the Panel, meaningful public participation: is initiated as soon as possible in the planning and design phases of a project; provides clear, relevant, and timely information to potentially-affected persons or groups; is accessible to, and inclusive of, all

potentially affected persons or groups; provides appropriate and effective opportunities for all potentially-affected parties to learn about a project, and to provide comments and concerns about a project to the applicant; ensures the applicant is responsive to the needs, input, and concerns of potentially-affected persons or groups; and continues throughout all phases of a project (Considerations, 2013). Meaningful public participation is inclusive of, and responsive to, all those potentially-affected by the Northern Gateway Project (Considerations, 2013).

The public participated directly with the Panel by filing letters of comment, by oral statement, and by intervening as parties to the review process (Considerations, 2013). Beginning in 2011, the Panel provided 35 public information sessions and 32 online information sessions to educate the public on how to participate in the EA. Seven days were used by the Panel to receive oral comments on the draft 'List of Issues' and on possible hearing locations (Considerations, 2013). Final hearings were held in Edmonton, Alberta, and Prince George, Prince Rupert, and Terrace, British Columbia.

Over 9, 400 letters of comment were filed throughout the EA (Considerations, 2013). Letters of comment allowed the public to provide knowledge, views, or concerns about the proposed project. Those who submitted letters of comment could not ask written or oral questions of other parties or make final argument (Considerations, 2013).

1, 179 oral statements were heard by the Panel (Considerations, 2013). Oral statements allowed the public to provide knowledge, views, or concerns about the proposed project in person (Considerations, 2013). The public was required to register with the Panel to make an oral statement (Considerations, 2013). Those who gave oral statements could not ask written or oral questions of other parties or make final argument (Considerations, 2013).

206 intervenors registered with the Panel, not including those that registered but subsequently withdrew their involvement (Considerations, 2013). The roles and responsibilities of intervenors included: asking questions, both in writing and orally; submitting written evidence, or, with Panel approval, oral evidence; formally receiving all documents filed in the process; and making final argument, in writing and orally (Considerations, 2013). Oral hearings were held at locations along the route of the Northern Gateway Project, including both the terrestrial and marine route (Considerations, 2013). 180 days of oral hearings were held (Considerations, 2013).

The Proponent of the Northern Gateway Project interacted with the public as well. The Proponent submitted detailed updates to the Panel summarizing its interactions with the public (Considerations, 2013). These updates included the concerns that were raised by the public (Considerations, 2013). Public input was incorporated into project design, planning, and environmental and socio-economic assessment studies (Considerations, 2013).

At the end of the EA process, the Panel concluded they had all of the necessary information to make an informed decision about the Northern Gateway Project. The panel concluded that the Canadian public would be better off with the Northern Gateway Project than without it (Connections, 2013). The Panel concluded that construction and operation phases would have adverse environmental effects on some ecosystems (Connections, 2013). In two cases, the Panel recommended that the effects of the Northern Gateway Project be found likely to be significant. The Panel concluded that the significant effects identified in the EA be justified in the circumstances (Connections, 2013).

The framework for the Panel's EA was based on science and law (Connections, 2013). The task of the Panel was to implement an EA that would result in recommendations to the

Governor in Council based on review of scientific and technical information placed on the record during public hearings (Connections, 2013). The Panel indicated in *Considerations* (2013) that tribunals are not influenced by the number of letters received by the public or by other demonstrations of public opposition or support. The Panel stated that their recommendations were based on the evidence provided, within a legal framework enacted by the legislature and applied by the courts (Considerations, 2013).

Despite the Panel's attempt at creating a process that was meaningful, public participation in the EA was not meaningful in two ways. First, the scope of the environmental assessment was too narrow, leaving out public concerns. Second, the process led to public participation that was not meaningful.

#### Scoping of the Northern Gateway Project:

In early 2009, the Canadian Environmental Assessment Agency drafted an agreement to create the Panel, and made it available for public comment (Connections, 2013). After review, the Panel was established by the Joint Review Panel Agreement, which sets out the terms of reference and defines the factors to be considered during the Panel's EA (Connections, 2013). After the application for the Northern Gateway Project was received by the Panel, the public offered comments on the scope of issues. The Panel offered opportunities to participate at this stage in Whitecourt, Alberta, and in Kitimat and Prince George, British Columbia (Connections, 2013).

The Joint Review Panel Agreement was amended in August 2012 to reflect the change to the *Canadian Environmental Assessment Act, 2012* (Connections, 2013). The Panel used the 2012 *Canadian Environmental Assessment Act*, to define the environment (Connections, 2013). In the Joint Review Panel Agreement's terms of reference, all of the project components to be

considered in the EA are listed (Considerations, 2013). This section outlines the scope of the Panel's EA in the List of Issues.

Early in the Panel's EA, the Panel drafted a List of Issues as a tentative guide (Considerations, 2013). In January 2011, after receiving public input, the Panel revised the List of Issues to guide the EA's hearings (Considerations, 2013). The main categories for consideration in the List of Issues were: need for the project; potential effects of the project; environmental effects; socio-economic effects; consultation; financial and tolling matters; routing; design, construction, and operation; safety, accident prevention, and emergency response; follow-up and monitoring; and recommendations and conditions (Considerations, 2013).

During the Panel's EA, the Panel received many public comments, through oral statements and letters of comment, expressing views and concerns beyond the List of Issues and outside the Panel's mandate set out in the Joint Review Panel Agreement (Considerations, 2013). Issues expressed by the public to the Panel, but were outside the List of Issues, fall into several categories. These categories are: product refining or upgrading capabilities; product transport to markets in eastern Canada; upstream oil production and its linkage to global climate change; views about the end market use of crude oil; views about the acceptability of using fossil fuels; views about Canadian policy and policy needs related to energy production and use, transportation, refining, and offshore shipping; and views about federal government department resourcing, capacity, and legislated responsibilities (Considerations, 2013).

In both *Connections* and *Considerations* the Panel attempts to outline the rationale used for excluding the concerns expressed by the public. In particular, the Panel offers some insight into the exclusion of the public's concerns relating to the upstream and downstream impacts of

the Northern Gateway Project. The public first expressed concerns regarding these issues to the Panel in 2010, and argued the Panel should consider the environmental impacts of bitumen extraction, including the production of greenhouse gases and related effects on climate change (Connections, 2013). The Panel formally addressed the public's concerns relating to this issue in January 2011 (Connections, 2013).

In the Panel's rationale, consideration is given to the degree of connection between the Northern Gateway Project and upstream oil sands development, downstream air emissions from bitumen upgrading, and eventual use of petroleum products to be transported by the project (Considerations, 2013). The Panel concluded that in relation to the upstream effects of the Northern Gateway Project that the connection to oil sands development was not sufficiently direct to allow consideration of their environmental effects. The Panel concluded that in relation to the downstream effects of the Northern Gateway Project that any effects would be hypothetical and of no meaningful utility to the Panel's EA (Considerations, 2013).

The Panel justified their decision regarding the upstream effects of the Northern Gateway Project in four ways: provincial and federal energy and environmental authorities already regulate oil sands development and other oil production activities; the Northern Gateway Project application was only for a transportation project and did not indicate any intention to develop oil sands or other oil production; the Bruderheim Station would not be located near oil sands developments and could receive oil from a variety of sources; and oil sands projects and activities were not included in the terms of reference under the Joint Review Panel Agreement (Connections, 2013). The Panel justified their decision regarding downstream effects of the Northern Gateway Project by stating that any downstream effects were outside the Panel's jurisdiction (Connections, 2013).

In relation to scoping, the Panel was consistent with its application of the Joint Review Panel Agreement. The Sustainability Coalition, representing ForestEthics Advocacy, Living Oceans Society, and Raincoast Conservation Foundation, argued that no consideration should be given to any upstream economic benefits if no consideration was given to upstream environmental and social costs (Connections, 2013). The Panel concluded that no weight would be assigned to any upstream economic benefits (Connections, 2013).

### The Process of the Environmental Assessment:

This section provides evidence that the process of the EA did not result in meaningful public participation. Throughout the EA, the public expressed concerns through oral statements, letters of comment, and by intervening in the EA, that participation in the Northern Gateway Project was not meaningful (Connections, 2013). The Proponent of the Northern Gateway Project suggested it had surpassed all regulatory requirements by providing more studies and information than usually required (Connections, 2013). The Panel referred to the requirements set out in the National Energy Board's Filing Manual for participation in addition to what the Panel considered to be meaningful (Considerations, 2013). The National Energy Board's Filing Manual requires participation to be appropriate for the nature, magnitude, and geographic extent of a proposed project and its potential effects (Considerations, 2013).

Many concerns were expressed by Indigenous peoples (Considerations, 2013). Many Indigenous peoples chose not to participate because of concerns with the Panel's process (Considerations, 2013). This section reflects on the participation of Indigenous peoples as members of the public, rather than in relation to Indigenous consultation.

Many groups felt they were not given sufficient opportunities to discuss the concerns they held or had been given adequate time to thoroughly review information about the Northern

Gateway Project (Considerations, 2013). Some groups felt that their submissions had not been thoughtfully considered (Considerations, 2013).

Coastal First Nations, representing ten Indigenous groups, indicated to the Panel that participation in the EA was challenging (Considerations, 2013). In February 2013, Coastal First Nations ceased participation in the questioning phase of the EA because they did not have the necessary funding to meaningfully participate (Considerations, 2013). Coastal First Nations received funding as part of the Aboriginal Funding Envelope, totalling \$41, 000 (Canadian Environmental Assessment Agency, 2013). Coastal First Nations indicated that it was disappointed with the Panel's EA process, stating it was flawed and incomplete (Considerations, 2013).

Gitxaala Nation, indicated that the Panel's EA process did not allow for them to meaningfully participate regarding specific mitigation measures that might address concerns about the impacts of the project. The Proponent presented a plan to the Gitxaala Nation that was completed, and asked for comments without providing adequate time or resources to conduct independent assessment work or present a comprehensive list of concerns (Considerations, 2013). The Gitxaala Nation received \$63, 500 as part of the Aboriginal Funding Envelope to participate in the EA (Canadian Environmental Assessment Agency, 2013).

**Discussion:**

This section discusses why the environmental assessment (EA), as outlined above led to public participation that was not meaningful. Meaningfulness of public participation is evaluated based on the academic literature discussed in the literature review. The first section discusses why the scope of the EA was not meaningful and the second section discusses why the process of the EA was not meaningful.

To reiterate, the basic legitimacy of EA is questionable if public participation is not meaningful (Robert, 1998, Gibson, 2012 in Sinclair and Diduck, 2015). Sinclair and Diduck (2015) suggest meaningful public participation incorporates all of the essential components of participation. Public participation must be meaningful in order for the EA to be considered effective as a decision-making tool (Gibson, 2012).

It is clear that the Joint Review Panel (the Panel) did consider public participation in the Enbridge Northern Gateway Project (the Northern Gateway Project) to be important. Evidence of the importance of participation to the Panel is outlined in the Panel's interpretation of meaningful participation in *Considerations* (2013). The interpretation of meaningful participation by the Panel is generally consistent with the process and substantive requirements of meaningful public participation in the academic literature. The Panel, however, stated that their final decision was based on the evidence provided, within their legal framework (*Considerations*, 2013).

Benidickson (2013) and Rutherford and Campbell (2004) suggest meaningful EA scoping should apply a broad determination of the scope where necessary. Meaningful scoping is broad enough that it reasonably includes the comments of the public (West Coast Environmental Law, 2016). Doelle and Sinclair (2006) suggest that a major source of the problem with public participation in EA is an insufficient focus on outcomes. Consensus reached upon the completion

of the EA should serve as a key determinant of whether public participation was meaningful (Doelle and Sinclair, 2006).

The EA scoping excluded concerns voiced by the public related to the upstream and downstream impacts of the Northern Gateway Project (Connections, 2013). As discussed by the Panel, the NEB has established a precedent in decisions on other pipeline projects, declining to consider adverse effects upstream or downstream of a proposed project (Considerations, 2013, Lucas and Thompson, 2016). According to Lucas and Thompson (2016), there are numerous adverse environmental and socio-economic effects associated with the rulings related to the NEB's scoping.

To the extent that this precedent leaves key public concerns unanswered, this precedent contribute to an EA process that is not meaningful. Despite the requirements of a List of Issues by the *Canadian Environmental Assessment Act, 2012*, the Panel chose to differ to the NEB precedent rather than amending the List of Issues to address the public's concerns. As a result, the Panel was not legally permitted to address the public's concerns based on the List of Issues. In the interest of creating an EA process that builds consensus, the EA for the Northern Gateway Project did not build consensus by excluding discussions related to the key public concerns.

Assessing whether the Panel was justified is beyond the scope of this thesis. An area of future research would be to examine the scoping judgements in greater depth to determine whether scoping can be more inclusive in the future in order to address public concerns. Could the scoping concerns, although seemingly justified using NEB precedent, be mitigated if the Panel were to have amended the Joint Review Panel Agreement? Would this have made public participation in the EA more meaningful? These questions can be explored in future research.

It is clear that public participation contributed to influencing project design, planning, and environmental and socio-economic assessment studies (Considerations, 2013). This influence by the public on the Proponent is consistent with meaningful public participation as described in the academic literature (Sinclair and Diduck, 2015).

A meaningful EA process requires two other considerations. Meaningful public participation includes reasonable opportunities to respond to the input and position of the proponent and other participants through the hearing process (Sinclair and Diduck, 2015). Meaningful public participation requires access to funding so that the public may hire a third-party to verify the quality of the proponent's submissions, and meet expert opinion with expert opinion (Rutherford and Campbell, 2004).

The experiences of Indigenous groups in the EA provides evidence that participation in the EA was not meaningful due to cost barriers. Coastal First Nations was not able to participate in the EA process due to a lack of funding. Similarly, the Gitxaala Nation received \$63, 500 as part of the Aboriginal Funding Envelope to participate in all aspects of the EA (Canadian Environmental Assessment Agency, 2013), and contract third-party assessments for the proponent's submissions (Considerations, 2013). Rutherford and Campbell (2004) argue that sufficient funding should be provided for the participation of those otherwise not likely to be included, such as marginalized populations. It is alarming then, that those who expressed concerns related to funding were Indigenous groups (Considerations, 2013).

Given the cost to develop the proposal for the EA was \$450 million (National Energy Board, 2013), the \$41, 000 allocated to Coastal First Nations and the \$63, 500 allocated to the Gitxaala Nation (Canadian Environmental Assessment Agency, 2013), shows that few resources

were provided to the public to meaningfully participate, despite a wealthy proponent. Greater funding would have been required for meaningful participation.

As Doelle and Tollefson (2013) explain, barriers such as a lack of resources, can lead to a lack of public confidence that participation will have influence on the decision-making. This is clearly illustrated in the experience of the Coastal First Nations, who claimed that the EA was flawed and incomplete (Considerations, 2013).

Doelle (2012) considers a joint panel review option to be the only sufficiently comprehensive process option under the *Canadian Environmental Assessment Act, 2012*, to serve as a planning tool. Although the EA for the Northern Gateway Project spanned two federal EA Acts, the lack of meaningful public participation in this case-study challenges this understanding of panel assessments.

**Conclusion:**

Meaningful public participation in environmental assessment (EA) practice was evaluated using the Enbridge Northern Gateway Project (the Northern Gateway Project), as a case study. The case-study revealed that in two ways public participation in EA was not meaningful in practice. These findings were related to the scoping and procedure used in the case-study.

This thesis provided two lessons regarding public participation in EA. First, EA laws remain a key barrier to meaningful public participation. In relation to the scoping of the EA, the Joint Review Panel Agreement and the precedents set in past National Energy Board scoping decisions were barriers by excluding the public's concerns regarding upstream and downstream emissions. The disregard of public concern contributed to an EA process that was not meaningful. It is worth exploring further whether the past scoping decisions are reasonable and whether the Panel could have adopted a process that would have alleviated the public's concerns. This barrier will need to be addressed in order to promote a shift to consensus based EA.

Second, there is still a need to improve the EA process in practice. The concerns expressed by Indigenous groups regarding the funding for the EA provide evidence to substantiate claims in the literature relating to process as a barrier in EA. The process concerns related to this case-study highlight the role that marginalized communities still play in creating a more meaningful EA process by identifying process deficiencies.

EA practitioners have the opportunity to learn from the public's participation in the Northern Gateway Project so as to encourage participation that is meaningful for similar EAs in the future. There is opportunity to look to past EA practice for examples of meaningful public participation. An excellent example of meaningful participation is the Berger Inquiry. Hopefully,

in the future, EA practitioners and critics will have more opportunities to compare meaningful experiences in EA.

The 2012 amendments to the *Canadian Environmental Assessment Act*, make it critical to continue reviewing EAs in order to improve the process in the future. The lack of meaningful public participation in the Northern Gateway Project resulted in an EA processes that is questionable as an effective decision-making tool. As the key process for decision making regarding resource development projects, the lessons learned from the Northern Gateway Project make it paramount to reconsider EA in the interest of the public, and sustainability in general.

**Bibliography:**

Benidickson, J. (2013). *Environmental Law*. Irwin Law.

Boyd, D. R. (2003). *Unnatural law: rethinking Canadian environmental law and policy*. UBC press.

*Canadian Environmental Assessment Act, 1995*

*Canadian Environmental Assessment Act, 2012*

Canadian Environmental Assessment Agency. (2016). *Enbridge Northern Gateway Project*.

Canadian Environmental Assessment Registry. Retrieved from

<http://www.ceaa.gc.ca/050/details-eng.cfm?evaluation=21799>

Canadian Environmental Assessment Agency. (2009). AGREEMENT BETWEEN THE NATIONAL ENERGY BOARD AND THE MINISTER OF THE ENVIRONMENT CONCERNING THE JOINT REVIEW OF THE NORTHERN GATEWAY PIPELINE PROJECT. Retrieved from <http://www.ceaa.gc.ca/050/documents/40851/40851E.pdf>

Canadian Environmental Assessment Agency. (2013). Participant Funding Program – Aboriginal Funding Envelope Funding Review Committee's Report. Retrieved from

<http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=54049>

Chalifour, N. J. (2010). *Bringing Justice to Environmental Assessment: An Examination of Kearsy Oil Sands Joint Review Panel and the Health Concerns of the Community of Fort Chipewyan*.

Demarco, JV and Muldoon, P. (2016). *Environmental Boards and Tribunals: A Practical Guide*.

2<sup>nd</sup> Ed. LexisNexis Canada.

- Doelle, M. (2012). CEEA 2012: The end of federal EA as we know it?
- Doelle, M. (2016). Integrating Climate Change into EA: Thoughts on Federal Law Reform.
- Doelle, M., & Sinclair, A. J. (2006). Time for a new approach to public participation in EA: Promoting cooperation and consensus for sustainability. *Environmental Impact Assessment Review*, 26(2), 185-205.
- Doelle, M., & Tollefson, C. (2013). *Environmental law: cases and materials*. Carswell.
- Fluker, S., & Srivastava, N. K. (2016). Public Participation in Federal Environmental Assessment under the Canadian Environmental Assessment Act 2012: Assessing the Impact of “directly affected”. *Journal of Environmental Law and Practice*, 29, 65.
- Gibson, R. B., Doelle, M., & Sinclair, A. J. (2015). Fulfilling the promise: basic components of next generation environmental assessment.
- Gibson, R. B. (2012). In full retreat: the Canadian government's new environmental assessment law undoes decades of progress. *Impact Assessment and Project Appraisal*, 30(3), 179-188.
- Hanna, K. S. (Ed.). (2016). *Environmental impact assessment: practice and participation*. Oxford University Press, USA.
- Hazell, S. (2010). Improving the effectiveness of environmental assessment in addressing federal environmental priorities. *Journal of Environmental Law and Practice*, 20(3), 213.
- Kandiyoti, R. (2012). *Pipelines: flowing oil and crude politics*. IB Tauris.
- Laxer, G. (2015). *After the Sands: Energy and Ecological Security for Canadians*. D & M Publishers.

Lucas, A. R., & Thompson, C. B. (2016). Infrastructure, Governance and Global Energy Futures: Regulating the Oil Sands Pipelines. *Journal of Environmental Law and Practice*, 28(3), 355.

Macklem, P., & Sanderson, D. (Eds.). (2016). *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights*. University of Toronto Press.

Mikadze, K. (2016). Pipelines and the Changing Face of Public Participation. *Journal of Environmental Law and Practice*, 29, 83.

Muldoon, P. R., Lucas, A. R., Gibson, R. B., & Pickfield, P. (2015). *An introduction to environmental law and policy in Canada*.

*National Energy Board Act, 1985*

National Energy Board. (2013). *Connections: Report of the Joint Review Panel for the Enbridge Northern Gateway Project*. Volume 1. The Publications Office, National Energy Board.

National Energy Board. (2013). *Considerations: Report of the Joint Review Panel for the Enbridge Northern Gateway Project*. Volume 2. The Publications Office, National Energy Board.

National Energy Board. (December 6, 2016) File OF-Fac-Oil-N304-2010-01 03.

Rutherford, S., & Campbell, K. (2004). Time well spent? A survey of public participation in federal environmental assessment panels. *Journal of Environmental Law and Practice*, 15(1), 71.

Sinclair, A. J., & Diduck, A. P. (2015). Public participation in Canadian environmental assessment: Enduring challenges and future directions. *Environmental impact assessment: practice and participation*, 53-74.

West Coast Environmental Law. (August, 2016). Federal Environmental Assessment Reform Summit: Executive Summary. Retrieved from [http://wcel.org/sites/default/files/publications/WCEL\\_FedEnviroAssess\\_ExecSum%2Bapp\\_fnldigital.pdf](http://wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_ExecSum%2Bapp_fnldigital.pdf)

West Coast Environmental Law. (August, 2016). Federal Environmental Assessment Reform Summit: Proceedings. Retrieved from [http://wcel.org/sites/default/files/publications/WCEL\\_FedEnviroAssess\\_proceedings\\_fnl.pdf](http://wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_proceedings_fnl.pdf)

West Coast Environmental Law. (2009). The Enbridge Northern Gateway Pipeline: Getting the Decision Right. Retrieved from <http://wcel.org/sites/default/files/publications/Enbridge%20Northern%20Gateway%20Pipeline%20%E2%80%93%20Getting%20the%20Decision%20Right.pdf>

West Coast Environment Law. (2016). West Coast Environmental Law Submissions on next generation environmental assessment. Retrieved from <http://wcel.org/sites/default/files/publications/wcel-submissions-to-ea-panel-final-16-12-23.pdf>