

# PUBLIC PARTICIPATION IN ALBERTA'S ENERGY AND NATURAL RESOURCES DEVELOPMENT: IS THERE ROOM FOR IMPROVEMENT?



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## CONFERENCE HANDBOOK

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## **INTRODUCTION**

Public participation is a key feature of energy and natural resource development in Alberta. Both the provincial government and many Albertans often express a desire for meaningful and effective participation by Albertans in decision-making processes, yet there are signs that public participation is not all that it seems in the energy and resource development context. Increasingly, some Albertans seem frustrated and dissatisfied with the current level or type of public participation.

Social, environmental and economic realities are beginning to change in Alberta. As the energy and natural resources sector adapts to these changes, it seems an opportune time to critically re-evaluate the role of public participation in the important decisions which are being made to determine the future of the province.

This Handbook is designed to give the Conference participants some background information on the main topics addressed during the Conference. Keep in mind that the following sections offer only a summarized and selective account of the issues surrounding public participation at key stages in the resource development process.

# 1. THEORETICAL FOUNDATIONS OF PUBLIC PARTICIPATION

## What is Public Participation, and Why is it Important?

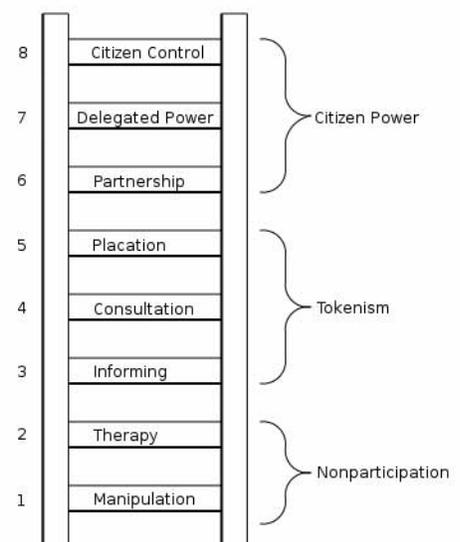
In its most basic form, the term “Public Participation” refers to participation by members of the public in decision-making processes in order to communicate and protect their interests. This can range from landowners attending government organized town hall meetings about proposed legislation, to cattle ranchers voicing their concerns at an oil developer’s roundtable meeting about the impact of nearby wells on their herds, to written submissions to a development committee made by concerned citizens whose only agenda is the protection of clean air and water for everyone. There is no universal format or manner in which the public is able to participate in decision-making processes and because of this there is often ambiguity in when and how the public can and should participate.

But despite this ambiguity, public participation is extremely important. Some have suggested that it leads to better decisions. Others have stated that public participation is essential for its own sake: it is a democratic and a human right. Apart from voting for different representatives during election times, participation in decision-making processes is one of the only ways for the public to voice its opinion and protect its interests. It presents an advantage in relation to representative procedures, to the extent that, through public participation, affected individuals usually have the opportunity to directly influence decision-making. This is particularly true when it comes to decisions about resource development and environmental protection. Because environmental decisions often involve complex issues with a strong public character, they require more open participation of citizens. Without participation, the public becomes a silent bystander as decisions are made jointly and exclusively by government and industry. The public not only must be able to have a venue to participate, but participation must be effective and meaningful.

## Understanding Different Types of Public Participation and “Effective” Public Participation

There are many different types of public participation. One question which has seen a fair amount of discussion is the matter of what constitutes “effective” public participation. In order to be meaningful, public participation must be effective.

According to Sherry Arnstein, the most desirable form of public participation is the one that allows a certain degree of power-sharing. She has captured these various degrees of participation in the form of a “ladder”. At the bottom end of the effectiveness spectrum are forms of participation which serve purely as a means to placate the participant therapeutically. What this means is that the public is given an opportunity to participate, but that



participants' input does not actually affect the decision-making process. Rather, it simply allows participants to voice their concerns. At the other end of the effectiveness spectrum are formats that allow levels of actual citizen control, systems which allow public participants to not only voice their concerns, but also to affect the outcome of the decision.

Scholars on the subject of what constitutes effective public participation have generally concluded that the following criteria are some of the major elements for determining effectiveness.

### **Criteria for Determining Effective Public Participation**

**(i) Appropriate access:** Participants must have an appropriate level of access, to both information and human resources. Access must be both timely so that participants can have an actual impact on development, and accessible enough so that participants are engaging with the right people and information during the consultation process. For example, the effectiveness of public participation can be very different depending on whether or not participants are engaged in discussions with lead development coordinators and directors of companies and projects, as compared with low-level government or industry representatives. Participants must have access to the information required to be knowledgeable on the issues being raised, as well as to people who themselves are capable of effecting change on a project. In addition, the government should have clear and fair criteria to define in advance who are the affected groups or individuals. Finally, participants must have the financial means to be involved in the process (“economic access”).

**(ii) Clear process rules:** There needs to be clearly outlined rules regarding the public participation process. Establishing at the outset criteria for when and how public participation will occur is vital to accountability and transparency, and it also significantly increases the likelihood that meaningful participation will occur. There are too many examples, especially in the Alberta context, of project developers or government officials claiming participants or stakeholders had their chance to participate and missed it, and stakeholders claiming that they were unclear as to what the rules of the process were supposed to be. If process rules are clear and understood by all stakeholders and participants at the outset, then effective public participation is much more likely. Moreover, the rules of participation should promote equality among the participants.

**(iii) Accepted methods of participation:** Participants must have accepted the particular method of participation used. Be this at town hall meetings, roundtable discussions, stakeholder meetings, or any number of other possible formats and methods, their participation must be considered both accepted and legitimate. The ways in which knowledge and the information provided will be used in the decision-making process should also be clear prior to engaging in the process.

**(iv) Outcomes:** Not surprisingly, one of the ways in which to determine whether or not there is effective public participation is by examining the outcomes from the participation

process. Examining such factors as whether or not the concerns and issues raised by participants were actually addressed in the development of a project or in the process is very important. Public participation can still be meaningful even if the goals and objectives of participants are not fully realized, but there must be some evidence that the outcome was affected by participants' input. Other examples of beneficial outcomes would be: the increase of social and political capital among the participants; the increase of public trust towards the government; or the participants' positive or valuable assessment of the results achieved.

**(v) Monitoring and enforcement:** Effective public participation requires ongoing commitment from a monitoring and enforcement perspective. It is vital to ensure that commitments and agreements made during the participation process are fulfilled and upheld. In determining whether or not there is effective public participation, it is important to not only examine the participation process, but what happens after it. It stands to reason that even if public participants are able to voice concerns and affect outcomes, their participation is rendered somewhat meaningless if sometime down the road there is a negative change, and there is no monitoring and enforcement system which can ensure compliance.

The content of each criterion varies. For example, sometimes a broad-based type of participation is appropriate while at other times it is appropriate that only the most affected stakeholders participate. What is clear is that it is imperative that the rules be determined at the beginning (through participant input) and that the process be structured so as to have the right people dealing with the rights issues at the right time. The entire process and the achievement of outcomes also must be non-biased and any barriers (social, economic, etc.) to participation must be addressed at the outset.

### **Sources and further reading**

Sherry R. Arnstein, "A Ladder of Citizen Participation" (July 1969) 35:4 J.A.I.P. at 216-224.

Barry Barton, "Underlying Concepts and Theoretical Issues in Public Participation in Resource Development" in Donald N. Zillman, Alastair R. Lucas & George Pring, eds., *Human Rights in Natural Resources Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University, 2002) 77.

Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: The Massachusetts Institute of Technology Press, 1998).

## 2. AN OVERVIEW OF PUBLIC PARTICIPATION OPPORTUNITIES IN ALBERTA'S RESOURCE DEVELOPMENT CONTEXT

The opportunities for public participation in Alberta vary depending on the stages of decision-making in the resource development process. There is a progression of decision-making from general policies providing broad strategic direction to decisions approving actual projects and activities. The decision-making continuum consists of seven main stages. Some stages afford opportunities for public participation; others do not. Some of these opportunities are legislated; most are not.

### **Seven Stages of Development Process**

1. Policy Development
2. Land-Use Planning
3. Mineral Rights Disposition
4. Surface Rights Access
5. Environmental Impact Assessment
6. Project Review and Approval
7. Project Monitoring

### **Understanding Public Participation at Each Stage**

This section of the Handbook only gives an overview of public participation opportunities at each of the stages of the decision-making process in resource development. Subsequent sections provide more detail with respect to each stage.

#### **Stage 1: Policy Development**

Public participation at the policy development stage, where broad strategic directions for land and resource management are set, is of vital importance. Forms of public participation at this stage can range anywhere from filling out surveys or questionnaires on relevant land-use issues, to participating in public open houses and consultation sessions, to being involved in advisory committees and in lobby organizations. Although public participation in policy development is not legislated in Alberta, there have been many examples of *ad hoc* public consultation processes on land and resources management policies. Section 3 of this Handbook offers examples of public participation in the development of land and resource strategic policies in Alberta.

#### **Stage 2: Land-Use Planning**

Land-use planning translates strategic policies into specific decisions regarding particular landscapes. There are currently two types of public participation at the land-use planning stage: legislated public participation and non-legislated public participation.

Legislated participation is limited to that under the *Alberta Land Stewardship Act (ALSA)*. The Act allows Cabinet to establish Regional Advisory Councils (RACs) that are to provide local input and advice to the government in the development of regional land-use plans. However, the government is fully able to develop, amend or change a regional plan without any input from a RAC and without even creating a RAC. There are no provisions in *ALSA* that give the public the *right* to participate in the development of a regional plan or to challenge its content. Does the RACs' input into the planning process (if and when it occurs) constitute effective or meaningful public or "stakeholders" participation?

There are also opportunities for non-legislated public participation during the land-use planning process. These may take the form of public information sessions and on-line filing of workbooks, as has occurred in the development of the Lower Athabasca Regional Plan. In the case of the South Saskatchewan Regional Plan, there have been multiple public and stakeholder consultation sessions, public input reports compiled, and more. Other regional plans will likely see other forms of non-legislated public participation as they too are developed. The main concern, however, is that non-legislated public participation, while both vital and encouraging, is entirely discretionary and consultative at best. Section 3 of this Handbook discusses public participation further in the context of land-use planning.

### **Stage 3: Mineral Rights Disposition**

There are no legislated mechanisms for public participation at the mineral disposition stage, and thus public participation is almost non-existent at this stage. This is important to know because the mineral disposition stage is often overlooked in comparison to the project approval stage. Major policy decisions are being made at the time when the government disposes of its minerals. The disposition of a mineral right creates a legally-enforceable property right, and once a property right has been granted, the holder of that right has a substantial advantage in any decision-making process. Also, once the government has given a property right to someone, it cannot take it away without some form of compensation. Some consider the mineral disposition stage to be where the true policy decisions are made, as by the time a project reaches the approval stage, the major decisions have all been made. Please refer to Section 4 of this Handbook for additional information on the disposition of mineral rights.

### **Stage 4: Surface Rights Access**

The opportunities for public participation at this stage vary depending on whether the surface land is owned by the Crown or privately, as public and private lands are governed by different statutes.

For public lands, access is granted by the province under the *Public Lands Act* in a purely internal review process. "Public" participation for energy projects on Crown lands is often limited to those with forestry interests or other surface lease interests, because no member of the general public can typically meet the directly and adversely affected standing test outlined in

the governing legislation (see Section 6 of this Handbook on Project Approval). Thus, the opportunities for public participation regarding the issuance of surface rights are very limited when a project is on public lands.

For private lands, the *Surface Rights Act* requires consent from the owner or a right-of-entry order. The Act establishes compensation and provides the owner of the surface with a mechanism to obtain conditions associated with access. Disputes between land owners or occupants and project operators can be brought to the Surface Rights Board's dispute resolution process. However, the Act cannot be used to prevent development. Please refer to Section 4 of this Handbook for additional information on surface rights access.

### **Stage 5: Environmental Impact Assessment**

An Environmental Impact Assessment (EIA) can provide an effective way for the public to participate in government decision-making. In Alberta, there are a few legislated mechanisms requiring public participation at the EIA stage. Public participation comes mostly in the form of opportunities for directly affected parties to submit written statements of concern to the responsible Director. When the Director is considering whether or not to order an EIA report (for those activities for which an EIA is not mandatory), section 44(6) of the *Environmental Protection and Enhancement Act (EPEA)* states:

44(6) Any person who is directly affected by a proposed activity that is the subject of a decision of the Director ... may ... submit a written statement of concern to the Director setting out the person's concerns with respect to the proposed activity.

When an EIA report is required, a notice must be placed in a local newspaper where the project is going to be located, stating that any persons wishing to provide written comments on the proposed terms of reference for the EIA report, may provide them to the Director by a date specified in the notice (section 6(1) of the *Environmental Assessment Regulation*). Also, if any changes, amendments or deletions occur to the project, and notice is provided of these changes, any directly affected person may submit a statement of concern to the Director within 30 days of the last providing of notice. Once completed, the EIA report is available for public review. However, there are no opportunities for public deliberations at this stage of the development process.

### **Stage 6: Project Review and Approval**

The project approval stage has the most extensive legislated opportunities for public participation, but this is not to say that there is easy access for the public at this stage. The regulatory boards that approve resource developments may allow public hearings to be held, and these hearings can open the door for a more public debate of issues and concerns surrounding development. However, only a small percentage of applications for resource development go to a public hearing. Some of the issues regarding public participation that arise at this stage of the

process are the determination of the “public interest” by the regulatory boards, and the ability of individuals or groups of concerned citizens to trigger a public hearing (the “standing test”). For a more complete discussion regarding public participation during the project approval stage, please refer to Sections 5 and 6 of the Handbook.

### **Stage 7: Project Monitoring**

After a project has been approved and development has begun, there are some limited opportunities for public participation in respect to the monitoring of that project. If a project is not being developed in accordance with a governing regional plan under the *ALSA*, then a person may make a written complaint to the Land-Use Secretariat that a regional plan is not being complied with. If there is a dispute between the owner or occupant of surface lands and an operator, under the *Surface Rights Act*, the Surface Rights Board of Alberta may hold proceedings and dispute resolution to remedy whatever grievances arise. There is also the option for rehearings on various matters, however, this is not frequently exercised as it is very difficult to meet the requirements for a rehearing.

### **Conclusion**

In conclusion, there are fairly limited legal opportunities for public participation in the resource development process in Alberta. When thinking about public participation at the various stages of resource development, it is worth asking yourself the following questions:

- Is public participation required at each stage of the resource development process? If yes, who is the public? Who can participate?
- What are the issues of concern to the public at each stage and how can they bring them up?
- How much public participation should be mandated by legislation?
- How does Alberta’s approach to public participation reflect the criteria of effective public participation outlined in the theoretical foundations of public participation?
- What works with current practices of public participation, and what needs improvement?

## OVERVIEW

<b>STAGE OF PROCESS</b>	<b>PUBLIC PARTICIPATION OPPORTUNITIES</b>
<b>Policy Development</b> →	Diverse forms of opportunity – non-legislated Legislated: ALSA – RACs
<b>Land-Use Planning</b> →	Non-Legislated: stakeholder consultations, public input seminars, others
<b>Mineral Rights Disposition</b> →	None
<b>Surface Rights Access</b> →	Private lands: legislated Public lands: not legislated for public at large
<b>Environmental Impact Assessment</b> →	Legislated: decision to order EIA, terms of reference, consideration of final report
<b>Project Review and Approval</b> →	Legislated: public hearings, standing, intervenor's costs
<b>Project Monitoring</b> →	ALSA, SRB dispute resolution, rehearings

### Sources and further reading

*Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8.

*Environmental Protection and Enhancement Act*, R.S.A 2000, c. E-12.

*Public Lands Act*, R.S.A. 2000, c. P-40.

*Surface Rights Act*, R.S.A. 2000, c. S-24.

Jason Unger, *A Guide to Public Participation in Environmental Decision-Making in Alberta* (Edmonton: Environmental Law Centre, 2009).

Nickie Vlavianos, "The Issues and Challenges with Public Participation in Energy and Natural Resources Development in Alberta" (2010) 108 *Resources*.

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### 3. POLICY AND PLANNING STAGES

#### Strategic Policies

Broad ranging or strategic policies set the ground for decision-making. Through policy-making, high level government officials provide direction to lower-level decision-makers. Without a policy framework, decision-makers such as regulatory boards approving resource developments have a hard time deciding whether or not projects should be approved, whether they are in the “public interest”. Developing broad land and resource strategies requires a consideration of a broad range of values, interests and viewpoints that need to be reconciled. These decisions are best made through broad public consultations. Open policy-making processes allow the public to be engaged in the discussion of issues which are not adequately debated or fleshed out during election time.

There is a history in Alberta of large, province-wide public consultation processes designed to assist the government in developing public policies for managing and conserving lands and resources. Examples in the 1990s and the 2000s include:

- the *Alberta Forest Conservation Strategy*, designed to develop a long-term vision and recommendations for sustaining Alberta’s forests (1993-1997);
- *Special Places 2000*, the Government of Alberta’s protected areas policy (1995-1998);
- *Water for Life: Alberta’s Strategy for Sustainability*, which defines a new water management approach and acts as a broad governance strategy for decisions around water through to 2015 (2001-2003);
- the *Land-use Framework* (2006-2008), which provides an approach to managing public and private lands and natural resources to achieve Alberta’s long-term economic, environmental and social goals.

The methods used to involve the public in policy development are wide-ranging, including public information or “awareness” sessions, workshops, public presentations, written submissions, or the appointment by government of stakeholders’ groups comprised of individuals representing a range of sectors and perspectives. Often, the government will hold “public consultations” while also seeking advice from a selected group of experts that will provide specific recommendations to government. However, it is difficult to know for certain how much these public consultation processes actually influence the final policy outcome. At the end of the day, are the concerns and issues of the public given proper weight and consideration in the final policy-making? Even the advice of highly selective “stakeholders groups” may be disregarded by policy makers. The most recent example is the newly announced provincial Wetland Policy. The Policy fails to adopt the almost unanimous advice provided to government by the Alberta Water Council, a group of 25 stakeholders representing industry, environmental and community sectors, to adopt a no-net-loss policy for wetlands.

At the policy development stage in Alberta, public participation is mostly at the lower level of Sherry Arnstein’s ladder of public participation outlined in Section 1 of this Handbook.

## Land-Use Planning

As with strategic resource policies, there have been several land-use planning initiatives in Alberta. Examples include the Regional Sustainable Development Strategy for the Athabasca Oil Sands Area (RSDS Strategy) and the Eastern Slopes Sustainable Resource and Environmental Management Strategy (NES Strategy). These regional land-use initiatives did not have any legislative basis. They were purely discretionary, *ad hoc* processes. Since 2009, the development of regional land-use plans is now legislated under the *Alberta Land Stewardship Act (ALSA)*.

*ALSA* is the outcome of the provincial *Land-use Framework (LUF)*, which “provides a blueprint for land-use management and decision-making that addresses Alberta’s growth pressures.” In the process of developing this framework, the government held numerous public information and input sessions across the province, invited Albertans to complete a workbook questionnaire and sought advice from various groups of stakeholders.

The government released its final *Land-use Framework (LUF)* in December 2008. In June 2009, the government adopted the *Alberta Land Stewardship Act (ALSA)*, legislation implementing the LUF. Various legal commentators have commented on the widely discretionary nature of the Act (see below Sources and further reading). As noted in Section 2 of the Handbook, *ALSA* has very limited provisions for public participation in the development of the seven regional plans that need to be developed. One possible source of public input into the development of the plans is through the Regional Advisory Councils (RACs), which provide advice to Cabinet on plan development. But the establishment of these RACs is entirely discretionary. In addition, when a RAC is established, the members are appointed by the government and their role is purely consultative. While the government is using other types of public consultation mechanisms (public information sessions, written workbooks, etc.), these are not legislated, and the extent to which public input will be reflected in the final regional plans is uncertain.

### **Sources and further reading**

*Alberta Land Stewardship Act (ALSA)*, S.A. 2009, c. A-26.8.

Cindy Chiasson, “New Legislation Continues Changes to Alberta’s Land Use Planning System” (2009) 24:2 *News Brief* at 5.

*Land-use Framework (2008)*, online: <<http://www.landuse.alberta.ca>>.

Jenette Poschwatta-Yearsley & Adam Zelmer, “The Alberta Land Stewardship Act: Certainty or Uncertainty?” (2009) 106 *Resources* 1.

Water Matters, “Alberta land-use planning legislation introduced” (May 14, 2009), online: <<http://www.water-matters.org/node/295>>.

Water Matters, “Weakened policy risks destroying thousands of hectares of Alberta wetlands” (October 29, 2010), online: <<http://www.water-matters.org/story/409>>.

Michael M. Wenig, *Understanding Local Albertans’ Roles in Watershed Planning — Will the Real Blueprint Please Step Forward?*, Occasional Paper #28 (Calgary: Canadian Institute of Resources Law, February 2010).

## 4. DISPOSITION OF MINERAL AND SURFACE RIGHTS

The processes by which the provincial government disposes of its lands and minerals and the legal arrangements utilized vary depending on the type of resource and the political and economic objective pursued by the government. One of the primary overarching features of mineral and surface rights disposition in the province is the considerable amount of discretion afforded to the government in the governing legislation. From the perspective of public participation, another important feature is the fact that there is no opportunity for public participation at this stage in the resource development process.

The disposition of rights to develop oil and gas resources in Alberta essentially has two facets: the issuance of rights to access the subsurface minerals or mineral rights, and the issuance of rights to access the surface land or surface rights. The three main provincial statutes governing the allocation of subsurface rights and surface rights are the *Mines and Minerals Act*, the *Surface Rights Act* and the *Public Lands Act* respectively.

### Mineral Rights

Section 16 of the *Mines and Minerals Act* authorizes the Minister of Energy to issue an agreement in respect of a mineral, either on an application if deemed to be warranted, or more typically through a sealed bidding process. The Minister may also determine to use another procedure to dispose of the mineral rights. The Minister can restrict the issuance of such agreements in certain areas and withdraw minerals from disposition. In other words, the Minister can attach terms and conditions, as well as exclude certain minerals from the disposition agreement. If a regional land-use plan is in place, the plan may limit the disposition of mineral rights within a certain geographic area.

The agreement granting mineral rights comes in the form of a licence or a lease. Once a mineral right has been issued, it creates legally enforceable property rights. This is important because given the nature of the decision-making process, those with property rights hold a significant advantage. Also, this property right cannot be taken away without compensation. At this stage, government is essentially making important social and financial policy decisions which have the potential to significantly impact public lands and resources, without any input from the public at all nor from the landowners whose lands may be affected by oil and gas development.

### Surface Rights

In order to carry out mineral development, oil and gas companies must secure access to the surface of the land by acquiring surface rights. As was mentioned earlier in the Handbook, access to surface lands is governed by a different process depending on whether the surface lands are public or private lands.

The disposition of public lands is governed by the *Public Lands Act* and its accompanying regulations, currently administered by the Department of Sustainable Resource Development. As

with mineral rights, government officials have sweeping powers to dispose of surface rights on public lands and the Act offers no guidance as to the objectives to be pursued in the allocation of these lands.

The *Dispositions and Fees Regulations* allows the Director to issue and renew dispositions of public land for various purposes. In particular, under section 76 the Director can “issue mineral surface leases of public land to mineral producers who require public land for purposes in connection with or incidental to the recovery and production of mines and minerals.” The only limitation on the Director’s discretion to issue a mineral surface lease relates to the obligation imposed upon the applicant to obtain consent from the holder of a timber disposition on that land.

The reason why this is important is because as a result of highly discretionary processes, valuable public lands and resources such as minerals and forests are allocated to the private sector for development with no statutory requirements for public participation. Applicants are generally encouraged to involve the public at some early stage in their application, however public participation is not required by law at any point during the mineral and surface rights issuance process.

Private lands or “occupied” public lands are dealt with slightly differently, as they are governed by the *Surface Rights Act*. According to section 12 of the Act, operators (including persons having the right to a mineral or the right to work it) cannot enter lands to remove minerals, to mine, drill or construct or operate a pipeline, power transmission line or telephone line without obtaining the consent of the owner or the occupant of the surface of the land. If the negotiations between an operator and a landowner or occupant do not result in a surface lease or agreement, the Surface Rights Board (SRB) may issue a right of entry order under section 12(3) of the Act.

### **Sources and further reading**

*Mines and Minerals Act*, R.S.A. 2000, c. M-17.

*Surface Rights Act*, R.S.A. 2000, c. S-24.

*Public Lands Act*, R.S.A. 2000, c. P-40.

*Dispositions and Fees Regulations*, Alta. Reg. 54/2000.

Steven A. Kennett & Michael M. Wenig, “Alberta’s Oil and Gas Boom Fuels Land-use Conflicts — But Should the EUB Be Taking the Heat?” (2005) 91 *Resources* 1.

Nickie Vlavianos, “Public Participation and the Disposition of Oil and Gas Rights in Alberta” (2007) 17 J.E.L.P. 205-234.

Government of Alberta Sustainable Resource Development Homepage, online: <<http://www.srd.alberta.ca/>>.

## 5. THE PUBLIC INTEREST

The Energy Resources Conservation Board (ERCB), the Alberta Utilities Commission (AUC) and the Natural Resources Conservation Board (NRBC) review and approve projects which impact natural resources in Alberta. These boards are required by law to determine whether a proposed project is in the “public interest”, taking into account the project’s social, economic and environmental effects.

However the term “public interest” is not defined in the boards’ legislation, and there is no uniformly accepted definition for the term. 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 could also refer to common interests that everyone shares, such as clean air, safe water, etc. Some think that the public interest is served as long as appropriate procedures are followed in the decision-making process.

Listed below is section 3 of the ERCB’s governing legislation and the sum total of what it has to say regarding the “public interest”:

### *Energy Resources Conservation Act*

3. ... the Board ... shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation, give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.

Because the public interest can be defined in so many ways, use of the term causes confusion. The NRCB and ERCB have tended to shy away from incorporating references to the public interest in their hearing decisions, and when they do reference it their reasoning is not elaborate. It has been pointed out that the ERCB tends to define the public interest in economic terms. Proponents that already hold mineral rights have acquired a legally-enforceable property interest, and that tilts the balance of the board’s decision towards allowing mineral development.

This is a problem because the “public interest” is supposed to play a vital role in determining and setting the direction for natural resource regulation and development decisions in Alberta. Therefore, something must be done to give meaning to the “public interest” test applied by the regulatory boards. Jodie Hierlmeier, formerly of the Environmental Law Centre has outlined a three step roadmap for providing guidance to the boards in interpreting the “public interest” in their decisions.

### **Step 1: Identify the problems with the *status quo* “open-ended” public interest test**

As discussed above, the term “public interest” has been left fairly open-ended, and the boards have been reluctant to concretely define it. There are two main problems that stem from this:

- The boards can use the “public interest” to justify projects without really explaining their reasoning, and thus decisions which may appear to some parties as not being at all in the public interest are explained as such. This leads to confusion and dissatisfaction among concerned parties, and poor reasoning on the part of the boards.
- The boards will consider the public interest, almost by default, as favouring economic interests above other interests. Hierlmeier explains that this may be for the following reasons: economic interests are most consistently heard by the boards due to narrow interpretations of standing and costs, provincial policies are driven by economic goals, there are no overarching policies for land and resource use in Alberta, or a combination of any of those factors.

### **Step 2: Specify what the public interest means for the boards by using the Land-use Framework and Regional Plans**

Alberta has recently seen major developments in land-use planning policy and legislation in the form of the Land-use Framework (LUF), the *Alberta Land Stewardship Act (ALSA)*, and the ongoing development of Regional Land-Use Plans. Hierlmeier proposes that as part of the Regional Plans developed under the LUF and the *ALSA*, the ERCB, the NRCB and the AUC should be told that the “public interest” includes ensuring that the projects that they approve are consistent with the Regional Plans that are in place. Because the *ALSA* stipulates that Regional Plans are legally binding, they would in effect define the terms of the public interest for the boards, and constrain much of their discretion and the ambiguity regarding the public interest test.

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

Any decision which seeks to serve “the public interest” must take into account the full range of competing views, interests and values that are relevant to the content of the decision. A decision that fails to do this, and only takes some interests into account, cannot be said to be a decision made in the public interest. The term “public interest” necessitates that the needs and desires of the public at large are considered.

The general trend in public interest litigation across Canada is to consider litigants’ history of involvement in issues in assessing the existence of a “genuine interest” sufficient to establish standing. Accordingly, Hierlmeier recommends 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.

### **Sources and further reading**

Jodie Hierlmeier, “‘The Public Interest’: Can It Provide Guidance for the ERCB and NRCB?” (August 2008) 18 J.E.L.P. at 279.

Jodie Hierlmeier, *Roadmap For Reforming “The Public Interest” For the ERCB and the NRCB*, Environmental Law Centre, February 11, 2008.

Steven A. Kennett & Michael M. Wenig, “Alberta’s Oil and Gas Boom Fuels Land-use Conflicts — But Should the EUB Be Taking the Heat?” (2005) 91 *Resources* 1.

## 6. PROJECT REVIEW AND APPROVAL BY REGULATORY BOARDS

### a. Standing

The issue of “standing” is one of the most important issues for anyone wishing to be involved in a hearing on a resource development project. One must have “standing” in order to be granted a hearing before a board, and traditionally this has been one of the hardest barriers for opponents of energy projects in the province to overcome, as the boards have uniformly taken a narrow approach to who exactly has standing, and what exactly their governing legislation means.

#### The Governing Legislation

All three major Boards involved in the approval process for energy and natural resource development projects in Alberta, the Energy Resources Conservation Board (ERCB), the Alberta Utilities Commission (AUC) and the Natural Resources Conservation Board (NRCB), are established by statute and as such they each have governing legislation from which they derive their authority.

Highlighted below are the sections of the relevant enabling legislation for each board which outline who has standing to trigger a hearing before each:

#### *Energy Resources Conservation Act – Enabling legislation for the ERCB*

26(2) ..., if it appears to the Board that its decision on an application *may directly and adversely affect the rights of a person, the Board shall* give the person

- (a) notice of the application,
- (b) a reasonable opportunity of learning the facts ...,
- (c) a reasonable opportunity to furnish evidence ...,
- (d) ... an opportunity of cross examination in the presence of the Board or its examination, and
- (e) ... opportunity of making representations by way of argument to the Board or its examiners.

#### *Alberta Utilities Commission Act – Enabling legislation for the AUC*

9(1) Unless expressly provided ... any order or decision that the Commission is authorized to make may be made without giving notice and without holding a hearing.

(2) If it appears to the Commission that its decision or order on an application *may directly and adversely affect the rights of a person, the Commission shall:*

- (a) ... give notice,

- (b) ... give the person a reasonable opportunity of learning the facts,
  - (c) hold a hearing.
- (3) ... the Commission is not required to hold a hearing where
- (a) no person requests a hearing in response to the notice of application,
  - (b) ... for the construction or operation of a hydro development, power plant or transmission line ... or a gas utility pipeline ..., the Commission is satisfied that the applicant has met the relevant Commission rules respecting each *owner of land that may be directly and adversely affected* by the Commission's decision on the application.

*Natural Resources Conservation Board Act* – Enabling legislation for the NRCB

- 8(2) The Board shall give persons who *may be directly affected* by a proposed project, and may give *any other persons it considers necessary*
- (a) a reasonable opportunity of reviewing the information relevant to the application ...,
  - (b) a reasonable opportunity to furnish evidence ...,
  - (c) ... cross examination... in the presence of the Board, and
  - (d) an adequate opportunity of making representations by way of argument to the Board.

(3) Where the Board receives a written objection in respect of an application and the objection is submitted by a **person who the Board considers is directly affected by the proposed project**, the Board **shall hold a hearing** ...

Each piece of enabling legislation uses almost identical phrasing stating that a person must be “directly affected”, or “directly and adversely affected” by a project to have standing at a hearing. This is done intentionally so as to limit the scope of who is able to trigger hearings and make objections to projects, and has for a long time been a significant barrier to public participation in hearings. Note, however, that once the “directly affected” test is met, the boards are required to provide notice, receive evidence and hold hearings.

**An In Depth Look at the Test for Standing: The ERCB**

In order to better understand how exactly “standing” is a barrier to public participation, it is worth examining more closely one of the boards, namely the ERCB, and how it determines who has standing.

A person must have “standing” to oppose an energy project being considered for approval by the ERCB. The key statutory provision for the ERCB is section 26(2) of the *Energy Resources*

*Conservation Act*, listed above. This provision grants hearing rights, specifically and only to those people who are “directly and adversely” affected.

So how does one determine whether or not one qualifies as being “directly and adversely” affected? The courts have said that a two-step test is involved: (1) a legal determination of whether the right or interest being asserted is one known to the law, and (2) a factual determination of whether there is information or evidence that shows that the application before the Board may directly and adversely affect that right or interest.

It is the second branch of the test which usually causes more difficulty for those seeking standing, but both steps have barred their fair share of interested parties from participating in hearings.

One of the main problems is that the ERCB consistently uses proximity as a determinative factor to preclude standing for those wishing to contest energy projects. What this means is that for almost all energy projects, the only persons granted standing are resident landowners who are both within a pre-determined “consultation radius” (set out in ERCB Directive 056) and who are willing to object to the application.

When a sour gas well is proposed, under ERCB Directive 071, an emergency planning zone (EPZ) must be designated. The delineation of an EPZ by and large defines the applicant’s consultation requirements, and informs the ERCB’s test for standing. Essentially, if you live within the EPZ, you are likely to have standing; otherwise, you do not.

The table below provides a few examples of cases and situations where standing has been granted or denied.

### Standing before the ERCB

CASE NAME	ISSUE	STANDING GRANTED?
<i>Castle-Crown Wilderness Coalition v. Alberta</i> , 2005 ABCA 283	This was a case opposing a Shell sour gas well in the Castle region. The Castle-Crown Wilderness Coalition argued that as an advocate for almost two decades for protection of the wilderness lands in question, and because of its local presence and a history of interaction with Shell and the Board, it should be allowed to have standing at a hearing.	No. The Board ruled that the Coalition did not establish an interest in the affected lands, and the Court of Appeal agreed.
<i>Sawyer v. Alberta Energy and Utilities Board</i> , 2007 ABCA 297	Shell Canada applied to drill a sour gas well on public land in the Castle region of the Rocky Mountains, near Pincher Creek. Michael Sawyer was a resident of Calgary, and a long-time recreational user of this land. He wished to oppose the drilling of a sour gas well on his recreational spot.	No. The Board concluded that Sawyer did not have a directly and adversely affected right. The Court of Appeal held that there was no question of law, and that a recreational interest in land was not enough.

CASE NAME	ISSUE	STANDING GRANTED?
<i>Graff v. Alberta</i> , 2008 ABCA 119	Encana wanted to drill a sour gas well within 2 kilometres of the Graff home. The Graffs opposed the application because the well would affect their already-compromised medical condition.	No. The Board denied the Graffs standing because they did not live within the EPZ. The court found that the Graffs had failed to provide the proper medical evidence to the Board to support their claim.
<i>Kelly v. Alberta</i> , 2009 ABCA 349	Grizzly Resources wanted to drill two sour gas wells. Kelly and 2 other landowners did not live within the emergency planning zone (EPZ), but within a different area called a “protective active zone” (PAZ), which must be designated to accommodate potential plumes of sour gas shifting. Kelly argued the fact of residing on land which has been designated by the drilling company as a place where sour gas plumes might shift granted the parties an interest worthy of standing.	No. The ERCB denied Kelly standing. The court however disagreed, and said that the ERCB had erred in its interpretation of the standing test. The ERCB responded by changing its Directive so that a PAZ can never exceed the size of an EPZ, effectively negating the use of the PAZ as a basis for future standing applications.
<i>Prince v. Alberta</i> , 2010 ABCA 214	Prince was a license holding trapper and member of the Sucker Creek Indian Band. Talisman Energy was proposing to build a pipeline through lands used by Prince for trapping, although not on Band lands. Prince argued that the pipeline would impact both his ability to trap, as well as the exercise of his historically protected aboriginal right to trap.	No. The Board denied him standing, and the Court of Appeal agreed, saying that the potential impact was mostly speculative.

### Conclusion on Standing and the ERCB

Many argue that the legislated standing test is outdated. The section 26(2) “directly and adversely affected” test for standing has been in place since 1969 when it was enacted under the *Oil and Gas Conservation Act*, S.A. 1969, c. 81. At the time, some forty years ago, it was meant to constrain what had previously been total discretion afforded to the Board to decide who had standing at hearings.

However, much has changed since 1969 for the ERCB and its role in energy regulation in Alberta. The ERCB is now regularly called upon to address the socio-ecological effects of energy development, a consideration which was not even remotely on the map in 1969. The “directly and adversely affected” test, combined with the Board’s and the courts’ traditionally very narrow interpretation of standing, fails to reflect this new reality and the broader nature of the ERCB’s role in contemporary energy regulation.

## **b. Interveners' Costs**

Along with standing, the other major barrier to public participation during the Project Review and Approval process is the cost of doing so. Even if interested and concerned parties were to be granted standing to intervene at a hearing, there is no guarantee that they would have the financial resources to do so. Lawyers or other forms of counsel are often retained or required for the hearing process, interveners will likely incur personal expenses, and along with other such things, the cost of being involved in a hearing quickly adds up.

Because the companies proposing projects are likely to have significantly more substantial financial resources than those who are opposing projects, there are mechanisms within the governing legislation allowing the boards to assist possible interveners with the cost of hearings.

Listed below are the specific sections from each of the governing and enabling legislation for the ERCB, the AUC and the NRCB.

Interveners' Costs in the enabling legislation:

### *Energy Resources Conservation Act – ERCB*

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

- (a) has an interest in, or
- (b) is in actual occupation of or is entitled to occupy land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it ...

(2) ... the Board may, subject to terms and conditions it considers appropriate, make an award of costs to a local intervener.

### *Alberta Utilities Commission Act – AUC*

22(1) For purposes of this section, “local intervener” means a person or group or association of persons who, in the opinion of the Commission,

- (a) has an interest in, and
- (b) is in actual occupation of or is entitled to occupy land that is or may be directly and adversely affected by a decision or order of the Commission ...

(2) The Commission may make rules respecting the payment of costs to a local intervener for participation in any hearing or other proceeding of the Commission.

*Natural Resources Conservation Board Act – NRCB*

11(1) Individuals or groups of individuals who, in the opinion of the Board, are or may be directly affected by a reviewable project are eligible to apply for funding under this section.

(2) On the claim of a person eligible ... or on the Board's own motion, the Board may, subject to terms and conditions it considers appropriate, make an award of costs to the person to assist in the preparation and presentation of an intervention at a proceeding of the Board.

(3) Where the Board makes an award of costs ... it may determine

- (a) the amount of costs that shall be paid, and
- (b) the persons liable to pay the award of costs.

There are three main things to note in the governing legislation: the use of the phrase "directly affected" in all three, the discretionary nature of the payment, and the necessary interest in land and entitlement to occupy land in the case of the ERCB and the AUC.

- The Directly Affected Test and Entitlement to Interveners' Costs

The enabling legislation for the ERCB, the NRCB and the AUC all use the phrase "directly affected". However, in the case of the ERCB and the AUC, it is the land that must or may be directly and adversely affected, whereas in the case of the NRCB, it is the individual or group of individuals that may be directly affected to apply for intervener funding. As discussed in the previous section above, both the boards and the courts have traditionally taken a narrow view of who qualifies under these sections.

- The Discretionary Nature of the Payment

It is worth noting that the language of the enabling legislation does not require the payment of interveners' costs, rather such payment is left to the discretion of the responsible board. This means that there is no form of guarantee with respect to receiving costs.

- The Necessary Interest in Land and Entitlement to Occupy for the ERCB and the AUC

The enabling legislation for both the ERCB and the AUC requires that in order to receive costs, an intervener must have an interest in land, and in the case of the AUC, be able to occupy that land. The situation has arisen where there is a party who is interested in intervening and has been granted standing, but has no interest in land. As such, this party is either responsible for the costs themselves, or it must refrain from intervening.

One example can be found in the case of *Freehold Petroleum and Natural Gas Owners Association v. Alberta*, 2010 ABCA 125. The Freehold Owners Association sought to participate

in a 2009 ERCB hearing to represent a landowner who was a member of the Association. The ERCB granted the Association full participation rights in the hearing, and after the hearing was completed, the Freehold Owners Association filed a request for the recovery of hearing costs in the amount of approximately \$45,000.

The ERCB denied their claim for costs, even though they had been granted standing. The Association did not meet the section 28 test of having an “interest in land”. The Association sought leave to appeal the decision from the Court of Appeal, however the application was dismissed.

### **Sources and further reading**

#### **Case Law on Standing:**

*Cheyne v. Alberta (Utilities Commission)*, 2009 ABCA 94.

*Dene Tha’ First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68 [leave to appeal to the Supreme Court of Canada dismissed [2005] S.C.C.A. No. 176].

*Graff v. Alberta (Energy and Utilities Board)*, 2007 ABCA 20.

*Kelly v. Alberta (Energy and Utilities Board)*, 2008 ABCA 52; *Kelly v. Alberta (Energy and Utilities Board)*, 2009 ABCA 161 (*Kelly #2*).

*Sawyer v. Alberta (Energy and Utilities Board)*, 2007 ABCA 297.

*Whitefish Lake First Nation v. Alberta (Energy and Utilities Board)*, 2004 ABCA 49.

#### **Case Law on Interveners’ Costs:**

*Freehold Petroleum and Natural Gas Owners Association v. Alberta*, 2010 ABCA 125.

#### **Relevant Legislation:**

*Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2 [Enabling legislation for the AUC].

*Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 [Enabling legislation for the ERCB].

*Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3 [Enabling legislation for the NRCB].

#### **Relevant Websites:**

Alberta Utilities Commission Homepage, online: <<http://www.auc.ab.ca>>.

Energy Resources Conservation Board Homepage, online: <<http://www.ercb.ca>>.

Faculty of Law, University of Calgary, Ablawg, An online law blog with postings on all issues discussed in this Handbook: <<http://ablawg.ca>>.

Natural Resources Conservation Board Homepage, online: <<http://www.nrcb.gov.ab.ca>>.