

Canadian Institute of Resources Law
Institut canadien du droit des ressources

**The “Public Interest” in Section 3
of Alberta’s *Energy Resources
Conservation Act*: Where Do We Stand
and Where Do We Go From Here?**

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Abstract

Section 3 of the *Energy Resources Conservation Act (ERCA)* requires the Energy Resources Conservation Board (ERCB) to consider whether a proposed energy resource project is “in the public interest” having regard to three factors, the social and economic effects of the project and its impact on the environment. Although the concept is fundamental to the discharge of the Board’s mandate, the phrase “in the public interest” is not defined in the *ERCA*.

Since little has been written about section 3 of the *ERCA* and since Alberta Energy propose to change to how the public interest is engaged in the course of regulation of the upstream oil and gas industry, this paper sets out to assess the current state of the interpretation and application of that provision by the ERCB against the background of relevant social science literature on the topic of the public interest and applicable court decisions. The paper concludes with a series of recommendations for the way forward.

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1.0. Introduction

The concept of a public interest is used and debated in multiple disciplines including political science, economics, public administration and law. Notwithstanding its long “venerable heritage”¹ there is no universally accepted meaning attributable to it. If there can be said to be a consensus at all, it is that “in the public interest” is a flexible concept that takes its meaning from the specific circumstances in which it is used.

The Energy Resources Conservation Board (ERCB)² is directed by section 3 of the *Energy Resources Conservation Act (ERCA)*³ to consider whether certain projects are “in the public interest” having regard to the social and economic effects of the project and its effects on the environment. There is no definition of “in the public interest”, “public interest” or of “public” in the *ERCA*, nor in any other legislation administered by the ERCB.⁴ Still that legislation uses the public interest as a guide for decisions to be made by the ERCB multiple times.⁵

Applications to the ERCB range from uncontroversial single well licences to complex, highly controversial, large scale project applications.⁶ Many applications attract little or no interest and proceed through approval without a hearing. Others attract a great deal of interest as a result of the proposed location or the perceived reach or severity of the project’s impacts, or of the implications for cumulative effects.⁷ Many applications to

¹ Barry Bozeman, *Public Values and Public Interest: Counterbalancing Economic Individualism* (Washington, DC: Georgetown University Press, 2007) at 1.

² The regulation of energy resources in Alberta is or has been carried out by the ERCB and its predecessors, the Alberta Energy and Utilities Board (1995-2008), the ERCB (1971-1995), the Oil and Gas Conservation Board (1957-1971), and the Petroleum and Natural Gas Conservation Board (1938-1957). For this paper references to the ERCB or “the Board” refer to the current ERCB or the appropriate predecessor as the context requires.

³ RSA 2000, c E-10 [*ERCA*].

⁴ Similarly, there is no definition of those phrases in the *Alberta Interpretation Act*, RSA 2000, c I-8.

⁵ There are at least 19 occurrences. See e.g.: *Oil Sands Conservation Act*, RSA 2000, c O-6, s 10(3)(a) [*OSCA*]; *Oil and Gas Conservation Regulations*, AR 151/71, ss 10(1)(b), 27(3), 41(1) and 43(6); and *Pipeline Act*, RSA 2000, c P-15, ss 4(a), 33(1) and 51(1).

⁶ See for example: *EnCana Shallow Gas Infill Development Project*, AEUB Decision 2009-008 (27 January 2009), online: ERCB <<http://www.ercb.ca/portal/server.pt?>>; *West Energy Ltd, Application for a Well Licence, Pembina Field*, ERCB Decision 2010-027 (6 July 2010), online: ERCB <<http://www.ercb.ca/portal/server.pt?>>; *Total E & P Canada an Application to Construct and Operate an Oil Sands Upgrader in Strathcona County*, ERCB Decision 2010-30 (16 September 2010), online: ERCB <<http://www.ercb.ca/portal/server.pt?>>; and *ARC Resources Ltd, Applications for Three Well Licences and a Pipeline Licence, Mikwan Field*, ERCB Decision 2009-063 (3 November 2009), online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

⁷ Examples of applications attracting (relatively) limited interest include: *Imperial Oil Resources Limited Application to Construct and Operate the Thicksilver Pipeline Project A Blended Bitumen Pipeline*

the ERCB relate to projects with limited footprints, while others are for undertakings with potentially wide ranging environmental, social and economic impacts.⁸ The issues the ERCB is required to address in the various hearings and inquiries it conducts range from purely technical engineering issues, to issues relating to energy markets, to public health and safety and so on.

Regardless of whether it is the result of a simple or complex proceeding and whether it is controversial or not, every ERCB decision has a public interest component. Given the variety of matters falling within the Board's purview, the actual contours of that interest vary, sometimes significantly, with each decision. For example, in a routine well licence application, a landowner might express concerns about the impacts of activity relating to drilling and completing a well on crops in the vicinity of the proposed location. By contrast, oil sands upgrader applications raise concerns ranging from the local impact of increased traffic to regional concerns about cumulative effects on air and water quality and on the ability of local communities to provide adequate infrastructure and services. Were the ERCB to conduct an inquiry into carbon capture and storage, the public interest issues would span the spectrum from collective concerns about the utility of such projects to CO₂ leaks from storage reservoirs to individual landowner concerns about the presence of injection wells on their lands.

Not only does the public interest vary depending on the matter before the Board but what the public is interested in has evolved and will continue to evolve with time and public understanding. Some have argued that "in the public interest" should be left undefined when used as a justification for regulatory action so it can be given content by decision makers appropriate to the relevant context including values held at the time.⁹ In light of the variety of situations in which the ERCB is required to consider the public interest, perhaps that is appropriate.

and Associated Surface Facilities Cold Lake to Hardisty, AEUB Decision 98-21 (26 November 1998), online: ERCB <<http://www.ercb.ca/portal/server.pt?>>; and *Daylight Energy Ltd Application for Special Oil Well Spacing*, ERCB Decision 2011 ABERCB 003 (25 January 2011) [*Daylight*], online: ERCB <<http://www.ercb.ca/portal/server.pt?>>. Examples of projects attracting a great deal of interest include: *Application for an Exploratory Well Amoco Canada Petroleum Company Limited Whaleback Ridge Area*, ERCB Decision 94-8 (September 1994) [*Whaleback*]; and *Compton Petroleum Corporation, 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)*, AEUB Decision 2005-060 (22 June 2005) [*Compton Petroleum*], online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

⁸ For an example of the latter see: *Petro-Canada Oil Sands Inc Application to Construct and Operate an Oil Sands Upgrader in Sturgeon County*, ERCB Decision 2009-002 (20 January 2009) [*Petro-Canada Sturgeon*], online: ERCB <<http://www.ercb.ca/portal/server.pt?>>; and *Cardinal River Coals Ltd TransAlta Utilities Corporation Cheviot Coal Project*, AEUB Decision 97-8 (6 June 1997) [*Cheviot Mine*], online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

⁹ Gerhard Colm, "In Defence of the Public Interest" (1960) 27:1 Social Research at 303.

Still, a recently released report by a provincial task force charged with reviewing the regulation of Alberta's upstream oil and gas sector ("Task Force") identifies possible "enhancements" to the regulatory system. Those enhancements include categorizing public interests as either common interests or private interests and considering or "engaging" those interests through separate processes with separate and distinct goals.¹⁰ According to the Task Force, classifying public interests will facilitate more efficient and effective consideration of the public interest at the policy development and project decision-making stages.¹¹ While the Task Force has said that landowners and "other specific interests" affected by a proposed energy project will continue to have the opportunity to participate in regulatory process, it has also identified specific issues for further examination including clarifying the test for standing.¹² More generally, there is an increasing lack of confidence in the ERCB's ability to effectively assess and address the public interest.¹³

While there is a growing body of literature dealing with issues around public participation in ERCB processes, there is little literature that focuses squarely on the question of what is meant by the phrase "in the public interest" in section 3 of the

¹⁰ Alberta, Department of Energy, *Regulatory Enhancement Project: Technical Report* (Edmonton: Regulatory Enhancement Project, 2011) at 35-38. Also see Alberta, Department of Energy, *Enhancing Assurance Developing an Integrated Energy Resource Regulator A Discussion Document* (Edmonton: Government of Alberta, 2011) [*Enhancing Assurance*] at 14-19. The Task Force describes common interest matters as those that are of concern generally and that inform broad policy issues and private interest matters as those involving specific parties that expect to be impacted by a proposed oil and gas activity. Concerns about the utility and the long term implications of sequestering CO₂ are examples of common interests. Concerns about the impact of a specific well or program of wells on crops in the immediate vicinity of the well(s) are private concerns. Some concerns will not be easily pigeonholed into one or the other category — cumulative socio-economic effects of ongoing oil and gas development concentrated in a geographic region come to mind.

¹¹ *Ibid.*

¹² *Enhancing Assurance*, *supra* note 10 at 18-19.

¹³ See for example: 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; Cindy Chiasson, "ERCB might benefit from listening to environmental, social and economic perspectives", *Alberta Oil Magazine* (February-March 2010), online: <<http://www.albertaoilmagazine.com/2010/02/deciding-factor/?year=2010>>; and Nickie Vlavianos, "Public Participation and the Disposition of Oil and Gas Rights in Alberta" (2007) 17 JELP 205. In addition, in the last year, a conference and a round table have been convened on the topic of public participation in Alberta's energy and natural resource development and in ERCB hearings. Specifically, the Canadian Institute of Resources Law (CIRL) convened a conference on the topic on 19 November 2010. On 16 April 2010, CIRL convened a round table discussion on the topic. The outcome is summarized by Nickie Vlavianos in an article entitled "The Issues and Challenges with Public Participation in Energy and Natural Resources Development in Alberta" (2010) 108 Resources 1. In both venues concerns about opportunities for public access to the decision-making process for energy resource projects and concerns about the determination of the public interest by the ERCB in light of perceived problems with access were front and centre.

ERCA.¹⁴ The literature that does deal with the issue usually does so in the context of a different question and does not analyse how the ERCB has interpreted and applied the phrase over a range of decisions.¹⁵

The original predecessor to the ERCB was formed specifically to protect the public interest in the non-wasteful development of natural gas resources.¹⁶ The ERCB publishes mission statements espousing the public interest.¹⁷ The purposes provisions of the *ERCA* and the other Acts administered by the ERCB set out goals that can only be described as public interest provisions.¹⁸ The public interest permeates and is fundamental to the ERCB's role.

In light of mounting concern about the ERCB's effectiveness in dealing with the public interest and suggestions that the ERCB requires specific direction regarding its public interest mandate, and in light of specific issues identified by the Task Force, it is appropriate to evaluate the current state of affairs with respect to the meaning of "in the public interest" in section 3 of the *ERCA*. To do so this paper looks first for guidance to the social science literature and then to court decisions dealing with the ERCB's public interest mandate. Second this paper considers how the ERCB views and applies its public interest mandate over the range of matters it is required to handle.

The balance of this paper proceeds as follows. In order to provide perspective, Part II provides a brief overview of what the social science literature says about "in the public interest". Because the ERCB follows relevant Supreme Court of Canada and Alberta Court of Appeal decisions, Part III examines how those courts have interpreted "in the public interest" as that phrase relates to the ERCB's mandate. Part IV reviews the relevant legislative framework to provide specific context for the use of "in the public interest" in section 3 of the *ERCA*. Part V surveys how the ERCB has interpreted and

¹⁴ It appears that there are only three published papers that focus on the topic. See: Jodie L Hierlmeier, "The Public Interest: Can It Provide Guidance for the ERCB and NRCB?" (2008) 18 JELP 279; Shaun Fluker, "The Jurisdiction of Alberta's Energy and Utilities Board To Consider Broad Socio-Ecological Concerns Associated With Energy Projects" (2004-2005) 42 Alta L Rev 1085; and Neil J Brennan, "Private Rights and Public Concerns: The 'Public Interest' in Alberta's Environmental Management Regime" (1997) 7 J Envtl L & Prac 243.

¹⁵ *Ibid.* See also, e.g. Vlavianos, *supra* note 13.

¹⁶ Cecilia A Low, *Energy and Utility Regulation in Alberta: Like Oil and Water?*, Occasional Paper #25 (Calgary: Canadian Institute of Resources Law, 2009) at 5.

¹⁷ The current mission statement of the ERCB reads: "To ensure that the discovery, development and delivery of Alberta's energy resources take place in a manner that is fair, responsible and in the public interest.", online: ERCB <<http://www.ercb.ca/portal/server.pt?open=512&objID=260&PageID=0&cached=true&mode=2>>.

¹⁸ For example s 2 of the *ERCA* includes the purposes of controlling pollution and securing the observance of safe practices in oil and gas activities.

applied “in the public interest” over a range of decisions. Finally, Part VI concludes with an assessment of where things stand now and what more explicit guidance as to what is meant by “in the public interest” in section 3 of the *ERCA* is necessary.

2.0. “In the Public Interest” — The Social Science Literature

“Public interest” is not a defined term in the dictionary. “Public” is defined as both an adjective and as a noun. Since it is used as an adjective in the phrase “in the public interest”, the relevant definitions of “public” are:

... of, belonging to, or concerning the public as a whole; of or by the community at large ... for the use or benefit of all: esp., supported by government funds ... as regards community, rather than private affairs ... acting in an official capacity on behalf of the people as a whole ...¹⁹

The relevant portions of the definition of “interest” are:

a right or claim to something ... a share or participation in something ... advantage; welfare; benefit ... a group of people having a common concern or dominant power in some industry, occupation, cause etc. ... a feeling of interest, concern, or curiosity about something ... importance; consequence.²⁰

Thus the public interest may be concerns shared by a community as a whole or it may relate to a group of people with a common concern in a specific issue or matter. Still further, it may describe actions taken by officials on behalf of the collective population in the name of some notionally shared interest. Clearly, it is important to be aware of whether the phrase is being used to describe official action or in a context where the focus is on the community as a whole or on constituent parts.²¹

There has been a great deal of scholarly writing on the meaning of the phrase “in the public interest” particularly in the fields of political science, economics and public administration. The question of whether that phrase can have any substantive meaning was the subject of significant debate in the early 1960s and continues to provide grist for the academic writing mill.²²

¹⁹ David B Guralnik, ed, *Webster’s New World Dictionary: 2nd College Edition* (USA: William Collins Plus World Publishing Co Inc, 1978).

²⁰ *Ibid.*

²¹ Bozeman, *supra* note 1 at 12.

²² See e.g. M Blitz, “Public interest” in Neil J Smelser & Paul B Baltes, eds, *International Encyclopaedia of the Social and Behavioural Sciences* (Amsterdam: Elsevier, 2006) at 12546-12548, online: <doi:10.1016/BO-08-043076-7/01217-1>; Richard C Box, “Redescribing the public interest” (2007) 44

Although some writers have defined the phrase for the purposes of their own work,²³ the consensus is that it is not possible to define “in the public interest” in a way that is relevant in all circumstances.²⁴ Indeed, it may not be in the public’s best interest to do so. Whether they say so explicitly or not, most commentators on the subject view the public interest as a malleable concept that takes its form and content from the context in which it is being used rather than as a concrete principle that is reducible to a single, simple definition.²⁵

While defining the public interest is consistently identified in the literature as problematic, its importance as a concept is routinely reaffirmed.²⁶ As a result, the trend has been to recast it as a functional concept. That change in approach has resulted in proposals that the public interest may function variously as one, some or all of the following: a means by which citizens may judge government’s actions; a means of justification when individual interests are not served by an identified common good; and as a check on public officials in their decision making.²⁷

The question has been posed: “... what does it mean to administer in the public interest?”²⁸ A recent survey conducted for the Canadian Centre for Policy Alternatives suggests that a majority of Canadians view the public interest in the context of government regulation of business as protecting the health, safety, working conditions and the environment of and for Canadians.²⁹

When used in regulation, the concept of the public interest provides a check on decision makers that is intended to prevent capture by the interests being regulated. It also provides a tool enabling decision makers to balance conflicting interests by creating a hierarchy in which the public interest or the broader community interest may trump

The Social Science Journal 585; and Thomas J Barth, “The public interest and administrative discretion” (1992) 22:4 *American Review of Public Administration* 289.

²³ For example, Bozeman, *supra* note 1 defines public interest to mean “In a particular context ... the outcomes best serving the long-run survival and well-being of a social collective construed as a ‘public’”.

²⁴ *Ibid* at 11. See also: Anthony Downs, “The Public interest: Its Meaning in a Democracy” (1962) 29:1 *Social Research* 1 at 1-2; Burton A Weisbrod et al, *‘Public Interest Law’ An Economic and Institutional Analysis* (Berkeley: University of California Press, 1978) at 4; and Mike Feintuck, *‘The Public Interest’ in Regulation* (Oxford: Oxford University Press, 2004) at 1.

²⁵ See e.g. Box, *supra* note 22 and Bozeman, *supra* note 1 at 13.

²⁶ *Ibid*. See also Downs, *supra* note 24 and Feintuck, *supra* note 24.

²⁷ Downs, *ibid* at 2.

²⁸ Barth, *supra* note 22 at 289.

²⁹ Marc Lee, *Canada’s Regulatory Obstacle Course: The Cabinet Directive on Streamlining Regulation and the Public Interest* (Ottawa: Canadian Centre for Policy Alternatives, 2010) at 4.

private or individual interests.³⁰ As a result, it is important to be aware of the scope of interests encompassed by any particular use of the concept. Is it meant to include only individuals who may experience direct impacts of a proposed activity or is it intended to include broad, collective interests such as protection of the environment?

When considering what “in the public interest” means in the context of section 3 of the *ERCA*, it is instructive to look to recent work in the area. The “redescription” of the public interest proposed by Richard C. Box is useful.³¹ Box argues that understanding and applying the concept requires that we take into account societal conditions, public knowledge and the fact that those factors change over time.³² In particular, Box emphasizes the notion that as individuals become informed or more informed about specific issues of concern to themselves and the community, their view of what is in their best interest and the collective interest can change.³³ Similarly, Barry Bozeman notes that an important aspect of the public interest is that it is “dynamic” and varies according to context in terms of circumstances and time.³⁴

Finally, it is noteworthy that there is a school of thought that says that in the context of regulatory decision making, the public interest can and should be thought of as having a procedural or structural component as well as a substantive component.³⁵ The procedural approach to the public interest necessarily focuses on whether the decision making process was fair, inclusive and transparent. This view holds that “being ‘in the public interest’ depends not only on what you do but also on how you do it.”³⁶ When approached in this manner, an appropriate process may be said to result in decisions in the public interest regardless of whether the public or some segments of it will experience negative impacts as a result.

3.0. “In the Public Interest” — In the Courts

The Canadian International Trade Tribunal has noted that “[t]here is a dearth of helpful Canadian jurisprudence on the meaning of the words ‘in the public interest’.”³⁷ While the

³⁰ Colm, *supra* note 9 at 303-304.

³¹ Box, *supra* note 22.

³² *Ibid.*

³³ *Ibid* at 168.

³⁴ Bozeman, *supra* note 1 at 13.

³⁵ See e.g. Barth, *supra* note 22 and Box, *supra* note 22 at 588.

³⁶ Barth, *ibid* at 292. See also Hierlmeier, *supra* note 14.

³⁷ Public Interest Investigation No.: PB-95-002, 1996 CanLII 7876 (CITT).

Trade Tribunal's lament is fitting, there is some judicial guidance on the meaning of the phrase as it relates to the ERCB.

3.1. Supreme Court of Canada

There is no instance where the meaning of the phrase "in the public interest" as it is used in section 3 of the *ERCA* has been considered by the Supreme Court of Canada (SCC); however, the SCC has considered the public interest jurisdiction of the ERCB as established by other provisions applicable to and administered by the Board.

In *Athabasca Tribal Council v. Amoco Canada*³⁸ the Tribal Council representing five First Nations with communities and traditional territories in the vicinity of Amoco Canada's (Amoco) proposed oil sands project argued that the ERCB had the jurisdiction under the *Oil and Gas Conservation Act (OGCA)* to order Amoco to implement an affirmative action program intended to ameliorate any negative impacts of the development on them and on the region as a condition of the project approval. Specifically, the Tribal Council asked for conditions to be imposed that would have required the project developer to give preference to First Nations members in the areas of employment and business opportunities.

The relevant section of the *OGCA* required the Board to hold a public hearing but did not refer to the public interest;³⁹ however, section 24 of the *Energy Resources Conservation Act, 1971*⁴⁰ provided then, as it does now, that the ERCB may "... recommend to the Lieutenant Governor in Council such measures as it considers necessary or advisable in the public interest related to the ... production, development ... of energy resources ..." (emphasis added). At the time, section 5 of the *OGCA* provided, as section 4 does now, that "[t]he purposes of this Act are ... to provide for the economic, orderly and efficient development in the public interest of the oil, gas and crude bitumen resources of Alberta" (emphasis added).

The Tribal Council argued that the reference to the public interest in those provisions gave the ERCB the necessary authority to recommend conditions intended to give Indians an equal opportunity to participate in work associated with the project. The SCC concluded that the references to the public interest in the relevant provisions of the *OGCA* and the *ERCA* must be interpreted in the context of the legislative scheme as a whole. It held that the jurisdiction of the Board was limited to the regulation and control of the development of energy resources in the Province of Alberta. More specifically, the

³⁸ [1981] 1 SCR 699 [*Athabasca Tribal Council*].

³⁹ RSA 1970, c 267, s 43.

⁴⁰ SA 1971, c 30.

court held that the Board's powers to recommend conditions were limited to "... the natural resources of the area rather than with the social welfare of its inhabitants".⁴¹

While not articulated in the decision, the SCC was surely influenced by the fact that the power to legislate in respect of Indians is a federal power. It also seems to have been influenced by the fact that the scope of the public that would be affected by Amoco's project was much broader than the five First Nations represented by the Athabasca Tribal Council. Ritchie J. specifically noted that:

The members of the five Indian bands do not comprise the sole population of the area in the vicinity of the proposed project. Some Metis and white persons also live in the area. We are told that all of the people in the general area may be said to suffer economic, educational and social disadvantage when compared to other Albertans. In some of the communities in the area, unemployment rates exceed 50 per cent compared to an overall rate of 5 per cent for the province as a whole.⁴²

It is implicit in the SCC's decision that the scope of the "public" falling within the public interest considerations of the Board in that case included all of the communities in the vicinity of the proposed project and individuals who might be affected by the project's development.

It must also be noted that the case was decided before the introduction of section 3 to the *ERCA*. So if the question related to conditions intended to ameliorate social or environmental impacts arising from a specific energy project were argued today, the case might be decided differently: although, as will become apparent below, it is not likely that the ERCB would arrive at a different decision.

In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*⁴³ the SCC considered the meaning of the public interest in the context of Alberta utilities legislation. ATCO Gas & Pipelines Ltd. (ATCO Gas), a natural gas utility, had applied to the Alberta Energy and Utilities Board (AEUB) for approval of the sale of buildings and land no longer required for supplying utility service.⁴⁴ The AEUB approved the sale imposing a condition that ATCO Gas allocate a portion of the sale proceeds to its ratepayers. On appeal the issues were whether the Board had the jurisdiction to allocate the proceeds of sale to ratepayers "in the public interest" and if so, whether its decision was reasonable in the circumstances. The case resulted in a split decision.

⁴¹ *Supra* note 38 at 707-708.

⁴² *Ibid* at 703.

⁴³ [2006] 1 SCR 140, 2006 SCC 4 [*ATCO Gas*].

⁴⁴ The AEUB is the immediate predecessor to the ERCB. From 1995-2008 the energy resource regulation and utility regulation functions were exercised by a single regulator, the AEUB. Prior to that time and since then, those functions have been exercised by separate regulators, the ERCB and the Alberta Utilities Commission. See *supra* note 2 and Low, *supra* note 16.

A major ratepayer had argued that the Board had the necessary discretion to allocate sale proceeds to ratepayers as a result of subsection 15(3) of the *Alberta Energy and Utilities Board Act (AEUB Act)*.⁴⁵ That provision authorized the Board to make orders subject to any conditions it thought necessary in the public interest. The majority of the Court held that the Board could not have been given completely unfettered discretion to attach any such condition it wished on orders.⁴⁶ In keeping with the Court's approach in *Athabasca Tribal Council*, interpreting the Board's seemingly broad powers in the overall context of the relevant legislation, the majority found that they were limited to balancing consumer protection with the property rights of the utility owners and to regulating utility rates.⁴⁷ The minority, three of the seven justices, found that it was for the Board to decide whether it was necessary to impose conditions pursuant to subsection 15(3) of the *AEUB Act*.⁴⁸

The majority view in *ATCO Gas* is consistent with the SCC's decision in *Cartaway Resources Corp. (Re)*.⁴⁹ That case dealt with an appeal from a decision of the British Columbia Securities Commission. An issue before the Court was whether general deterrence was an appropriate consideration when establishing a penalty in the public interest. The Court noted that when a regulatory board is given the discretion to determine whether something is in the public interest, the courts should defer to reasonable determinations by the board.⁵⁰

Just as "public interest" is not defined in the *ERCA*, the term was not defined in the legislation at issue in *Cartaway*. The Court reiterated that notwithstanding the use of language giving the Commission a very broad discretion to act in the public interest, that discretion is not unlimited.⁵¹ The Court said that the proper scope of what was to be considered in the public interest was to be determined by assessing the public interest provision in the context of the legislative framework. The purposive provisions of the legislation were found to provide specific guidance on the nature of the interests the Commission ought to have in mind in assessing whether to exercise its public interest discretion. The Court went on to find that nothing in the Commission's public interest jurisdiction precluded it from considering general deterrence in making an order because

⁴⁵ RSA 2000 c A-17.

⁴⁶ *Supra* note 43 at para 46.

⁴⁷ *Ibid* at paras 54-69.

⁴⁸ *Ibid* at para 89.

⁴⁹ 2004 SCC 26 [*Cartaway*].

⁵⁰ *Ibid*.

⁵¹ *Ibid* at para 58, citing *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, [2001] 2 SCR 132, 2001 SCC 37 at paras 39-41.

deterrence was a reasonable consideration that fell within the scope of regulatory sanctions permitted by the legislation.⁵²

Finally, in *Memorial Gardens Association (Canada) Limited v. Colwood Cemetery Company*,⁵³ the SCC held that the determination of whether a proposed action met the test of public convenience and necessity is not a question of fact for appellate courts, it is a matter of opinion of the original decision maker.⁵⁴ This case has been cited as supporting the proposition that a parallel is to be drawn between “in the public interest” and “in the public convenience and necessity” in terms of recognizing that a determination of what is or is not in the public interest is a matter of opinion for the board.⁵⁵

3.2. Alberta Court of Appeal

There are a number of Alberta Court of Appeal decisions in which the Court has discussed the public interest mandate of the ERCB. Unfortunately, there has been no clear judicial determination of how the Board’s public interest mandate is to be interpreted and applied.

In *Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy and Utilities Board) (Caroline Plant)*,⁵⁶ the facts were that Shell had applied to the Board for an amendment to its sour gas processing plant permit to allow it to increase the volume of gas processed with a corresponding increase in the level of sulphur dioxide released to the atmosphere. The interveners had asked the Board to consider evidence of the site specific effects of emissions, both existing and incremental, on cattle. The ERCB declined to hear that evidence on the grounds that it had considered evidence of site specific effects of emissions on cattle prior to issuing the original permit and that the issue of health effects on cattle of oil and gas industry emissions was a subject of concern in Alberta generally that would be dealt with by way of a review being carried out by the Alberta Cattle Commission.

The Court of Appeal and the Board noted that section 2.1 (now section 3) of the *ERCA* required the Board to consider “whether the project is in the public interest, having

⁵² *Cartaway, ibid.*

⁵³ [1958] SCR 353 [*Memorial Gardens*].

⁵⁴ *Ibid* at 357.

⁵⁵ See e.g. *Sincennes, infra* note 83.

⁵⁶ (1996) ABCA 277 [*Caroline Plant*].

regard to the social and economic effects of the project and the effects of the project on the environment”.⁵⁷

Two of the three justices hearing the appeal found that while section 2.1 “imposed a duty” on the ERCB to consider the social, economic and environmental impacts of a project, if those impacts had been canvassed and considered by the Board in a previous proceeding, it could choose not to revisit those considerations in respect of the same project. This was so notwithstanding the fact that the evidence was being offered in respect of proposed changes to the original project that were expected to result in increased emissions.⁵⁸

The majority also found that where concerns about certain effects were not project specific but arose in relation to oil and gas activity generally, then it was open to the Board to determine that such concerns were not relevant in terms of the social, economic and environmental effects in respect of a specific application and to defer broader public interest issues to another forum and time.⁵⁹ In arriving at its decisions the majority relied heavily on its finding that the Board was entitled to a high degree of curial deference.⁶⁰

In a well-reasoned dissent, Madam Justice C. Conrad found that the impact of increased sulphur dioxide emissions on cattle was an issue that the ERCB ought to have considered in the context of the social, economic and environmental effects of the proposed permit amendment.⁶¹ She also found that regardless of whether the issue was being dealt with in another forum, section 2.1 of the *ERCA* clearly required the Board to consider the matter itself.⁶² In her view section 2.1 “requires the Board to inquire into whether the project is in the public interest”.⁶³ She held that the Board may not defer or delegate its responsibility to consider the social, economic and environmental effects of a proposed project even where the project is simply a change in the through put or operation of an existing and previously permitted facility.

It is unfortunate that the *Caroline Plant* decision was not appealed to the SCC. While the majority decision appears at first blush to be consistent with SCC decisions deferring to the Board’s determination of what is in the public interest, it fails to draw the necessary distinction between the jurisdictional question of what the Board’s specific

⁵⁷ *Ibid* at para 3. Section 2.1 of the *ERCA* was renumbered s 3 in a later amendment.

⁵⁸ *Ibid* at para 9.

⁵⁹ *Ibid*, paras 18-23.

⁶⁰ *Ibid*, paras 14, 23 and 25.

⁶¹ *Ibid* at paras 30-31 and 42-47.

⁶² *Ibid*.

⁶³ *Ibid* at para 43 [emphasis added].

obligations are under section 2.1 and the discretionary question of whether its discharge of those obligations in specific circumstances was reasonable.

In *Rocky Mountain Ecosystem Coalition v. Alberta (Energy and Utilities Board)*⁶⁴ the Alberta Court of Appeal granted leave to the Coalition to appeal a decision of the Board in order to consider two questions: first, whether the introduction of section 2.1 to the *ERCA* (the public interest provision) had any impact on the general policies and procedures of the Board when carrying out its functions in relation to applications for gas removal permits; second, regardless of whether the addition of the explicit requirement to consider the public interest in section 2.1 had any impact on the general policies and procedures of the Board, whether the Board had complied with its statutory mandate in this case.

In a short judgment the Court of Appeal agreed with the Board that where it had already conducted a broad review of public interest considerations in the context of exercising its supervisory powers over the exploration, production, transmission and marketing of natural gas it was “not reasonable” to conduct a review of the social, economic and environmental impacts of the proposed export of natural gas.⁶⁵ The Court found this was a sufficient answer to the second question on appeal and went on to find that given its conclusion that the export permit stage was not the appropriate time for a “further consideration” of social, economic and environmental impacts, “... then it cannot be said that the amendments can have any impact on the Board’s existing policies and procedures regarding export permits.”⁶⁶

The Court then appears to backtrack by saying that it did not need to decide whether the introduction of section 2.1 should have any impact on the ERCB’s existing practice and policies with regards to the social, economic and environmental effects.⁶⁷ Indeed, the Court of Appeal confused matters further, saying “... it would appear to be arguable that the Board can continue” with its existing practice without paying specific heed to the mandatory words of the amendment.⁶⁸

There are a couple of disappointing aspects of the Court’s decision in this case. First, the Court ignored the question of whether there could in fact be a different “public” affected by gas exports than those affected by the drilling of gas wells and the operation of mid-stream and pipeline facilities for natural gas. Second, the Court of Appeal failed to

⁶⁴ 1995 ABCA 500 [*Rocky Mountain Ecosystem Coalition*].

⁶⁵ *Ibid* at para 8-10.

⁶⁶ *Ibid* at para 10.

⁶⁷ *Ibid*.

⁶⁸ *Ibid*.

take the opportunity to offer guidance on the legal interpretation of the then newly added public interest provision in the ERCB's governing legislation.⁶⁹

Subsequently, in the leave to appeal application styled *Calgary North H2S Action Committee v. Alberta Energy and Utilities Board*,⁷⁰ the Court of Appeal did provide some useful guidance on the legal interpretation of the public interest mandate of the ERCB. The Calgary Regional Health Authority had argued that because it was a statutory body with a legislated mandate to protect public health, the Board was required to give its submissions on potential public health impacts greater weight than those of other, non-specialist interveners. In dismissing the leave application, the Court noted that it was not persuaded that the Health Authority raised an arguable point of law.⁷¹ In particular, the Court noted that the Board would not be able to fulfill its statutory obligation to consider whether a project was in the public interest having regard to the social, economic and environmental impacts if it were required to give special weight to the arguments of other statutory bodies with their own mandates.⁷²

The Court of Appeal's decision in *Lone Pine (Committee) v. Alberta (Natural Resources Conservation Board)*⁷³ deals with the public interest mandate of a different regulatory body but its comments regarding whether a regulatory decision maker may assume no adverse environmental impact if none is proven by opponents to an application are relevant to the ERCB's public interest mandate under section 3 of the *ERCA*. The Lone Pine appeal arose from the approval by the Natural Resources Conservation Board of an application to expand an existing feedlot and that Board's interpretation and application of the legislation.

The relevant portions of the legislation provided that:

In considering whether an application for an amendment to an approval meets the requirements of the regulations, an approval officer ... shall not consider whether the existing buildings and structures meet the requirements of the regulations unless in the opinion of the approval officer the existing buildings and structures may cause a risk to the environment ...

The Court found that the provisions were directed at "protection of the environment and the larger public interest." What the Court went on to say about the onus to assess the public interest issues is instructive. It stated:

⁶⁹ For a more detailed critique of the Alberta Court of Appeal decision in this case see Fluker, *supra* note 14.

⁷⁰ 1999 ABCA 323.

⁷¹ *Ibid* at paras 17-18.

⁷² *Ibid*.

⁷³ (2004) ABCA 404 [*Lone Pine*].

... this section [does not] entitle the approval officer or, for that matter, the Board, to assume that because those opposing an application under AOPA have not proven an adverse impact on the environment from existing operations, it follows that there is no risk to the environment.

The general proposition that should be taken from this decision is that when a regulatory body has been delegated the responsibility to assess risk to the environment and the broader public interest, it has a positive obligation to take steps to do so. It cannot avoid doing so simply because no one has opposed the project. This view is consistent with the general language of the majority and the specific language in the dissent in *Caroline Plant*.

In *ATCO Electric Limited v. Alberta (Energy and Utilities Board)*⁷⁴ the Court of Appeal considered the Board's role in reviewing and approving negotiated settlements. It was concerned with the question of what is meant by "in the public interest" when used in the context of the Board's rate setting and settlement approval roles. The Court noted that the public interest is "amorphous" in nature and varies according to the circumstances and context in which it arises.⁷⁵ The Court said the key to understanding the context in that case was the fact that the legislation had been substantially amended to accommodate competition in some aspects of the electric sector in the province of Alberta: as a result, the value of competition, including fostering and strengthening it, must inform the analysis of the public interest.⁷⁶

In assessing the specific public interest the Board had to consider in deciding whether to approve a negotiated settlement agreed to by ATCO, the Court found that the Board had to take into account the interests of the rate paying public. In other circumstances the Board might have to take into account the interests of both the rate payer and the utility.⁷⁷ The general proposition that may be taken from this case is that the public interest must be considered against the background and history of the legislative scheme in which it appears.

In *Solex Gas Processing Corp. v. Alberta (Energy and Utilities Board)*⁷⁸ leave to appeal from an approval of a proposal by Solex Gas Processing Corp. to side stream natural gas was denied. In the course of the application, the parties submitted and the court agreed that the overriding consideration in the proceedings before the Board was whether approval of the proposal was in the public interest. The court noted that through section 3 of the *ERCA* the Legislature had delegated to the Board the duty to consider the

⁷⁴ (2004) ABCA 215 [*ATCO Electric*].

⁷⁵ *Ibid* at para 134.

⁷⁶ *Ibid* at para 136.

⁷⁷ *Ibid* at paras 140-143.

⁷⁸ (2004) ABCA 388.

“wider public interest”, that is interests other than competing commercial interests.⁷⁹ The Court made it clear that it considered the scope of public interest considerations to be broad and that, often, the commercial interests of the applicant will have to be balanced with broader community concerns.⁸⁰

In *ATCO Midstream Ltd. v. Alberta (Energy Resources Conservation Board)*,⁸¹ the Alberta Court of Appeal was asked to grant leave to appeal a decision of the ERCB on a number of grounds. One of those issues was whether the Board had failed to consider the public interest in the course of an application for an amendment to a facility licence. In granting leave Madam Justice P. Rowbotham noted that the ERCB had not even mentioned the public interest in its reasons for decision. She said that “[it] may be that the Board need not address public interest in detail or perhaps even specifically, in every decision, but the question remains as to what the Board must do to satisfy, or indicate that it has satisfied, its obligation to consider the public interest.”⁸²

In *Sincennes v. Alberta (Energy and Utilities Board)*⁸³ an issue before the Court was whether the Board correctly defined and applied the public interest test under the *Hydro and Electric Energy Act*.⁸⁴ The direction to the Board to consider the public interest when assessing an application for approval of an electric transmission line is the same as that under the *ERCA*. In its reasons for decision the Board had specifically referred to its public interest mandate under not only the *Hydro and Electric Energy Act* but section 3 of the *ERCA* as well.

The appellants argued that the merchant nature of the transmission line necessarily affected the Board’s public interest considerations. In deciding what standard of review to apply, the Court affirmed that the Board’s application of its public interest mandate was a matter of administrative discretion and of forming an opinion.⁸⁵ However, the Court specifically cited the SCC’s decision in *ATCO Gas*⁸⁶ and noted that the question for determining the proper test for what constituted the public interest was a question of law and jurisdiction.⁸⁷

⁷⁹ *Ibid* at para 27.

⁸⁰ *Ibid* at para 33-43.

⁸¹ (2008) ABCA 231 (CanLII).

⁸² *Ibid* at para 37. As of the time of writing, there is no record of an appeal.

⁸³ 2009 ABCA 167.

⁸⁴ RSA 2000, c H-16.

⁸⁵ *Ibid* at para 29. The Court of Appeal adopted the Supreme Court of Canada’s formulation for the public convenience and necessity used in *Memorial Gardens*.

⁸⁶ *Supra* note 42.

⁸⁷ *Ibid*.

In analysing the arguments made before it, the Court of Appeal noted that “public interest” was a flexible term and that it would not be appropriate to ascribe to it a fixed meaning for all purposes. The Court went on to cite with approval the reasoning of the National Energy Board on the issue of the meaning of the “public interest” and said:

... there are no firm criteria for determining public interest that will be appropriate to every situation. Like ‘just and reasonable’ and public convenience and necessity’, the criteria of public interest in any given situation are understood rather than defined and it may well not serve any purpose to attempt to define those terms too precisely.⁸⁸

In finding that the Board had adequately considered the public interest, the Court cited specific references in the Board’s decision to, among other things, agricultural and other land use impacts, environmental impacts and mitigation, and impacts of construction and operation of the proposed line in terms of noise, wetlands, birds, electromagnetic fields and radio and television interference.⁸⁹

Finally, the Alberta Court of Appeal has recently reaffirmed that seemingly broad powers given to regulatory boards, such as the power to determine whether an application is in the public interest, are in fact limited in scope by the purposes of the legislation in which the powers are delegated and the context of the regulatory scheme.⁹⁰

3.3. Key Principles from the Case Law

The best opportunity the courts had to give guidance on the meaning of “in the public interest” in section 3 of the *ERCA* resulted in a decision with a strong dissent from the Alberta Court of Appeal that has not been appealed to the SCC. As a result, the judicial guidance that is available is not definitive. Nonetheless, the following principles may be distilled from the case law:

- “in the public interest” is a flexible concept that must be given content appropriate to the circumstances at the relevant time. The circumstances include the legislative and policy context.⁹¹
- The scope of the public interest in the context of section 3 of the *ERCA* is meant to be broad and should not be interpreted restrictively.⁹²

⁸⁸ *Ibid* at para 67. See note 117 *infra* for the NEB’s definition of the public interest.

⁸⁹ *Ibid* at para 72.

⁹⁰ *Calgary (City) v Alberta (Energy and Utilities Board)*, 2010 ABCA 132 at paras 137-139.

⁹¹ *Ibid* and *ATCO Electric*, *supra* note 74.

⁹² *Solex Gas Processing Corp*, *supra* note 78.

- Assessing the public interest requires balancing competing interests and or concerns.⁹³
- The ERCB has a positive obligation to take steps to assess the public interest.⁹⁴
- Unless and until the Court of Appeal finds otherwise, it would be prudent for the Board to explicitly refer to its public interest deliberations in its decisions.⁹⁵
- Finally, the ERCB’s jurisdiction to make orders in the name of the public interest is not unlimited. It must be exercised within the applicable legislative context.⁹⁶

4.0. Legislative Framework

One commentator has noted that “[t]he phrase ‘in the public interest’ is favoured by legislators and politicians for the protection offered by its flexibility.”⁹⁷ It is employed both in the purposes provisions of statutes and within operational provisions in both statutes and regulations. Indeed, the phrase is used in all manner of legislation in Canada including the Criminal Code, freedom of information and privacy legislation, legislation enabling self-regulation by professions and oil sands conservation legislation.

In Canadian legislation at the federal and provincial levels, “in the public interest” is used both to characterize and control regulatory actions. It has been said that:

Perhaps no concept has sparked more consternation, debate and general disagreement among those involved in environmental regulatory approval processes than that of the ‘public interest’. It is a term that appears incapable of precise definition yet is invariably used by decision makers as the principal rationale for the approval or denial of a particular application. Regulatory statutes often charge tribunals directly or by implication to take account of the public interest in the course of rendering a decision. Yet precious little guidance is provided or available to assist in the determination of precisely what constitutes the public interest. The primary difficulty involves a lack of consensus over the limitations to be applied to the term ‘public’ or ‘affected public’.⁹⁸

⁹³ *Caroline Plant*, *supra* note 56 and *Sincennes*, *supra* note 83.

⁹⁴ *Lone Pine*, *supra* note 73 and *Caroline Plant*, *supra* note 56.

⁹⁵ *Atco Midstream Ltd*, *supra* note 81.

⁹⁶ *Athabasca Tribal Council*, *supra* note 38 and *ATCO Gas*, *supra* note 43.

⁹⁷ Alan Rycroft, “In the Public Interest” (1989) 106 SALJ 172 at 172.

⁹⁸ Michael I Jeffrey, “Commentary” in *The Place of Negotiation in Environmental Assessment: A Background Paper* (Hull: Canadian Environmental Assessment Research Council, 1989) at 56, online: <<http://www.worldcat.org/title/place-of-negotiation-in-environmental-assessment/oclc/052373103>>.

In Alberta the phrase “in the public interest” is used throughout legislation governing and administered by the ERCB and how it is used differs. For example, in subsection 10(3)(a) of the *Oil Sands Conservation Act (OSCA)*⁹⁹ the ERCB may grant approval for an oil sands operation subject to terms and conditions “if, in its opinion, it is in the public interest to do so.” Pursuant to subsection 41(1) of the *OGCA*¹⁰⁰ the Board may take “any means that appear to it to be necessary or expedient in the public interest” to prevent or control the uncontrolled flow or escape of oil gas or water or any other substance from a facility, or from a well or any underground formation. Public health and safety as well as environmental protection within a specific geographic setting are arguably the driving public interest concerns in the latter section while broader economic and social considerations are at play in the former.

In accordance with subsection 33(1) of the *Pipeline Act*¹⁰¹ the ERCB may require a licensee to take one or more of a number of actions in respect of its pipeline including altering or relocating part of it if the Board is of the opinion that it would be in the public interest to do so.¹⁰² In this case the relevant public interest could be limited to considerations proximate to the pipeline such as concerns about safety or it could be a more generic or presumed public interest concerning the proliferation of pipelines in a region.

Pursuant to subsection 51(1) of the *Pipeline Act* when a licensee contravenes a Board order and the Board considers it in the public interest to do so, it may make a declaration naming individuals in control of the company at the time. The public interest in this provision must refer to the presumed interest of Albertans in appropriate enforcement and accountability measures in respect of regulatory compliance generally and pipeline operations in particular.¹⁰³

Section 21 of the *ERCA* describes the circumstances in which the ERCB may and must hold public hearings or inquiries for the purpose of making recommendations to cabinet.¹⁰⁴ Any such recommendations must be for measures the Board considers “necessary or advisable in the public interest”.¹⁰⁵ Unlike section 3, there is no

⁹⁹ RSA 2000, c O-7.

¹⁰⁰ RSA 2000, c O-6.

¹⁰¹ RSA 2000, c P-15.

¹⁰² Pursuant to the *Pipeline Act* the ERCB has jurisdiction over all but utility pipelines which fall under the jurisdiction of the Alberta Utilities Commission.

¹⁰³ A similar use of in the public interest may be found in s 1(1)(ddd) of the *OGCA*. That provision sets out a definition of “wasteful operations” and one of the criteria is a public interest in the avoidance of flaring gas.

¹⁰⁴ *ERCA*, *supra* note 3, s 21(a).

¹⁰⁵ *ERCA*, *ibid*, s 21(b).

requirement in section 21 that the Board take specific public interest factors into account. The mandate for public policy development in section 21 suggests that, in hearings and inquiries held pursuant to the section, the Board should take the broadest possible view of the public interest commensurate with the policy issues to be canvassed in the hearing. In the language of the Task Force, section 21 enables and requires the ERCB to assess interests held by the public in order to identify common interests for the purpose of public policy development.

Pursuant to subsection 22(1) of the *ERCA*, the ERCB may participate in or conduct co-operative proceedings where “it is of the opinion that it would be expedient or in the public interest to do so”. The context suggests that the public interest here refers to concerns about efficient use of resources, for example in minimizing the number of proceedings in respect of a single project. While many knowledgeable members of the public may be expected to express such a concern if asked, the public interest referred to in subsection 22(1) is a good example of an interest imputed to the public to justify regulatory action.

The foregoing examples demonstrate the flexibility and dynamism that must be inherent in the phrase “in the public interest” as it is used in the legislation administered by the ERCB. More importantly, they show the importance of context for the purpose of giving substance to the phrase.

The specific requirement for the ERCB to consider whether an energy resource 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” was first introduced into the Board’s governing statute in 1993 by way of the *Environmental Protection and Enhancement Act*.¹⁰⁶

Prior to that time, reference to the public interest was found in legislation administered by the Board such as section 4 of the *OGCA* which provides that:

[t]he purposes of this Act are:

...

(c) to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta.¹⁰⁷

As noted above, in *Rocky Mountain Ecosystem Coalition* the Board took the view that the explicit requirement to consider whether a project was in the public interest in light of

¹⁰⁶ RSA 2000, c E-12.

¹⁰⁷ *Supra* note 100. Other purposes of the *OGCA* include ensuring conservation of oil and gas resources, controlling pollution resulting from oil and gas activity and securing the observance of safe practices in the conduct of oil and gas activity.

its anticipated social, economic and environmental effects simply affirmed what it already did when considering energy project applications, including applications for well licences.¹⁰⁸ Others have suggested that the introduction of a specific public interest consideration was intended to enhance the jurisdiction of the ERCB to address broader socio-ecological concerns.¹⁰⁹

To better understand the Board's public interest mandate in section 3 of the *ERCA*, it is worth taking a closer look at the legislation. Section 3 of the *ERCA* says:

[w]here by any other enactment the Board is charged with the conduct of a hearing, inquiry or other investigation in respect of a proposed energy resource project or carbon capture and storage project, it 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. (emphasis added)

The emphasised words of section 3, given their plain and ordinary meaning, suggest that the Board is only required to give specific consideration to the public interest factors set out later in the provision when an Act other than the *ERCA* requires that the ERCB conduct a public proceeding in respect of a proposed project. However, other enactments do not require the Board to conduct a hearing, inquiry or other investigation in respect of all energy project applications. For example, under the terms of the *OGCA* the Board may grant a well licence on receiving a complete application and is not required by that Act to hold a hearing, inquiry or other investigation prior to doing so.¹¹⁰ Similarly, the Board may grant a permit to develop a coal mine without holding a hearing or conducting an inquiry or other investigation.¹¹¹

Likewise, under the terms of the *Pipeline Act*, there is no requirement for the Board to hold a hearing prior to granting or refusing to grant a licence to construct a pipeline.¹¹² By contrast, the provisions of the *OSCA* do require the Board to make any investigation or inquiries and hold any hearing it considers necessary or desirable in connection with an application for approval to construct an oil sands project.¹¹³

It is by virtue of the operation of section 26 of the *ERCA*, not “any other enactment”, that the Board is charged with conducting a hearing in respect of an application when it is

¹⁰⁸ See *Rocky Mountain Ecosystem Coalition*, *supra* note 64 and Fluker, *supra* note 14 at 1093.

¹⁰⁹ Fluker, *ibid* at 1092-1093.

¹¹⁰ *Supra* note 100, s 18(1).

¹¹¹ *Coal Conservation Act*, RSA 2000, c C-17, s 14 [CCA].

¹¹² *Pipeline Act*, RSA 2000 c P-15, s 9(a).

¹¹³ *Supra* note 99, s 10(2). The section applies to both *in situ* and mineable oil sands projects.

of the view that its decision may directly and adversely affect the rights of a person.¹¹⁴ So, when the Board conducts an investigation, inquiry or hearing pursuant to section 26 of the *ERCA* and not pursuant to the provisions of an enactment other than the *ERCA*, it is arguable that the requirement to consider the public interest as prescribed in section 3 does not apply. As a result, any consideration the Board gives to the public interest having regard to social, economic and environmental effects in the course of hearings conducted pursuant to section 26 of the *ERCA* is either on its own initiative and perhaps over and above what is strictly required of it or it is in keeping with the purposes provisions of the legislation giving rise to the application that resulted in the public process. In that respect, to the extent that the Board views section 3 as confirming its past practice, it is filling a large hole that is arguably present in the legislation.

Having said that, the principles of statutory interpretation require that section 3 of the *ERCA* is given a fair, large and liberal interpretation so as to achieve the objects of the Act in the broader context of the energy resource legislation administered by the ERCB.¹¹⁵ In doing so it is arguable that section 3 is triggered any time the ERCB holds a hearing or conducts an investigation or inquiry into a matter falling within its jurisdiction. The ERCB seems to interpret section 3 in this way without actually saying so since it invokes the public interest in many hearings that it holds pursuant to section 26 of the *ERCA*.¹¹⁶ The courts have not yet been asked to consider the point.

5.0. “In the Public Interest” — The ERCB Perspective

5.1. *ERCA*, Section 3: Has a Test Been Prescribed?

The ERCB has discussed its public interest mandate in numerous decisions but it has not articulated a definition of the public interest nor has it set out a test to be used when it applies section 3 of the *ERCA*.¹¹⁷ Indeed, consistent with scholarly writing on the topic

¹¹⁴ *ERCA*, *supra* note 3.

¹¹⁵ See e.g. *TransCanada Pipeline Ventures Ltd v Alberta (Utilities Commission)*, 2010 ABCA 96 at 8.

¹¹⁶ See e.g. *Compton Petroleum*, *supra* note 7. Regardless of whether s 3 is triggered or not, it is arguable that the ERCB is vested with a public interest mandate. See “Letter to the chair of Energy Resources Conservation Board from the Office of the Minister of Alberta Energy”, mailed 20 December 2007, online: <http://www.energy.alberta.ca/Electricity/pdfs/ERCB_Mand.pdf> (last checked 10 March 2011).

¹¹⁷ By contrast the National Energy Board (NEB), which is not explicitly charged with considering the public interest, employs a working definition of “in the public interest.” That definition is:

“The public interest is inclusive of all Canadians and refers to a balance of economic, environmental, and social interests that changes as society’s values and preferences

and the case law, the Board has taken the position that there can be no fixed, objective test and that the public interest in any given energy project is a function of that particular project's parameters and potential environmental, social and economic impacts.¹¹⁸

In the course of its decision regarding a highly contentious application by Compton Petroleum Corporation to drill several sour gas wells near the City of Calgary, the Board specifically addressed the concept of the public interest identified in section 3 of the *ERCA*.¹¹⁹ The Board said:

[i]t is difficult to define concretely what is meant by the public interest and how the Board will apply considerations of this interest in any given situation. To assert that the public interest is found where the greatest good for the greatest number can be identified ignores the very specific elements that Section 3 of the *Energy Resources Conservation Act* requires the Board to consider in assessing the public interest.¹²⁰

The Board noted that not only was it concerned with the interests of the applicant and the interveners but with those of all citizens of the province of Alberta.¹²¹ The Board also stated that for each application before it, it has to identify the benefits of the proposed project to Albertans in general and weigh those against the risks raised by the proposed project given its nature, location and other circumstances specific to the proposal.¹²²

The Board has recently reiterated that there is and can be no fixed, objective test for what is in the public interest and that the public interest in any given project is situation specific.¹²³ Since the Board is not bound by precedent and is not required to follow its previous decisions, it is important to look at a range of Board decisions that deal with the

evolve over time. The Board estimates overall public good a project may create and its potential negative aspects, weighs its various impacts and makes a decision.”

NEB, *Pipeline Regulation in Canada: A Guide for Landowners and the Public*, Chapter 1, online: <http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprcptn/pplnrgltncnd/pplnrgltncnd_c01-eng.html>. Also see Gaétan Caron, “Energy Regulation in Canada — 50 years in the Public Interest” (Speech delivered at the Alaska RDC Annual Meeting”, Anchorage, Alaska, 19 November 2009), online: <<http://www.neb-one.gc.ca/clf-nsi/rpblctn/spchsndprsnntn/2009/nrgltnrnd50yrpblcntrst/nrgltnrnd50yrpblcntrst-eng.html>>.

¹¹⁸ See e.g. *Cheviot Mine*, *supra* note 8; and *Taylor Processing Inc Applications for Three Pipeline Licences and a Facility Licence Amendment Harmattan-Elkton Field*, ERCB Decision 2010-36 (7 December 2010) at 5 [*Taylor Processing*], online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

¹¹⁹ *Compton Petroleum*, *supra* note 7 at 12-14. It should be noted that the well licence applications were made pursuant to s 2.020 of the *Oil and Gas Conservation Regulations*, AR 151/71. The Board was not required by those regulations or the *OGCA* to hold a hearing; it did so pursuant to s 26 of the *ERCA*.

¹²⁰ *Ibid* at 12.

¹²¹ *Ibid*.

¹²² *Ibid*.

¹²³ *Taylor Processing*, *supra* note 118.

public interest to get a sense of whether it has developed a unified theory or approach in the absence of a test. Reviewing ERCB decisions, it is possible to identify a number of themes that arise consistently with regards the ERCB's approach to the public interest. The themes relate to: who constitutes the public; what interests does the ERCB consider; how does the ERCB handle competing interests; how is the public interest established; and, how does the Board address public interest concerns? Each theme is discussed in the sections that follow.¹²⁴

5.2. Who Constitutes the Public?

A theme implicit in Board decisions when the public interest is at issue is that there are, broadly speaking, two publics to which the Board has regard. First there is the public at large — usually Albertans as a whole. Then there are particular segments of the public which, depending on the circumstances may be identifiable groups within the broader public such as a First Nation or an interest group, or may be individuals living and or working in close proximity to a proposed project. This differentiation results from the multiple public interest mandates delegated to the ERCB and from the wide range of projects that the Board must consider.

In terms of the public that benefits from any given energy resource project, to the extent that the Board has discussed the issue it looks for benefits to the citizens of Alberta in respect of projects over which the province of Alberta has sole jurisdiction and Canadians in respect of projects over which both the province of Alberta and Canada exercise jurisdiction. In other words, proposed projects must benefit the public at large and not just the proponent.

It is difficult to identify any other unifying theme in terms of who will constitute the public whose interest must be considered in energy project applications. That difficulty is illustrated in the examples that follow.

For the purposes of certain energy project applications, the Board has formally identified the public to be those persons falling within the area enclosed by a circle of a defined radius measured from the surface location of the project.¹²⁵

¹²⁴ For the purposes of this paper all published decisions since the beginning of 2008 and most of the Board's published decisions since 1997 were reviewed. In the latter sample, every effort was made to review decisions that clearly had significant public interest implications, such as those for oil sands and coal mining projects, and to review decisions covering the full range of application types (e.g. well licences, pipeline licences, pooling orders). Relevant decisions prior to 1997 were also reviewed.

¹²⁵ In *Energy Development Applications and Schedules*, ERCB Directive 056 (July 2008), the Board sets out specific requirements for public engagement and consultation to be conducted by project proponents prior to filing an application. In s 2.1 the Directive includes tables setting out the specific radius

For other energy project applications, the public varies. In its reasons for decision regarding an application by Syncrude Canada Limited (Syncrude) for its Aurora oil sands mine,¹²⁶ the Board took an expansive view of the public both in geographic and temporal terms. It noted that:

[t]he oil sands will contribute significantly to Alberta and Canada ... Syncrude's proposal ... has economic implications for Alberta and Canada that will span several generations ...

Given the shorter time horizon of corporate interests as compared to society as a whole, there is a need to ensure that development of the resources meets the needs of the public interest, including those of future generations, by recovering all the ore that is economic, using criteria acceptable to society as a whole.¹²⁷

In *Aurora*, the Board also identified different segments of the public, for example Indian bands and the commercial sector, saying that they would have specific interests that would not necessarily coincide with the overall interests of society as a whole.¹²⁸ The Board's comments regarding the public in *Aurora* demonstrate that it will adjust its public interest focus according to the scale and significance of a proposed energy project.

By contrast with the *Aurora* proceeding and others similar in nature, the Board often limits the scope of the public that it hears from in the course of evaluating the public interest. Specifically, the Board has adopted a restrictive approach to subsection 26(2) of the *ERCA*. That subsection sets out the circumstances when the Board must hold a public hearing and grant certain persons full participation rights. The ERCB has generally interpreted those provisions so that only persons with property or legal rights that may be directly and adversely affected by a proposed energy project are entitled to participate with full rights as a party to a hearing.¹²⁹

More recently, the Board further restricted the scope of the public when it denied standing to an individual who owns and resides on lands within the Board prescribed

from any given project type that must be covered. Persons beyond a pre-defined radius that the applicant knows have special needs or concerns are also to be included.

¹²⁶ *Application by Syncrude for the Aurora Mine*, AEUB Decision 97-13 (24 October 1997) [*Aurora*], online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

¹²⁷ *Ibid* at 30-31.

¹²⁸ *Ibid* at 31-32.

¹²⁹ See e.g. *Grizzly Resources Ltd Section 39 and 40 Review of Well Licences No 0404964 and 0404965 Pembina Field*, ERCB Decision 2010-028 (13 July 2010) [*Grizzly Resources*], online: ERCB <<http://www.ercb.ca/portal/server.pt?>>. See also *Kelly v Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349, (CanLII) [*Kelly*]. For commentary on the standing issue and *Kelly* in particular see Shaun Fluker, "The Problem of Locus Standi at the Energy Resources Conservation Board: A Diceyan Solution" (2010) 109 Resources 8.

flaring notification radius of a proposed well. In an unusually legalistic decision, the ERCB said:

the regulatory requirements applicable to flaring and the approval process itself take into account any health and safety effects of flaring. When flaring is approved, the ERCB has satisfied itself that any potential health and safety impacts associated with flaring have been addressed.¹³⁰

Implicit in the Board's comments is the idea that where operational regulations are in force and a regulated activity which is the cause for individual concern has been authorized, then the public interest has been sufficiently protected. In such cases the public interest as determined by the regulator trumps the concerns or interest of individual members of the public. While this may be expedient it may not be efficient if the result is that further resources are expended dealing with requests for review and appeals. Regardless, it most certainly leaves many members of the public wondering whose interest the public interest regulator is protecting.

An overly restrictive approach to subsection 26(2) of the *ERCA* raises the risk that persons with genuine public interest concerns may not be heard. It is not always clear, however, when the ERCB will employ a restrictive approach. In a relatively recent prehearing decision the Board took a more expansive view of the public to be granted standing. It said:

While the Board may use proximity to the development as a tool in assisting in its determinations, it considers that whether a person is within an emergency planning zone is not necessarily determinative of whether that person meets the test in Section 26(2). ... the Board has determined that there are persons who may be directly and adversely affected by its decision on the applications based on, among other things, their proximity to the proposed developments, their concerns regarding emergency planning and response, their concerns relative to individual impacts (which may include health, traffic, lifestyle among others) and their concerns related to past events in the area.¹³¹

Similarly, as seen in the Aurora hearing, once a proceeding has been triggered, where the Board is of the view that the circumstances are such that a broad range of public interests may be affected and members of the public have information to bring to proceedings that is useful and relevant, it has exercised its discretion to allow such persons to participate; however, when doing so the Board takes the position that it is not

¹³⁰ *West Energy Ltd./Daylight Energy Ltd Review Application 1647499 A Section 39 Review of Linda McGinn's Status under Section 26 of the ERCA re Hearing of Application 1623169*, ERCB Decision 2011 ABERCB 002 (2 February 2011) [*West Energy/Daylight Energy*], online: ERCB <<http://www.ercb.ca/portal/server.pt?>>. The decision is legalistic because the Board distinguishes aspects of the Alberta Court of Appeal in Kelly as obiter dicta that need not be followed.

¹³¹ *Shell Canada Limited Prehearing Meeting Application for Well and Facility Licences Castle River*, ERCB Decision 2010-026 (29 June 2010) at 2 [*Shell Castle River*], online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

required to act on the submissions, nor is it required to grant such persons full rights of participation or intervener funding.¹³²

An application by Highpine Energy Ltd. is a good illustration of this issue.¹³³ The proposed wells were expected to encounter sour gas and would be located near the Hamlet of Tomahawk. The ERCB granted full standing to individuals living within the emergency planning zone for the wells. The Board also heard from a number of discretionary participants, including members of the greater Tomahawk community.¹³⁴ The Board commented that:

The Board has allowed this kind of participation at its hearings on a case-by-case basis to ensure that it gains a better understanding of the broader issues and concerns of the public when energy development occurs near communities. Members of the public who spoke ... were not sworn in as witnesses and the submissions heard that evening were not prefiled, nor were they subject to cross-examination. This means that the Board uses the information presented differently from evidence given under oath or testimony ...¹³⁵

It is not clear from the decision if or how the Board used the information presented by the discretionary participants in the Highpine hearing.

It is also noteworthy that the Board has said that if parties falling within the scope of subsection 26(2) were to withdraw their objections prior to the commencement of a scheduled hearing, leaving only discretionary participants, it would reconsider whether a hearing was necessary.¹³⁶

In summary, the public to whom the ERCB has regard in any given application depends on the nature of the application and the extent to which it may affect both the public at large and segments of the public including individuals. Generally speaking, it appears that the more significant the project in terms of project scale and or scope, or in terms of project location or history the more willing the Board is to implement a broad approach when identifying the public it will hear from. But the bottom line is the ERCB is inconsistent and sometimes seemingly arbitrary in its approach.

¹³² *Ibid* at 3. See also *Grizzly Resources*, *supra* note 128, at 2; *Petro-Canada Sturgeon*, *supra* note 8.

¹³³ *Highpine Energy Ltd, Applications for Six Well Licences, Pembina Field*, ERCB Decision 2008-88 (30 September 2008) [*Highpine*], online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

¹³⁴ *Ibid* at 30-31.

¹³⁵ *Ibid* at 31.

¹³⁶ *Shell Castle River*, *supra* note 131 at 3.

5.3. What Interests Does the ERCB Consider?

The ERCB's assessment of the public interest in any given application is informed by its understanding of the prevailing public interest policy objectives as well as the nature of the application, the location of the proposed activity and, most importantly, by the submissions made to it by the applicant and any other parties heard by the Board.

The Board publishes directives to be followed when preparing applications. These directives require applicants to include information regarding public interests such as: economic information, environmental assessments, social impact assessment, waste management, emergency response planning, and groundwater protection.¹³⁷ When the ERCB issues a decision without holding a public hearing, presumably it does so having regard to the public interest issues addressed in the application.

When the Board does hold a hearing into an application, the interests it considers include those identified in the application in addition to those raised by interveners. They are varied and may range from road infrastructure and traffic concerns to air emissions, livestock health, soil monitoring, weed and pest management, noise, technology and cumulative effects.¹³⁸

There are two overarching "interest" themes emerging from Board decisions regarding energy project applications. The first is that the scope and substance of the interests it considers are dependent on the specific circumstances of any given application. Apart from what is set out in Board directives, the Board has no pre-set list of interests that it considers in the context of section 3 of the *ERCA*. Nonetheless, there are certain interests that the Board regularly identifies for consideration.

An application by Ketch Resources Ltd. for a review of a routine well licence and facility application provides an example of a typical list of interests the Board is asked to consider by interveners.¹³⁹ The Board expressly took into account landowners' concerns, the relative impact on existing and future development, environmental impacts as well as technical and economic considerations.¹⁴⁰ Lists in other applications include issues such as compliance history, noise, impacts on water, human and animal health and safety, and

¹³⁷ See for example: *Guidelines Respecting an Application for a Commercial Crude Bitumen Recovery and Upgrading Project*, ERCB Directive 023 (September 1991); and ERCB Directive 056, *supra* note 125.

¹³⁸ See e.g. *Petro-Canada Sturgeon*, *supra* note 8 at 7.

¹³⁹ *Ketch Resources Ltd Review of Well Licence No 0313083 and Application for Associated Battery and Pipeline Pembina Field*, AEUB Decision 2005-129 (1 December 2005) [*Ketch*], online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

¹⁴⁰ *Ibid* at 7. The Board will not consider public interest issues that are purely speculative in nature. See *Sirius Energy Inc Application for a Well Licence Crossfield East*, ERCB Decision 2010-004 (16 February 2010) at 5 [*Sirius Energy*], online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

traffic and infrastructure concerns.¹⁴¹ Such interests tend to be raised by individual interveners or communities living within the vicinity of a proposed project.

The Board also takes broader interests into account. Where relevant, the Board considers efficient energy use and proliferation of oil and gas activity concentrated in a geographic area.¹⁴² Similarly, enhancing competition and checking market power are considered by the Board to be legitimate public interest concerns in respect of facilities and pipeline applications.¹⁴³ Competition and energy use issues are usually raised by interveners that are in the oil and gas business, often competitors of a proponent. They are also interests raised by special interest groups. Proliferation is usually raised by private individuals, special interest interveners and by commercially motivated interveners.

The second and more troublesome theme is that there is a distinction between the interest of the public in the orderly and efficient development of energy resources that benefits the province economically¹⁴⁴ and the public interest identified in section 3 of the *ERCA*. The Board's interpretation of the purposes provisions of the energy resource legislation it administers presumes that Albertans as a whole are interested in having the province's energy resources developed without interruption to reap the attendant economic benefits.¹⁴⁵

A recent example of the distinction is found in the decision of the Joslyn North Mine Project Joint Review Panel.¹⁴⁶ The Panel considered the appropriate set-back from a river for wildlife corridors. It noted that the ERCB's responsibilities include the conservation of oil sands resources and that the potential sterilization of such resources, through the loss of minable area to wildlife corridors, would run contrary to its conservation mandate.¹⁴⁷ Balanced against that consideration the Panel noted that the ERCB had to

¹⁴¹ See e.g. *AltaGas Ltd Applications for Two Pipeline Licences, an Amendment to a Facility Licence, and Approval for an Acid Gas Disposal Scheme Pouce Coupe Field*, ERCB Decision 2009-073 (22 December 2009) at 2, online: ERCB <<http://www.ercb.ca/portal/server.pt?>>; and *Highbine*, *supra* note 133 at 2.

¹⁴² *Ibid.*

¹⁴³ See, e.g. *Federated Pipe Lines Ltd Application to Construct and Operate a Crude Oil Pipeline from Valhalla to Doe Creek*, AEUB Decision 98-12 (29 May 1998), online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

¹⁴⁴ As stipulated in the purposes provisions of the *OGCA*, the *OSCA*, and the *CCA*.

¹⁴⁵ *Ketch*, *supra* note 139. The Board's interpretation is consistent with that of the policy makers. See Low, *supra* note 16 at 20.

¹⁴⁶ *TOTAL E&P Joslyn Ltd Application for the Joslyn North Mine Project*, ERCB Decision 2011-005/CEAA Reference No 08-05-37519 (27 January 2011), online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

¹⁴⁷ *Ibid* at 45.

take into account the environmental effects of proposed oil sands projects and requiring a set-back sufficient for wildlife use was consistent with that mandate.¹⁴⁸

In a different application, although the ERCB heard submissions from the Fishing Lake Métis Settlement regarding proposed amendments to an oil sands recovery scheme that would reduce previously approved well spacing to optimize recovery of crude bitumen, it noted that concerns about unresolved surface issues were best dealt with in the context of the relevant well or other facility application process.¹⁴⁹ The tension between the presumed public interest in the efficient development of resources and the actual public interest in ensuring energy projects are carried out in a manner that minimizes negative social and environmental impacts is created by the differing public interest mandates set out in the *ERCA* and other legislation administered by the Board.

Finally, where there are no interveners in a hearing, such as when the intervening parties reach an agreement with the project proponent and file a notice of withdrawal of objection at the commencement of the hearing, presumably the Board considers the interests identified by the applicant which are those set out in the applicable Guide.¹⁵⁰ Ultimately, the answer to the question of what interests the Board will consider in the context of section 3 of the *ERCA* is that it depends on the nature of the application, who participates in the hearing if one is held, and what submissions have been made and evidence submitted to the Board.

5.4. How Does the ERCB Handle Competing Interests?

Although the Board does not consider a cost benefit analysis *per se* to be a requirement for its public interest analysis,¹⁵¹ the need to balance competing interests and risks in the name of the public interest is a constant theme in Board decisions. In a decision relating to an application for a waste disposal scheme, the Board said:

[t]he Board attempts to achieve a balancing of risk factors to meet a series of legislative objectives ... Although the protection of groundwater is an essential and important objective, it is not the only objective. The Board's decision also considers the broader perspective of the economic,

¹⁴⁸ *Ibid.*

¹⁴⁹ *Canadian Natural Resources Limited Application to Amend Approval No 6280 (Primary Recovery Scheme) Cold Lake Oil Sands Area*, AEUB Decision 2008-015 (19 February 2008), online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

¹⁵⁰ See for example: *Daylight*, *supra* note 7; and *Pennine Petroleum Corporation Application for a Pipeline Licence Pincher Creek Field*, ERCB Decision 2009-027 (10 March 2009), online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

¹⁵¹ *Taylor Processing*, *supra* note 118.

environmental and social impacts ... as well as whether the project provides for the economic, orderly and efficient development in the public interest of oil and gas resources of Alberta.¹⁵²

Although the Board tries to balance the resource development imperative in the legislation with competing interests such as maintaining the ecological integrity of a region it has been inconsistent in its approach. For example, while it was prepared to hold off drilling in the Whaleback region of the province pending provincial government policy determinations,¹⁵³ it was not prepared to postpone proceedings to hear an application by Petro-Canada for wells and associated pipeline and facilities in the Sullivan field on similar grounds.¹⁵⁴ In the latter case the Board said that it was required to rule on Petro-Canada's applications within the context of then current legislation and regulations.¹⁵⁵ A key difference between the two situations was probably that Petro-Canada's proposed wells and facilities would not be the first oil and gas activity in the Sullivan field.

Whaleback is an unusual example of the Board's balancing act. The example is unusual because the Board, in a rare move, turned down an application for a licence to drill a well on the basis of public interest issues. The well was to be located in an area of the Eastern Slopes of Alberta known as the Whaleback Ridge. In discussing the need for the well, the Board said it was required to balance the applicant's need to prove its play against "the potential economic, social, and environmental costs and benefits accruing to the public from the exploration well."¹⁵⁶ The Board went on to say that to approve the well it would have to be convinced on the basis of the evidence before it that "certain safety, social and environmental impacts can be or will be satisfactorily mitigated".¹⁵⁷

The Board refused to approve the application because there was not a sufficiently robust mitigation plan in place for the anticipated impacts and because the well and associated infrastructure would be inconsistent with the provincial government's land management goals for the Whaleback as expressed through the Integrated Resource Plan for the area. The Board was also concerned that the Whaleback, a unique and valuable ecosystem with "extremely high recreational, aesthetic, and wildlife values"¹⁵⁸ could be

¹⁵² *CCS Corporation Section 40 Review and Variance of Application 1515213 Class 1b Waste Disposal Scheme Well 00/09-01-048-14 W5M Brazeau River*, ERCB Decision 2009-029 (26 March 2009) at 14, online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

¹⁵³ *Whaleback*, supra note 7.

¹⁵⁴ *Petro-Canada Prehearing Meeting Applications for Wells and Associated Pipeline and Facility Licences Sullivan Field*, ERCB Decision 2008-029 (16 April 2008), online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

¹⁵⁵ *Ibid* at 4.

¹⁵⁶ *Supra* note 153 at 12.

¹⁵⁷ *Ibid* at 13.

¹⁵⁸ *Ibid* at 34-35.

significantly, negatively affected before the Province's (then) Special Places 2000 initiative could evaluate its importance in the overall provincial context.

Whaleback is instructive because it shows that the Board will not only balance the presumed interest in resource development with concerns about local impacts but will balance competing interests of the public at large. Specifically, in this case, fiscal and financial benefits to the province were balanced with protecting the ecological integrity of a region considered to be a valued and valuable resource for the province as a whole.

In *Cheviot Mine* the Board was asked to approve a proposed coal mine and processing project.¹⁵⁹ In that decision the AEUB gave further indications of how it addresses competing interests. Having found that the applicants had established a need for the proposed mine, the Board said that “the establishment of need does not automatically imply that the project is in the public interest ... The degree of environmental, social and economic impact must also be assessed.”¹⁶⁰ The Board made clear the notion that some environmental impacts were acceptable if they were justifiable in the public interest.¹⁶¹ The context of the comment indicates that the Board was referring to the imputed public interest in the orderly and efficient development of coal resources — a stated purpose of the CCA.¹⁶²

In carrying out its public interest assessment in *Cheviot Mine*, the Board balanced the economic value to Alberta of coal resources in the proposed mine area against both hard costs and the loss of valued environmental components.¹⁶³ As in *Whaleback*, it balanced the presumed interest in resource development with concerns about local impacts as well as balancing competing interests of the public at large, including non-monetary costs — the valued environmental components — in the process. Although it approved the project, the Board did refuse to permit coal mining activity in one portion of the project area because it determined that the loss of the value of those coal reserves would be outweighed by the loss of the valued environmental components identified in the area.¹⁶⁴

In the course of a facilities application by Talisman Energy Inc., the interveners repeatedly expressed concerns about negative social impacts of oil and gas activity within

¹⁵⁹ *Supra* note 8.

¹⁶⁰ *Ibid* at 21.

¹⁶¹ *Ibid* at 12.

¹⁶² *Supra* note 111, s 4(c).

¹⁶³ *Supra* note 8 at 160.

¹⁶⁴ *Ibid*.

their community.¹⁶⁵ They were particularly worried about public health and safety. The Board once again described the balance it has to strike in energy project applications:

The Board recognizes that energy development, while providing economic benefits, also carries with it inherent impacts and risks. And though the economic benefits tend to accrue to the province as a whole, the Board is aware that the impacts of development are experienced most immediately by residents in the vicinity of the project.

...

The EUB is therefore challenged to balance the shared economic benefits of a proposed project with its more localized risks and impacts. In instances where the potential benefits appear to be outweighed by the risks and impacts associated with a project, the Board will deny an application.¹⁶⁶

In a 2003 application by Polaris Resources Ltd., the Board described its public interest mandate in the following terms:

Consideration of the public interest is in essence a question of finding the appropriate balance between the benefits of the proposed project and the potential risks of the project to the public and the environment. Where the potential for risk outweighs the possibility for gain, the board will find that the specific proposed project is contrary to the public interest.

As all projects may have some element of risk, a great deal of the Board's attention must be focused upon the level of risk and the ability and willingness of the applicant to mitigate or eliminate such risks. An applicant's ability to take the appropriate measures to deal with risk is therefore critical to the Board's final determination as to whether the project can be found to be in the public interest.¹⁶⁷

Reaffirming the tension between the public interest in resource development referred to in the purposes provisions of the *OGCA* and the public interest in section 3 of the *ERCA*, the Board has stated that taking all factors into account, the option with the least surface impact or the greatest economic benefits will not necessarily be found to be in the public interest.¹⁶⁸

¹⁶⁵ *Talisman Energy Inc Applications to Construct and Operate a Sour Gas Battery and Pipeline and to Amend an Existing Pipeline Licence, Grande Prairie Field (Clairmont Area)*, AEUB Decision 2002-011 (22 January 2002) [*Talisman Energy*], online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

¹⁶⁶ *Ibid* at 9.

¹⁶⁷ *Polaris Resources Ltd Applications for a Well Licence, Special Gas Well Spacing, Compulsory Pooling, and Flaring Permit*, AEUB Decision 2003-101 (16 December 2003), online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

¹⁶⁸ *Ketch*, *supra* note 139 at 8. See also: *Novagas Canada Ltd Applications to Modify Sour Gas Plant and Construct Sour Gas Pipeline Harmattan-Elkton Field and BP Energy Company to Modify Two Sour Gas Plants Caroline Field*, AEUB Decision 2001-62 (31 July 2001) at 7, online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

Finally, in a decision regarding an application by Shell Canada Limited to drill a sour gas well the Board found that the proposed well was not in the public interest since public safety could not be assured.¹⁶⁹ The Board reiterated that economic benefits to Alberta from energy development could outweigh negative impacts at the local level providing that the applicant established to the Board's satisfaction that those impacts could be properly managed and mitigated.¹⁷⁰ If there is an implicit weighting of interests in the Board's balancing process, public safety perhaps carries greater weight relative to other interests.

5.5. How is the Public Interest Established?

As noted, the ERCB requires applicants to conduct pre-application public participation processes involving members of the public whose rights may be "directly and adversely affected" by the proposed project.¹⁷¹ Applicants bear the onus of placing sufficient information before the Board to establish that a particular proposal is in the public interest in light of the circumstances prevailing at the time.¹⁷²

The ERCB views the pre-application public consultation process as essential to determining the scope and depth of the public interest.¹⁷³ It relies on applicants to identify and scope out the public interest in an application.¹⁷⁴ In *Ketch*, the Board specifically noted that the onus is on applicants to address issues relating to environmentally sensitive areas, proliferation and alternatives to the proposed project.¹⁷⁵ However, while it is reasonable for the Board to delegate to the proponent some of the work of discerning the public interest in a specific application, it would be inappropriate for the Board to completely abdicate its responsibility for evaluating and determining the public interest. This issue comes to the fore where the Board issues approvals without holding a hearing or, more particularly, schedules a hearing for an application but the interveners do not appear and or present evidence because they have negotiated a settlement with the applicant. In this case the Board has before it only the evidence of the project proponent.

When interveners do participate in a hearing the Board requires those with full participatory rights to prove, through quantifiable or other objective evidence, that a

¹⁶⁹ *Shell Canada Limited Application for a Well Licence Shell PCP Ferrier 7-7-38-6W5 Ferrier Field*, AEUB Decision 2001-9 (20 March 2001) at 1, online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

¹⁷⁰ *Ibid* at 5.

¹⁷¹ ERCB Directive 056, *supra* note 125, s 2.

¹⁷² See for example: *Taylor Processing*, *supra* note 118 at 16; and *Sirius Energy*, *supra* note 140.

¹⁷³ See the "Participant Involvement" part of ERCB Directive 056, *supra* note 125.

¹⁷⁴ *Whaleback*, *supra* note 7.

¹⁷⁵ *Ketch*, *supra* note 138.

project will cause impacts that fall within the scope of social, economic and environmental impacts.¹⁷⁶

For the purposes of assessing the interests of the public at large, the Board will look to government policy documents when those documents are put in evidence before it in the course of a proceeding. It did so in both the *Whaleback*¹⁷⁷ and *Cheviot Mine*¹⁷⁸ proceedings.

In addition to considering provincial government policy, the Board will consider local government policy. In *Compton Petroleum*, the Board took note of the fact that local by-laws had been passed to protect a watershed that would be impacted by oil and gas development. It viewed the by-laws as an indication of a public interest concern.¹⁷⁹ In that same decision the Board took the position that certain parties with public interest obligations, such as municipalities, have the responsibility to assess the potential impacts of proposed energy projects and to fully participate in Board processes to ensure that their views are shared with the Board.¹⁸⁰ This point is problematic, however, because a municipality will not necessarily meet the restrictive interpretation of the subsection 26(2) standing test of the *ERCA*.¹⁸¹ It is also problematic because it attempts to place an onus on such parties that is not imposed by legislation.

In addition to considering policy documents placed in evidence in a hearing, the Board must take into account policies communicated to it through legislation, such as the requirement in section 3.1 of the *ERCA* that the Board act in accordance with any applicable *Alberta Land Stewardship Act*¹⁸² regional plan.

The question arises whether the Board is under any obligation to inform itself about relevant public policy in order to properly discharge its public interest mandate. This is particularly relevant where there is no party to an application who might be expected to draw such documents to the Board's attention such as where the project proponent and

¹⁷⁶ For example, the Board approved a facilities application noting that the interveners had not proven that there would be any negative social impacts that could not be mitigated through the operation of the regulatory framework and "conscientious operation". See *Talisman Energy*, *supra* note 165 at 10. See also *West Energy/Daylight Energy*, *supra* note 130.

¹⁷⁷ *Supra* note 7.

¹⁷⁸ *Supra* note 8 at 20.

¹⁷⁹ *Compton Petroleum*, *supra* note 7.

¹⁸⁰ *Ibid.*

¹⁸¹ See Nickie Vlavianos & Chidinma Thompson, "Alberta's Approach to Local Governance in Oil and Gas Development" (2010) 48 *Alta L Rev* 55 at 73-74.

¹⁸² SA 2009, c 26.8.

affected parties have reached an agreement with the result that there is no objection to an application or any initial objections are withdrawn prior to a full hearing.

Finally, the Board's preference is to hear from the public regarding general concerns about energy resource development in Alberta on a business as usual basis through direct correspondence with the ERCB, its Field Centres or its Community and Aboriginal Relations staff.¹⁸³ In addition, it routinely encourages parties interested in participating in project specific hearings to express concerns about broader policy issues, such as the desirability of oil and gas development at all, to relevant government representatives — in other words, the public policy makers.¹⁸⁴

5.6. How Does the Board Address Public Interest Concerns?

The answer to the question of how the Board addresses public interest concerns has both form and substantive components. In terms of form there are two key issues that merit discussion. First, the Board is inconsistent in the extent to which it addresses the public interest in its decisions. In some the Board explicitly canvasses and assesses public interest considerations.¹⁸⁵ But often, after holding a hearing in which interveners have made submissions on issues of concern, the Board will simply say that it has carefully considered all of the evidence and approves the application. In those cases where the Board has canvassed public interest issues, such as protection of water sources or public safety concerns, it must be implicit in the Board's approval that the Board considers the project to be in the public interest.¹⁸⁶

In still other cases, public interest issues are raised but the interveners withdraw their objections prior to the hearing and the Board says that the application is approved as it meets all regulatory and technical requirements with no reference at all to the public interest.¹⁸⁷ It is an open question whether the ERCB is entitled to assume that an application is in the public interest because initial objections to it are withdrawn or when interveners do not prove adverse social, economic or environmental impacts. This is

¹⁸³ *Compton Petroleum*, *supra* note 7 at 32.

¹⁸⁴ *Ibid.* The recommendations of the Task Force regarding public engagement at the policy development and policy assurance (i.e. regulatory) stages reinforce the views of the ERCB in this regard. Whether streaming public interests in this way would result in Board decisions that are consistently perceived to be in the public interest is debatable.

¹⁸⁵ See e.g. *Taylor Processing*, *supra* note 118.

¹⁸⁶ See e.g. *Canadian Natural Resources Limited, Application for a Pipeline Licence, Taber Field*, AEUB Decision 2008-012 (12 February 2008), online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

¹⁸⁷ See e.g. ERCB Decision 2009-027, *supra* note 150; and *Milner Power Inc No 14 Mine Project Grande Cache Area*, ERCB Decision 2009-062 (27 October 2009), online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

particularly so in light of the Court of Appeal's holding in *Lone Pine* that a regulatory body that has a legislative responsibility to assess risk to the environment has a positive obligation to take steps to do so. The Board ought, as a matter of practice, to substantially demonstrate that it has satisfied its mandate to consider the public interest and it ought to do so consistently.

The second issue arising from the Board's processes relating to the public interest is the Board's presumption that consultation, negotiation and settlement of issues of concern results in outcomes that are in the public interest. While this process oriented view results in more efficient use of Board time and resources and, ideally, results in positive working relationships between the energy sector and members of the public affected by a particular project, it raises the risk that the Board will not consider issues in the context of a proposed activity that are of concern to the broader public. For example, what if, in respect of a facilities application, landowners raised issues of concern that would also be of concern to the public generally but since they reached a financial settlement with the project developer they were content to drop the issues? Concern about potential impacts of a CO₂ injection well on an underground aquifer is an example of such a concern.

While the ERCB's public involvement process may be in the public interest because individual members of the public to be directly affected are actively engaged, it does not necessarily result in a decision that is in the overall public interest. For example, if local landowners' concerns about timing and compensation for access to and use of their property are addressed through a financial settlement with the proponent, will they raise issues relating to valued ecosystem components that are found on and adjacent to their property?

It is also arguable that this approach is contrary to the principle that has been established in public utility case law requiring the Board to assure itself that negotiated settlements of public utility rates are in fact in the public interest.¹⁸⁸ Surely the ERCB must also assure itself that settlements reached between project proponents and stakeholders adequately protect the public interest. Perhaps it does without saying so; if that is the case it should speak up.

There are a number of substantive issues arising from how the Board addresses public interest concerns. First, in *Compton Petroleum*, the Board referred to the tension between benefits to the public at large and impacts felt by segments of the public proximate to the proposed project. The Board commented that a challenge for it was to balance those competing interests and to ensure that site specific impacts are mitigated to an

¹⁸⁸ See *Atco Electric*, *supra* note 74. It should be noted that legislation requires utilities to seek Board approval of negotiated settlements.

“appropriate and acceptable level.”¹⁸⁹ Thus, in the Board’s world, the public interest lies not in eliminating risk but in managing risks so that they are “acceptable”.

A good example of the extent to which the Board relies on managing risks is a typical oil sands project decision. In Shell’s application for its Muskeg River Mine project, the Board affirmed that a project can still be found to be in the broader public interest even though it may result in significant local impacts where such impacts may be mitigated through the application of the Board’s regulatory oversight and by conditions on the project approval.¹⁹⁰ Specifically, the Board said that it was satisfied that Shell’s proposed oil sands mine was in the public interest provided that conditions imposed by the Board and Alberta Environmental Protection were met.¹⁹¹

Balancing and mitigating risks is consistent with the existing legislative framework and in particular, the differing public interest mandates given to the Board. The problem with this is that the larger the revenue stream and other benefits to the public at large from a particular project, the more significant and immitigable the local public interest concerns have to be to outweigh that side of the balance. Indeed, for projects that are extensive in scope promising benefits over a long period of time such as oil sands development, the presumed interest of the public at large in the development of the resource appears to be insurmountable. Under the existing legislative framework, the ERCB cannot be expected to stop or hinder oil sands development on the basis of the public interest.¹⁹²

As long as the ERCB continues to employ an impact management approach to the public interest, then the process of assessing just what the public’s interest is pursuant to section 3 of the *ERCA* takes on even greater importance.

The second issue of substance arising from how the Board addresses public interest concerns is that the Board presumes that its operational regulation of the oil and gas sector protects the public interest.¹⁹³ It employs this presumption to both address and to pre-empt expressions of public interest.¹⁹⁴ This raises the concern that because the Board

¹⁸⁹ *Ibid* at 13.

¹⁹⁰ *Shell Canada Limited Muskeg River Mine Project*, AEUB Decision 99-02 (12 February 1999) at 4 [*Shell Muskeg River Mine*], online: ERCB <<http://www.ercb.ca/portal/server.pt?>>.

¹⁹¹ *Ibid*.

¹⁹² Although it is arguable that it is open to the ERCB to deny an oil sands project application on grounds of public interest concerns as *OSCA*, s 10(3)(b) provides that the ERCB may refuse to grant approval of an oil sands project application. *OSCA*, *supra* note 99.

¹⁹³ See e.g. *Shell Muskeg River Mine*, *supra* note 190 and see *West Energy/Daylight Energy*, *supra* note 130.

¹⁹⁴ *Ibid*. The *Shell Muskeg River Mine* decision is an example of addressing public interest issues whereas *West Energy/Daylight Energy* is an example of pre-emption.

has extensive regulation making powers and makes many of the operational regulations it says will protect the public interest, it is in a conflict of interest. This will only be exacerbated if the Task Force recommendation of creating a single regulator is implemented.

The third substantive issue is illustrated by the *Syncrude Aurora* decision. In that application for approval of an oil sands project, the Board was faced with multifaceted public interest concerns. The Board identified the need for a comprehensive regional approach to oil sands project development to protect both the presumed public interest in having the oil sands developed and the public interest in minimizing and mitigating environmental impacts.¹⁹⁵ Having said that, the Board indicated that orchestrating and directing such a process was beyond the scope of its mandate. It punted the organization and execution of regional co-operative processes to oil sands developers and noted that “government agencies representing the interests of the public” ought to have a “small, relative to project developers”, yet “influential” role in ensuring the protection of the public interest in any regionally based co-operative process.¹⁹⁶

Similarly, while the impact on regional infrastructure and services resulting from a proposed project is, in the Board’s view, a legitimate public interest concern, because of its limited jurisdiction it is not one that the Board is willing or able to address in any concrete way other than to exhort municipal, provincial and federal governments to work to address the issue.¹⁹⁷ This is a clear and concrete example of how matters of concern to significant segments of the public in Alberta are not addressed through the application of section 3 of the *ERCA*.

6.0. Conclusion

The phrase “in the public interest” has been discussed extensively by social scientists and to a lesser extent by the courts with the same result, the only consensus is that no single meaning can be attributed to it. When used in a regulatory setting, the phrase is credited with having a procedural aspect as well as a substantive aspect and this certainly holds true for the ERCB.

¹⁹⁵ *Aurora*, *supra* note 126 at 32-34.

¹⁹⁶ *Ibid* at 34.

¹⁹⁷ See e.g. *Petro-Canada Sturgeon*, *supra* note 8; and *Albian Sands Energy Inc Application to Expand the Oil Sands Mining and Processing Plant Facilities At the Muskeg River Mine Fort McMurray*, Decision AEUB 2006-128 (17 December 2006) at 1-4, online: ERCB <<http://www.ercb.ca/portal/server.pt?>>. See also *Highpine*, *supra* note 133 at 33. In light of the decision in *Athabasca Tribal Council*, *supra*, note 38, the ERCB is arguably not able to impose conditions relating to infrastructure development.

The statutory framework that establishes and enables the ERCB uses “in the public interest” in multiple contexts. While the Board is required to consider the public interest and to take steps to protect both common and private interests, such as controlling pollution and ensuring the observance of safe exploration and production practices, the overarching legislative framework is based on a public policy foundation that says that the development of Alberta’s energy resources is in the public interest.

The legislation creates tension between the development imperative and the notion that public concerns arising from such development will be taken into account. The same public policy foundation also creates inherent conflicts between the holders of oil and gas rights and owners/occupiers of surface lands. The ERCB is required to discharge its functions within this framework. As a result, ERCB decisions that are required to be made in the public interest are not always considered by some, or even many, to be in substance, in the public interest.

Some commentators have suggested that the Board should rely on section 3 of the *ERCA* to address broader socio-ecological issues raised by energy resource development in the province.¹⁹⁸ Others have suggested that the provincial government should give the Board policy direction to shape and inform its public interest considerations.¹⁹⁹ The Task Force has recommended that regulatory efficiency could be improved by differentiating between the interests of the community as a whole and the interests of individual members of the public. The Task Force has also said that “landowners and other specific interests affected by a proposed energy activity will continue to have the opportunity to engage” in the decision making process.²⁰⁰ The suggestions certainly have their place but, in addition to the issues identified earlier in this paper, there are more fundamental issues arising from the ERCB’s approach to its public interest mandates that should be addressed. This is particularly the case in light of the Task Force recommendations.

First, the application of section 3 of the *ERCA* should be clarified. Is the Board meant to consider the public interest as a matter of course in all of its decision-making? Or, since the development of energy resources in Alberta is in the public interest is the Board meant to consider the social, economic and environmental impacts of energy projects in the course of hearings conducted pursuant only to Acts other than the *ERCA*?

Second, the issue of at whose instance the Board must hold a hearing and at whose request the Board may hold a hearing should be clarified as should the test to be applied. Similarly, the *ERCA* should be amended to clarify whether there is a difference between members of the public who may be entitled to a hearing and those who may be given

¹⁹⁸ See e.g. Fluker, *supra* note 14 at 1092-1093.

¹⁹⁹ See e.g. Hierlmeier, *supra* note 14.

²⁰⁰ *Enhancing Assurance*, *supra* note 10 at 18.

leave to participate in a hearing that has been set at the instance of the Board or another person.

Third, the ERCB should adopt a consistent, transparent approach to its public interest mandate in its processes and its reasons for decision.

Fourth, consideration must be given to whether it is appropriate and/or desirable for the Board, in the name of the public interest, to make regulations, apply those regulations, and then to rely on those regulations to pre-empt consideration of concerns raised by the public in respect of a particular energy resource project.

Finally, the government of Alberta needs to clearly delineate the scope and extent of the role of the ERCB in addressing public interest concerns. For example, when proposed energy resource development threatens to overwhelm the physical and service infrastructure of a region that is a valid public interest concern. Arguably the Board ought to be able to deny an application that might have that result rather than issue plaintive appeals for processes beyond its jurisdiction to ameliorate the situation. The legislature should make it crystal clear whether and in what circumstances it is open to the Board to do so.

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