

EXPANDING THE PARAMETERS OF PARTICIPATORY PUBLIC LAW: A DEMOCRATIC RIGHT TO PUBLIC PARTICIPATION AND THE STATE'S DUTY OF PUBLIC CONSULTATION

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This article examines the potential for an improved and expanded democratic relationship between the state and its legal subjects in public law. In Part I, I synthesize several of the compatible features of liberal, civic republican, and deliberative democratic theories in order to advance a new framework for public law in Canada that grounds a right to public participation, and the state's public consultation duties. The framework illustrates how liberalism, civic republicanism and deliberative democracy possess mutually beneficial effects for public law. This type of democratically-informed common law juridical relationship has not yet been achieved—the topic of Part II—but, in Part III, I employ two typical Canadian public law cases to highlight the nature of current limitations as a springboard to suggest that expanded participation rights are both immanent and possible in Canada. In Part IV, I argue that along with the framework from Part I, jurisprudential pieces are already in place to expand the parameters of participatory public law. Drawing on insights from other jurisdictions, current limitations and anxieties about this expansion can be mitigated or overcome. I then briefly consider two criticisms concerning the effect that more robust public participation requirements may have on courts and governments. Drawing on the theoretical framework presented in Part I, I conclude that an individual right to public participation combined with a general duty of public consultation is an essential legal requirement in modern rights-respecting democracies, such as Canada's, which aspire to be deliberative, fair, and participatory.

Cet article envisage la possibilité d'une relation démocratique plus riche et approfondie en droit public entre l'État et ses sujets juridiques. La première partie synthétise plusieurs éléments compatibles issus des théories du libéralisme, du républicanisme civique et de la démocratie délibérative dans le but de proposer une nouvelle structure pour le droit public canadien. Celle-ci établira un droit à la participation publique et les devoirs de consultation publique de l'État. Cette structure illustre à quel point le libéralisme, le républicanisme civique et la démocratie délibérative ont des effets mutuellement bénéfiques pour le droit public. La deuxième partie confirme que ce type de relation juridique démocratique de common law n'a pas encore été adéquatement développé. La troisième partie analyse deux arrêts en droit public canadien qui sont représentatifs de cette idée pour mettre en lumière la nature des obstacles à cette relation et suggérer que des droits participatifs plus étendus sont à la fois possibles et immanents au Canada. La quatrième partie argumente qu'aux côtés de la structure suggérée par la première partie, les éléments jurisprudentiels nécessaires à l'expansion du droit public participatif sont déjà présents. En s'appuyant sur les enseignements d'autres juridictions, les limites et les craintes liées à cette expansion peuvent être atténuées ou dépassées. L'on considère brièvement deux critiques concernant l'effet que des exigences de participation plus robustes pourraient avoir sur les tribunaux et les gouvernements. S'appuyant sur le cadre théorique présenté dans la première partie, l'article conclut que la combinaison d'un droit de participation individuel et d'un devoir général de consultation publique constitue une exigence juridique essentielle dans les démocraties modernes qui respectent les droits individuels, tel le Canada, et qui aspirent à être délibératives, justes et participatives.

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Introduction

This article examines the potential for an improved and expanded democratic relationship between the state and its legal subjects in public law. In Part I, I synthesize several of the compatible features of liberal, civic republican, and deliberative democratic theories in order to advance a new framework for public law in Canada that grounds a right to public participation and the state's public consultation duties. The framework illustrates how liberalism, civic republicanism, and deliberative democracy possess mutually beneficial effects for public law. This type of democratically-informed common law juridical relationship has not yet been achieved—the topic of Part II—but, in Part III, I employ two typical Canadian public law cases to highlight the nature of current limitations as well as a springboard to suggest that expanded participation rights are both immanent and possible in Canada. In Part IV, I argue that along with the framework from Part I, jurisprudential pieces are already in place to expand the parameters of participatory public law. Drawing on insights from other jurisdictions, current limitations and anxieties about this expansion can be mitigated or overcome. I then briefly consider two criticisms concerning the effect that more robust public participation requirements may have on courts and governments. Drawing on the theoretical framework presented in Part I, I conclude that an individual right to public participation combined with a general duty of public consultation is an essential legal requirement in modern rights-respecting democracies, such as Canada's, which aspire to be deliberative, fair, and participatory.

I. A New Framework for Participatory Public Law

In order to prepare the ground for the discussion concerning the possibilities for improvement in Part II, as well as the analysis of the deficiencies in the cases selected for Part III, I will first set out my conception of participatory public law in a nutshell. This framework draws on three theoretical traditions: liberalism, civic republicanism, and deliberative democracy. While salient differences amongst these theories exist, I will draw on a synthesis of their components that can be considered complementary, mutually supportive, and ultimately providing a harmonious base for a robust understanding of the democratic rights and duties that could inform Canadian public law.¹ In subpart I(a), I will set out the polit-

¹ John S Dryzek, Bonnie Honig & Anne Phillips confirm that since the 2000s, both civic republicanism and deliberative democracy can no longer be seen as total alternatives to liberalism. According to them, this attests to liberalism's resilient ability to "swallow" or "mop up" its erstwhile historical critics or opponents. See John S Dryzek, Bonnie Honig & Anne Phillips, "Introduction" in John S Dryzek, Bonnie Honig & Anne Phillips, eds,

ical tenets that I employ from each tradition. In subpart I(b), the legal entailments of these tenets will be presented.

A. *Political Tenets*

What this subsection aims to illustrate is that significant overlap exists amongst liberal, civic republican, and deliberative democratic theories concerning the relationship between procedural norms and substantive equality in modern states (i.e., states that are commonly labeled representative liberal democracies).² The main takeaway is that the reciprocal relationship takes the following form: the moral import of substantive equality can be used to secure fair procedures for all members of a polity so that they may engage in, or contest, collective decision-making, while fundamental procedural norms, in turn, are the norms that are used to define and effectuate substantive equality in public decision-making.³

The Oxford Handbook of Political Theory (Oxford: Oxford University Press, 2008) 3 at 20–21. See also Simone Chambers, “Deliberative Democratic Theory” [2003] 6 Annual Rev Political Science 307 (describing deliberative democratic theory as “a rights-friendly theory of robust democracy, with some theorists leaning toward the rights side while others lean more toward the democracy side” at 310 [references omitted]).

² For theorists who accept and advance this overlap, see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997); Henry S Richardson, *Democratic Autonomy: Public Reasoning About the Ends of Policy* (Oxford: Oxford University Press, 2002). For a more qualified acceptance of this affinity, see Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007). Bellamy rebrands civic republicanism as a form of democratic liberalism (*ibid* at 156), but unlike Pettit and Richardson, Bellamy argues that judicial review is a form of arbitrary rule because of its lack of popular accountability:

Moreover, [the role of public reason in voting and legislation] also suggests that the method used for making the decision will not solely or even primarily have an epistemic purpose—at least not one that extends to producing the correct or the most justified answer. Its role will be more a matter of legitimacy—of giving everyone a say. As we saw, it is this quality that the process of democratic voting possesses and judicial review lacks (*ibid* at 169).

While I agree with many of Bellamy’s views on how to improve contemporary democratic processes, I disagree with his rejection of judicial review. Instead, I endorse Pettit and Richardson’s accommodation of a liberal-orientated legal constitutionalism as a complement to civic republican political constitutionalism.

³ For a similar argument concerning how constitutions can play a role in contributing to, constructing, and at times frustrating more deliberative forms of democracy, see Ron Levy & Hoi Kong, “Introduction: Fusion and Creation” in Ron Levy et al, eds, *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press, 2018) 1 at 2.

1. Liberalism, the Norm of Substantive Equality, and the Right to Democracy

Modern theories of democracy acknowledge liberalism's significant contribution to the development of the idea of the rule of law and its promotion and protection of fundamental individual rights and basic civil liberties. Liberalism's emphasis on individual rights and civil liberties, however, means that democratic rights appear less central in this philosophical tradition. In Lockean social contract theory, for example, democratic rights are not considered fundamental, while in the Rawlsian tradition they are subsumed within his conception of equal fundamental liberty for all in a well-ordered society committed to particular scheme of distributive justice. This is why I turn to two other traditions—civic republicanism and deliberative democracy—in order to emphasize the basic right to democracy and its commitment to equal participation in deliberation over, and contestation of, public decision-making.

In the framework that I construct here, these three theories inform and supplement each other. For example, democratic equality can be seen to comport with substantive liberal equality—not unlike or incompatible with Rawlsian equality.⁴ The conception of equality in both theories therefore requires the right to participate on equal terms with others in society in the collective establishment of laws that regulate our lives.⁵ As Richard Arneson argues, this liberal-democratic understanding of the importance of substantive equality moves the right to democracy into the very core of liberal equality rights so that “the right to democracy can appear to be the right of rights, the crown jewel of individual rights.”⁶ The equal moral worth of individuals at the heart of liberalism, then, can be seen also to lie at the heart of democratic rule.⁷ This shared commitment to substantive equality forms the starting point of my analysis: liberalism's contemporary ability to recognize the right to democracy as a fundamental, constitutive, and complementary right that assists in the realization of every person's equal moral worth. Liberal democratic institutions—understood

⁴ See e.g. Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Belknap Press of Harvard University Press, 1986), ch 6.

⁵ See David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart, 1997) 279 at 300–01 [Dyzenhaus, “Politics of Deference”] for a perspective on the twentieth-century administrative or welfare state, understood similarly as a democratic rule of law state committed to substantive equality. See also David Dyzenhaus, “Deliberative Constitutionalism Through the Lens of the Administrative State” in Levy et al, *supra* note 3, 44.

⁶ Richard J Arneson, “Justice After Rawls” in Dryzek, Honig & Phillips, *supra* note 1, 45 at 60.

⁷ See Mark E Warren, “Democracy and the State” in Dryzek, Honig & Phillips, *supra* note 1, 382 at 384–85 [Warren, “Democracy”].

here as the political institutions that can incorporate the strengths of liberalism, civic republicanism, and deliberative democracy—must then be seen as a “conceptually necessary constituent of political nondomination” with non-domination as the complementary civic republican understanding of its similar commitment to realizing substantive equality in contemporary liberal democracies.⁸

A contemporary right to democracy, then, can be understood as a right that is compatible with liberalism and can be conceived as a shared commitment to substantive political equality amongst the three theories considered. Substantive political equality can be realized through a variety of modes of participation in the polity.

2. Civic Republicanism, the Norm of Non-Domination, and Participation

Carrying forward the idea from subpart IIa(i) that substantive political equality in a liberal democracy includes the right to democracy as a fundamental, constitutive, and explicit right, I now turn to civic republicanism. I want to suggest here that the basic requirement of substantive political equality as part of a right to democracy distinctly shapes civic republican content in two ways: the necessity of multiple modes of political participation; and the concept of “freedom as non-domination”. I will turn to political participation first, and then focus on what I perceive to be two key entailments of freedom as non-domination.

A society that embraces a civic republican understanding of participation aims to incentivize its members to be democratically active. To do this, it makes an instrumental appeal to a distinct set of virtues that constrain individual self-interest and encourage other-regarding behaviour.⁹ Although the civic republican conception of equality comports with the conventional liberal conception of the formal equality of individuals who are guaranteed basic equality in access to health, education, welfare, safety, and other important goods, it is premised on more equal access to ef-

⁸ Richardson, *supra* note 2 at 48. See also Ian Shapiro, “On Non-Domination” (2012) 62:3 UTLJ 293.

⁹ This article does not consider the strand of republicanism concerned with virtue ethics, excellence in the human character, and human flourishing. Instead, it assumes a minimum level of virtuosity in citizens and officials, and endorses the instrumental value of civic virtues and duties. See Frank Lovett, “Civic Virtue” in *The Encyclopedia of Political Thought* by Michael T Gibbons (Malden, Mass: Wiley, 2015) at 7–9. According to Lovett, both liberals and civic republicans share the view that civic virtue should be understood primarily as an instrumental good and the commitment to political liberty as an opportunity concept whereby “one enjoys freedom to the extent that one is not subject to arbitrary rule or domination. This sort of freedom can be enjoyed only in a well-ordered republic—that is, in a community of citizens governed by a shared system of law in which no one person or group holds arbitrary power over any other” (*ibid* at 9).

fective political influence or power. It moves from a merely formal conception of equality to a robustly substantive one that is dedicated to establishing a more egalitarian and inclusive membership by advancing the republican conception of freedom as non-domination. The substantive political equality underpinning civic republicanism requires each member's participation in collective decision-making, such that this form of equality is more demanding on both the individual and the state than that contemplated in the more conventional liberal-representative model of democracy discussed above. As a consequence, this conception of political equality possesses the potential to place positive duties on the state to provide multiple routes for citizens' effective participation in public decision-making to achieve these goals.¹⁰ Such an outcome would comport with a robust norm of democracy, understood as the right to democracy, discussed above in subpart Ia(i) above.

A defining feature of civic republicanism is its conception of freedom as non-domination. If the right to democracy is informed by the concept of freedom as non-domination—as I argue it should be—then two key entailments emerge: the first is a shared commitment to non-domination amongst all three theories; the second is a participatory dynamic of inclusion.

First, civic republicanism's signature characterization of *freedom as non-domination* distinguishes republican freedom and democracy from classic liberal conceptions. In civic republicanism, freedom is understood as non-domination rather than non-interference, which is the conception characteristic of the classic liberalism of Hobbes and Locke. Non-domination is centrally concerned with the absence of arbitrariness, itself understood as the lack of external domination or the capacity to interfere in people's affairs on an unjustifiable basis. The state and powerful individual actors or socio-economic groups can act arbitrarily towards others. Political freedom is therefore realized when a "well-ordered self-governing republic of equal citizens under the rule of law [exists and] where no one citizen is the master of any other."¹¹ Because of this distinctive understanding of freedom as non-domination, and the corresponding commitment to non-arbitrariness, civic republican democracies will focus on the "institutional conditions which inhibit or prevent people from participat-

¹⁰ Such a conception might also place positive duties on the individual, such as compulsory voting. My argument only considers positive duties on the state to engage in public consultation and to provide opportunities for citizens to participate voluntarily.

¹¹ Frank Lovett, "Republicanism" in *Stanford Encyclopedia of Philosophy* by Edward N Zalta (Updated 4 June 2018), online: <<https://plato.stanford.edu/archives/sum2018/entries/republicanism>>, archived at <https://perma.cc/YUR8-UTQV>.

ing in determining their actions” (i.e. institutional conditions) and attempt to redress these unsatisfactory conditions.¹²

Multiple routes exist for individuals to influence collective decisions in a democracy: voting, running for office, lobbying, joining political organizations, protesting, etc. The forum and associated procedures for individual participation in collective decisions that this article focuses on are the courts. Courts constitute one forum for participation. They are structured by the legal principles of procedural fairness, and exhibit a commitment to equal access to justice, albeit usually one that is not fully substantive—certainly not yet in contemporary Canadian public law, as will be discussed in Part 2 below.

Second, the concept of freedom as non-domination sustains a dynamic of inclusion in accessing participation. This inclusive dynamic can be located within both liberal and civic republican theories because both theories share a commitment to substantive equality as discussed above. Democratic theorist Mark Warren argues that a robust and general norm of democracy should take the following form:

[E]very individual potentially affected by a collective decision should have an equal opportunity to influence the decision proportionally [to] his or her stake in the outcome [such that it results in the] empowered inclusion of those affected in collective decisions and actions.¹³

This is a democratic norm that differs from the classic *one person one vote* form of democratic equality. Indeed, it links up with deliberative democracy’s concerns about *qualitative equality*.¹⁴

Civic republicanism therefore supplements the variety of liberalism which has long been subject to feminist and difference theory critiques that the abstract individual inhabiting the liberal worldview is premised on an idealized vision of Western individuals and their interests (aka “white men”), and does not take into account the barriers to access justice faced by multiple others. Seen from this perspective, freedom as non-domination, combined with a robust norm of democracy as the right to democracy, and a shared commitment to substantive equality, may result in a state that guarantees multiple routes for affected individuals to participate in collective decision-making no matter *who* is affected. Each theory—civic republicanism, liberalism, and deliberative democracy—reciprocally supports this argument. Finally, the polity will be animated

¹² Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990) at 38.

¹³ Warren, “Democracy”, *supra* note 7 at 386 [emphasis omitted]. This is often termed the “all-affected” principle.

¹⁴ See Richardson, *supra* note 2, ch 6 (entitled “Equality in Deliberative Democracy”).

by an inclusive dynamic grounded in equal concern and respect along the lines Warren has suggested. As will be argued below, courts can participate in this participatory dynamic of inclusion and can assist individuals to secure broader substantive equality. Sub-part Ia(iii) therefore examines the role of courts in public law as one institution where individuals attempt to seek redress for conditions and processes that inhibit their equal participation.

3. Deliberation, the Norm of Inclusion, and Collective Decision-Making

The concept of the *res publica* grounds all republican thought—i.e., of things that concern “the public”—where a public is a community of individuals bound together by a conception of justice, common interests, and membership in a community of fate.¹⁵ Underpinning all republican civic duties is an understanding of the *public good* not as the aggregate of individual preferences, but as an entity that transcends, unites, and transforms aggregate preferences into an overriding consideration in public decision-making. Because of this, the republican understanding of democracy differs from the liberal one. Philip Pettit’s variety of civic republicanism, for example, argues that the best form of democracy is one that is *deliberative and responsive*.¹⁶ To become this, a civic republican democracy may require citizens’ prior commitment to shared goals (perhaps through a constitution), but these goals are not necessarily *only* oriented towards individual rights as in liberalism. Rather, as subparts Ia(i) and (ii) established, rights and freedoms assist citizens in their capabilities to exercise self-government individually and collectively.

Self-government requires forums for deliberation and these forums should be designed to be what democratic theorist Mark Warren calls “reflexive”, with reflexive acting as a synonym for “deliberative and responsive”: “[T]hey should favour rules that enable the deliberative generation, revision, and renewal of collective procedures and decisions. Reflexive institutions are those that best induce and organize the creativity, intelligence, and energy of individuals.”¹⁷ While important, my article largely

¹⁵ One can trace this line of thinking back to Aristotle and Cicero. For the modern development, see Maurizio Viroli, *Republicanism* (New York: Hill and Wang, 2002). My argument does not rely on classical or neo-roman republican theories.

¹⁶ Philip Pettit, “Law and Liberty” in Samantha Besson & José Luis Martí, eds, *Legal Republicanism: National and International Perspectives* (New York: Oxford University Press, 2009) 39 at 55–57. See also Samantha Besson & José Luis Martí, “Law and Republicanism: Mapping the Issues” in *ibid.*, 3 at 20–22.

¹⁷ Mark E Warren, “Beyond the Self-Legislation Model of Democracy” (2010) 3:1 *Ethics & Global Politics* 47 at 48 [Warren, “Beyond Self-Legislation”]. See also Thomas A Bryer,

sidesteps the sites of deliberation that much of the deliberative democracy literature focuses on—the legislature, elections and electoral laws, referenda and voting, citizen assemblies and town halls, and so on. What I wish to draw on is the nexus between civic republicanism and deliberative democracy in their concern for the creation of public forums that provide—or have the potential to provide—participation and relatively equal access to deliberation over public matters. As stated above, the public forum I turn to are the courts, the formal institution where a plurality of voices—both dominant and subordinated—can be heard in public law.¹⁸ One of the significant features of our legal system is that it already places a positive obligation on the judicial and the executive branches to provide access to participation in public decision-making, a requirement discussed in subpart Ia(ii) above. These obligations can be found in administrative law’s principles of procedural fairness which, in turn, can be embedded in statutes, and which also provide some of the content for Canada’s constitutional guarantees of due process found in the *Canadian Charter of Rights and Freedoms*.¹⁹

Importantly, courts are also a forum where affected individuals and groups can demand justifications or reasons from the state for its actions and decisions. A polity informed by civic republicanism and deliberative democracy may require that coercive public decisions be justified through a practice of reason-giving in order to prevent unlawful or unjust domination.²⁰ Public reasons are capable of explaining or even justifying authoritative decisions when they track public interests rather than private or sectional interests.²¹ A state is permitted to interfere with individual ac-

“Toward a Relevant Agenda for a Responsive Public Administration” (2007) 17:3 J Public Administration & Research Theory 479.

¹⁸ Following the conception of contemporary democracy offered by Warren, “Beyond Self-Legislation”, *supra* note 17 at 52, a “democratic minimum” will:

[P]roduce multiple polities with many kinds of actors—elected representatives, numerous publics, new institutions such as structured mini-publics, self-appointed representatives and advocates, and very many places open to participation and deliberation. The image of democracy is one of free-floating, overlapping, and plural memberships, within which individuals have the powers to selectively participate, as they choose, to delegate much political work to others, and to trust interdependencies that are supportive and unproblematic.

¹⁹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. See e.g. ss 7, 11.

²⁰ See Richardson, *supra* note 2 at 83–84 (discussing justification).

²¹ See Pettit, *supra* note 2 at 178–79. See also Stuart Hampshire, *Justice is Conflict* (Princeton: Princeton University Press, 2000); Jerry L Mashaw, “Reasoned Administration and Democratic Legitimacy: Reflections on an American Hybrid,” in Levy et al, *supra* note 3, 17 (“taken together, [American] administrative law’s contemporary reason-

tions and choices so long as this interference is not arbitrary. The animating concern is not just with actual arbitrary interference by the state but with the *very possibility* of interference, whether effectively realized or not.²² Citizens can therefore legitimately expect a secure measure of independence from arbitrary rule, guaranteed partly through good institutional design, effective laws, and the provision of public reasons.

Democracy requires that the laws and rules that govern our lives be produced using fair and equitable procedures in a deliberative forum that respects substantive equality and appear in a public and intelligible form. Liberalism also requires institutional design informed by procedural norms. Both implicate the norm or dynamic of inclusion discussed in the previous subpart. Procedural norms are important in and of themselves—as practices of bounded rationality and democratic participation—but also because procedural norms are essential to the pursuit of equality and legitimacy of outcomes. According to Bhikhu Parekh, substantive equality of political participation requires principles that identify who can make what claims and these principles “can only be arrived at by means of a democratic dialogue, which generates them, tests their validity, and gives them legitimacy.”²³ Formerly unequal or excluded groups can make use of these procedures to test the validity and legitimacy of collective decisions and this will have the effect of unsettling accepted arrangements and understandings of what equality requires. Inclusive deliberative practices may result in better decision-making, including better judgments, because public actors may benefit from an *enlarged mentality* as a result of hearing and considering other perspectives.²⁴ When distinctions are drawn between individuals and groups, justificatory reasons can ensure that such a line is not arbitrarily drawn.

ableness demands aspire to construct a system of administrative governance that is well-informed, highly participatory, complexly inter-connected with political and legal monitors and insulated against (although surely not immune from) the seizure of public power for private or partisan advantage” at 18).

²² See Christian Nadeau, “Republicanism” in Gerald Gaus & Fred D’Agostino, eds, *The Routledge Companion to Social and Political Philosophy* (New York: Routledge, 2013) 254 at 261.

²³ Bhikhu Parekh, “Redistribution or Recognition? A Misguided Debate” in Stephen May, Tariq Modood & Judith Squires, eds, *Ethnicity, Nationalism and, Minority Rights* (Cambridge, UK: Cambridge University Press, 2004) 199 at 207.

²⁴ Jennifer Nedelsky adapts and extends this concept from Hannah Arendt’s work on judgment. See Jennifer Nedelsky, “Receptivity and Judgment” (2011) 4:4 *Ethics & Global Politics* 231. See also Amit Ron, “Affected Interests and Their Institutions” (2017) 4:2 *Democratic Theory* 66 for an argument that multiple modes of democratic inclusion are required when individuals are affected by political decision. Ron applies his analysis to the transnational level, whereas I am applying his and Warren’s insights to a pluralist domestic level.

The institution that receives the most scrutiny in the three theoretical traditions is the legislature and the lines it has historically drawn to treat individuals and groups differently. The courts and their form of public or collective decision-making come a close second in liberalism, chiefly due to the work of influential legal theorist Ronald Dworkin. My focus, however, rests on the executive branch and its administrative state, an area that is generally under-examined in the three theories that I employ here. Executive or administrative decision-making is a form of political decision-making not done through elections or enforcing legislative rules, but through governance in administration. Often, the decisions made are highly discretionary and this discretion presents the risk of arbitrariness.²⁵ New strands of democratic theory have recently turned to “the arena of administration, varyingly referred to as collaborative policy-making, governance networks, reflexive law, and empowered autonomy.”²⁶ This is because the democratic state, argues Warren, currently exhibits (and it will increasingly do so) attentiveness to processes of conflict resolution amongst its members aimed at generating deliberative and negotiated solutions that are reflexive and more process-oriented in nature. These processes may take place in traditional state forums like courts, but will also be decentralized into civil society.²⁷

Jerry Mashaw argues that well-designed administrative decision-making may be more respectful of individuals than the institutional alternatives of the legislature or the courts.²⁸ This is partly because of the practice of reason-giving, a practice most valued by deliberative democracy, is a conventional legal requirement:

[D]eliberative democracy and reasoned administration seem to have much in common ... they are approaches that rely on reason rather than on will as the legitimating characteristic of public decisions. Here legitimacy flows from a capacity to give public-regarding reasons that all might accept, even those who disagree about where reasons should lead.²⁹

I agree with Mashaw. But I also hope to show in this article how judicial review of suboptimal administrative decision-making can reinforce the democratic right to participation, substantive equality, and the duty of

²⁵ For the classic analysis of administrative discretionary decision-making, see Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969).

²⁶ Warren, “Democracy”, *supra* note 7 at 394.

²⁷ *Ibid* at 396. See also John Braithwaite, “The Essence of Responsive Regulation” (2011) 44:3 UBC L Rev 475.

²⁸ Mashaw, *supra* note 21 at 27.

²⁹ *Ibid* at 21.

public consultation. In all three institutions, any outcome will be non-ideal and pragmatic. Following the thinking of political theorist Jennifer Nedelsky, it is a shared hope that legal remedies may also play a part in (re)structuring autonomy-enhancing relations with the state and civil society, even as the power disparities within these relations are not immediately eliminated.³⁰

Before moving to the legal entailments of the framework I am developing, I will restate the political components that I have sought to synthesize here. A modern conception of political equality goes beyond classical liberalism to argue for maximal inclusion so that all affected persons can participate in decision-making. Each theory considered here values political equality and understands the necessity of providing multiple processes to participate in decision-making for affected persons. We can understand these demands as part of a right to democracy and its associated “all-affected” principle. The right to democracy clearly places positive obligations on political institutions such as the legislature and the electoral system. This article shifts the focus to the executive branch and the larger administrative state where individuals can access procedures to participate in the sites of decision-making located there. Affected persons can also access courts to contest these decisions when they believe these executive or administrative decisions have been made unfairly or manifest other indicia of arbitrariness and domination. In each domain, deliberation demands reason-giving and justification for state procedures and decisions to be considered legitimate and non-arbitrary.

B. Legal Entailments

This subpart again considers the significant overlaps among the three theories in terms of the legal entailments of the political tenets outlined above. Here I consider three entailments: (1) universal commitment to the rule of law principle and its procedural norms; (2) a shared understanding of the anti-rule-of-law practices of arbitrariness; and (3) a common desire to make room for contributory *and contestatory* modes of public participation.

³⁰ Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011) at 152–56. In this chapter, “Reconceiving Autonomy”, Nedelsky looks to insights from administrative law and the potential of due process in American and Canadian public law to recognize and support the concept of relational autonomy.

1. Sharing a Commitment to the Rule of Law Principle and its Procedural Norms

For the purposes of this article, I begin with a minimalist liberal conception of the rule of law³¹ in which this principle offers the following basic guarantees to legal subjects: that all persons will be considered formally equal under the rule of law, including those holding public power; that public standards will guide the creation, enactment, revision, and enforcement of all laws; that the government and the legal system will treat individuals fairly; and, that a legal system will exist that enables access to legal processes for all persons in order to resolve complaints (i.e., what is more colloquially known as access to justice).³² In Canada, these guarantees are embedded in our constitution, our institutions of government, and our political culture. These features and guarantees comport with the Supreme Court of Canada's definition of the rule of law: (1) it is supreme over private individuals as well as over government officials, who are required to exercise their authority non-arbitrarily and according to law; (2) it requires the creation and maintenance of a positive order of laws; (3) it requires the relationship between the state and the individual to be regulated by law; and (4) it is linked to the principles of judicial independence and access to justice.³³ Any modern democracy, then, recognizes that democratic rule requires the rule of law.

In deeper normative terms, the Supreme Court of Canada described the rule of law as a “highly textured expression ... conveying ... a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.”³⁴ As an expression of a commitment to peace, or-

³¹ I am following Henry Richardson's lead to sidestep the application of a more robust understanding of the rule of law which carries “all of the commitments of legitimate legality,” in order to focus on some of the connections between the three traditions which connect the rule of law with the burden of legitimation that it places on the state. Richardson, *supra* note 2 at 216–17.

³² For a larger discussion of the concept of the rule of law, see Mary Liston, “The Rule of Law” in *The Encyclopedia of Political Science* by George Thomas Kurian (Washington, DC: CQ Press, 2011) 1494; Mary Liston, “The Rule of Law Through the Looking Glass” (2009) 21:1 L & Lit 42; Mary Liston, “Governments in Miniature: The Rule of Law in the Administrative State” in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery, 2013) 39.

³³ See the following cases for these propositions: *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689; *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721 at 747–72, 19 DLR (4th) 1 [*Manitoba Language Rights*]; *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 58, [2005] 2 SCR 473; *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 123, 150 DLR (4th) 577; *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59 at paras 38–39, [2014] 3 SCR 31.

³⁴ *Manitoba Language Rights*, *supra* note 33 at 750.

der, and good government over violence, anarchy, and arbitrary power, the rule of law, to the Court's mind, represented a "philosophical view of society" that "in the Western tradition is linked with basic democratic notions."³⁵ In Canada, it is also concretized in our state through the legal structures provided by constitutional monarchy and representative Westminster democracy. Lastly, the rule of law's interrelation with democracy also informs our written constitution and our common law, especially public and administrative law.

As mentioned earlier, contemporary theories of democracy acknowledge liberalism's significant contribution to the development of the idea of the rule of law and its promotion and protection of individual rights and basic civil liberties. This is why many civic republicans and deliberative democrats agree that a legal constitution serves two important functions: it establishes the preconditions for democratic self-rule; and it constrains public and other kinds of power so that powers are exercised non-arbitrarily.³⁶ All three theories, then, share a strong commitment to the principle of the rule of law and its associated procedural norms.³⁷

2. Aspiring to Non-Arbitrariness in Public Decision-Making

Both liberalism and civic republicanism explicitly consider arbitrariness to be the chief anti-rule of law value.³⁸ Procedural versions of republican legal theory overlap with legal liberalism in the formal requirements of a legal system (such as public processes for the enactment of valid general rules) as well as in the very concept of procedural justice. The scope of freedom may be larger under liberalism due to more absolute guarantees of rights as non-interference (e.g. such as those found in the *Canadian Charter of Rights and Freedoms*). The robustness of freedom under republicanism might be thicker because of its attentiveness to multiple and overlapping sources of domination. This consideration is crucial in how we constrain power, especially when public officials exercise considerable amounts of delegated discretion that may result in arbitrary decisions (see subpart Ia(iii) above).

³⁵ *Ibid* at para 749.

³⁶ See Bellamy, *supra* note 2 at 155.

³⁷ See e.g. Jürgen Habermas's explanation of the connections among deliberation, discourse theory and the rule of law: Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge, Mass: MIT Press, 1996), ch 4.3. See also Ron Levy & Graeme Orr, *The Law of Deliberative Democracy* (Abingdon: Routledge, 2017), ch 3.

³⁸ See Besson & Martí, "Law and Republicanism" in Besson & Martí, *supra* note 16 at 13–14.

Arbitrariness, on this account, does not only mean the unpredictable and random effects of power, but it fundamentally concerns an unconstrained (and often inherently discretionary) act or decision located in a structural relationship between the person(s) affected and the decision-maker(s).³⁹ An arbitrary act or decision is also not constrained substantively by requiring the state to track the interests and welfare of individuals. Arbitrariness is a form of power that is not constrained procedurally by commonly known and accessible rules, processes, or standards. Two key implications for public decision-makers in the state are: (1) the requirement that state actions and decision be justified interferences and therefore require reason-giving as a conventional practice;⁴⁰ and (2) (for some theorists) a recommendation that the state start with incentivized self-regulation or decentralized regulation so that the state reserves for as long as possible the imposition of the most extreme sanctions (i.e., criminal).⁴¹

The potentially-strong association between the rule of law and civic republican-style democracy takes two now-familiar forms: (1) limitations on guaranteed rights validated by state justification; and (2) proportionate balancing of rights and competing goods or other rights. We must, however, also consider a broader range of legal mechanisms that not only act as checks against self-interested legislation or centralized arbitrary power, but also function to defend and justify appropriate state actions in the service of the common or public good. Added to the mix, then, are the kinds of constraints and justifications located in administrative law's supervision of discretionary decision-making in the executive branch.⁴² This article hopes to illustrate that administrative decision-making can use appropriately-deliberative procedures and that these (usually discretion-

³⁹ For this understanding of the relationship between arbitrariness and discretionary decision-making, see Geneviève Cartier, "Administrative Discretion: Between Exercising Power and Conducting Dialogue" in Flood & Sossin, *supra* note 32, 381.

⁴⁰ On the connections between reason-giving or justification and deliberative democratic theory, see Chambers, *supra* note 1 ("deliberative democratic theory moves the heart of democracy away from the vote and into the public sphere and practices of accountability and justification" at 311).

⁴¹ John Braithwaite and Ian Ayres' regulatory compliance pyramid is one famous example. Their model relies on public interest groups' participation in regulatory processes in order to counterbalance the power of regulated entities as well as in contesting resulting regulatory decisions. See Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York, Oxford University Press, 1992), ch 2.

⁴² For a similar and supportive argument, see Geneviève Cartier, "Deliberative Ideals and Constitutionalism in the Administrative State" in Levy et al, *supra* note 3, 57. In this chapter, Cartier argues—and I concur—that democratic deliberative theory and her conception of discretion as dialogue in the administrative state are "different manifestations of the same ideals" (*ibid* at 63).

ary) decisions can in fact advance a sophisticated understanding of the public interest or public goods that can draw on the framework I have constructed using liberal, civic republican, and deliberative democratic theories.

3. Attending to the Separation of Powers and the Role of the Courts

Although liberalism and civic republicanism each endorse the doctrine of the separation of powers, the role of the courts under each theory differs. Civic republicanism, for the most part, tends to privilege the legislative branch. It asserts the primacy of democratic authority and its substantive content with important implications for the role of judges and adjudication (despite the necessity of a bill of rights).⁴³ Legislation would constitute the primary source of constraint on public power, followed by regulations, and other forms of non-judicial guidance. Liberalism, conversely, looks to strong courts for constraints and protections as well as judicial recommendations concerning how to channel discretion (executive or legislative) towards proper purposes. Each will attend differently to the well-known risks that majoritarianism or democratic authoritarianism might pose for the polity. Though each tradition weighs the value of the legislative and judicial branches differently, they are not incompatible, and deliberative democracy provides one bridge. Processes of deliberative, practical reasoning can occur in different sites and take different forms. Henry Richardson's variety of civic republicanism, for example, looks at the form of democratic reasoning that could take place in a modern administrative state like Canada's. For Richardson, properly structured deliberative procedures can counteract the instrumental techniques of policy analysis that take place in the executive branch and its administrative arm.⁴⁴

Both Philip Pettit's and Henry Richardson's varieties of civic republicanism may be influenced by the historical association of the rule of law with the common law in Anglo-American political thought (unlike, perhaps, republican thought such as Montesquieu's whose context is a civilian legal system) and that may be why they both voice a strong role for courts not just in enforcing rights against the state. My framework takes seriously their view that rights-based judicial review—whether through a written constitution or the unwritten common law constitution—

⁴³ See Bellamy, *supra* note 2 and the text therein. Not all civil republicans follow Bellamy. See e.g. Jeremy Waldron who does support constrained judicial review, but not judicial supremacy. Jeremy Waldron, "Judicial Review and Judicial Supremacy" (2014) NYU School of Law Public Law Research Paper No 14-57, online: SSRN <<https://ssrn.com/abstract=2510550>>.

⁴⁴ See Richardson, *supra* note 2 at 222–30.

combined with a variety of collaborative and contestatory political mechanisms, provides the best means to meet the shared commitment to non-arbitrary government action and decision-making.

4. Contributory and Contestatory Participatory Procedures: Reinforcing Roles

In the second half of the last century, democratic theory shifted its emphasis from concerns about the nature of representation to concerns about the quality of participation. Rather than centring democratic efforts on mechanisms for better representation—such as electoral reform and political parties—recent thought has turned its attention to the role of citizens as individuals and/or as part of representative groups in government decision-making.⁴⁵ The institutions of government most associated with this type of agenda are legislatures. For legislatures, participation occurs prior to government decision-making since elections act as a means to assess the viability of potential policy creation and seek voter feedback. Other deliberative fora, such as citizens' assemblies, take place while policy matters are under current consideration but can be extended to include popular participation through town halls, referenda, and the like.

When allied with procedural fairness, well-functioning civic republican government requires legally-informed processes for individuals' participation. In its ideal form, civic republican democratic theory argues for a broad and deep scope of participation. Recall from subpart I(a) that citizens not only have a duty to exercise their republican freedom, they have a right to have processes created by the state so that they can realize both the duty and the set of virtues that animate this duty. The state, then, has a positive duty to provide mechanisms for citizen participation in the process of government and these mechanisms must be non-arbitrary, fair, reasonable, and rights-respecting.

This article focuses on citizen involvement in the other two branches: the judiciary and the administrative state. The modes of participation associated with these two branches are not "popular" in the sense of, say, mass voting. Instead, participation takes two main forms: contributory and contestatory, each of which contains an important temporal dimension.⁴⁶ Because my focus is on citizens' right to participate in administrative decision-making and the state's duty of public consultation, I draw on

⁴⁵ See several of the contributions in Levy et al, *supra* note 3 which examine this turn to participatory, rather than merely representative, democracy in theory and as a matter of constitutional design, interpretation, and practices.

⁴⁶ See Peter Cane, "Participation and Constitutionalism" (2010) 38:3 Fed L Rev 319 at 320.

liberal and civic republic democratic theories to help explain the potentially mutually reinforcing roles of contributory and contestatory participation in the two cases examples examined in Part 3.

Contributory participation occurs when individuals or groups advance arguments in front of a decision-maker *before* a decision is made in the hope of shaping the ultimate outcome. The mechanisms associated with this kind of participation—public hearings, for example—can be adversarial, deliberative, or facilitative. Context and institutional design can determine the form and tone. The decision-maker(s) often acts as both participant in, and facilitator of, the process. The participant(s) can participate in a variety of ways ranging from a minimal paper submission to active presence. Here contributory participation occurs in procedures located in the administrative state and the executive branch of government. This is where a general duty of consultation would be located.

Contestatory participation occurs *after* an administrative decision has been made and usually involves challenging the decision in an administrative tribunal, a court of law, and/or to an ombudsperson or other similar watchdog. The form or tone of the challenge can be more or less adversarial, depending on whether the body is inquisitorial or non-adversarial in design and purpose. Again, depending on the body, the role of the citizen can vary from a “paper hearing” to active involvement in the actual case. The expanded right to public participation would inform the whole process from the initial contributory to final contestatory phases. When seen from this larger perspective, contributory and contestatory modes of participation can be mutually reinforcing in securing democratic freedom and non-arbitrary decision-making in the state.

In sum, civic republicanism seeks to maximize freedom as non-domination by decreasing the intensity and frequency of domination as well as by increasing the range of un-dominated choice through a variety of ways to participate, including consultation. This may involve a more intrusive role for the state (when viewed from a liberal perspective).⁴⁷ Interventions can take the form of more constraints on, or guidance concerning, decisions wherever discretion is exercised in the state. Not all forms of legal regulation will constitute an arbitrary imposition, even if we know that delegations of discretion invite the risk of arbitrary decision-making.

⁴⁷ Each theory will also entail a different conception of the public/private divide thereby facilitating or disabling the reach of the rule of law into the household to prevent familial domination, for example, or to control private forms of power exercised by corporations, associations, and communities. At best, the state would, through enlightened legislation, actively create the conditions—so far as it is known how to—for human flourishing and the development of basic human capabilities. Liberalism, even Rawlsian liberalism, resists disrupting this divide too deeply in order to achieve these goals.

The use of proper procedures, constrained and guided delegations of discretion, rights enforcement, transparency, and provision of reasons for decisions that limit or balance rights will all go a great distance to provide trust and confidence in the legitimacy and non-arbitrariness of the outcomes. Where and when decision-making fails, however, courts provide a necessary space to demand democratic responsiveness and non-arbitrary outcomes through contestatory modes of participation.

II. The Current State of Participatory Public Law

Modern public law in Anglo-American common law jurisdictions clearly provides multiple grounds to challenge arbitrary exercises of power and remedies to mitigate the action and its effects. But, as Andrew Edgar states, individual rights and interests clearly attract more robust protection in law (usually through contestatory processes), than decisions and procedures that affect the general public.⁴⁸ He calls this the “public exception” in relation to legislative actions (e.g. regulations, bylaws, and policies) and decisions (e.g. licensing and permit matters).⁴⁹ As a result, common law courts normally supervise public consultation requirements that are imposed as a specific duty by a statute, rather than as a general duty through the common law. Although the standard reason given for this legal exception is that these types of actions and decisions are part of a legislative or legislative-type function and therefore court supervision violates the separation of powers, in truth it is the executive that would be most affected by a radical change in the jurisprudence. Courts in Australia and Canada have resisted imposing public participation requirements on administrators as part of common law procedural fairness, absent statutory indications that welcome gap-filling. Instead, these public participation requirements and processes, contributory in nature, remain under the purview of the executive and legislative branches.

Geneviève Cartier provides a thorough and compelling examination of the Canadian landscape,⁵⁰ contrasting the difference between the extension of procedural fairness to decisions affecting individuals⁵¹ and the contemporaneous resistance to extending procedural obligations involving so-

⁴⁸ Andrew Edgar, “Procedural Fairness for Decisions Affecting the Public Generally: A Radical Step towards Public Consultation?” (2014) 33:1 U Tasm L Rev 56 [Edgar, “Procedural Fairness”].

⁴⁹ *Ibid* at 57.

⁵⁰ Geneviève Cartier, “Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?” (2003) 53:3 UTLJ 217 [Cartier, “Fairness in Legislative Functions”].

⁵¹ See *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 SCR 311, 88 DLR (3d) 671.

called legislative functions.⁵² Cartier's interpretation of subsequent case law implicating the legislative function indicates that the first-stage "threshold" determination about what matter (i.e., legislative, discretionary, or quasi-judicial) is suitable for judicial review no longer has relevance because the Supreme Court has admitted that such categories do not exist in rigid silos from each other.⁵³

In Canadian administrative law, courts are also guided by the unwritten principle of deference—termed "deference as respect"⁵⁴ in the jurisprudence—and so must defer to procedures and decisions that are fair, reasonable, and proportionate. Courts—even in cases involving public consultation—can be appropriately tasked with reviewing procedures and ensuring justifications for choices, without descending into the "micro-managing" of government. Cartier argues that public law has already acknowledged the legitimacy of non-judicial models of procedure that are appropriate to the statutory, institutional and social context that structure the decision-maker's jurisdiction. To be properly attentive, the decision maker should be informed about the specific values attached to the exercise of discretion as well as the general values that uphold the democratic nature of every grant of discretion, including discretionary control over procedures.⁵⁵

Both Edgar and Cartier point to specific types of responsiveness that currently inform public consultation.⁵⁶ Such content will vary from the

⁵² See *Canada (AG) v Inuit Tapirisat of Canada*, [1980] 2 SCR 735, 115 DLR 3(d) 1. Cartier's definition of legislative functions—a term not well or universally defined in Canadian law—refers to general and/or policy-based executive decisions, which are directed at a class (like the public), not an individual. See Cartier, "Fairness in Legislative Functions", *supra* note 50 at 220–21.

⁵³ *Ibid* at 233–34, 253–55.

⁵⁴ David Dyzenhaus coined this phrase, which is cited with approval in the landmark case *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 65, 174 DLR (4th) 193 [*Baker*]. See Dyzenhaus, "Politics of Deference", *supra* note 5 at 286.

⁵⁵ See Cartier, "Fairness in Legislative Functions", *supra* note 50 at 259. This article cannot, and does not intend to, summarize the case law on "deference as respect" and the current complexity of this aspect of administrative law. For further analysis, see many of the contributions in the blogging symposium organized by Paul Daly of *Administrative Law Matters* and Léonid Sirota of *Double Aspect* on "The *Dunsmuir* Decade", online: <www.administrativelawmatters.com/blog/2018/01/11/the-dunsmuir-decade10-ans-de-dunsmuir>, archived at <https://perma.cc/S2K6-QWRT>. These contributions will be published in a special 2018 edition of the *Canadian Journal of Administrative Law and Practice*.

⁵⁶ See Andrew Edgar, "Judicial Review of Public Consultation Processes: A Safeguard Against Tokenism?" (2013) 24:3 Public L Rev 209 at 220–24; Cartier, "Fairness in Legislative Functions", *supra* note 50 at 259–61.

maximum to the minimum modes of participation depending on the context so that the current legislative exception will not completely disappear but will be subsumed into a consideration of the appropriate content and scope of participation. Certainly for Canadian Aboriginal administrative law, consultation potentially contemplates more “dialogic” components to procedures affecting Aboriginal and public interests.⁵⁷ Aboriginal administrative law already enables judicial supervision of “high policy” decisions (i.e., decision-making at the earliest stages).⁵⁸ And, it does this without statutory authority—it is a consultation obligation first developed through administrative common law.

Edgar cautions that judicial review of non-statutory, policy-based decision-making in the early stages would constitute too radical a step for Australian public law; it might not, this paper argues—because of coterminous developments in Aboriginal administrative law—be too radical a step for Canadian courts.⁵⁹ Part 4 will discuss this and other possibilities further.

III. Two Commonplace, Common Law Examples

As presented in Part II, the right to public participation and concomitant duties of consultation in common law jurisdictions can operate in four main ways: (1) through individual rights to administrative fairness; (2) through statutory provisions permitting affected or interested parties (both individual and corporate) to participate in discrete regulatory regimes (e.g. environmental hearings); (3) through the common law doctrine of public interest standing on judicial review; and, (4) through the statutory discretion of administrative actors to engage in consultation and define the parameters of permitted participation.

⁵⁷ In Canada, Aboriginal administrative law generally pertains to the application of administrative law to Indigenous decision-makers, rather than the law created by Indigenous communities.

⁵⁸ See *Haida Nation v BC (Minister of Forests)*, 2004 SCC 73 at paras 35, 46–47, [2004] 3 SCR 511. See also the following statement by Binnie J in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 44, [2010] 2 SCR 650: “Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to ‘strategic, higher level decisions’ that may have an impact on Aboriginal claims and rights.” These cases state that Crown contemplation of an action that affects Aboriginal interests or rights is not confined to statutory powers and that only potential impact is required, not actual. This means that the harm does not need to be immediate and strategic, higher-level executive decisions can be reviewed.

⁵⁹ Edgar, “Procedural Fairness” *supra* note 48 at 71–72. Edgar points to cases involving large-scale infrastructure planning such as airports, high-speed rail, and municipal planning.

In Canada, two areas of law have pushed these four routes well beyond their traditional confines: environmental law and Aboriginal law. Yet, no standalone common law or constitutional right to public participation currently exists and its development in Canada is further hampered by a state with unacceptable, undemocratic features. Two Canadian provincial cases illustrate the main modes of public participation in government decision-making: statutory procedural requirements and common law procedural fairness. Both cases involve a relatively less-complicated process, at least compared to federal environmental and Aboriginal consultation cases found at the municipal level of government decision-making.⁶⁰ These British Columbia (BC) cases are *VAPOR v. British Columbia (Minister of the Environment)*⁶¹ and *Community Association of New Yaletown v. Vancouver (City)*⁶² (*CANY*). The first case illustrates the current limits in this area of the common law in Canada while the second offers a vision of the legitimate expansion of the role of the courts in furthering democratic participation.

A. “VAPORizing” the Right to Adequate Public Consultation and Participation

“Fairness requires this court not to get lost in minutiae...”⁶³

In *VAPOR*, the Vancouver Airport Fuel Facilities Corporation (VAFFC or “the proponent”) proposed a project that involved transporting jet fuel by tanker up the south arm of the Fraser River, and then by pipeline through the City of Richmond to Vancouver International Airport. *VAPOR* (which stands for “A Society for Vancouver Airport Fuel Project Opposition for Richmond”) opposed the project. *VAPOR*’s diverse membership consisted of affected residents in Richmond, some of whom had educational backgrounds that enabled them to assess the information that was provided for the project’s environmental assessment and/or had ties to environmental organizations. But, most of the members did not have the time or expertise to engage robustly in the process and, as a result, left the bulk of the advocacy and participation to particular individu-

⁶⁰ I have chosen municipal governments to complement Hoi Kong’s article which uses a deliberative lens to examine administrative law concerns in the municipal zoning bylaw context in Quebec. See Hoi Kong, “The Deliberative City” (2010) 28:2 Windsor YB Access Just 411.

⁶¹ 2015 BCSC 1086, 95 Admin LR (5th) 300 [*VAPOR*].

⁶² *Community Association of New Yaletown v Vancouver (City)*, 2015 BCSC 117, 70 BCLR (5th) 87 [*CANY SC*] is the first-level decision while *Community Association of New Yaletown v Vancouver (City)*, 2015 BCCA 227, 70 BCLR (5th) 140 [*CANY CA*] is the appellate-level judgment.

⁶³ *VAPOR*, *supra* note 61 at para 87.

als. As a result, the organization itself never submitted collective feedback during the process. As in all of these kinds of cases—and this case is therefore merely exemplary of a host of similar cases rather than being a “landmark” case (though it and the *CANY* case below attracted significant attention in BC)—the polycentric nature of the consultation process has significant implications for public law.⁶⁴

VAFFC consulted not only with the public, but also with other governments, local First Nations, and businesses. The process contained many flaws, but none of these procedural defects processes, or resource constraints (i.e., time, expertise, financial resources), appear atypical and are indeed standard in most participatory regulatory processes.⁶⁵ Despite the flawed process, the petitioners did not question the good faith efforts of the VAFFC to discharge its statutorily imposed public consultation duties. Instead, VAPOR took issue with the discretion exercised by the Environmental Assessment Office’s (EAO) executive director (Executive Director). The heart of this case therefore concerns the nature of the statutory discretion delegated to the EAO to craft its own procedures for participation and to determine the scope of its consultation obligations.

At judicial review, VAPOR sought a declaration that the procedures used for the environmental assessment of the Vancouver Airport Fuel Delivery Project (the Project) failed to satisfy the statutory standards contained in the *Environmental Assessment Act (EAA)*⁶⁶ and the *Public Consultation Policy Regulation (PCP Regulation)*.⁶⁷ VAPOR also sought a dec-

⁶⁴ For a similar analysis in the context of environmental law in Alberta, see Shaun Fluker, “The Right to Public Participation in Resources and Environmental Decision-Making in Alberta” (2015) 52:3 *Alta L Rev* 567. Fluker’s article concludes that the current judicial approach to statutory interpretation in the Alberta courts unjustifiably narrows the scope of public participation such that, despite statutory signals to the contrary, there is no legal right to public participation in resource and environmental decision-making in Alberta and decision-makers are under no legal obligation to hear individuals or groups acting in the public interest.

⁶⁵ See *VAPOR*, *supra* note 61 at para 57. Complaints included: the public website was un-navigable; key informational documents were either not made available to the public on the website or were not available for public comment; time requirements were not adhered to (including key documents not being publicly posted until sometime after they were required by the *PCP Regulation* to be made available on the public website); newspaper notices for the public comment period in local newspapers were printed only in English, not Chinese (Richmond has a large Chinese-Canadian population); notices were general and failed to state exactly where the fuel terminal and pipeline would be located; VAFFC and EAO responses to public comments were “ cursory, empty” and “stock” consultation periods were too short given the complexity of the project; and, the assessment report did not reflect public contribution because it lacked detail.

⁶⁶ *Environmental Assessment Act*, SBC 2002, c 43 [EEA].

⁶⁷ BC Reg 373/2002 [*PCP Regulation*].

laration that the project failed to comply with natural justice and procedural fairness and therefore the environmental assessment certificate should be quashed. VAPOR argued that cumulative deficiencies at all parts of the process should support the conclusion that the executive director's assessment of the adequacy of the consultation was unreasonable. VAPOR bore the legal burden of persuading the court that the executive director's decision was unreasonable, including on any statutory interpretation matters such as the definition of "adequacy", which is not defined in the *PCP Regulation*.⁶⁸ VAPOR also bore the burden of showing that the decision was unfair on a common law procedural fairness standard in order to access a potential remedy on that basis.

The nature of this administrative discretion—which the next subpart confirms is a chief concern for participatory public law—is important. The *EAA* delegates discretionary powers to the Executive Director (which s/he can subdelegate to other subordinate actors) that include the power to decide which persons and organizations will be consulted, how they will be given notice, what types of information can be disclosed and accessed, and the opportunities to be consulted.⁶⁹ The Executive Director also has the discretionary power to determine which persons and organizations will provide comments during the assessment process—such as governments, First Nations, government agencies, businesses, and the public.⁷⁰ The *PCP Regulation* further sets out general policies guiding what "adequate" public consultation looks like and which the Executive Director of the EAO must take into account to ensure that these policies are reflected in the assessment.⁷¹ With this guidance, the executive director issues a scoping order that determines the procedures and methods that the statutorily-required public consultation and participation will take in the two defined stages: the pre-application stage (involving a typical notice and

⁶⁸ Discretionary decisions like those made by the executive director are evaluated using a reasonableness standard in Canadian administrative law because they are usually a mix of fact and law, rather than being a pure question of law attracting a correctness standard. Determination of the adequacy of public consultation processes is generally considered by reviewing courts to be part of the decision-maker's expertise under their home statute, particularly if (as here) the statute delegates discretionary powers to create procedures. A reviewing court will consider the executive director's reasons as evidence that this decision-maker took into account all relevant factors (including relevant rights), did not consider irrelevant factors, and justified the outcome with adequate reasons. See *Baker*, *supra* note 54.

⁶⁹ *EAA*, *supra* note 66, s 11.

⁷⁰ *Ibid.*, s 11(2)(f).

⁷¹ *PCP Regulation*, *supra* note 67, ss 3, 4.

comment period) and the application review stage.⁷² The reviewing court characterized the scoping order as *the* “dynamic” for public consultation.⁷³

To complicate matters further, discretionary decisions concerning the scope of public consultation and participation usually involve a balancing exercise where the decision-maker identifies and considers

all potential environmental consequences of a proposed undertaking using decision making that guarantees the adequacy of the assessment process and reconciles, as much as possible, the proponent’s development desires with environmental protection and preservation ... [and] a range of effects including environmental, economic, social, health and heritage.⁷⁴

Public participatory rights are part of that mix and, if codified as in the *PCP Regulations*, should be given great weight as a “core principle” in environmental assessments.⁷⁵ The purposes and objectives of the enabling legislation are also fundamental: because

environmental assessment counteracts the ability of collective economic and social forces to set their own environmental agenda. Through a neutral assessment process, those affected are given a reasonable opportunity to be engaged and to have their interests given transparent and thorough consideration.⁷⁶

That said, the assessment process is proponent-driven “with responsibility for the design and assembly of public participation placed upon a proponent with the policy confines of the [*PCP Regulation*] as reasonably interpreted by the executive director.”⁷⁷ It therefore matters greatly whether legislative intent strongly or weakly indicates whether deliberative consultation is a top statutory objective or not.

For example, in contrast to level or scope of consultation required by BC’s *Local Government Act (LGA)*,⁷⁸ the *PCP Regulation* does not demand a public hearing. The procedural baselines that the public receives are minimal and are limited to notice, access to information, and formal public comment.⁷⁹ “Comment” is not synonymous with “hearing” and is “limited to the making of critical remarks and expressions of opinions on the proposed project, reflective of the nature of the administrative decision be-

⁷² *EAA*, *supra* note 66, ss 11(1), 14–16.

⁷³ See *VAPOR*, *supra* note 61 at paras 52.

⁷⁴ *Ibid* at para 63.

⁷⁵ *Ibid*.

⁷⁶ *Ibid* at para 64.

⁷⁷ *Ibid* at para 65.

⁷⁸ RSBC 2015, c 1 s464.

⁷⁹ *PCP Regulation*, *supra* note 67, ss 4–7.

ing made.”⁸⁰ The process contemplated by the *PCP Regulation*, according to the British Columbia Supreme Court (BCSC), is really about information providing and assessment. This means that the process will be considered more “administrative” than “adjudicative” on the administrative law spectrum with the potential outcome that fewer procedural obligations will be implied through statutory interpretation or supplemented through the common law.

Contrary to an ideal vision of democratic deliberation, public consultation and participation in these decision-making contexts does not take the form of “a back and forth or ongoing dialogue” or negotiation.⁸¹ Moreover, public comments cannot act as a “veto” on a project:

[P]ublic comment cannot be made with the objective of compelling a proponent to modify the project to be acceptable to all. Rather, the object of the exercise is to gather as much information as possible relating to the project as proposed by the proponent, to assess and report on the information and then refer it to the ministers for decision.⁸²

Again, greater democratic content for the procedures is pushed aside based on an interpretation of legislative intent and judicial reticence to impose higher standards and better-quality procedures.

Applying the administrative law reasonableness standard, the reviewing court upheld the Executive Director’s assessment of the adequacy of the process, rejecting each of the complaints in turn. According to the court, the *EEA* permitted the Executive Director to establish the scope and content of the public’s opportunity to be heard—a determination to which the courts must defer, unless compelling evidence shows otherwise. The court rejected the proposition that adequacy and fairness meant that each public comment receive a meaningful response; rather, the question was whether or not “the substance of the issue raised was adequately and substantively dealt with.”⁸³ The court agreed that notice could have been better, but the notice did not mislead and in fact drew significant public input. According to the court, a difficult website is not unreasonable at all as people need only to learn how to use the Internet better to access it. The timeline for posting relevant materials was only a mere guideline and so not legally enforceable. Even the delays (one lasted as long as three years due to a website “error”) did not convey the necessary “cavalier” attitude on the part of the executive director to invite judicial scrutiny and

⁸⁰ *VAPOR*, *supra* note 61 at para 67.

⁸¹ *Ibid* at paras 65, 67.

⁸² *Ibid* at para 70.

⁸³ *Ibid*.

intervention.⁸⁴ Finally, “the public” could not be considered analogous to the First Nations or other governments in the consultation program. These other actors were specifically tasked by the executive director with providing advice and they therefore legitimately benefitted (as a result of his scoping decision) from individualized consultation. The court concluded that the public should not have the same status or be consulted as robustly as these other entities.⁸⁵

With the statutory analysis completed, the BCSC briefly considered common law procedural fairness. Applying the analytic framework that Canadian courts use to determine the level of procedural fairness owed,⁸⁶ the court concluded that: (1) the assessment process delegates broad powers to the executive director to determine both the scope and the type of required procedures; (2) this was a complex and polycentric task engaging expertise; (3) the decision and process implicated broad issues of public policy that involved “weighing of all public and private interests”; (4) the scoping order established under statute and regulations met all of the public’s legitimate expectations about fairness and no more could be expected; and, (5) deferential respect is owed to agency procedures.⁸⁷

Tellingly, the respondents had argued that the residents of Richmond had no or little standing because the process affected them in only a limited way. The court agreed that because

none of the petitioners’ liberty, ability to practice their profession, or business interests is directly affected by the project ... other *Baker* factors weigh heavier and the importance of the ultimate decision to these petitioners is a minor consideration.⁸⁸

The “public interest” was too vague to attract much countervailing weight unless it could be attached to an identifiable value or benefit that the residents possessed. In this analysis, one can see the continuing impact of the legislative exception discussed above in Part 2.

Ultimately the court resisted, as the epigraph to this subpart confirms, getting involved in what I consider the “minutiae” of reviewing procedures, even where clear deficiencies exist. It also resisted getting involved in the academic debates about which elements of public participation are necessary for *meaningful* public participation, concluding:

⁸⁴ *Ibid* at para 74.

⁸⁵ *Ibid* at para 76.

⁸⁶ This is called the *Baker* test or framework, established in *Baker*, *supra* note 54 at paras 21–28.

⁸⁷ *VAPOR*, *supra* note 61 at para 83.

⁸⁸ *Ibid* at para 84.

All of these considerations are outside the application of the law to the circumstances of this case and are left to consideration by legislatures. It is not up to this Court to consider the broad purposes of public consultation and then interpret the legislation in a manner that imposes techniques or processes that it considers will result in meaningful dialogue or democratization of the process. This assignment has been given to the executive director of the EAO within the policies dictated by regulation and as long as the executive director's interpretation is reasonable and fair within the confines of that law, then this Court cannot interfere.⁸⁹

B. A CAN[N]Y Judgment

A public hearing is not just an occasion for the public to blow off steam: it is a chance for perspectives to be heard that have not been heard as the City's focus has narrowed during the project negotiations. Those perspectives, in turn, must be fairly and scrupulously considered and evaluated by council before making its final decision.⁹⁰

The second case, *Community Association of New Yaletown v. Vancouver (City)* (which I will refer to as *CANY*), represents the other side of the legal coin. This case involved judicial review of a rezoning bylaw and development permit process. Jubilee House on Helmcken Street was an older 87-unit affordable housing building in a terrible state of disrepair and with no resources for improvements. Brenhill Developments approached the City of Vancouver with a "creative proposal" to increase much needed social housing in exchange for a development opportunity in the form of a "land swap".⁹¹ Brenhill owned property across the street from Jubilee House on Richards Street. Brenhill proposed to build a 162-unit replacement low cost social housing project on its Richards Street property and, once that building was complete and the Jubilee residents moved over, the City would "transfer" the Helmcken property to Brenhill to construct a 36-story tower with 448 units (including 110 secured market rental units), a two-story pre-school, and retail space. This understanding was set out in a land exchange contract with the City—a document that is not a contract in the legal sense but, rather, a series of operating assumptions and mutual assurances that permit the parties to continue negotiations. *CANY* was a neighbourhood citizen's group opposed to these developments. The deeply suspicious members of this group viewed the Land Exchange Contract as evidence of a pre-existing agreement such that everything that occurred subsequently could be no more than a *pro-forma* ne-

⁸⁹ *Ibid* at para 93.

⁹⁰ *CANY SC*, supra note 62 at para 120.

⁹¹ *CANY CA*, supra note 62 at paras 4, 125.

cessity in order to legitimize a “behind closed doors” private decision.⁹² Brenhill applied for rezoning of the Helmcken property and the process began for a public hearing about the proposed development. The Richards Street property was not overtly identified or connected with the rezoning application process for the Helmcken property, but it was widely known that they were linked as one project.

CANY later argued that the process implemented by the City of Vancouver failed to meet the common law duty of fairness. CANY’s legal argument was bolstered by one statute that must be considered fundamental for guaranteeing the quality of the public participation in the context of this case—the *Vancouver Charter*.⁹³ In addition to incorporating the city of Vancouver, the *Vancouver Charter* contains a number of provisions setting out municipal process rights including giving notice, holding a public hearing, and providing copies of draft bylaws for advance scrutiny.⁹⁴ As in *VAPOR*, the process was profoundly imperfect and disorganized.⁹⁵ For CANY, this clearly contributed to a sense of mistrust in the participation process and the decision-maker. In preparation for the public hearing, the City prepared and posted online a 100-page agenda package that included a summary and recommendation section, a draft of the proposed amending bylaw, and a policy document. At the public hearing, persons associated with Jubilee House spoke in favour of the project, while a number of New Yaletown residents spoke against it. After receiving 197 submissions from the public, City Council gave approval in principle to the rezoning bylaw subject to additional conditions.⁹⁶ Subsequently, the Development Permit Board (DPB) passed a resolution to issue (with conditions) to Brenhill the development permit for the Richards Street property.

Sometime afterward, City Council enacted a bylaw to amend the Downtown Official Development Plan (DODP) which would authorize the DPB to, in certain circumstances, permit an increase in floor space ratio in order to ensure the inclusion of “social housing” in the project (previ-

⁹² For media coverage of this project which discusses these views, see Bob Mackin, “Yaletown Citizens Take City of Vancouver to Court”, *Vancouver Courier* (21 August 2014), online: <<https://www.vancourier.com>>, archived at <https://perma.cc/NXD9-Q2VH>.

⁹³ SBC 1953, c 55.

⁹⁴ *Ibid.*, s 566, as amended by *An Act to Amend the Vancouver Charter*, SBC 1959, c 107.

⁹⁵ *CANY SC*, *supra* note 62 at paras 14–17. Notices were sent out in the form of postcards, but the earlier ones contained significant errors. The third correct notice postcard was sent out only four days before the actual public hearing. Residents complained about the short window of opportunity, so City Council extended the time for the public to make written submissions as mitigation.

⁹⁶ *CANY CA*, *supra* note 62 at para 22.

ously, it had referred to “low cost housing”, a different type of housing).⁹⁷ This increase in density for Brenhill (five times the density and four times the height normally allowed in the neighbourhood) was to be offset by a large “community amenity contribution” which Brenhill would pay to the City. The City sent out notice of a public hearing regarding the new DODP amendment, but the notice failed to identify that this New Yaletown area would be the area that was affected by the amendment. City Council then passed a resolution endorsing the DPB decision, provided notification and the agenda of the upcoming meeting where the rezoning bylaw would be considered, and ultimately enacted the rezoning bylaw thereby ensuring the Brenhill could commence the project.⁹⁸ It was then that CANY applied for judicial review of the development permit.

The trial judge, Justice McEwan, summed up the essential question on judicial review as: “[W]hether the City provided enough information for the public, in a form that was understandable, to fairly evaluate the pros and cons of the proposed development.”⁹⁹ More controversially, he rephrased the essential question as:

Put in other terms, the issue might be described as whether the sacrifice the residents of that part of the City and the general public were expected to accept was worth the trade-off, or whether, as the petitioner appears to suspect, the net result would be, in essence, a private benefit to Brenhill at a loss to the public.¹⁰⁰

Throughout the case, the trial judge expressed the common view that municipal real estate development often privileges private developers first, with social concerns a distant consideration, and with even fewer benefits to lower income residents who clearly were ranked last in importance.¹⁰¹

Justice McEwan found that the package of material prepared for the public hearing was too technical and not organized in a way that allowed the public to grasp the essentials easily. Moreover, he considered the monetary value that the City put on both the Richards property and the building cost of the new facility as “arbitrary”, adding “if they are not, there is no apparent attempt to offer objective standards from which these values have been derived. Perhaps there are none. If that is the case, however, the public has a right to know that the City has provided conclu-

⁹⁷ CANY SC, *supra* note 62 at paras 45, 100.

⁹⁸ *Ibid* at paras 23–25.

⁹⁹ *Ibid* at para 112.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid* at paras 112, 115, 132–34.

sory figures that are not objectively justified.”¹⁰² In other words, he thought the numbers were fudged to conceal the true costs and benefits of the deal.

The City’s argument that a public hearing concerns *only* matters contained in *the* bylaw was rejected by Justice McEwan. Instead, he offered a broader interpretation of the range of considerations that would be relevant at a public hearing. Importantly, he agreed with CANY that treating the two properties as distinct issues did not reflect the true nature of the project or the affected public interest. Citizen’s input, he stated, should not be limited to a narrow discussion of building dimensions but, instead, residents “have a right to a voice in integrated projects of this kind, and a right to a fair opportunity to express themselves relative to the over-all advantages and disadvantages of the proposal.”¹⁰³ According to Justice McEwan, the residents should be able to comment on the effects of the City’s business dealings and housing strategy on them and their neighbourhood and whether “at the end of the day, the City simply gets what it has and Brenhill gets a tower, to the overall detriment of the neighbourhood, or whether, in fact, the arrangement is a good deal, enhancing the City’s social housing and low cost housing goals at minimal cost to those nearby.”¹⁰⁴ As the epigraph to this subpart adverts, to be fair, a public hearing shouldn’t merely technically comply with the minimum requirements of a public hearing (even if set out in statute) because a public hearing should be a “kind of counterweight, and as fair, open and transparent as the nature of the overall project dictates.”¹⁰⁵ Justice McEwan concluded that the City had taken a narrow view of disclosure, the scope of the public hearing should have been broader, and a more intelligible financial justification provided. He confirmed that on judicial review, the City and Brenhill provided a better description of the project and its benefits than what the public got: “I simply note that I think the public was entitled to an explanation that was more like what the court was given in this proceeding.”¹⁰⁶ He quashed the zoning bylaw and directed new and improved hearings as a remedy.

The BC Court of Appeal overturned Justice McEwan’s decision.¹⁰⁷ In its judgment, the Court of Appeal notably set out the different powers or “many hats” that the City possesses: (1) a “legislative function” which is

¹⁰² *Ibid* at para 116.

¹⁰³ *Ibid* at para 118.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid* at para 120.

¹⁰⁶ *Ibid* at para 123.

¹⁰⁷ See CANY CA, *supra* note 62.

not subject to procedural fairness requirements because accountability for that function ought to be found at the ballot box; (2) business functions; and (3) a “quasi-judicial” function, which is engaged in a public hearing and in which procedural rights will be found or amplified.¹⁰⁸ In complex municipal planning projects, all functions may be simultaneously engaged, leading to a potential conflict. Acquiring a property may be good business, but business interests may shape the legislative function in regulating development and use of the property. As the Court of Appeal noted: “Good business may not serve the same interests as good land use planning and development control.”¹⁰⁹ What is clear is that business powers cannot fetter the discretion the City must have when exercising its legislative powers to enact policy options as law.¹¹⁰ Once again, the legislative exception makes its unwelcome jurisprudential appearance. With a different understanding of the democratic rights such as that laid out in Part 1, function 2 would be ranked lower than functions 1 and 3, and function 3 would be re-interpreted as a combined contributory/contestatory mode of participation that is both legitimate and supportive of function 1.

The Court of Appeal found that the scope of the hearing—restricted to the rezoning of Helmcken—was appropriate, that disclosure was adequate such that CANY could not expect disclosure akin to the civil litigation context, and that the City had gone above and beyond what was procedurally required by providing *lots* of information (even if this information was not always relevant or accurate). The judges disagreed with Justice McEwan, stating that “[t]here was no duty on the City to create and provide a more readable or convincing report on the issues raised by the proposed rezoning “and that the Policy Report for the public hearing was thorough, clear and cogent.¹¹¹ At the public hearing, the City did not have to listen to citizens’ comments on the land exchange or the plans for the new Richards Street social housing, but the City “chose to permit such comments nonetheless.”¹¹² When it came to public participation rights at a public hearing, Justice Bauman of the Court of Appeal concluded that local residents have two, and only two, important rights: (1) a right to be given sufficient information to permit them to come to an “informed, thoughtful and rational opinion” about the merits of rezoning; and, (2) a right to express this opinion to the City at a public hearing.¹¹³ The citizens

¹⁰⁸ *Ibid* at paras 59–61, 64.

¹⁰⁹ *Ibid* at para 65.

¹¹⁰ *Ibid*.

¹¹¹ *Ibid* at paras 109, 111.

¹¹² *Ibid* at para 119.

¹¹³ *Ibid* at para 153.

were accorded both of these rights in fair proceedings. If they continued to disagree with the City's view of the public interest, the BCCA advised that they must seek change through the political process rather than through the courts.

C. Putting the Extra into the Ordinary

These two ordinary common law cases illustrate both the nature of the limitations of the judicial role in a democracy and also that the potential for innovation exists. *VAPOR* and the BC Court of Appeal's *CANY* decision illustrate the continued force of the legislative exception and judicial anxieties about expanding the scope of participation and supervising consultative procedures. But, the lower court *CANY* decision provides a toehold for the approach laid out in Part I to inform the common law through common law procedural fairness and statutory interpretation. The next Part examines this potential common law toehold and argues that, if better informed by the unwritten principle of democracy, it would be appropriate for reviewing courts to enhance statutes containing participatory procedures by ensuring inclusions, amplifying content, and guaranteeing quality. Moreover, through administrative law, courts can supervise fair procedures and check arbitrariness in discretionary decision-making.

IV. Expanding the Parameters for Participatory Public Law in Canada

In the preceding Part we saw that Canadian administrative law still operates under common law baselines which deny general participation rights, restrict deliberative processes by maintaining the inapplicability of fairness to legislative and policy decisions, and resist imposing consultation requirements unless interpreted as being strictly consistent with express legislative intent. Looking back to the theoretical grounds laid out in Part 1 and the current state of the law sketched out in Parts 2 and 3, where can a toehold for the expansion of participatory rights be found?

One can view public law norms through a variety of lenses emphasizing their limitations and coercive power or, alternatively, their capacity for incremental expansion and realizing individual and public goods. Legal theorist Robert Cover famously characterized the former lens as “jurispathic” and the latter lens as “jurisgenerative” modes of legal interpretation.¹¹⁴ Jurisgenerative modes of legal interpretation emphasize shared values using pre-existing politico-moral narratives in a country's national law. One of the most famous Canadian examples is the Supreme Court of Canada's use of four fundamental unwritten principles (i.e., federalism,

¹¹⁴ Robert Cover, “Nomos and Narrative” (1983) 97:1 Harv L Rev 4 at 11, 40.

democracy, constitutionalism and the rule of law, and the protection of minorities) in the *Secession Reference* to craft a new legal duty in constitutional law¹¹⁵—but one could also look to the ability of courts to employ dynamic methods of interpretation, create new rights, and construct novel remedies.

Unwritten principles like democracy and the rule of law clearly underwrite a dynamic approach to constitutional law, common law, and statutory interpretation in public law. A dynamic approach evidently facilitated the creation of the duty to consult and accommodate in Aboriginal administrative law, discussed above in Part II. This article argues that courts can fruitfully employ in tandem a dynamic approach to interpreting the unwritten constitutional principle of democracy informed by the framework laid out in Part I, administrative law principles of procedural fairness, and a robust modern approach to interpreting any relevant statutory provisions relating to public participation. Together these changes can generate a new public law baseline that *all* government decision-making should have a participatory component ranging from the most minimal to the maximum feasible. This new baseline would clearly bolster judicial review of statutorily imposed public consultation duties, like those found in *VAPOR*. With a different approach that is more attentive to fundamental democratic values, “the public” and guarantees of quality participation would be given more weight than in *VAPOR*. The public interest in accessing multiple secure modes of public participation would constitute part of the core content principle of democracy and could be interpretively employed to expand the content of fairness in administrative law for all affected persons. The principles of democracy and procedural fairness could then embolden courts to provide remedies where the statute or regulations disclose democratic deficiencies, or where the breadth of discretionary decision-making requires better structure and guidance. The hope is that together, these interrelated and mutually reinforcing principles can overcome longstanding “judicial anxiety” about broadening the scope of procedural fairness on democratic grounds.¹¹⁶ It goes without saying, however, that it is also within the powers of the government of the day to adopt and entrench more robust public consultation and contributory forms of participation in the public interest voluntarily.

In his examination of how more robust participation in sites of delegated decision-making crucially contributes to the legitimacy of the administrative state, Edward Clark looks to other models of participation

¹¹⁵ *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 49ff, 161 DLR (4th) 385.

¹¹⁶ See Edward Clark, “Procedural Fairness and Citizen Control: Addressing the Legitimacy Deficit in the Canadian Administrative State,” (SJD thesis, University of Toronto Faculty of Law, 2017) [unpublished] at 112.

than that found in Canada. He notes that in comparable jurisdictions with narrower and less flexible approaches to administrative law fairness than that found in Canada, courts have developed jurisprudence, even in the absence of statutory consultation requirements, to enhance participation rights in non-adjudicative contexts. As he argues, the existence of other Commonwealth case law “throws into relief the Canadian courts’ failure to engage with process rights where courts elsewhere in the common law world quite readily do so.”¹¹⁷ Given that many administrative decisions simultaneously involve legal considerations, factual matters, *and* policy or discretionary considerations, limits like the legislative exception no longer make sense.¹¹⁸ If Canada abandoned the threshold stage, then the new Canadian legal position would be:

[I]n the case of legislative silence, fairness applies to all decisions made by the administration, unless specifically modified by statute or contract, and then the remaining task is the determination of specifics of procedure in any given case, from full procedural protection to “nothingness”.¹¹⁹

Andrew Edgar compares Australia with the United Kingdom (UK) to illustrate how the UK courts over the past thirty years have imposed requirements and supervised consultation processes without statutory authorization in decisions which affect the general public concerning infrastructure planning, school closures, licensing systems, and permits.¹²⁰

¹¹⁷ *Ibid* at 116. Clark examines the United Kingdom, New Zealand, and Australia. He also—as do I—looks to the duty to consult and accommodate in Canadian Aboriginal administrative law. Note that the United Kingdom and New Zealand rely on the doctrine of legitimate expectations in a way that is not currently possible in Canadian administrative law jurisprudence. For a Canadian case that references, but ultimately rejects, the UK’s creation of a legitimate expectation of consultation, see *Old St Boniface Residents Association Inc v Winnipeg (City)*, [1990] 3 SCR 1170 at 1202–04, 75 DLR (4th) 385. This article does not argue for an expansion of the doctrine of legitimate expectations. Similar to the literature on legitimate expectations, other thinkers look to fiduciary duties to ground an expanded right to democracy in public law. See e.g. David L. Ponet and Ethan J. Leib, “Fiduciary Law’s Lessons for Deliberative Democracy” (2011) 91:3 BUL Rev 1249.

¹¹⁸ Cartier rereads the jurisprudence to show how more recent cases undermine these bright line categorical distinctions, thereby opening the door for implied procedural obligations in the exercise of legislative functions. See Cartier, “Fairness in Legislative Functions”, *supra* note 50 at 248–55.

¹¹⁹ *Ibid* at 252.

¹²⁰ See Edgar, “Procedural Fairness”, *supra* note 48. Edgar situates Canada closer to Australia in his examination. William Funk provides a detailed examination of public participation in American administrative law and concludes on a pessimistic note that the three specific laws he considers have largely failed to achieve the goals of increasing transparency and public participation in agency decision-making there. See William Funk, “Public Participation and Transparency in Administrative Law: Three Examples as an Object Lesson” (2009) 61:Special Edition Admin L Rev 171.

Public consultation standards in the UK are commonly referred to as the *Gunning* principles and contain four requirements: (1) consultation must occur when the proposals are still at a formative stage; (2) the proponent must give sufficient reasons for the proposal that permit intelligent consideration and response; (3) adequate time must be given for consideration and response; and (4) the product of consultation must be conscientiously taken into account in finalizing any statutory proposals.¹²¹ These principles have been further extended to include two further additions: (5) the degree of specificity regarding consultation should be influenced by those who are being consulted; and, (6) when someone is likely to be deprived of an existing benefit, procedural fairness demands will be more onerous.¹²² Using these principles, UK courts may impose more information disclosure, demand better explanations from the decision-maker, require a broader range of values to be taken into account, and encourage or order modification of the proposed action in order to avoid or mitigate potential harms. In the UK, public participation is directed at preventing harm to particular (or particularized) individual and group interests, and “more generally to ensuring that democratic values extend to administrative actions.”¹²³ For the general duty of public consultation, understood as a component of a democratic participatory right, Canadian courts could adopt the UK’s *Gunning* principles when these cases reach judicial review through contestatory modes of public participation.

The first step, then, would clearly be to follow Edgar’s recommendation for Australian and English modernization of public law: eliminate the public or legislative exception in administrative law.¹²⁴ The second step would be to embrace more fully the necessary content of the right to democracy, its expanded scope for participation, and its commitment to the

¹²¹ See *R v Brent London Borough Council, ex parte Gunning* (1985), 84 Knight’s Local Government Reports 168 at 189 (QB). The other significant consultation case is *R v North and East Devon Health Authority, ex parte Coughlan*, [2001] QB 213, [2000] 3 All ER 850 (CA).

¹²² See *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56 at paras 26–28, [2014] 1 WLR 3947. *Moseley* establishes a new and radical principle that a public body must publicly consult on proposals which it, itself, has rejected (*ibid* at para 28).

¹²³ Edgar, “Procedural Fairness”, *supra* note 48 at 59.

¹²⁴ See also Alice Woolley’s discussion of the legislative exemption in the supervision of policy-making: Alice Woolley, “Legitimizing Public Policy” (2008) 58:2 UTLJ 153 at 176–77. Woolley argues that legislatures and courts fail to require appropriate procedures prior to the elaboration and implementation of regulatory policy. She looks to deliberative democracy as a source for enhanced procedural norms that will orient the policy-making process towards the goals of rational discussion, reason, consensus and the equality of discussants. In a compatible way, she argues that the basic tenets of Canadian administrative law—fairness, reasonableness, and protection of human dignity—possess an “internal morality” that can realize these goals.

“all-affected” principle. A third step would be to recognize the contextual nature of participatory rights ranging from the minimal to the maximum, as just discussed. For some contexts, like the municipal level decision-making and procedures analyzed in Part 3, the right to democracy and its participatory potential would require both more content and legitimize heightened judicial supervision. We can see this potential in Justice Charron’s contemporary perspective on judicial review of municipal action:

The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law. When a municipal government improperly acts with secrecy, this undermines the democratic legitimacy of its decision, and such decisions, even when *intra vires*, are less worthy of deference.¹²⁵

Judicial anxieties about determining the scope of standing and participation can be alleviated through this contextual approach. When administrative decisions about participation are contested, judicial determinations about the scope of participation would depend on the impact on particular members of the public or the general public: general and equal would be minimal, specific and maximum would be more robust. Initially, this determination is left to the decision-maker who would be guided by the statute, regulations, and soft law—as we saw in the cases examined in Part 3. But courts would now have a clear role to—at the very least—supervise consultation on a number of principled grounds. They would also have a legal source and support to impose further consultation and participation requirements if the particular context discloses deficiencies as it did in the *CANY* decision. This expansion rests on an understanding of the administrative state as a dialogic site for deliberation and reasoning between public actors and affected persons as well as between courts and the executive branch.

Anxieties about enhancing the contestatory side of democratic participation can also be minimized because this form of participation is also under a significant internal constraint. As Philip Pettit terms it, the democratic power that is exercised in contestatory practices is not—unlike the contributory practices that are part of more legislative and electoral practices—“authorial” in nature. When exercised through the contestatory court procedures, for example, the function of this kind of participation—and resulting judicial action—is as a kind of “editing” of agreements or values for maladministration, bias, fairness, and so on.¹²⁶ This is true es-

¹²⁵ *London (City) v RSJ Holdings Inc*, 2007 SCC 29 at para 38, [2007] 2 SCR 588.

¹²⁶ Philip Pettit, “Democracy, National and International” (2006) 89:2 *Monist* 301 at 302–03.

pecially when the people plurally or severally—rather than as a unity—“exercise editorial control through contesting what government does under a dispensation that sets the terms and the channels of legitimate, potentially effective contestation” such as through a street protest or, for my purposes, the legal system.¹²⁷

Courts and counsel will also need to understand how different models of participation and deliberation that range from the local to micro to meso to macro inform legal argumentation.¹²⁸ The public or “mini-public” in each will differ and affect the public actor’s discretionary “scoping” of the participation requirement: should the scope be broad so as to maximize participation at the expense of quality deliberation or should the emphasis be on quality consultation (i.e., face-to-face) with only the most affected members of the relevant “mini-public”? As we have seen, usually the decision maker sets the scope, but courts could oversee the type of balance that is struck. We could look, for example, to the *CANY* case to see how the common law can establish the appropriate lowest limits for a fair public hearing process in that context: timely notice with important specifics briefly communicated; information tailored to the audience (the public) and presented fairly and in time; intelligible financial rationales for costs, benefits and burdens grounded in “reality”; dealing with projects holistically instead of piecemeal or siloed from each other; permitting comments on the entire decision; and, having the decision maker demonstrate that comments were heard, perhaps not individually, but as thematically organized aggregates.

Finally, a significant barrier found in many jurisdictions, and one that must also be overcome, is the problem of polycentricity—otherwise known as judicial anxiety concerning the presence of too many parties in litigation. Concerns about polycentricity and the appropriate role of the courts often result in the recommendation that courts not involve themselves in policy matters or that the appropriate remedies can be found in another branch of government—usually the legislative branch and its ballot box.¹²⁹

¹²⁷ *Ibid* at 303.

¹²⁸ See Cristina Lafont, “Deliberation, Participation, and Democratic Legitimacy: Should Deliberative Mini-Publics Shape Public Policy?” (2015) 23:1 *J Political Philosophy* 40. Macro deliberative processes include referenda and other for a for citizen deliberation about general political issues. Many public law cases concern public consultation at the micro and local levels, as Part 3 demonstrated.

¹²⁹ As one might suspect, this concern may be a mere re-packaging of the legislative or public exception. According to Bastarache J in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 36, 160 DLR (4th) 193 [references omitted], polycentricity means an issue “which involves a large number of interlocking and interacting interests and considerations.” While judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some prob-

This factor compels courts to declare some matters non-justiciable in *toto* or to limit standing to a small set of *directly* affected persons, rather than the full set of interested parties.¹³⁰ To overcome this factor, standing in the public interest should be broadly interpreted, while special interest tests could be used to narrow the number of parties participating in the court process to prevent too much unwieldiness.¹³¹ The dynamic of inclusion (discussed in subpart a(iii)) could further this expansion for, as Mark Warren puts it:

The institution of rights, in other words, is generative of a particular kind of politics—that kind of politics built on the powers of individuals as citizens. These institutions are ‘reflexive’ in that they do not make collective decisions, but enforce status in ways that when collective decisions are made, affected individual[s] have the powers to include themselves, should they decide to do so. They provide, as it were, the conditions of participation by limiting domination and securing status.¹³²

One could argue, as Farrah Ahmed and Adam Perry do, that the test for public standing could be improved and refined to be more maximally participatory by extending the legal status of standing, yet still provide scope for courts to limit or exclude participation from particular parties on a better articulated, more principled basis.¹³³ It should also be clear that

lems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint.

¹³⁰ On this point, see the discussion of the interpretation of persons directly affected in provincial environmental law in Fluker, *supra* note 64 at 595–602.

¹³¹ James Pfander looks to eighteenth-century Scots law which permitted an exception to the ordinary standing rules to bring forward a “popular action” (*action popularis*) which enabled a person or members of the public to pursue a claim on behalf of the general public where a public wrong might otherwise go unredressed, or to vindicate a public right. An example would be obtaining a declaration that the public is entitled to use and enjoy in common a particular parcel of land. See James E Pfander, “Standing to Sue: Lessons from Scotland’s *Actio Popularis*” (2017) 66:7 Duke LJ 1493.

¹³² Warren, “Beyond Self-Legislation”, *supra* note 17 at 53. I have also described standing as both an end in itself to access judicial procedures and remedies, but importantly also as a form of recognized legal status that one’s claim is justiciable, and one can use those procedures to vindicate a right or enforce a duty. See Mary Liston, “Transubstantiation in Canadian Public Law: Processing Substance and Instantiating Process,” in John Bell et al, eds, *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart, 2016) 215 [Liston, “Transubstantiation”].

¹³³ See Farrah Ahmed and Adam Perry, “Standing and Civic Virtue” (2018) 134 Law Q Rev 239. Ahmed and Perry draw on liberalism and civic republicanism to delineate their conception of civic virtue. According to them, civic virtue is a complex disposition expressed by individuals who wholeheartedly accept the public good as a strong reason for action and have the wisdom to know how that good should be served in order to con-

expanded consultation and participation in the public interest should not engage justiciability concerns in a modern democracy. As Justice Stratas of the Federal Court of Appeal observed in *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, “[s]ome questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government,”¹³⁴ are empowered to review statutory and Crown prerogative powers and the remaining categories of non-justiciable subject-matters are “very small” indeed. So small, this paper argues, that they should clearly exclude the effects of the legislative exemption on participatory rights.

I do, however, seriously heed Cristina Lafont’s caution that advocating for an increase in court support for mini-publics in micro or local deliberative contexts does not address the macro problem that many deliberative democrats focus on. Strategies for micro and macro deliberation may be compatible, but “the point is to caution against the temptation to think that micro-deliberative strategies offer a feasible shortcut for realizing deliberative democracy.”¹³⁵ I am also attentive to Richard Bellamy’s rejection of rights-based judicial review as being partly premised on the impossibility of a depoliticized judiciary in pluralist societies. He also underscores Henry Richardson’s observation that in real politics the reasons that no one can reject is “likely to be an empty set” by suggesting that the range of core values held by individuals is so wide that any reason that is offered will likely conflict with another’s reason and judicial review will do no better job than legislatures in resolving these value conflicts.¹³⁶ So, it is true that expanded participatory rights entailing expanding judicial supervision carries risks for the legitimacy of judicial review and the outcomes it produces. My and others’ view is that judges can play a legitimate role and it is through their own practice of reason-giving that their judgments can be seen as non-arbitrary or less arbitrary because they disclose the values on which their decisions are based.¹³⁷

tribute to the well-being of the political community. It is manifested in the public sphere, which includes courts. Their use of civic virtue maps onto the discussion found in subpart a(ii).

¹³⁴ 2015 FCA 4 at paras 62, 67, 379 DLR (4th) 737. Stratas JA agrees that executive decisions to sign treaties, without more, are not justiciable. He also says, that even in case involving judicial review of subordinate legislation where the government benefits from a very large margin of appreciation, the matter is still justiciable.

¹³⁵ Lafont, *supra* note 129 at 59.

¹³⁶ Bellamy, *supra* note 2 at 164.

¹³⁷ See Liston, “Transubstantiation”, *supra* note 133 and the sources cited therein.

Conclusion

This article has argued that an improved and expanded democratic relationship between the state and its legal subjects is both possible and even immanent in Canadian public law. It does this by drawing on compatible features of liberal, civic republican and deliberative democratic theories to provide more content to the unwritten principle of democracy—specifically enhanced participation rights and public consultation duties. This enhanced role would be guided by dynamic approaches to interpretation in public law, a contextual approach statutorily-imposed consultation and participation requirements, broader standing in the public interest, and greater democratic content in the common law principles of fairness. A modern democracy requires better representation of the public and the public interest as well as participation by public-spirited individuals in law. The judiciary has access to the tools to expand the parameters of participation on democratic grounds, and to limit it on principled and pragmatic grounds where appropriate. Developments, however, need not be limited to the courts and courts can be supported by contemporaneous changes in the way the executive and legislative branches engage in public consultation and respond to public participation. None of these developments alone will fully transform Canada into a perfect democracy, but they are important and necessary incremental steps toward better realizing our democratic potential.
