

Roadmap For Reforming “The Public Interest” For the ERCB and NRCB*

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Overview

In the midst of developing a plan for Alberta’s future, it is an opportune time to re-examine how “the public interest” fits into regulating the province’s natural resources. “The public interest” is the current test for deciding how and when natural resources are developed in Alberta.

Specifically, the Energy Resources Conservation Board (ERCB) and the Natural Resources Conservation Board (NRCB) must decide whether the projects they review are “in the public interest.” But this raises the following questions:

- What does “the public interest” mean?
- How do these Boards use this term in their decisions? and
- Is a public interest test sufficient for making decisions about natural resource development in Alberta?

With the current growth pressures facing Alberta, a highly discretionary public interest test is no longer sufficient to set the direction for natural resource development in Alberta. This brief sets out a road map for reforming “the public interest” so it can provide better guidance for the ERCB and NRCB and for natural resource regulation in Alberta. The road map involves three steps:

- (1) Identify the problems with an open-ended public interest test;
- (2) Specify what the public interest means for the ERCB and NRCB by using the Land-use Framework; and
- (3) Provide meaningful public input at each key stage of the decision-making process.

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Background

Both the ERCB and NRCB review and license projects which impact natural resources in Alberta. The ERCB regulates fossil fuel projects such as oil and gas wells, pipelines and oil sands projects, while the NRCB reviews certain non-energy projects relating to forestry, recreation and tourism, mining and water management.¹

If a hearing is triggered, both the ERCB and NRCB are required by law to determine whether a proposed project is in the public interest while taking into account the project's social, economic and environmental effects.² The problem is that the term "the public interest" is not defined in either Board's legislation and these Boards have faced ongoing challenges in stating and applying this concept in their decisions.

Effective January 1, 2008, the province split the EUB back into two separate agencies.

This is a fitting time to review the ERCB's mandate.

The task of deciding whether a project is in the public interest has become increasingly difficult in the context of Alberta's economic boom. It is no surprise to anyone living in this province that continuous growth has placed pressures on the province's land base, environment and infrastructure. Growth pressures have brought to the forefront the problem of cumulative effects, sometimes called "death by a thousand cuts," which refers to how the incremental effects of human activities can lead to larger unintended impacts on the environment.

All of these factors have heightened the number and intensity of viewpoints that come before these Boards, particularly before the ERCB. Frustration and dissatisfaction with Board decisions are increasingly apparent when parties do not see how their views are incorporated into a Board's public interest test.

As Alberta continues to wrestle with rapid growth and cumulative effects, it is time to examine if the ERCB and NRCB should continue to make decisions based on broad public interest mandates, or whether these Boards require further guidance from the provincial government when confronted with hard policy choices such as:

- What areas of the province are suitable for industrial development?
- Are there areas of the province where development should not occur due to ecological significance or sensitivity?
- When have development thresholds been met due to the cumulative effects of many human activities?

A reassessment of the public interest is especially timely because of the split of the Energy and Utilities Board (EUB) into two separate agencies, the ERCB which regulates fossil fuel production and the Alberta Utilities Commission which regulates the electricity system. This split warrants a reassessment of the ERCB's public interest mandate to ensure that the new Board approaches its work with the proper underlying policy foundation.

What does “the public interest” mean?

Academics, courts, boards and legislators have attempted to define the public interest in various ways. A summary of these approaches is included in **Table 1**.

Research reveals that the public interest can be defined in many ways. In fact, the term can be defined in radically different and often contradictory ways.

Table 1: Summary of approaches to defining the public interest	
Academic theories	
Common interest	Any interest that is common to all members of society.
Majority interest	The interests of the majority or greatest good for the greatest number.
Balance of interests	The public interest is drawn out of the process of compromise or negotiation among competing interests.
Superior standard	The “superior” standard is based on either the ethics of the individual decision-maker or upon scientific objectives.
Economic interest	The interests of the consumer majority, with goals defined in terms of economic growth, wealth maximization and resource efficiency.
Shared values	The public interest is based on a fundamental set of shared values which are held in common with all or most members of society.
Procedure	The public interest will be revealed if the appropriate procedures have been followed and if the widest possible range of interests are consulted.
No definition or meaningless	The public interest is incapable of definition or is effectively meaningless because no one theory provides enough specificity so that the term can be used to guide a decision-maker’s discretion.
Courts and boards	
<p>If courts or boards define the public interest, they usually tie the term’s meaning to the purposes of the statute in which it appears. Accordingly, the meaning of the public interest varies depending on the subject matter of the statute.</p> <p>Some boards have published their own definition of the public interest, such as the National Energy Board which uses this definition: “[t]he public interest is inclusive of all Canadians and refers to a balance of economic, environmental, and social interests that change as society’s values and preferences evolve over time. As a regulator, the Board must estimate the overall public good a project may create and its potential negative aspects, weigh its various impacts, and make a decision.”</p>	
Legislation	
<p>The public interest is defined in various pieces of Canadian legislation but none of these definitions are directly relevant to natural resource regulation.³ However, statutes from outside Canada have defined the public interest in relation to oil and gas rights. For example, Alaska and Australia both provide a list of factors that the decision-maker must consider before deciding whether leasing Crown owned oil and gas rights to a private entity is in the public interest.⁴</p>	

The public interest *can* be defined in many ways.

For example, the public interest can be defined in economic terms if the goals of regulation are economic growth, wealth maximization and resource efficiency.

The public interest can refer to common interests that everyone shares such as clean air and water, safety and a core of public services.

Others assume that decisions are in the public interest as long as the appropriate procedures are followed.

Because the public interest *can* be defined in many ways, use of the term can cause confusion. Every person thinks he or she knows what the term means and will define it based upon a self-evident understanding of the term.

As a result, on its own, the public interest does not have any obvious or shared meaning. The term can be defined if a board or the legislature chooses to define it. The term can also be left undefined and open-ended.

In Alberta, the choice has been made to give the ERCB and NRCB broad discretion and little guidance beyond the requirement to consider social, environmental and economic effects in determining whether a project is in the public interest. The Boards themselves have been given the discretion to state what the public interest means in their decisions.

How do the ERCB and NRCB use the term in their decisions?

A comprehensive review of ERCB and NRCB decisions revealed that both Boards have been inconsistent in stating and applying the public interest tests in their decisions.⁵ When these Boards do not define the public interest in any explicit or consistent manner, it means that they have very broad discretion to make decisions. A review of Board decisions revealed that two consequences flow from this broad discretion.

One consequence is that the public interest is simply used to justify the decision that has been made. The words “the public interest” appear as one phrase in a decision as a way to validate the decision. The danger is that the public interest becomes shorthand that replaces the reasoning for decisions. A decision-maker can simply hide under the cover of a public interest test to legitimize a decision.

In fact, this was seen in many of the Boards’ decisions. Very few ERCB and NRCB decisions included an in-depth discussion or application of public interest considerations.⁶ If the public interest was mentioned, it was often as a brief comment which justified approval of a project.

The second consequence of an open-ended public interest test is that it is vulnerable to being dominated by economic interests and open to capture by industry.⁷ Decision-makers who are given a lot of discretion and are left without a clear concept of the public interest tend to adopt the loudest and most consistent voice they hear, that of the parties that they regulate. The result is that the public interest, by default, becomes defined in terms of economic interests.⁸

A review of Board decisions reveals that the ERCB tends to be influenced more by economic views of the public interest than the NRCB. This is most obvious in ERCB decisions where the Board describes how the “need for the well” fits into the ERCB’s public interest determination.⁹ Before getting to the ERCB, operators have already acquired the mineral rights in question from the Department of Energy. Operators then must receive ERCB approval in order to exercise their rights to develop the minerals and for all Albertans to benefit from the taxes and royalties associated with that resource.

When operators come to the ERCB with the mineral rights in hand, some may argue that the time has passed for making decisions as to whether the environment can support another energy development or whether there is sufficient infrastructure to support the project’s needs. Their right to work the minerals, and the resulting economic benefits that flow to all Albertans from it, tip the balance in favour of approving the project, all other factors being equal.¹⁰

The ERCB’s economic approach to the public interest is also reflected in its treatment of standing and costs that determine which members of the public may participate in its hearings. For example, when energy development is proposed for public land often no one other than the industry operator is permitted to present their views on the Board’s public interest test.¹¹ Also, the ERCB’s legislation ties costs awards to those parties who have economic (or private property) interests in land affected by the proposed project. It is difficult to see how the ERCB can fulfill its public interest mandate when only members of the public with economic interests are permitted to participate and recover their costs for doing so.

<p>It is easy to fault the Boards, particularly the ERCB, for promoting economic rights over others, but placing the responsibility entirely on the Boards is misguided.</p> <p>Other factors contribute to economic interests dominating in Alberta.</p>

At the highest level, economic interests which dominate the public interest in Alberta stem from provincial policies which set ambitious targets for growth in the energy sector and in non-energy land uses such as tourism.¹²

Economic interests are also privileged in Alberta due to the “policy vacuum” or the absence of overarching energy and land-use policies, which could set out how social and environmental benefits could be achieved alongside economic development. The balancing act that these Boards must undertake will always remain difficult in the policy vacuum that exists in Alberta.

When a project reaches the licensing stage before the ERCB and NRCB, too often important broad level policy issues, such as which areas of Alberta are appropriate for industrial development, have not been addressed. All of these factors place pressure on the Boards, particularly on the ERCB, to achieve a seemingly unattainable balance between economic growth and social and environmental factors.

A review of ERCB and NRCB decisions has led to the conclusion that the public interest, in its current form and use by these Boards, is no longer sufficient for setting the direction for natural resource regulation in Alberta. Reforms are needed.

Roadmap for reforming the public interest

STEP 1: *Identify the problems with an open-ended public interest test*

“The public interest” has been left open-ended and undefined by the ERCB, the NRCB and the legislature. The problem with leaving the term undefined is that it gives the decision-maker very broad discretion. Two consequences flow from this broad discretion:

- the public interest is primarily used to justify the decision that has been made, which can lead to confusion and dissatisfaction with decisions because some parties may not see how their views have been incorporated into the Board’s public interest test; and
- the public interest, by default, becomes prone to domination by economic interests. This may be because economic interests are most consistently heard by Boards due to narrow interpretations of standing and costs, because provincial policies are driven by economic goals, because there is no overarching policy for land and resource use in Alberta, or a combination of these factors.

STEP 2: *Specify what the public interest means for the ERCB and NRCB by using the Land-use Framework*

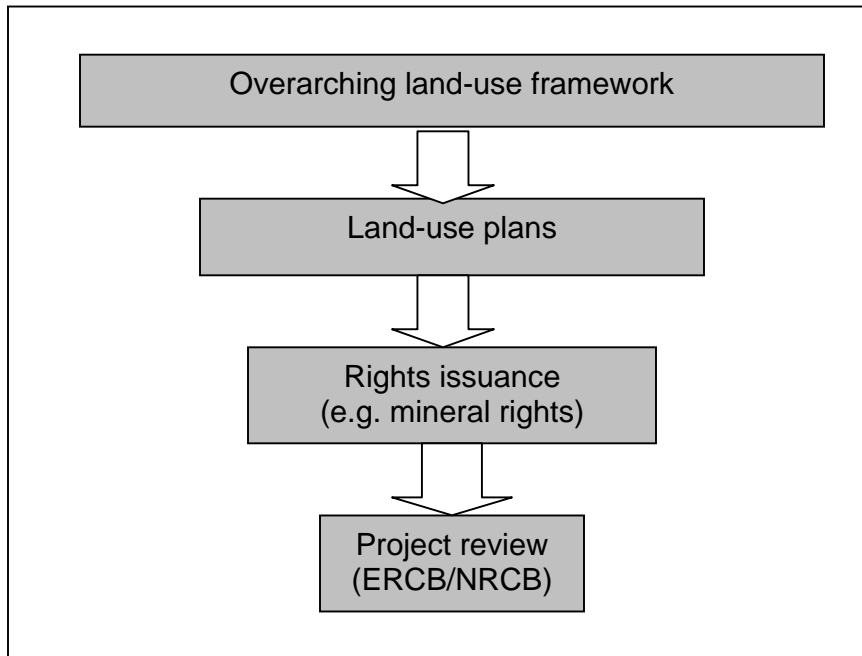
The public interest can be defined in many ways, but it is currently left open-ended and undefined for the ERCB and NRCB. There is a way to address the Boards’ broad discretion under their public interest mandates and to fill the policy vacuum that exists in Alberta. The solution is planning.

Alberta is in the process of developing a Land-use Framework, which is the big picture plan for land and resource use in the province.¹³ As part of this plan, the ERCB and NRCB should be told that “the public interest” includes ensuring that the projects that they approve are consistent with land-use plans established under the Land-use Framework. By making these land-use plans prior to the licensing stage and binding on the ERCB and NRCB, the public interest is defined in terms of the applicable land-use plan. The effect is to constrain the Boards’ discretion, much as a public interest test would, but through the authority of decisions made earlier in the decision-making chain (see **Figure 1**).

The benefit of using the Land-use Framework is that overarching plans should guide the allocation of mineral rights by the Department of Energy. The issuance of mineral rights is a key decision-making stage for directing the timing, location and intensity of oil and gas development, and contributes to the domination of economic interests in ERCB processes.

Also, broad level planning processes can better deal with the cumulative effects of many projects and activities occurring on the landscape. It is unlikely that cumulative effects can be adequately addressed in a project-specific review before the ERCB and NRCB.

Figure 1. Decision-making chain for natural resource development



STEP 3: *Provide meaningful public input at each key stage of the decision-making process*

It is common sense that a public interest decision must take into account the full range of competing views, interests and values that are relevant to the content of the term. A decision that fails to do this, that takes only some interests into account, will not be a decision in the public interest. In fact, the very connotation of the public interest implies that the needs and desires of the public are considered.

Meaningful public participation includes both “formal access” (standing and other procedural rights) and “economic access” (costs or intervener funding) at each key stage of the decision-making process.

The Land-use Framework must provide mechanisms for meaningful public participation at each stage where major decisions about land-use and resource development are being made, and where the public interest will be determined.

At the project review level, standing and costs eligibility should ensure the breadth and intensity of issues are fully represented to the Boards, particularly for projects occurring on public lands.

The general trend in public interest litigation across Canada is to consider litigants' history of involvement in issues in assessing the presence of a "genuine interest" sufficient to establish standing.¹⁴ Accordingly, it is recommended that the term "directly affected" be removed from Alberta legislation and that standing be granted to any person or group who has a legitimate interest which ought to be represented in the hearing, or has an established record of legitimate concern for the interest they seek to represent.

Costs should no longer be tied to private property rights and economic rights. Costs awards for both Boards should be tied to whether the costs are reasonable and directly necessary to the proceeding, and whether the party contributed to a better understanding of the issues before the Board.

Conclusions

As Alberta continues to wrestle with rapid growth and cumulative effects, it is no longer good enough for boards, which deal with public resources or public land, to operate under broad mandates and make decisions based on whatever wants and needs appear relevant at a particular point in time.

The term "the public interest" as currently used by the ERCB and NRCB serves little purpose in the decision-making process when the term is used to justify decisions or has become dominated by economic interests.

In order to address these issues and deal with natural resource regulation on a more proactive basis, changes need to be made. Decisive government leadership is required to give meaning to the public interest and make a plan which guides natural resource development in Alberta.

Endnotes

¹ For the purposes of this brief, the NRCB is discussed only in relation to its authority over non-energy natural resource projects. This brief does not address the NRCB's authority over confined feeding operations under Alberta's *Agricultural Operation Practices Act*.

² *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 3; *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3, s. 2.

³ See Yukon's *Engineering Profession Regulation*, Y.O.I.C. 1996/056, s. 1; Yukon's *Subdivision Regulations*, Y.O.I.C. 1999/77, s. 1; Manitoba's *Engineering and Geoscientific Professions Act*, C.C.S.M. c. E120, s. 1, *Manitoba Evidence Act*, C.C.S.M. c. E150, s. 10.2(1).

⁴ See Alaska Admin. Code, title 11, §83.303. Before the state will approve an agreement to lease state owned oil and gas rights to a company, the commissioner must make a written finding that the agreement is necessary or advisable to protect the public interest by considering: the environmental costs and benefits of unitized exploration or development; the geological and engineering characteristics of the potential hydrocarbon accumulation or reservoir proposed for unitization; prior exploration activities in the proposed unit area; the applicant's plans for exploration or development of the unit area; the economic costs and benefits to the state; and any other relevant factors, including measures to mitigate impacts identified above, the commissioner determines necessary or advisable to protect the public interest. See also *Petroleum and Gas (Production and Safety) Act 2004*, No. 25 of 2004, Sch. 2. In Queensland, Australia, the government must take the following public interest considerations into account when making decisions relating to oil and gas leases: government policy; value of commodity production (including time value); employment creation; total return to the State and to Australia (including royalty and rent), assessed on both a direct and indirect basis, so that, for example, downstream value adding is included; social impacts; the overall economic benefit for the State, or a part of the State, in the short and long term; impacts on aesthetic, amenity, cultural or environmental values.

⁵ The author read ERCB energy decisions from 1996 to 2006 as posted on its website, online ERCB <www.ercb.ca> and read all 11 NRCB decisions from 1992 to 2005 as posted on its website, online NRCB <www.nrcb.ca>.

⁶ Some NRCB and ERCB decisions did include an in-depth discussion of the public interest. Typically this discussion appeared in cases where the Boards turned down the application for not being in the public interest or conditioned the project's approval to make it in the public interest. For the ERCB see, *Shell Canada Limited Application for a Well Licence, Shell PCP Ferrier 7-7-38-6W5, Ferrier Field* (20 March 2001), Decision 2001-9, ERCB Application 1042932 at 34; *Memorandum of Decision Pre-hearing Meeting Manhattan Resources Ltd. Applications for Wells, Pipelines, and Facilities Licences and An Amendment To A Facility Fort Saskatchewan Field* (6 December 2002), Decision 2002-107, ERCB Applications (see Appendix A of the decision for application numbers) at 4; *Applications for a Well Licence, Special Gas Well Spacing, Compulsory Pooling, and Flaring Permit, Livingstone Field* (16 December 2003), Decision 2003-101, ERCB Applications 1276521 and 1276489 [*Polaris*] at 3 and 22; *Applications for Licences to Drill Six Critical Sour Natural Gas Wells, Reduced Emergency Planning Zone, Special Well Spacing, and Production Facilities, Okotoks Field (Southeast Calgary Area)* (22 June 2005), Decision 2005-060, ERCB Applications 1276857, 1276858, 1276859, 1276860, 1307759, 1307760, 1278265 and 1310351 [*Compton*] at 13. For the NRCB see, *Application to Construct a Recreational and Tourism Project in the Town of Canmore, Alberta* (8 December 1992), Application 9103 at 5-1, 5-2 and 13-6; *Application to Construct Recreational and Tourism Facilities in the West Castle Valley, Near Pincher Creek, Alberta* (20 December 1993) Application 9201 at 5-20, 5-21, 12-5-12-13. In these two decisions the NRCB tied its view of the public interest to concepts of sustainability of natural resources and attention to cumulative effects.

⁷ See Mike Feintuck, *The Public Interest' in Regulation* (Oxford: Oxford University Press, 2004). Feintuck has described the domination of economic interests in the United Kingdom and the United States in areas of media regulation and food regulation where regulators have highly discretionary public interest tests.

⁸ See Raj Anand & Ian G. Scott, Q.C., "Financing Public Participation in Environmental Decision-Making" (1982) 60 Can. Bar Rev. 81 at 91-92 for further background on agency capture.

⁹ See *Polaris*, *supra* note 6 at 5, see also *Compton*, *supra* note 6 at 16.

¹⁰ Steven Kennett & Michael Wenig, "Alberta's Oil and Gas Boom Fuels Land-use Conflicts" (2005) 91 *Resources* 1 at 5.

¹¹ A ERCB hearing will be triggered if someone is "directly and adversely affected" by the energy application; this individual or group then has standing to appear before the Board in the hearing process. The problem arises when energy projects are proposed for public land or involve sweet gas wells with very small consultation radiuses where a hearing may not be triggered because there is no one that lives close enough to the project to meet the standing criteria see, *Decision on Requests for Consideration of Standing Respecting a Well Licence Application by Compton Petroleum Corporation Eastern Slopes Area* (8 June 2006), Decision 2006-052, ERCB Application 1423649.

¹² See *supra* note 10 at 3-4.

¹³ Online: Alberta Sustainable Resource and Environmental Management <<http://www.landuse.gov.ab.ca/>>.

¹⁴ See Chris Tollefson, "Advancing an Agenda? A Reflection on Recent Developments in Canadian Public Interest Environmental Litigation" (2002) 51 U.N.B.L.J. 175.