

Standing on the Shoulders of Rio:

Greening Mediations under the *Canadian Environmental Assessment Act*

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ABSTRACT

On June 11, 2003, Bill C-9, *An Act to Amend the Canadian Environmental Assessment Act*, received royal assent. In the midst of such change, this paper examines the role of mediation in the federal assessment process. Although *CEAA* contains many references to mediation, this form of alternative dispute resolution has never been used under the *Act*. Consequently, federal assessments have neither enjoyed the advantages nor suffered the disadvantages that mediation offers.

This paper explores ways to limit these disadvantages. Indeed, environmental mediations have many dangers. Although they hope to create a private forum in which interested parties can reach an agreement, environmental disputes are public, not private. Consequently, many dangers arise, including power imbalances between the parties; the under-representation of environmental interests; private analyses of public risks; and the unaccountability of mediation settlements. This paper suggests the federal government, using the principles of public participation and precaution found in the Rio Declaration, must refine *CEAA*'s use of environmental mediation. Filtered through these principles, *CEAA* mediations could minimize their inherent disadvantages and become a framework for sustainable development.

I. Introduction

Environmental mediation has had a short but revolutionary history. In 1973, two mediators first tried to settle an environmental dispute; today, many governments and international organizations have institutionalized various forms of environmental dispute resolution.¹ In Canada, the federal government has included the option of mediation in its *Canadian Environmental Assessment Act (CEAA)*. Rarely used but available to parties of an environmental assessment, *CEAA* mediations hope to create a private forum in which interested and willing parties can candidly discuss their interests and reach an agreement. Many private disputes suit such mediation well; affected parties can all come to the table. Yet “environmental

¹ E. Smith, “Danger-Inequality of Resources Present: Can the Environmental Mediation Process Provide an Effective Answer?” (1996) 2 *J. of Dispute Resolution* 379 at 379 [hereinafter Smith].

disputes are public, not private.”² They affect public and environmental interests that are often not represented at the mediation. Consequently, in the environmental context, mediations must be used carefully.

The federal government can refine *CEAA*'s mediation process using the principles of public participation and precaution found in the Rio Declaration, to which Canada is a party. These principles recognize the unique character of environmental disputes, encouraging public involvement and a unique form of risk-analysis to settle them. Applying these principles to *CEAA*, the federal government could minimize the dangers of environmental mediation. These dangers include frequent power imbalances between the parties; the under-representation of public and environmental interests; private risk-analyses of public risks; and the unaccountability of mediation settlements. By including and funding all affected parties, by evaluating the environmental proposals of the parties, and by making the process transparent, the Minister of the Environment, the responsible authority, and the mediator can make mediation an appropriate tool for environmental dispute resolution. By incorporating principles of public participation and precaution, *CEAA* mediations can better promote their ultimate goal -- sustainable development.

II. Public Participation, Precaution, and Environmental Assessments

In 1992, the United Nations Conference on Environment and Development adopted the Rio Declaration on Environment and Development.³ Designed to reaffirm and refine the 1972 Stockholm Declaration, Rio advocated twenty-seven principles of sustainable development. While they all have relevance to environmental decision-making, two principles are particularly important: public participation and precaution. Principle 10 advocates public participation: “Environmental issues are best handled with the participation of all concerned citizens, at the

² Dianne Saxe as cited in M. Taylor et al., “Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices” (1999) 22 *Dalhousie L. J.* 51 at 56 [hereinafter Taylor].

relevant level. At the national level, each individual shall have ... the opportunity to participate in decision-making processes.”⁴ Principle 15 meanwhile states, “the precautionary approach shall be widely applied by States Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”⁵ This approach helps decision-makers manage risk: where the environment faces the risk of serious harm, decision-makers should not focus on the risk, but rather on the serious harm, and minimize the risk.⁶ Both principles offer important guidance for environmental decision-making.

Particularly, both principles offer guidance for decision-making in environmental assessments. Designed to promote sustainable development, the purpose of Rio mirrors that of environmental assessments. Indeed, effective environmental assessments assess and ensure the sustainability of development projects.⁷ To do so, environmental assessments often draw on Rio’s principles of public participation and precaution. During the 1970s, environmentalists advocated increased public participation in environmental decision making. The federal government responded, in part, by introducing its environmental impact assessment guidelines.⁸ More recently, *CEAA* has required proponents of the Voisey’s Bay Mine and the Red Hill Creek Expressway “to provide evidence that their undertakings will make a positive contribution to sustainability and respect the precautionary principle.”⁹ By incorporating public participation

³ Distr. General A/Conf.151/5/Rev.1 (13 June 1992) [hereinafter Rio Declaration].

⁴ *Id.*, Principle 10.

⁵ *Id.*, Principle 15.

⁶ Government of Canada, “A Canadian Perspective on the Precautionary Approach/Principle” (September 2001), online: http://www.pco-bcp.gc.ca/raoics-sr...aution/Discussion/discusstion_e.htm (retrieved 2 April 2003).

⁷ D. Doyle, *Environmental Assessment in Canada: Frameworks, Procedures & Attributes of Effectiveness* (Ottawa: Minister of Supply and Services Canada, 1996) at 33.

⁸ *Environmental Law, 2nd Ed.*, E. Hughes, A. Lucas, & W. Tilleman, eds. (Toronto: Edmond Montgomery Publications, 1998) at 515 [hereinafter *Environmental Law*].

⁹ R. Gibson, “Favouring the Higher Test: Contribution to Sustainability as the Central Criterion for Reviews and Decisions under the *Canadian Environmental Assessment Act*” (2000) 10 *J. Env. L. and Practice* 39, at 40.

and precaution into environmental assessments, the federal government hopes to promote sustainability that will satisfy environmentalists and the environment alike.

III. Mediation in the *Canadian Environmental Assessment Act*

1. The Act

The *Canadian Environmental Assessment Act*, which applies to projects promoted by a federal authority involving an exercise of a federal function or duty¹⁰, includes these principles in its purposes. It seeks to provide “an opportunity for public participation in the environmental assessment process.”¹¹ It also hopes “to ensure that the environmental effects of projects receive careful consideration before responsible authorities take action in connection with them.”¹² This last purpose, by focusing on environment effects, echoes the precautionary approach. *CEAA* outlines three main assessment procedures -- screening reports, comprehensive study reports, and review panels¹³ -- each of which must consider these purposes.

At any time during a screening or comprehensive study, the Minister of the Environment can refer the project to mediation.¹⁴ *CEAA* defines mediation as “an environmental assessment that is conducted with the assistance of a mediator appointed pursuant to section 30 and that includes a consideration of the factors required to be considered under subsections 16(1) and (2).”¹⁵ The Minister can only use this procedure where she is uncertain whether a project will cause significant adverse environmental effects; where the project, despite mitigation measures, will likely cause significant environmental effects; where the project will likely cause significant

¹⁰ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 5 [hereinafter *CEAA*].

¹¹ *Id.*, s. 4(d).

¹² *Id.*, s. 4(a).

¹³ *Id.* See s. 18 for screening reports, s. 21 for comprehensive study reports, and s. 29 for review panels.

¹⁴ *Id.* See ss. 20, 21, 23, 25, and 28. Following these sections, the Minister can refer a project to a mediator or review panel, pursuant to s. 29. The responsible authority can also request the minister to refer a project to mediation: s. 25.

transboundary effects; or where public concerns warrant mediation or a review panel.¹⁶ Moreover, the Minister cannot refer such a project to mediation “unless the interested parties have been identified and are willing to participate in the mediation.”¹⁷ If the parties are identified and willing to mediate, the Minister can send the whole project or one of its issues to mediation, even if that project is undergoing a review panel assessment.¹⁸

When it refers a project to mediation, the Department relinquishes control over the assessment process, but retains discretion over its substantive outcome. Indeed, after consulting the responsible authority and the parties, the Minister appoints an unbiased and knowledgeable or experienced mediator who then controls the process.¹⁹ For example, the mediator can at any time add an interested party to the mediation.²⁰ *CEAA* does little to structure this process. The Canadian Environmental Assessment Agency (the Agency) writes, “[m]ediation is a voluntary process of negotiation in which an independent and impartial mediator helps interest parties resolve their issues.”²¹ However, this description defines little; in fact, “a significant uncertainty about mediation is the process to be used for conducting a mediation, including the process for identifying all interested parties.”²² Whatever the process, the Minister can at any time terminate the mediation if she feels it will not produce a satisfactory result for all participants.²³ So too, when considering the final report submitted by the mediator, the responsible authority can decide

¹⁵ *Id.*, s. 2. Section 30 will be discussed below. Sections 16(1) and (2) highlight considerations like a project’s purpose and environmental effects, potential mitigation measures and alternatives, the need for follow-up plans, and public comments.

¹⁶ See e.g. *Id.*, ss. 20, 21, 23, 25, 28. Only projects warranting a comprehensive study report, not a screening report, will have significant transboundary effects and be able to be referred to mediation through this route.

¹⁷ *Id.*, s. 29(2).

¹⁸ *Id.*, s. 29(3).

¹⁹ *Id.*, s. 30(1). The Minister can choose the mediator from a roster of candidates.

²⁰ *Id.*, s. 31.

²¹ Canadian Environmental Assessment Agency, *Canadian Environmental Assessment Process: A Citizen’s Guide* (Ottawa: Minister of Supply and Services Canada, 1994) at 22.

²² R. Northey, *The 1995 Annotated Canadian Environmental Assessment Act* (Scarborough, Ontario: Thomson Canada, 1994) at 694 [hereinafter *CEAA Annotated*].

²³ *CEAA*, *supra* note 10, s. 29(4).

the project will not likely cause significant adverse environmental effects, or that such effects can be justified in the circumstances; or he can decide that the project will cause significant and unjustifiable effects.²⁴ If he decides the latter, the responsible authority must reject the project. In *CEAA*, the mediation remains flexible but the federal government retains discretion over any mitigation measures agreed upon in mediation -- and, consequently, over the project's future.

2. The Mediation

Despite its prevalence in *CEAA*, mediation has only been used once. Although the Minister must always consider mediation alongside the option of a review panel, as the Act presents both as equally preferable options,²⁵ “panel review will be the more frequent option since mediation is appropriate where there are a limited number of interested parties and all parties agree on fundamental issues associated with the project, just not the specific ways of addressing certain issues.”²⁶ The only situation where the parties found mediation appropriate was the Sandspit Small Craft Harbour project.²⁷ Here, the Canada-British Columbia South Moresby Agreement planned the construction of a small craft harbor near Sandspit. It promised economic opportunities but also threatened geese and fish habitat. So in April 1992, the parties agreed to mediation as part of the initial environmental assessment, hoping to address these socioeconomic and environmental issues.

The mediation that followed involved several federal departments, two ministries from B.C., and some interests from Haida Gwaii and the Queen Charlotte Islands. The Federal Environmental Assessment Review Office (FEARO) consulted these interests and developed the

²⁴ *Id.*, s. 37.

²⁵ *CEAA Annotated*, *supra* note 22 at 693.

²⁶ *Id.*

²⁷ J. Mathers, *Sandspit Small Craft Harbour Mediation Process: A Review and Evaluation* (Ottawa: Minister of Supply and Services Canada, 1995) at 1 [hereinafter Mathers]. This process was begun under the Environmental Assessment and Review Process, the guideline order that precurred *CEAA*. Yet the process mirrored that which *CEAA* legislated.

initial terms of reference. The parties agreed their objective was “to define a commonly acceptable way to provide the community of Sandspit, British Columbia with a small craft harbour ... consistent with the principles of sustainable development.”²⁸ Fifteen meetings, fourteen months, many public consultations, and \$248 000 later, the parties agreed to a harbor site. In doing so, mediation consolidated evidence of environmentalists, engineers, and the public; the parties used this information to negotiate an acceptable project rather than having the Minister decide acceptable mitigation measures for them.

Although the parties reached an agreement, the Sandspit process had both benefits and pitfalls. The Agency ruled the mediation a success, citing its consensus, its consistency with the Canadian Round Tables’ guiding principles for consensus processes, and its pleased participants.²⁹ It stated the mediation had many advantages over a panel review, including more direct involvement from the participants, greater flexibility, more trust between parties, and a consensual outcome.³⁰ Yet the mediation also had disadvantages. Some participants found it hard to define the issues and, because of the mediation’s flexible structure, found the debate often wandered and dragged.³¹ Moreover, at nearly \$250 000, the mediation did not save anyone money; it cost as much as a panel review of a small project.³² Furthermore, although it strived to involve all affected parties, the mediation did not include representatives from all affected groups. Many suggested that, even when the government did consult the public, it reacted to

²⁸ *Id.*, at 1.

²⁹ *Id.*, at 17. These principles include purpose driven, inclusiveness, voluntary participation, self-design, flexibility, equal opportunity, respect for diverse interests, accountability, time limits, and implementation.

³⁰ *Id.*, at 5.

³¹ *Id.*

³² *Id.*, at 6.

rather than solicited prevalent concerns.³³ Finally, some still debate whether the mediation chose the best harbor site.³⁴ The mediation was both a success and a failure, but mostly a learning experience.

IV. Public Participation, Precaution, and *CEAA* Mediations

Indeed, the Sandspit process highlights the promises and dangers of environmental mediation. Unmanaged, each benefit has a detriment. Flexibility can create instability and delay the process. A drive for consensus might force parties to abandon the best environmental outcome. Public consultation often clouds scientific issues and marginalizes those groups that, inevitably, were not consulted. A high cost might also be better spent elsewhere. Thus, using *CEAA*'s provision for mediation does not automatically achieve sustainable development. Yet by using principles of public participation and precaution, found in *CEAA*'s purpose and in Rio, to guide the mediation and to limit its inherent dangers, assessments like Sandspit can realize this goal.

1.1 Public Participation – *Balancing Power*

CEAA mediations can offer a venue for public participation, but only if used wisely. Used unwisely, they can permit power imbalances between the parties to stifle meaningful participation: “powerful interests may actively embrace mediation as a way of co-opting their weaker opponents.”³⁵ Because of the nature of parties in an environmental dispute, this potential power imbalance is especially dangerous. An environmental mediation will assemble the project proponents and project opponents, typically industry and the local community and environmentalists. The former group has many financial and political resources; the latter has

³³ *Id.*, at 11-12. Mainly excluded from the mediation were the families and employees of Transport Canada and the Agnes Creek enhancement program.

³⁴ *Environmental Law*, *supra* note 6 at 533.

few, if any, to spend on a lengthy mediation.³⁶ If the mediator only facilitates, and lets these inequalities endure the mediation, neither the public nor the environment will be heard. As solicitor John Harrison writes, “[i]f environmental mediation is simply a process through which power is exercised, and if power is unequally distributed among the parties to environmental disputes, it is open to the charge that it merely replicates or indeed reinforces such inequities at the expense of principles of social (or environmental) justice.”³⁷ Unguided, *CEAA* mediations might not reflect social or environmental interests.

Yet *CEAA* contains provisions to ensure these power imbalances do not survive the mediation and manifest in the final agreement. First, section 30 grants the Minister broad discretion to appoint any mediator on whom the parties and responsible authority agree. She should use this discretion to appoint a mediator who is both facilitative and evaluative. This mediator must facilitate the communication of complex, often scientific, information.³⁸ Yet if one party, because of abundant resources or information, attaches meretricious weight to their interests, the mediator must not perpetuate this imbalance but rather actively bare parties’ interests.³⁹ Similarly, the mediator should allow all parties to set the agenda, but also, perhaps by gleaned information in caucuses, ensure this agenda reflects the interests of all parties.⁴⁰ Focusing the parties on their interests will often prevent the focus from shifting to the parties themselves.

³⁵ D. Brach et al., “Overcoming the Barriers to Environmental Dispute Resolution in Canada” (2002) 81 *Canadian Bar Rev.* 396 at 403 [hereinafter Brach].

³⁶ Smith, *supra* note 1 at 385.

³⁷ J. Harrison, “Environmental Mediation: The Ethical and Constitutional Dimension” (1997) 9 *Journal of Environmental Law* 79 at 96 [hereinafter Harrison].

³⁸ B. Krages, “Mediation as a Tool for the Environmental Advocate” (1998) 12 *Natural Resources & Environment* 209 at 211 [hereinafter Krages].

³⁹ L. Riskin, “Mediator Orientations, Strategies and Techniques (1994) 12 *Alternatives* 111.

⁴⁰ Smith, *supra* note 1 at 392.

The federal government should also help minimize abuses of power. The Minister can at any time terminate the mediation when she determines it will not produce a satisfactory result for all parties.⁴¹ The Minister should watch the mediation closely; if it merely reinforces existing inequalities between the parties, the Minister should terminate it. Doing so will both stop and deter unfairness. Indeed, *CEAA* mediations operate not only in the shadow of law⁴², but also in the shadow of Ministerial discretion. Knowing that *CEAA* affords the Minister discretion to moderate unequally distributed power, most parties will strive to moderate their own power; if they do not, the Minister might impose an agreement worse than that they could mediate.

Finally, to proactively equalize power, the federal government should fund all non-government parties. In the Sandspit process, the participants received compensation for their travel expenses and an honorarium that “was essential to the participation of some parties.”⁴³ Participants should not make money, but they should receive this compensation; moreover, they should also receive, which the Sandspit participants did not, money for data collection and research. If objectivity and meaningful participation is an aim of mediation, participants need to be able to afford to collect such information. Funding for participants, an evaluative mediator, and an observant Minister will together help level power inequities. Only on this level field can parties participate meaningfully.

1.2 Public Participation – *Representing All Interests*

If *CEAA* mediations will foster meaningful public participation, they must also include representation from all interested parties. As seen, few *CEAA* mediations have occurred, in part because mediation works best with fewer parties and fewer issues.⁴⁴ Many environmental

⁴¹ *CEAA*, *supra* note 10, s. 29(4).

⁴² Harrison, *supra* note 37 at 96.

⁴³ Mathers, *supra* note 27 at 13.

⁴⁴ *CEAA Annotated*, *supra* note 22 at 693.

mediators prefer to limit participation, sometimes only choosing participants that can block or hinder final agreement.⁴⁵ Yet environmental disputes usually cut through administrative, business, environmental, social, and many other issues, affecting many parties.⁴⁶ The proposed Sandspit harbor affected five groups of island residents, six federal departments, and two provincial ministries -- and still omitted interested parties.⁴⁷ Moreover, not all of these parties, especially not social or environmental interests, have sufficient resources to block agreement; so mediators often block their participation. Critics of environmental mediation often argue “that participatory processes may exclude the true interests of the marginal, the different and the other.”⁴⁸ Whether or not interested parties can affect the mediation’s substantive outcome, the mediation can certainly affect the substance of their lives. Meaningful participation includes these parties.

CEAA mediations must invariably include another underrepresented party -- the environment itself. In his classic article “Should Trees Have Standing?” Christopher Stone asks just that: whether courts should recognize legal rights of the environment. He writes, “throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable.”⁴⁹ He argues the legal system too often filters environmental concerns through human concerns, and the environment consequently suffers; it should therefore have its own rights. The same applies to mediations. Sitting around the table is industry, local residents, government, environmentalists, but no trees. Even environmentalists do not always represent the environment. They too have anthropocentric concerns, such as attracting

⁴⁵ D. Amy, “The Politics of Environmental Mediation” (1983) 11 *Ecology Law Quarterly* 1 at 7 [hereinafter Amy].

⁴⁶ A. Painter, “The Future of Environmental Dispute Resolution” (1988) 28 *Natural Resources Journal* 145 at 147.

⁴⁷ Mathers, *supra* note 27 at 26.

⁴⁸ R. Lyster, “Should We Mediate Environmental Conflict: A Justification for Negotiated Rulemaking” (1998) 20 *Sydney Law Review* 579 at 592 [hereinafter Lyster].

⁴⁹ C. Stone, “Should Trees Have Standing? Toward Legal Rights for Natural Objects” (1972) 45 *Southern California L. Rev.* 450 at 453.

membership or political support, which often shorten their environmental vision.⁵⁰ Moreover, few environmentalists can “claim to be the *duly selected* representative of a non-human life or a whole ecosystem.”⁵¹ Of course people must articulate environmental concerns, yet they often do not, and failing to do so does not garner participation from, in *CEAA*’s opinion, the most important party to the assessment.⁵²

CEAA contains few provisions ensuring mediations will involve all interested parties. The Minister cannot refer an assessment or a part thereof to mediation unless “the interested parties have been identified and are willing to participate in the mediation.”⁵³ Yet if the Minister has not already included these parties in the scoping process and in setting the assessment’s terms of reference, they will not likely suddenly declare their interest in mediation. The Minister should assemble all interested parties long before mediation begins. Moreover, the Minister should not include only those parties that can influence the mediation’s outcome: “Widely based public participation is now recognized as an essential element of sustainable development and of effective public administration.”⁵⁴ Finally, *CEAA* lets the Minister identify interested parties. These parties should identify themselves. If the Minister excludes them from mediation, the represented parties might reach an agreement, but they will also endanger an ongoing relationship between all parties.⁵⁵ These parties know best whether they want, or feel responsible, to represent a certain interest.⁵⁶ The federal government should give them broad discretion to decide if they have a legitimate interest in the assessment. Then, to guarantee their

⁵⁰ Lyster, *supra* note 48 at 592.

⁵¹ W. Stephens as cited in *Id.*, at 593. *Italics* original.

⁵² See purposes of *CEAA*, *supra* note 10, s. 4.

⁵³ *CEAA*, *supra* note 10, s. 29(2).

⁵⁴ Harrison, *supra* note 37 at 101.

⁵⁵ See e.g. on the importance of ongoing relationships, R. Fisher and W. Ury, *Getting to Yes*, 2nd ed. (Toronto: Penguin Books, 1991) at 6-7.

⁵⁶ Brach, *supra* note 35 at 402.

meaningful participation in the mediation, the Minister should include these self-identified groups from the start of the assessment process.

CEAA should also strengthen its requirement that mediations consider environmental interests. Section 16(1) requires mediations to consider a project's environmental effects, the significance of these effects, and potential mitigation measures.⁵⁷ To do so, the Minister should include special representatives of environmental interests and ensure these representatives reflect a variety of environmental perspectives.⁵⁸ After all, a dam might affect a local fishery; it might also flood the nesting grounds for migratory birds and the fields of local farmers. The responsible authority should also exercise his discretion and reject mediated agreements that will not produce an acceptable environmental result.⁵⁹ When using this discretion, he should always consider that, because trees have no standing in mediation, they will often be underrepresented: "Where a particular compromise might ... harm parties not represented, or where it might set an inappropriate precedent for future decisions, the relevant agency must intervene."⁶⁰ Government can help voice environmental interests.

So too can the mediator. The Minister, after consulting the interested parties and the responsible authority, should appoint a mediator who will ensure identifiable parties that do not directly participate -- like the environment -- receive consideration by the principal parties.⁶¹ To do so, the mediator should probe the parties, questioning if they appreciate the environmental consequences of their proposals.⁶² This mediator must therefore at times become evaluative. Yet the mediator should not evaluate the final agreement; doing so would risk her own

⁵⁷ *CEAA*, *supra* note 10, s. 16(1).

⁵⁸ *Id.*

⁵⁹ *Id.*, s. 37. Some deference is necessary but not for clearly egregious mediations that violate public policy.

⁶⁰ Taylor, *supra* note 2 at 65-66.

⁶¹ Lyster, *supra* note 48 at 591.

⁶² *Id.*, at 593.

impartiality and trust.⁶³ Besides, the government, a better mirror of the public interest, already has the discretion to evaluate this agreement. Alongside this discretion, the mediator's attention to environmental consequences can give trees legs and promote environmental participation.

2. Precaution

CEAA mediations can also promote precaution, but only if its philosophy permeates the decisions of all those involved. As seen, this philosophy offers a method of risk-analysis that prevents decision-makers from using scientific uncertainty as an excuse to postpone cost-effective ways of preventing environmental degradation. Environmental issues, however, pose risks to the public. Because the risks are public, so should be the risk-analysis. Mediations should therefore bring this analysis to the public.

2.1 Precaution – *Publicly Analyzing Public Risks*

Environmental mediations can easily overlook a project's environmental consequences. These consequences affect the public: an environmental mediation might endanger human health, have large monitoring and enforcement costs, and lower property values, among other things.⁶⁴ Because these concerns are public, the “private nature of EDR [environmental dispute resolution] could encourage ‘back room’ deals and could fail to adequately engage the public and protect the public's interest in the environment.”⁶⁵ Not all mediations involve such sinister deals; more often, they involve compromises. Yet compromises can have similar effects:

If disputes were seen in moral terms, where one party is right and the other is wrong, the attractiveness of compromise would be minimized. Compromise with those who are wrong would itself be seen as immoral. If one views environmental conflicts as clashes of different but equally valid *interests*, however, then compromise becomes the logical solution to the problem.⁶⁶

⁶³ Krages, *supra* note 38 at 210-211.

⁶⁴ Brach, *supra* note 35 at 402.

⁶⁵ *Id.*

⁶⁶ Amy, *supra* note 45 at 14. *Italics* original.

In environmental disputes, often fought between industry and environmentalists, compromise connotes environmentally sensitive development. In some situations this compromise will benefit the public, especially where the choice is between responsible and irresponsible development. For example, choosing an appropriate area for the Sandspit harbor appealed the public and satisfied industry. Yet sometimes, where the environmental consequences are more severe, the choice is between development and non-development: “environmentalists would undoubtedly argue that the responsible development of nuclear plants or the responsible development of oil drilling in national parks are ‘compromises’ that are essentially victories for pro-development interests.”⁶⁷ Precaution begs risk-analysis, but not necessarily private risk-analysis. Sometimes the risk is too large to lock behind closed doors.

CEAA does not require mediations to undertake a public, precautionary risk-analysis. With the parties’ consent, the Minister can refer any assessment to mediation, from a screening report to a full panel review.⁶⁸ Some of these projects might be small; others might involve nuclear plants or oil wells in national parks. These latter projects affect public interests too large and diverse to be adequately represented in mediation. As Tom Turner, formerly of the U.S. Sierra Legal Defense Fund, states of his approach to major environmental conflicts, “We don’t have much to give away or compromise ... We’re in the business of litigation.”⁶⁹ In the *CEAA* process, the Minister should recognize too that some issues cannot be compromised and should not be referred to mediation. Particularly, *CEAA* should be amended to preclude those mega projects on the comprehensive study list from going to mediation. These projects, like pulp mills or oil refineries, involve risks too great to analyze and mitigate in private. *CEAA* should

⁶⁷ *Id.*, at 14.

⁶⁸ *CEAA*, *supra* note 10, s. 29(2).

⁶⁹ T. Turner as cited in D. Singer, “The Use of ADR Methods in Environmental Disputes” (1992) 47 *Arbitration Journal* 55 at 56.

therefore require the Minister to exclude these projects from mediation; currently, the decision is discretionary. Precaution mandates public review, not private compromise, of these risks.

2.2 Precaution – *Encouraging Transparency and Accountability*

To ensure mediations adopt a precautionary approach, accountability must reign over confidentiality. Most mediators agree that parties need confidentiality to build trust and consensus.⁷⁰ Yet in environmental mediations, mediators must balance confidentiality with competing public policy. Hidden from view, the mediation process denies the public “the opportunity to hold regulatory agencies to account, either through judicial review or through the democratic process.”⁷¹ Accountable to no one, parties in mediation need not consider any environmental interests. In *CEAA*’s case, these parties could neglect the criteria listed in section 16. They could forego a precautionary approach, letting one party argue that high mitigation costs or scientific uncertainty should excuse mitigation measures. For example, in the United Kingdom, such backroom deals have plagued the confidential resolution of planning disputes.⁷² Confidentiality does not satisfy “a desire to affect broader change or [to] achieve a sort of economy in addressing the next environmental concern to be resolved.”⁷³ Conversely, confidentiality narrows mediation. In part, this is why parties like it. Yet when sustainable development requires a precautionary approach, an analysis that considers public environmental consequences, the need for accountability will often outweigh the need for confidentiality.

CEAA should loosen its confidentiality rules. It contains a strict privilege requirement, making mediation proceedings inadmissible in courts or administrative tribunals without the

⁷⁰ New Jersey Task Force on Dispute Resolution as cited in Taylor, *supra* note 2 at 64.

⁷¹ Harrison, *supra* note 37 at 88.

⁷² *Id.*, at 89.

⁷³ Brach, *supra* note 35 at 402.

mediator or participant's consent.⁷⁴ Yet the public nature of environmental disputes urges a looser privilege, one in which the proceedings of agreements objectionable to public policy cannot be withheld from judicial or political scrutiny.⁷⁵ *CEAA* should allow for such legitimate breaches of privilege. Furthermore, *CEAA* should loosen its confidentiality requirements. Presently, the mediator must submit a report of the mediation to the Minister, who must then post the report on the public registry.⁷⁶ Yet the mediation proceedings should also be available. In the U.S., environmental mediation cannot achieve confidentiality, even if parties desire it; indeed, too many interested parties with too little organization make confidentiality impractical. Consequently, U.S. environmental mediations do not require confidentiality: "openness and transparency are the norm."⁷⁷ This transparency outweighs any benefit confidentiality might have. Without the informational basis for settlement, especially where government is a party, the public cannot remain confident in the assessment process.⁷⁸ When the parties, and especially the government parties, cannot be held accountable for adopting a precautionary approach, sustainability suffers.

V. Conclusion

Mediations under the *Canadian Environmental Assessment Act* do have merit. Refined using principles of public participation and precaution, they can promote sustainable development: "environmental mediation, especially when the objective is sustainable communities, holds great promise as a vehicle for renewed public dialogue about our common fate on planet Earth."⁷⁹ However, to realize this promise, the *CEAA* mediation process needs change. Presently, it gives the Minister of the Environment, responsible authority, and mediator

⁷⁴ *CEAA*, *supra* note 10, s. 32(2).

⁷⁵ See Harrison, *supra* note 37 at 90.

⁷⁶ *CEAA*, *supra* note 10, ss. 32(1), 36.

⁷⁷ Harrison, *supra* note 37 at 89.

considerable discretion over the mediation's process and substantive outcome. These actors can follow principles of precaution and public participation, but *CEAA* contains few provisions binding them to do so. Consequently, *CEAA* might neglect these principles and, consequently, its own purposes, including sustainable development⁸⁰. Power imbalances and underinclusive representation threaten public participation. A focus on private interests and confidentiality threaten precaution and its focus on public risk-analysis.

Still, with a few changes, *CEAA* can meld the advantages of mediation, public participation, and precaution. To promote public participation, *CEAA* mediations should balance the power between interested parties. The Minister could appoint a mediator who will focus on the parties' interest, terminate abusive mediations, and fund all non-government parties. To encourage better participation, *CEAA* mediations should also ensure better representation. The Minister and mediator could require environmental representation and evaluate the parties' proposals from an environmental perspective. The Minister could also let interested parties select themselves. To infuse a precautionary risk-analysis into *CEAA* mediations, the federal government should also publicly analyze great public risks and loosen confidentiality requirements. To do so, the government could prohibit comprehensive study list projects from going to mediation. It could also loosen confidentiality rules, allowing the public to critique what affects them. Bringing precautionary risk-analysis into the public forum will help enable this accountability. Thus, guided by principles of public participation and precaution, *CEAA* can limit the dangers of environmental mediation and promote sustainable development. The rewards of upholding Rio's principles will empower Canada's citizenry and emblazon its environmental reputation.

⁷⁸ Taylor, *supra* note 2 at 85-86.

⁷⁹ Lyster, *supra* note 48 at 593.

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⁸⁰ *CEAA*, *supra* note 10 at s. 4(b).

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