

**Public Interest Standing and the Environment:
Setting Boundaries of Participation in Energy and Natural Resource Decision Making**

by

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Abstract

Public participation processes are touted as an effective way to increase the capacity and legitimacy of policy making. Yet the focus in the public participation literature is primarily on issues of design, assuming a neutral, unbiased public that can be inserted into any public participation process. Consequently, attention is rarely given to who gets to participate in such processes. Recent changes to the Canadian environmental assessment process, an environmental decision making process with a strong public participation component, raise critical questions about who gets to participate. Specifically, the process narrowed the criteria of who can participate to those who are “directly affected”. The result is that a process designed to determine whether a particular project is in the public’s interest has restricted participation from any who were interested to those with the most direct material interests. The directly affected criteria, however, is not new. It is known in the context of administrative law as the test of standing. The test of standing asks who can legitimately bring forth a complaint before the court. As such, it is design to exclude more than include. Through a discussion of the theoretical relationship of representation this thesis presents arguments for why one might seek particular kinds of input for particular kinds of decisions. Analysis of several court cases where the standing test is applied is then used to illustrate both the restrictive nature of the test, as well as ambiguities regarding what constitutes being ‘affected’. This analysis suggests that the consequences of this criterion are that it undermines the ability of participants to effectively represent the public interest. The thesis concludes that restricting participation to the “directly affected” is far too narrow a test for processes like environmental assessment that are designed to determine the public interest.

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Dedication

To all us radicals out there who happen to care about the environment.

Introduction

In the context of public participation mechanisms, the question of who gets to participate is not often given priority. Much like with democratic theory – defined as “rule by the people” – attention is typically paid to the methods of rule and less to the people (Dahl 1989; Näsström 2011). Innovative public participation mechanisms are increasingly being developed to augment the gaps that arise in electoral democracy between constituents and policy-makers (Warren 2009). With the occasional exception (Booth and Halseth 2011; Longstaff and Burgess 2009), the literature prioritizes methods to increase public participation rather than question who gets to participate. In cases where attention is given to who gets to participate, it rarely extends beyond straightforward demographic representation (Rowe and Frewer 2005). With regards to environmental assessments, the open ended nature of many environmental assessment participation processes means that even less attention is given to the question of who gets to participate in the environmental assessment literature. Recent changes to Canada’s environmental assessment process, a central environmental regulatory process with a significant public participation component, make this gap in the literature a pressing issue (Government of Canada 2012a). One of the central changes to the Canadian environmental assessment process was to restrict those involved in the public participation component to those who are “directly affected” or have “relevant information”. Prior to the changes, the process was what Dietz and Stern (2008) refer to as “unbounded” (193) with respect to who could participate: those who felt that they might have information to contribute, or who wished to register an opinion on a project, could sign up to participate. The goal of policy processes, like environmental assessments, is to make determinations of whether a particular project is in the “public interest” (Glasson, Therivel, and Chadwick 2005; Vlavianos 2010). Public participation has a crucial role to play in making

such determinations. Public interest is a broader, value-oriented determination. Understandably the public interest is a difficult concept to define, especially in a pluralist society with differentiated and conflicting interests (Cramton 1974). Nevertheless, restricting the people who are able to participate to those who are directly affected, such as landowners, undermines the ability to make a broad determination concerning the “public interest” and exacerbates, rather than alleviates, collective action problems inherent to environmental decision-making. Typically those involved in the environmental assessment process are technocrats: highly qualified technicians, public servants and industry specialists. In contrast, public participation mechanisms are designed to broaden the scope of the assessment in order to incorporate other concerns. Restricting those able to participate, compromises the abilities of such processes to legitimately claim that determinations are made in the public interest.

This thesis seeks to understand the issue of who gets to participate in environmental assessments, as one example of public participation processes. It will focus on the changes to the federal environmental assessment in Canada in 2012 to provide insight into the issues concerning the establishment of ‘publics’ in such participatory contexts. This thesis argues that for environmental assessment processes to be effective and legitimate, they must incorporate a combination of values and interests that is representative of broader public. This issue of representation raises serious questions concerning who gets to participate. What category of interest is legitimately qualified to participate in a particular process, such as the Canadian environmental assessment process? What might the consequences be in narrowing the scope of individuals legitimately allowed to participate in such changes? Finally, who is best suited to participate in order to make determinations concerning the public interest?

To begin to answer these questions this thesis will outline how public participation processes aid policy making decisions. Public participation processes, it is argued, augment electoral democracy and allow for additional and more specific input on significant policy decisions in ways that cannot be done through the electoral process (Warren 2009). The theoretical relationship of representation is then discussed to outline how representation works differently for issue based publics, and outlines a number of different representative methods in addition to directly affected. To understand the potential consequence of Canada's changes to the environmental assessment public input criteria, we will examine situations where similar doctrines have been applied: energy regulation in Alberta and the standing doctrine in the administrative law more generally. The thesis concludes that restricting participation to the "directly affected" is far too narrow a test for processes like environmental assessment that are designed to determine the public interest and the current use of the directly affected criterion suggests even more restrictive application.

1. Context: Restricting Participation in the Canadian Environmental Assessment Process

In the 2012 Canadian Conservative federal budget, the government enacted substantial changes to the environmental assessment process. The goal of these changes, dubbed “Responsible Resource Development” (Government of Canada 2012b), was to streamline environmental decision-making. Of particular interest is the change to the definition of “interested party” within the Canadian Environmental Assessment Act. The 1992 Act stated an interested party was “any person or body having an interest in the outcome of the environmental assessment for a purpose that is neither frivolous nor vexatious” (Government of Canada 1992). This definition is what Dietz and Stern refer to as “unbounded” (Dietz and Stern 2008) as there are no boundaries established concerning who can participate, the individual must simply have an ‘interest’ in the project. In contrast, the 2012 Act changed the definition of interested party to the following, referring to the environmental assessment panel: “if, in its opinion, the person is directly affected by the carrying out of the designated project or if, in its opinion, the person has relevant information or expertise” (Government of Canada 2012a). This definition is a more restrictive “bounded” definition as it established strict criteria concerning who is allowed to participate.

This alteration in definition presents significant challenges for environmental assessments. First, the directly affected tests are typically defined via property rights, safety concerns or financial costs (Muldoon et al. 2009, 187). Consequently, those who pass such tests represent those with the most direct material concerns with a given project. Limiting the scope of public participation to such people, at the exclusion of others, introduces a significant amount of bias into a process designed to determine whether a project is in the public interest. It would exclude those concerned about environmental impacts that have more diffuse effects that extend

temporally as well as spatially. For example, impacts to air and water quality, as well as species habitat, are frequently indirect, diffuse, or delayed. Second, this restriction in definition is unprecedented. Many environmental assessment processes include provisions for public participation, but do not have restrictions on who can participate. No provincial environmental assessment makes any such restriction, nor does the US National Environmental Protection Act include any such restriction (Wood 2003).

2. Public Participation & Representation

2.1 Conceptualizing Public Participation in Electoral Democracy

Public participation is a well established goal for policy making in democratic societies. Attention in the literature has focused primarily on issues of design. Many have created different typologies (Gene Rowe and Frewer 2005), frameworks (Palerm 2000), or “ladders” (Arnstein 1969) to help clarify and differentiate between the objectives and designs of public participation mechanisms (Bishop and Davis 2002; Cornwall 2008; Fung 2006; O’Faircheallaigh 2010; Mark S. Reed 2008; Gene Rowe and Frewer 2000). Such frameworks are instructive in understanding the role public participation plays in specific policy contexts while allowing us to generalize conclusions that are instructive to broader policy making processes.

Given the ambiguity of the term ‘participation’, it would be helpful to situate this concept within the broader conceptual environment of representative democracy more generally. Webler and Tuler (2006) define public participation “as forums that are organized for the purpose of facilitating communication among interested and affected citizens and groups, scientists, experts, political officials, and regulators for the purpose of making a specific decision of governance or solving a shared problem” (599). Others focus more narrowly on stakeholder events which, by definition, are intentionally limited to those with a direct stake in the issue (Reed et al. 2009). Warren (2009) argues, however, that public participation is part of a broader push to democratize policy-making (what he calls governance-driven democratization), consequently arguing for participation, not just by stakeholders, but by ordinary citizens.

If public participation processes are designed to allow ordinary citizens to have informed input on policy-making, could it not be argued that this is precisely what representative

democracy does? Why would we need citizens to participate in the policy making process more fully if elected officials are suppose to fulfill that role? One of the classical distinctions in the theory of democratic representation is the distinction between trustee and delegate (Pitkin 1967). The trustee is a representative who is able to exercise her own judgement whereas the delegate is one who is supposed to represent the preferences of the constituents as accurately as possible, whether or not he agrees with them. This distinction highlights the difference of who is doing the representing from the content of representation. Such a clarification is important for policy-making. Warren (2009) suggests that public participation mechanisms augment electoral democracy, yet at first glance it might appear as if they duplicate the work done by elected officials.

There is a well established critique within democratic theory on the limitation of electoral democracy in representing citizen policy preferences. The first disconnect arises as “territorial electoral constituencies do not match issue constituencies, which are increasingly non-territorial” (Warren 2009, 6). The issue of how to represent such issue-based publics will be briefly touched on later. A second problem is the challenge of divining the policy mandate from an election when constituents have a multitude of preferences which do not line up easily with the platforms of political parties or the views of particular individual representatives. Yet another challenge is when electoral and party systems distort the relationship between votes and seats in the legislature. This problem is a particular challenge in recent years in Canada, where majority governments have been elected with a minority of votes. For example in Canada’s most recent election (2011) the Conservative party won a majority government with only 39.6% of the popular vote (Elections Canada 2011).

Finally, policy-making has become infinitely more complex. Both Warren (2009) and Dalton, Scarrow and Cain (2003) suggest that the political milieu of highly organized and professional interest groups, combined with the complexities of increasing economic and social integration across nations (often referred to as globalization), make for highly complex contexts in which to create policy. This complexity has two consequences. First, citizens become more alienated from the policy making process. As the process becomes increasingly complex, highly organized and well-funded interest groups are more able to effectively navigate those complexities. The result is a particular form of collective action problem where a small number of highly organized interests are able to override a more diffuse but prevalent general will (Olson 1971). The second consequence of this complex political milieu is it undermines trust citizens have in policy makers. As a result, citizens are increasingly less deferential to authority and demand that their elected officials be more responsive on an issue by issue basis (Warren 2009, 7). As trust has declined, we have witnessed a marked drop in voter participation and an increase in skepticism regarding politicians, political parties and political institutions (Dalton, Scarrow, and Cain 2003). Electoral democracy is a blunt representative instrument. Public participation processes, in comparison, are able to address those representative linkages with much more precision. As will be explained later, public participation processes provide additional information for policy makers. Returning to Pitkin's dichotomy, public participation processes provide input on the content of representation which in turn aids individual representatives.

2.2 Conceptualizing Public Participation in the Policy-Making Process

While we have highlighted the deficiencies in electoral systems to adequately address representative linkages, it is also necessary to highlight a few different models of the policy-

making process in order to better conceptualize how public participation processes might best be designed. Different models of how the policy-making process does, or should, operate impart normative assumptions that have consequences for public participation design.

The first, as outlined by Poisner (1996), is the synoptic approach. At the risk of oversimplifying, this is when bureaucratic experts, or technocrats, are the primary shapers of policy. This model, for lack of a better term, is elite-driven model, assuming that a professional bureaucracy with expert knowledge is best able to determine what policies should be created and how they should be implemented. They simply require general guidance from elected officials.

As an alternative, Poisner outlines a pluralist model. The pluralist model is more adversarial. Applied to the environmental assessment process it represents “fora in which conflicts are resolved and winners and losers *are decided* through the contest of competing interests” (O’Faircheallaigh 2010, 22). In contrast to such an adversarial conception of the policy-making process is a third model which sees public participation as a mechanism to aid the pursuit of the “common good” or “public interest” (Hindess 2002; O’Faircheallaigh 2010), or what Poisner calls “civic republicanism” (Poisner 1996). This republican understanding of environmental assessment creates the need for a different set of evaluative criteria than the pluralist understanding. For example, in trying to gauge whether or not public participation was influential over the final outcome, one definition of effectiveness, will be radically different if the public is seen as one interest group among many who lost to stronger, more organized interests, versus whether or not the final decision incorporated in some way the concerns of the public with regard to a specific project. A typical outcome of environmental assessment decisions is that a project is approved with certain conditions to lessen particular environmental impacts, thus making it difficult to ascertain to what extent public participation influenced the

final decision. Very rarely is a project deemed unacceptable from a ‘public interest’ perspective.¹ Consequently, environmental assessments would be deemed effective from a pluralist perspective insofar as the main interest group (industry or the project proponent) gets the project approved with minor concessions to other interests. It would be more difficult, however, to conclude that the process is effective from a republican perspective if 99% of the projects that go through environmental assessment are in the public interest. If the central aim was determining public interest and not providing a regulatory hoop to jump through one would expect to see a few more projects deemed not in the public interest. The case analyzed by Haddock (2011) illustrates that the amount of environmental damage necessary to deem a project not in the public interest is very high indeed.

Another model, touted as a middle ground between the latter two presented above, is the deliberative model (Kahane, Weinstock, and Leydet 2010). This perspective holds that those involved do come from distinct and separate interest perspectives that cannot easily be reconciled, similar to the pluralist model. However, the deliberative model eschews the assumption that participants have unwavering, pre-determined interests. At the same time it rejects the republican belief that a ‘common good’ understanding requires a certain level of societal homogeneity. The exchange of reasons for one policy or another is supposed to alter the perspective of the participants. The deliberative model also rejects the pluralist understanding of the process necessarily being adversarial. It argues that those involved work, through argumentation and persuasion as opposed to bartering or bargaining or other *strategic* forms of communication (Habermas 1996), to reconcile their differences in pursuit of an understanding of the common good or public interest. Indeed, many have argued for the deliberative model to be

¹ For one particularly enlightening example see Haddock (2011).

the basic normative idea undergirding public participation processes (Macias 2010; Roberts 2004; Rosenberg 2007; Warren 2009), or environmental assessment specifically (Wiklund 2005). In this way, one can map these models onto a typology such as Arnstein's ladder (Arnstein 1969) which highlights different power dynamics within the policy making process: the synoptic approach leaving bureaucrats and experts with the most power and influence over policy outcomes, the pluralist approach devolving that power to particular (well organized) interest groups, and deliberative democracy being the most egalitarian, granting the most power to the citizenry. It should be noted, however, that the pluralist and synoptic models are supported by more empirical evidence, whereas the deliberative model is more normative in approach. Consequently, in evaluating these models one often finds conclusions that suggest synoptic or pluralist models more closely align with reality, while still maintaining the normative ideals of deliberative democracy as a laudable goal (Macias 2010; Wiklund 2005).

To be sure, the language of models is problematic. It suggests more separation and division between each conceptual model than might otherwise exist. Despite this, there are some analytical benefits of such an approach. Each of these models offers a different way of conceptualizing the policy-making process and, consequently, the role public participation processes would have therein. In the synoptic model, public participation is an information input into this process to which the bureaucrats can pay attention, or not. In the pluralist model, public participation processes can make the bargaining less vitriolic, or allow particularly adversarial interests to work out their differences. This was the case with the creation of the Great Bear Rainforest as environmental and industry groups settled their differences prior to negotiating with the British Columbia government and First Nations (G. McGee, A. Cullen, and Gunton

2010). In the deliberative model, public participation processes create the potential for an idealized form of deliberation as the basis for collective decision-making.

By conceptually outlining the way in which public participation processes function within electoral democracies and democratic policy making processes we can better situate the environmental assessment process. Some public participation processes are specifically designed to provide a very specific kind of information that cannot be obtained by other means. Such mechanisms would undoubtedly be designed by people who conceptualize the policy process in terms similar to the synoptic model. Other participatory processes are much more open ended. The environmental assessment process, until recently, was a more open ended process. The fact that a number of scholars evaluated the environmental assessment process according to highly idealized criteria of deliberation suggests those scholars saw potential for the environmental assessment to achieve those ideals (Wiklund 2005). The changes, however, suggest a move towards the synoptic model rather than addressing the central critique of environmental assessment participation not being deliberative enough (Petts 1999).

2.3 Objectives of Public Participation

Public participation has numerous potential benefits for environmental decision-making (Dietz and Stern 2008; Hanna 2005; Macias 2010; Parkins and Mitchell 2005; Reed 2008). Many of these benefits specifically address the concerns regarding the representative linkages in electoral democracies noted earlier. Broadly speaking, the benefits of public participation can be synthesized into two categories: process and outcome (Parkins and Mitchell 2005; Rowe and Frewer 2004). The increased legitimacy of a decision due to a transparent public participation process would be an example of a process benefit. The eventual decision may not be substantially different than if the process had not taken place, but it increases the public's trust in

the decision-making process, which is one of the major concerns noted above (Booth and Halseth 2011; Hawkins and O'Doherty 2010).

Increased legitimacy can be understood in both a positive and a negative light. Viewed in a positive light, the increased legitimacy of a decision-making process can be seen as an honest reflection of the government's desire to come to decisions that are acceptable to as wide a population as possible, and to make those decisions as transparently as possible. The work by some scholars on the case of the Great Bear Rainforest is an example that reflects this optimistic perspective (D. Cullen et al. 2010; Day, Gunton, and Williams 2003; G. McGee, A. Cullen, and Gunton 2010). Viewed negatively, participation processes can be seen to be an attempt by the government to placate opposition through cooptation, while keeping policies substantively unchanged. There is a risk that participatory processes can be a form of tokenism, where government create the appearance of being open to public input while manipulate outcomes (Arnstein 1969). This argument has been applied to the Alberta government's use of multi-stakeholder consultations around the oil sands in the 2000s (Hoberg and Phillips 2011).

In addition to potential process contributions, public participation mechanisms can also contribute substantively to policy making outcomes in two significant ways. First, by raising issues that may only be known by local residents, public participation can allow general decision-making processes to be attentive to local circumstances (Bäckstrand 2003; Fischer 2000). Such a contribution would allow a technical decision-making process to be more robust and comprehensive. Ciaran O'Faircheallaigh (2010), for example, highlights a number of dimensions in which public participation contributes in such a manner. The public both provides information that may not otherwise be accessible (such as particular local knowledge) but also acts as a form of peer-review as the claims made by the proponent are open for contestation.

Second, by revealing public values to decision-makers, public participation can contribute to the making of decisions that technical policy processes are fundamentally unable to make, for example determining the public acceptability of a particular risk.

2.4 Evaluating Public Participation

Having conceptualized and identified the objectives of public participation, we can develop a framework regarding public participation mechanisms with regard to those it seeks to include in the process. While evaluation frameworks are not uncommon they often ignore questions of who participates, assuming an unbiased public to be inserted into the process. Rowe and Frewer (2004) provide the most comprehensive one in their attempt to provide a synthesized framework to define and operationalize the concept of “effectiveness” for evaluating public participation processes in a more broad and systematic manner. Yet “effectiveness” of such public participation mechanisms is often defined as influence over policy decisions, adopting similar normative assumptions to Arnstein (1969), in part because of the generalizability of such a definition. Public participation design issues are obviously much more complicated and must necessarily be attentive to the goals of each individual process. As such, little attention is paid to the criteria that determine who will participate; indeed many public participation mechanisms simply assume a neutral and benign public to be inserted into the process – the underlying assumption being that more participation is unequivocally good, without any consideration to what precisely is meant by participation. A crucial point is that the objectives of participation processes necessarily dictate different publics to be created in order to achieve those objectives. For example, public participation for health policy decisions would be need to be delineated along jurisdictional lines, whereas environmental decisions might require a public constituted based on bio-regional boundaries, or even extended beyond such boundaries.

While public participation is believed to be a cornerstone of environmental assessment (Glasson, Therivel, and Chadwick 2005; Sadler 1996; Wood 2003), the environmental assessment literature is still seeking consistency on what is deemed effective participation (Hanna 2005; Hartley and Wood 2005; Rowe and Frewer 2004; Sadler 1996). Moreover, the overall purpose of environmental assessment, let alone public participation within such mechanisms, is even up for debate in fundamental ways. Despite this, the environmental assessment process remains consistent enough across national jurisdictions that a comparative evaluation of process design can take place (Wood 2003). For our purposes, one of the critical issues is whether the inclusion of certain participants, paired with the exclusion of many others, leads to a systemic biasing of some interests over others, namely direct material interests over general public interests such as the environment.

In many public participation processes, typically the participants are selected with some attention to issues of representation, whether demographic replication of the larger body politic (Warren 2008) or inclusion of a broad range of salient perspectives with regard to a particular issue. In contrast, prior to the changes to the Canadian environmental assessment, any individual that chose to participate could do so. In such a situation, there is no representative relationship established between the participating public (the representers) and the broader body politic (the representees). The participants are there only to represent their own views. Participants contribute to determining the ‘public interest’ insofar as the process is open to all who wish to participate and feel they have something to contribute. By restricting environmental assessment participation to “directly affected” and “relevant perspectives” it inadvertently forces the participants into a representative role. As long as the process is seeking to make a public interest determination, those included in the process are, in effect, representing the larger public,

including those who have been excluded from the process. This institutionalizes a particular bias into the process. While the previous iteration of the environmental assessment had the *potential* for such a bias towards such direct material interests (due to, for example, self-selection (Chalifour 2010, 55)), the changes institutionalize that bias. Intentional or not, the inclusion of such interests follows the logic of collective action (Olson 1971) as government officials expect those directly affected to express the most adamant opposition, whereas those indirectly or diffusely affected individuals might not necessarily oppose a project as adamantly (Hoberg and Harrison 1994, 121).

2.5 Representing Issue Based Publics

Representation in public participation mechanisms is the representation of citizens by citizens (Warren 2008). The main representation issue that public participation mechanisms raise is which citizens become involved. Inadequacy of inclusiveness is already noted as one of the most prevalent criticisms of public participation (Dietz and Stern 2008). From the perspective of the public participation designers, there is the potential to include marginalized perspectives. Whether that potential is realized, however, is another matter. The other issue is that such processes can undoubtedly bias towards those with either the most significant material interests in a given issue (directly affected or stakeholders) or provide bias towards those who are the most organized and resourced (Dalton, Scarrow, and Cain 2003; Warren 2009). How we get inclusive, unbiased and comprehensive participation is a pressing question. In what follows, we look at four methods for representing issue based publics: demographic, discursive, all-affected and directly affected.

Demographic representation is a method of constituting the public involved in participation processes in a manner such that the participants mirror the larger body politic based

on particular demographic characteristics. This can be achieved through random selection, as was the case with the British Columbia's Citizen's Assembly on electoral reform, where a male and female representative were randomly chosen from each electoral riding in the province (Warren and Pearse 2008; Warren 2008). Another much smaller public participation event concerning the governance of a British Columbia biobank also sought representativeness according to demographic categories considered relevant to the particular topic in question (Longstaff and Burgess 2009). The rationale behind this approach is that you want distinct perspectives represented in the process (Young 2002) and demographic categories work as a proxy to include those different perspectives.

Demographic representation operates on an assumption that the boundaries of the public are limited to those of the nation state. The geopolitical boundaries constitute the relevant body politics and the public participation participants are to mirror that body politic as closely as possible. Three other representative methods do not hold this assumption: discursive, all-affected and directly affected.²

Discursive representation is the desire to represent different discourses in the process (Dryzek and Niemeyer 2008). In one sense, discursive representation is not concerned with allowing particular *individuals* to represent particular perspectives, but rather seeks to represent those perspectives or positions on their own (Keck 2003). Dryzek and Niemeyer, however, intentionally differentiate between perspectives and discourses, the latter of which they argue are more "solid". Whereas an individual perspective can be as unique, irreducible and fleeting as the individual, discourse is a communal concept around which a community of perspectives might

² While the directly affected is highly restrictive and consequently operates within a geopolitical context, there is nothing, according to its logic, that necessitates such a restriction.

coalesce. Defining discourse as a “set of categories and concepts embodying specific assumptions, judgements, contentions, dispositions, and capabilities” (481), Dryzek and Niemeyer provide a number of rationales of why representing discourses might be an appropriate method. Rationales include the assumption that democracy is a rational political system based on the idea that diversity of opinion and breadth of argument aids the collective decision-making process; discourse’s ability to extend representation beyond geopolitical boundaries; as well as the ability address the problem of scale that faces deliberative democracy, that face-to-face deliberation is too unwieldy for national public debates.

All-affected representation provides yet another alternative of how to establish an issue-based public. Originally extending from the Justinian Roman legal code which stated “what touches all should be approved by all”, this principle posits that anyone who is affected by a decision should contribute to making it. The debates concerning the all-affected principle concern the issue of how to establish the boundaries of a particular public because undoubtedly one can extend definitions infinitely into space and time, which is unhelpful.

There are two substantively different interpretations of the all-affected principle. The distinction lies between “legally subjected” and “causally affected.” Some argue that the all-affected principle should be read as an all ‘subjected’ rule from a governance perspective (Heyward 2008; Karlsson Schaffer 2012; Karlsson 2008). In other words, those that are affected because they are subjected to particular decisions should have a say. The alternative is the “causally affected” which typically fits with environmental concerns of affectedness (Heyward 2008). In other words, the all-subjected maintains the boundaries of a body politic along the borders of legal jurisdictions, namely the nation-state. The causally affected extends those boundaries to include those affected by a particular issue, whether within the legal boundaries of

a nation-state or not. In this latter conception, affectedness is not constrained by geopolitical borders, much like environmental effects. This approach makes it easier to extend the boundaries of a public body, but difficult to cogently argue for establishing the boundaries at a particular point, as the chain of cause and effect could extend infinitely.

In contrast to the all-affected principle is the directly affected principle that has been adopted by the Canadian environmental assessment law. The directly affected provision is one familiar in the Canadian context of administrative law. The technical judicial term of *locus standi* – legal standing before the court – is commonly used in legal proceedings to determine if a third party is able to bring an issue before the court. Bishop and Davis (2002) note that “standing” is one mechanism by which the public can participate as it provides that individual or organization the ability to comment on a particular policy issue. However, the doctrine of standing, especially as traditionally defined, has some significant problems.

In the Canadian administrative law context the test of standing provides the answer to a basic question: are the interests of this individual relevant to the issue at hand? This question seeks to establish whether the individual or plaintiff is a stakeholder with regard to this particular law or, if not, whether this plaintiff can serve as an effective representative of other stakeholder’s interests who may not be able to bring this issue before the courts.³ The test of standing is often exercised with strict adherence to a narrow set of criteria: property rights, financial costs or immediate safety concerns (Muldoon et al. 2009, 187).

Consequently, this raises two issues with regard to democratic theory. The first is a general collective action problem that plagues democracies around the world: the tension

³ One example is that an organization with better access to resources might better represent those interests than an individual on his/her own (Mullan 2007, 452).

between the self-interest of the individual and the public interest in the common good. If the environmental assessment is tasked with making a determination concerning whether or not a project is in the public interest, given certain economic benefits and environmental costs that cannot be mitigated, can it do so when only those involved are “directly affected”? The second, of central concern here, is a question of bias: whether those who pass the test of “standing” are in any way representative of broader interests that should be included in such considerations. In other words, is the standing test overly narrow and restrictive with regard to the interests or perspectives that are included for consideration? By focusing on the “directly affected” it necessarily considers a narrow subset of affectedness.

Each of these methods of representing issue base publics has strengths and weaknesses. The main weakness of the demographic representation method is it remains restricted to geopolitical boundaries which may not line up accurately with the boundaries of a given issue. The other three methods, discursive, directly-affected, and all-affected, each have the ability to overcome this weakness to varying degrees. The discursive representation method, while perhaps the most adaptable to different policy arenas, is open to the same critique that many representative models suffer, namely accountability. Those presenting the different arguments are open to the critique of not representing them as accurately possible. Dryzek and Niemeyer attempt to overcome this critique by relying on discourses, rather than simply different perspectives or arguments, however the critique still remains if only blunted slightly. The breadth of the concept of discourses allows a certain amount of flexibility in the representative relationship. Finally, the two affected methods of representation are perhaps mirror images of each other with regard to strengths and weaknesses. While the directly affected is practical and

more easily operationalized in policy decision processes, all-affected method addresses the ideals of the democratic process more fully.

3. Directly Affected in Practice

Thus far we have sketched out the mechanisms and objectives of public participation methods. We have outlined some of the fundamental concerns regarding representation in such public participation processes. At this point it is necessary to understand how a “directly affected” limitation on public participation might function in the context of environmental policy decision-making. This section will outline how this directly affected provision operates in the Canadian environmental legal context, with examples from relevant cases. From this analysis we will be able to better understand the consequences of this change to the environmental assessment process, especially regarding the question of representation.

One clear example of the “directly affected” provision is known as the legal doctrine of “standing” or *locus standi*. It operates in a number of different legal areas such as constitutional law (Greenbaum and Wellington 2010, 36), civil litigation (Greenbaum and Wellington 2010, 125), or administrative law (Greenbaum and Wellington 2010, 64–68). While the standing test is designed so that those who are most affected by a decision have a legal right before the court, it is also broader than that. At its essence, this provision is designed to determine who can rightly bring forth a concern of law before the courts, for example to challenge a law as unconstitutional or to request a judicial review of a decision made by an administrative body (Benidickson 2009, 136). In such circumstances, the individual most affected by the decision is presenting the case. However, in some circumstances, such as when a decision “affects a broad cross-section of the public in largely undifferentiated ways [or] where the decision affects a range of interests in differentiated ways and someone other than the primary target or most affected person seeks judicial review” (Mullan 2007, 445) then the question of standing surfaces. There are two different manners in which to address this question: traditional standing and public interest

standing. Both are intentionally designed to be limiting provisions, excluding more than they include, although the latter is broader in scope. This limitation serves a number of functions (Cane 1986). Some functions include the protection of public bodies from harassment from professional litigants, the rationing of judicial resources, and ensure people do not meddle paternalistically in the affairs of others. The essential point being that the test of standing ensures “that the applicant has a *personal interest* not just an *ideological concern* in the outcome” (Cane 1986, 165). This is a necessary step to keep a distinct boundary between the judicial and political realms and allow the courts to remain adjudicators of, and not participants in, political battles. Yet interestingly, Cane also argues that if a public interest approach is taken to administrative law, that is one is seeking to determine what is in the public’s interest in broad terms, then the “ultimate logic of [this approach] is the abolition of standing rules” (Cane 1986, 166).

Moreover, the standing test often concern issues of public wrongs or public law that are brought forward by individuals. This is in contrast to private claims which are undoubtedly in the claimants interests’ (Cane 2011). The standing test determines who gets to represent the public interest in such cases, or put otherwise, who is entitled to “complain of a wrong” (Cane 2011, 282). Typically, it is believed, that those directly affected, and consequently those with the most to gain or lose, are best suited to represent the public’s case before the courts in judicial reviews. The conflation of public and private interests creates some problems for while “the wrong is defined in terms of the public interest...the right to initiate legal proceedings in respect of it is described in terms of the claimant’s interest in the matter” (Cane 2011, 282). Consequently, the standing test is situated in an uncertain nexus where public and private

interests overlap. This overlap creates ambiguity concerning the purpose of judicial review.

Cane poses the following questions:

If the prime aim of judicial review is seen as being the protection of individuals (whether people or corporations), this would suggest and justify standing rules which require the claimant to have been specially affected by what was done or decided. If judicial review is seen as going further and being concerned with the protection of groups as well as individuals, standing rules should only require that the claimant share some personal interest with others. If the prime function of judicial review is seen as being to provide remedies against unlawful behaviour by government, then there should be no requirement of personal interest. (295)

3.1 Traditional Standing Doctrine

This test of standing is the most straightforward, as it operates on the understanding that those who pass are directly or adversely affected. It is the narrowest of tests and is limited to those who might experience adverse effects in three distinct areas: property, health or safety, and financial costs (Muldoon et al. 2009, 187). The standing test is designed, as noted, as a barrier against frivolous lawsuits in a context of scarce judicial resources. It is also designed to suit the adversarial nature of the legal system. Those with a personal stake in a particular issue will be the best to argue that side of the case than someone who has only a slight interest in seeing the case succeed. The standing test thus presents an institutional check that the person in question bringing forth an issue of law is best suited to do so. Passing the test of standing allows an individual to bring forth a judicial review or, in the case of Alberta's Energy Resources Conservation Board (ERCB), to trigger a hearing to raise concerns regarding a particular project. With regard to the ERCB, passing the test of standing is the only way an individual citizen can participate this regulatory process. As such, it currently operates according to the principles that have been recently adopted by the environmental assessment process.

A number of cases involving Susan Kelly and the Alberta Energy Resources Conservation Board illustrate the complexity of dealing with this seemingly straightforward test of standing. In 2008 Grizzly Resources proposed to drill two sour gas wells near the residences of Susan Kelly, Linda McGinn and Lillian Duperron. These three presented an application to the ERCB in opposition to the proposed development. The ERCB denied their application because they did not pass the Board's test of standing as outlined in section 26(2) of the Energy Resource Conservation Act. The section in question states:

(2) Notwithstanding subsection (1), if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person, the Board shall give the person

- (a) notice of the application,
- (b) a reasonable opportunity of learning the facts bearing on the application and presented to the Board by the applicant and other parties to the application,
- (c) a reasonable opportunity to furnish evidence relevant to the application or in contradiction or explanation of the facts or allegations in the application,
- (d) if the person will not have a fair opportunity to contradict or explain the facts or allegations in the application without cross-examination of the person presenting the application, an opportunity of cross-examination in the presence of the Board or its examiners, and
- (e) an adequate opportunity of making representations by way of argument to the Board or its examiners.

Section 26(2) concerns the requirements for which an individual should be consulted, or may trigger a hearing into the decision. With regard to the development of gas and oil wells the notion of 'directly affected' is limited to a narrow set criteria based on safety concerns or property right infringement. Two directives are relevant for the determination of standing with regard to these cases: Directive 56 and 71. Directive 56 determines who must be consulted with particular projects, following the "directly and adversely affected" provision. Directive 71 outlines the radius of an Emergency Planning Zone (EPZ) as well as a Protection Action Zone (PAZ). The EPZ is the area within which the company must develop an emergency response

plan and is fairly narrow in its radius. Such a plan would have to account for the definite effects that would result in a gas release or explosion. The PAZ area is a broader area wherein the company must attempt to predict what the effects of a gas release might have, given certain conditions such as wind speed and direction. As Shaun Fluker puts it: “The level of hydrogen sulphide that would escape within the EPZ should a release occur is fatal. Outside the radius of the EPZ, levels of hydrogen sulphide are perhaps not fatal but still seriously adverse to health and safety such that energy companies must have an emergency response plan” (Fluker 2010). Consequently, what was at stake was determining what constituted a health or safety effect. The question was whether health and safety effects needed to be direct and immediate or diffuse and accruing over time to constitute “directly and adversely affected”. The other two components of the traditional standing test (property or financial effects) were not applicable. In the end, the Alberta Court of Appeal ruled that indeed the test of standing did extend to the more extensive PAZ area (*Kelly v. Alberta (Energy Resources Conservation Board)* 2009). However, the ERCB responded on November 13, 2009 by suggesting the PAZ zone was never supposed to exceed the EPZ zone, essentially redefining the former to coincide with the latter, arguing that the broader radius was excessively cautionary (Fluker 2009). This suggests intentional attempts on the part of the ERCB to restrict the test of standing as much as possible.

Another case concerns two of the three above mentioned residents (Susan Kelly and Lillian Duperron) and a different energy company (Daylight Energy) proposing another well in the area (*Kelly v. Alberta (Energy Resources Conservation Board)* 2010). Here the ERCB again argued that these residents did not pass the test of standing as the PAZ zone was based on worst case scenarios with low probability and, in the unlikely event something did happen, they would simply be evacuated from the area (which the ERCB deemed not to be an adverse affect but in

fact “the possibility of an evacuation would be to their benefit”) (Fluker 2010). As noted above, the ERCB had redefined the PAZ much more narrowly and this case was one that brought forth those new barriers. Of note is that in the reason for decision, the judge in this case erroneously quoted the ERC Act test for standing (s26(2)) as saying that an applicant *will* be adversely affected, when the Act in fact states that an applicant merely *may* be affected. The differentiation between potential versus actual effects in the case of a problem seems significant given the arguments the ERCB is attempting to make regarding the health and safety effects of the well and parallels the arguments of the previous case which tried to limit the standing test to immediate health effects as opposed to ones diffused over time.

Following *Kelly v. Alberta (Energy Resources Conservation Board)* (2009), Kelly et al. applied to the ERCB to be reimbursed as interveners for the legal costs incurred (Energy Resources Conservation Board 2010). The ERCB again denied the claim, again, on the argument that they did not pass the test of standing of someone who is adversely affected. However, in this case the ERCB focused on the language surrounding the funding of intervenors from section 28(1) which states:

28(1) In this section, “local intervener” means a person or a group or association of persons who, in the opinion of the Board,

(a) has an interest in, or

(b) is in actual occupation of or is entitled to occupy land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.

In this case, the ERCB explicitly focused on the impacts on the *land* rather than the potential health risks that would be associated with the project. The Board stated that “no evidence was

presented at the review hearing or in this cost proceeding to demonstrate a potential for the Grizzly wells to directly and adversely affect lands that the Kelly Interveners have an interest in, occupy, or are entitled to occupy” (Energy Resources Conservation Board 2010). This, in effect, alters the standing test and disregards the health and safety concerns and limits it to property issues, at least as far as the local intervener funding of section 28 of the Energy Resources Conservation Act is concerned. Shortly thereafter they sought leave to appeal this decision and were successful (*Kelly v. Alberta (Energy Resources Conservation Board)* 2011).

3.2 Public Interest Standing

Public interest standing is much broader in scope than the traditional standing test. This doctrine may only be applied if there is no one available who might potentially meet the traditional standing test. In *Finlay v. Canada (Minister of Finance)* (1986), public interest standing was extended from constitutional to administrative law arena (Mullan 2007, 447). The threefold test for public interest standing was summarized succinctly in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* (1992):

First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

In this case, the Canadian Council of Churches (CCC) was denied standing as they were attempting to present an issue before the court that affected refugees. It was the opinion of the court, rightly or wrongly, that the refugees in question would be a more reasonable and effective proponent of this issue for the court. Arguments could be made as to whether refugees do have access to the courts either through the lack of financial resources necessary to mount a challenge, or even the knowledge of what rights are afforded them as they enter in a new country. In either

case, the court determined there were individuals that passed the traditional standing test and consequently there was no need for the CCC to bring the issue before the court. The CCC failed the public interest standing test on the third component of the test. While the Finlay case opened the door for public interest standing, the Canadian Council of Churches case decision limited how far that door would be opened (Bailey 2011).

In contrast, the Pembina Institute for Appropriate Development did pass the public interest standing test in a case against the Alberta Utilities Commission (AUC). In this particular case concerning the approval of a coal-fired power plant, the company, Maxim Power Corp, was attempting to fast-track project approval in order to exempt it from anticipated greenhouse gas regulations that would come into effect in 2015. The AUC complied with Maxim's request to expedite the approval process and issued an interim decision that the project was in the public interest to allow for the company to proceed to the next stages of the permitting process. Pembina sought to challenge this interim decision in order to keep the coal-fired power plant from evading the greenhouse gas regulations. The AUC had already made a determination that no one was directly or adversely affected, thus no party was granted standing before the Utility Commission under the criteria of the traditional standing test. Pembina successfully argued that:

the test for standing before the Commission is different than the test for standing to appeal the Commission's decision to this court. It contends that if only those parties found to be directly and adversely affected by the Commission's decision have standing on appeal, then once a determination has been made that no such party exists, the Commission would be immune from any oversight in its decision-making; the Commission would essentially be able to act with impunity in such circumstances ("Pembina Institute for Appropriate Development v. Alberta (Utilities Commission)" 2011).

In other words, because the AUC had already ruled that no party was granted traditional standing before the court, there was no other way to raise this issue other than to grant Pembina public interest standing. While the appeal was eventually denied in the end, Pembina

successfully argued that it had public interest standing (“Pembina Institute for Appropriate Development v. Alberta (Utilities Commission)” 2011).⁴

3.3 Consequences for Environmental Assessment

But what does this have to do with environmental assessment? The first point that must be made is to highlight just how narrow the traditional standing test is with regard to those who may participate. Property rights, financial costs and personal health and safety concerns are the three potential triggers to achieve standing. Yet as the above mentioned cases have demonstrated, those seemingly straightforward criteria can be problematic. Are health concerns that pass the test only immediate ones or might they accrue over time? How does one adjudicate the effect of such concerns when they are probabilistic in nature? Public interest standing is a little broader, and yet is still a very narrow subset of the population. In some ways, this comparison of the legal definition of standing with regard to the environmental assessment is a false one. Or to put it another way, the use of the legal doctrine of standing for the purpose of determining the environmental assessment participants is completely inappropriate because the purpose of participants in the courts and the purpose of participants in the environmental assessments are completely different. Their role in each of these processes is a fundamentally different form of representation.

In the legal system, the role of the appellant in either the case of a judicial review, or in challenging some other decision by a quasi-judicial body (as is the case with the ERCB), is to argue a point of law as successfully as possible. The scope of the argument, and thus its consequences, in such contexts is highly restricted. As a result, the desired appellant is one who

⁴ For other cases where public interest standing was achieved for environmental cases see Benidickson (2009, 136n53)

can represent that argument on that point of law as best as possible. The scope of the case is narrow and so the nature of the representative is specific. This is, of course, because in the legal system decisions made by the courts set precedents for others to follow. A case that is decided because one side argued a potentially valid point of law poorly, in theory, undermines the legal system itself (hence the need for appeals). The ideal is that both sides bring forth the best possible version of their arguments on a particular point of law and judgment is rendered as to the validity of each argument. The traditional test of standing intentionally operates as a mechanism to *exclude* others who might not best *represent* the argument, or to put it another way “to ensure that the argument on the merits is presented in the best possible way and by a person with a real interest in presenting it” (Cane 2011, 295). Public interest standing is a broader standard, but is still meant to operate as a second best option in the absence of a candidate that satisfies the first, more restrictive approach.

Environmental assessments, on the other hand, are not dealing with a narrow highly restrictive point of law. They are determining whether a particular project is in the public interest. Such determinations are necessarily broad. The role of the public participants in such processes, as we’ve discussed, are numerous. They provide information, local or otherwise, that might not otherwise be had. They impart a level of legitimacy to the process insofar as it includes the concerns from as many citizens as possible. And the public is able to contribute to determinations that technocrats are unable to make, such as whether the level of risk associated with a particular project is acceptable. The nature of such determinations is broad and as such a breadth of representatives is required. Participants are not representing a single argument on a point of law to be determined by the courts. They are collectively representing the diversity of views necessary to make collective decisions in a democratic fashion. The goal of

environmental assessment participation processes is to make sure all potential issues are *included* in the process; the directly affected provision is explicitly designed to *exclude*.

Conclusions

Canada's choice to limit participation to those directly affected creates fundamental problems in the environmental assessment process. Environmental assessment includes a number of people in the process. In more thorough reviews, a panel is struck comprised of those who are deemed to have relevant experience to adjudicate the project at hand. They have no representative relationship with the public. They are designed to be the "rational decision-maker": taking in vast amounts of information, weighing the positives and negatives and coming to some conclusion regarding whether the economic benefits outweigh the environmental impacts. Yet the decision they arrive at is only as good as the information they receive. Following the logic of rational collective decision-making, the broader the input, the better the decision.

The original practice of the environmental assessment was to allow any who desired to comment on a project the opportunity to do so. No perspective was too trivial; no issue denied a voice. It was a broad, unbounded process, despite perhaps being a little too dependent upon the inconsistent attention of the public to achieve that breadth. If anything, the process could have been more intentional about *including* additional perspectives that may not necessarily come forward voluntarily. Instead, in the interest of timeliness and efficiency, the decision has been made to *exclude* the number of people involved in the process, to restrict rather than expand participation (Government of Canada 2012a).

One of the key requirements for democratic decision-making to be legitimate is impartiality (Rosanvallon 2011). Impartiality is necessary if, collectively, we want to legitimately suggest that we are pursuing the common good, our public interest. If we want decision-making to achieve this ideal, especially with regard to public participation processes

used to augment electoral democracy, we need to pay attention to the question of who participates. This question is crucial as it touches on many of the ideals of democracy, such as equality and liberty, even when in practice they are not fully realized (Przeworski 2010). Impartiality is not achieved if those who participate are solely those with the most direct material interests. By restricting participation in the environmental assessment to those who are directly affected, the impartiality of the process is compromised insofar as the information the adjudicators on the panel receive concerns only the most direct material interests in the project. As a result, a significant amount of bias is institutionalized in the environmental assessment process. This undermines the environmental assessment both procedurally as well as substantively: procedurally as the legitimacy of the process is compromised, substantively as its capacity to make determinations concerning the public interest is severely curtailed.

Four representative methods for issue based publics were identified: demographic, discursive, all-affected, and directly affected. While these are not exhaustive, they work to illustrate a key concern regarding the changes to the environmental assessment process. Of the four methods identified, the directly-affected is the most restrictive by far. The three other methods at least seek to be comprehensive in their outlook, using alternative means to achieve breadth of input. To make a determination on the public interest, this breadth of input is critical.

Yet even more troubling is that while the directly-affected provision is already highly restrictive, it can be utilized in even more restrictive means. Looking at the way the Energy Resources Conservation Board has utilized the directly affected principle is disconcerting from a democratic theory perspective. Much effort goes into keeping the scope of participation as narrow as possible. In addition, the differentiation between different effects, despite both being adverse (potential fatality vs. potential detrimental health effects) is problematic as well. This

highlights an important point for this thesis. Different policy areas will require different sets of representation. As noted earlier, environmental problems are pervasive and difficult to contain in a small geographical area due to the interdependence of particular eco-systems. In contrast with, for example, health policy in which one is able to find a relatively clearly defined public.

Affectedness in the all-affected principle has potential to broaden the scope of those who participate in processes like the environmental assessment with a genuine democratic ideal. Such an extension of the public is not without its own issues. Nevertheless it allows the scope of participants to more adequately coincide with the scope of potential impacts. In contrast, affectedness in the directly affected principle relies too heavily on liberal concepts of private property, an issue that is often referred to as “the tragedy of the commons” following Garrett Hardin’s notable essay (1968). If we seek to arrive at determinations concerning the public interest, or the common good, we perhaps need to think differently about the perspectives we include in such participatory mechanisms.

The consequences of these changes to the environmental assessment process also have implications for broader public participation processes. If normative deliberative ideals are assumed both for democracy as well as the policy-making process, then breadth of input is critical. While many studies evaluate public participation processes, their goals are often to increase participation, the assumption being that more is good. When dealing with transboundary issues, like the environment, increasing the quantity of participation within political borders does not necessarily increase the quality of participation. The territorial disconnect between participatory processes and impacts remains. The issues of representation this thesis has raised point to a fruitful point of intersection for transnational governance, democratic theory and public participation literatures.

The changes to the environmental assessment came about because some in the federal government believed that allowances for public participation were being “hijacked” (Oliver 2012). The question should be asked, what would the alternative be? By restricting public participation even further, the inevitable result is that such processes will be deemed even less legitimate than they already are. Rather than “advancing an agenda” there are numerous “public benefits that flow from citizen engagement” (Tollefson 2002, 195). If government decision-making processes further exclude concerned citizens from the process, it seems guaranteed to increase public alienation and reduce the legitimacy of the process. The democratic belief that all who are affected by a decision should have the opportunity to contribute to making that decision remains, in the end, however, it continues to remain unheeded.

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