

# Public-Interest Determination for Infrastructure Development:

A Review of Guidance and Practice in Canada<sup>†</sup>

Knowledge Synthesis Report submitted to the Social Sciences and Humanities Research  
Council

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# Executive Summary

## Background

The concept of “the public interest” is used to guide government decision-making worldwide (Campbell and Marshall 2002; Pal and Maxwell 2004; Fisher 2014), and is applied in Canadian environmental legislation and regulation in a variety of ways for use in procedural (process-oriented) and substantive (outcome-oriented) decisions. Canada’s new federal environmental assessment regime under the Impact Assessment Act (2019) implements a “public interest test” as the basis for assessing whether to recommend proposed infrastructure projects for approval in Canada (Canada 2019a, sec. 63). This presents a timely need to improve Canadians’ understanding of perspectives on “regulating in the public interest and related best practices.

## Objectives

Our objectives are to identify where and how public interest test provisions for infrastructure approval appear in Canadian statutes and regulations, and how decision-makers (statutory bodies and the courts) have interpreted and applied these provisions in practice. Our purpose is to (1) inform policy guidance and direction, and (2) inform further research on how current regulatory practice in Canada compares to best practices.

## Methods

We conducted a two-phase literature review to identify all statutes and regulations in Canada (provincial, territorial, federal) with a public interest test for infrastructure development, and key decisions (court and regulatory) that provide insight into application of the public interest test in practice. We supplemented our review and analysis of statutes, regulations and key decisions with a limited snowball sample of academic discourse and grey literature specifically discussing the concept of public interest and its use in decision-making.

## Results

The public interest test appears in a variety of ways across current Canadian environmental law, supported by varying degrees of guidance. This guidance also varies in terms of how the public interest is defined and meant to be assessed. Our review reveals:

- **52 unique public interest tests for infrastructure development** in current Canadian law, across 33 statutes and 13 regulations.
- **39 of the 52 tests target a particular industrial sector** (oil and gas, electricity, water management, renewable energy, forestry, rail, or waste); oil and gas represents nearly half of the sector-specific tests (44%), and electricity accounts for 23%.
- Of the 52 public interest tests, **46% provide the decision-maker explicit factors to consider, 65% provide some form of guidance for the test, and 35% provide no guidance at all.**
- **48 statutory bodies** are granted the authority to conduct a public interest test for infrastructure development, ranging from a potential 36 to 48 unique decision-making agencies at any one time.

All jurisdictions in Canada other than Nunavut currently have public interest tests for infrastructure development. The test appears most often in Alberta, Manitoba and Saskatchewan, likely correlated with oil and gas development. It may be used to approve or recommend approval of a proposed project, reject or recommend rejection of a proposed project, or terminate an existing project.

The mandate of each of the 48 statutory bodies is distinct. The scope of this mandate is almost never explicitly defined, and current practice dictates that a decision-maker is not required to explain its methods for weighing interests in coming to a final determination. Legislation rarely explicitly defines public interest mandates: only one case specified “the public” that must be considered, and only 6% of public-interest-test provisions in our review define the public interest. Where statutes and regulations do not provide any guidance, more discretion is awarded to the decision-maker. Generally, decision-makers define their public interest mandate “by reference to the context and to the objects and purposes of the statute in which it is found” (SCC 1958), and public interest provisions should be read alongside other applicable statutes. How decision-makers and courts define the boundaries of the applicable legislative framework, however, and how they factor in the different purposive provisions, is not clear.

Across all sectors and statutes, common themes emerge about “balancing” the social, economic and environmental effects of a project. In the decisions we reviewed, it was common practice for the regulator to “weigh” different contributing factors to come to an overall public interest determination, which is implicitly a form of benefit-cost analysis. The methods regulators used to weigh individual factors, however, are unclear and not well-explained in the decisions we reviewed. Regardless of its approach, a regulator is generally not required to explain its methods for public interest determination. This is in contrast to other policy and non-infrastructure regulatory decisions in Canada.

Electricity regulation has perhaps the most well-developed and detailed methodology for public interest determination, as well as the most robust guidance and discourse around the concept. Though a provision might provide for the consideration of specific factors, the decision-maker is not limited to considering these factors alone; in each case, there will be unique and case-specific factors to consider. Ensuring a full account of all of the “benefits and burdens” and affected interests is part of the decision-maker’s obligation under a public interest mandate. The policy context, such as the degree to which the project aligns or conflicts with current government policy objectives, may be taken into account, but not necessarily.

### **Implications**

Our review identified significant gaps in the knowledge base around how the public interest test is applied by decision-makers in Canada. There is the need to inquire into: how decision-makers conduct benefit-cost analyses (implicit or explicit) in public interest tests and how this compares against best practice; suitability of the test for determining infrastructure outcomes; and how the 48 individual decision-making bodies define the “applicable” legislative framework from which they interpret their public interest mandate.

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# 1 Introduction and Background

Canada's new federal environmental assessment regime under the Impact Assessment Act (IAA), enacted in 2019, implements a public interest test as the basis for assessing whether to recommend proposed infrastructure projects for approval (Canada 2019a, section 63). A public interest test, or public interest determination, is where a responsible authority is required to make a decision or recommendation as to whether a project or activity is in the public interest. The addition of this test in the IAA is a marked change from the previous regime under the Canadian Environmental Assessment Act 2012 (CEAA 2012), which used significance of adverse effects as the main basis for decision-making.<sup>1</sup> Infrastructure projects are now assessed based on the extent to which the adverse effects of the project are deemed "in the public interest", using five mandatory criteria.<sup>2</sup> The IAA does not define "the public interest", however, nor provide guidance on how the contributing factors are meant to be weighed against one another. With the IAA in its first year of application, there is a timely need to improve Canadians' understanding of perspectives on regulating in the public interest and related best practices.

There is significant debate amongst scholars on the concept of the public interest, centering largely on "whether the public interest is simply a colloquial, subjective, commendatory term used freely by individuals to promote a program or policy or whether the concept carries a more specific, objective meaning that can be examined with some degree of intellectual rigor" (Barth 1992). Despite and perhaps because of its ambiguity, public interest is a central legitimating concept of planning and policy-making in Europe and North America (Campbell and Marshall 2002; Pal and Maxwell 2004) and Australia (Fisher 2014). Acting in the public interest is considered a cornerstone of Canadian public service (MacNair 2006) and policy evaluation (Treasury Board of Canada Secretariat 2007, 2018a,b); the phrase appears in hundreds of statutes, and Canadian governments frequently mandate regulators to act in the public interest.

The concept is present in Canadian environmental law and regulation in a variety of ways, though scholars argue that the public interest test entrenches the "environmental law as decision-making process" paradigm rather than environmental law as a set of substantive rules (Tarlock 2004; Olszynski 2015, 2018). The test is used for determining both procedural (process-oriented) and substantive (outcome-oriented) decisions related to impact assessment. Barth (1992) argues that because substance is more vulnerable to bias and human error, it could potentially undermine even a 'perfect' process and so should be especially subject to careful examination. Long (1990) and Pal and Maxwell (2004) acknowledge the public interest is a function of values and different interests, which evolve over time, as well as facts. This subjectiveness contributes to the difficulty of defining "public interest" in law, civil society and academic discourse.

Given its ambiguity, what does "the public interest" mean to those exercising a public interest mandate in Canada? How do these decision-makers interpret their mandate to act in the public interest, and how do they assess a project's alignment with the public interest? Further, though we know the public interest test exists in Canadian law, we do not know how often it is used for

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<sup>1</sup> CEAA 2012 can also be interpreted as having an *implicit* public interest test, though the factors to consider differ from the IAA.

<sup>2</sup> These are, in brief: contribution to sustainability; the significance of adverse effects; planned mitigation measures; the impact on Indigenous groups and adverse impacts on the rights of Indigenous Peoples; and the effects of the project on the Government of Canada's "ability to meet its environmental obligations" and climate change commitments (Canada 2019, section 63).

regulation of physical infrastructure, specifically, or how such test provisions compare across jurisdictions and sectors.

In this report, we examine how the public interest test is used in environmental law in Canada, and how decision-makers apply public interest provisions when assessing the predicted impacts of infrastructure projects.<sup>3</sup> We do this by reviewing (1) all statutes and regulations in Canada (provincial, territorial, federal) with a public interest test for infrastructure development; and (2) key decisions (court and regulatory) that provide special insight into application of the public interest test in practice. These results directly inform our on-going research comparing regulatory practice in Canada to best-practice guidance from the courts and scholarly discourse. Our analysis and synthesis contributes to an improved understanding of the use of public interest tests in Canadian law and regulation.

The remainder of the report proceeds as follows. We review the objectives of the knowledge synthesis (section 2) and explain our methods (section 3). We then discuss results (section 4), including how the public interest shows up in environmental law in Canada, who has a public interest mandate for infrastructure, how they define public interest, and what methods they use to conduct a public interest test. We conclude with a discussion of implications for policy and research (section 5), recommend areas of future research (section 6), and discuss knowledge mobilization plans (section 7).

## 2 Objectives

Our objective is to identify where and how public interest test provisions for allowing infrastructure development appear in Canadian statutes and regulations, and how decision-makers (statutory bodies and the courts) have interpreted and applied these provisions in practice. Our purpose is to summarize the current state of practice, in order to inform (1) policy guidance and direction on the public interest mandate, and (2) further research on how current regulatory practice in Canada compares to best practices put forth in academic literature.

Specifically, we pose three questions:

- A. Where does a ‘public interest test’ to allow or prevent physical infrastructure projects appear in current Canadian federal and provincial/territorial law and regulation?
- B. What guidance do these statutes and regulations provide about how to determine whether a physical infrastructure project is in the public interest?
- C. How have decision-makers applied these provisions in practice?

In answering the questions above, we require definitions for the terms “public interest test,” “decision-maker” and “legislative guidance” to bound our literature review and synthesis. We define a “**public interest test**” as where a statutory provision requires the responsible authority

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<sup>3</sup> We focus on the use of the concept to determine infrastructure development outcomes, specifically, for three reasons. First, this is the category of projects assessed under the IAA regime and our goal is to inform effective implementation of the IAA. Second, we want to understand how decision-makers have substantively assessed singular infrastructure projects against broader public impacts. Third, much of the discourse to-date has focused on procedural applications; for example due process and public interest standing.

to make a determination as to whether development of a physical infrastructure project is in the public interest.<sup>4</sup> The “**decision-maker**” is the statutory body with the legislated or delegated mandate to conduct the public interest test. Examples of Canadian decision-makers include regulatory boards, review panels, or the designated Minister. “**Legislative guidance**” is any provision in an identified statute or regulation that provides information to decision-makers about how to apply the public interest test. Guidance may include defining public interest, listing factors the decision-maker must consider, or explicit reference to consideration of the act’s purposes.

## 3 Methods

In this section, we briefly describe our process including methods, selection criteria, data collection and analysis.

We conducted a two-phase literature review to identify all statutes and regulations in Canada (provincial, territorial, federal) with a public interest test for infrastructure development, and key decisions (court and regulatory) that provide insight into application of the public interest test in practice. The first phase involved initial screening of the literature. The second phase was more targeted, with additional, more specific search terms and screening criteria. We supplement our review and analysis of statutes, regulations and key decisions with a limited snowball sample of academic discourse and grey literature specifically discussing the concept of public interest and its use in decision-making.

### Phase 1: Initial screening

We focused our search on legal databases (CanLII, WestLaw, Lexis LAQ, LEGISinfo) to identify court decisions where a statutory body’s public interest mandate or other application of the test was discussed or contested. Court decisions directed us in part to the other two types of literature we sought: the primary legislation or regulations providing the mandate, and regulatory and court decisions cited as setting precedent in public interest determination.

From November 2019 to February 2020, three research assistants collected data by querying the databases (full list of search strings in Appendix A) and applying the screening questions with periodic, randomized data validation from the primary investigators. We used a shared reporting spreadsheet to track results and decisions at each stage of the literature review: literature scan, detailed literature review, and data analysis.

**Search terms** covered six categories: the public interest concept; public interest as decision-making criteria; decision-makers; industrial sectors of interest; type of project; and jurisdiction. We used the categories of projects designated for federal review under the Impact Assessment Act (see Physical Activities Regulations 2019) to identify sectors of interest.

Research assistants ran 45 searches of unique search strings in four databases. They restricted the literature for review based on four factors: temporal, geographic relevance, subject, and population (Table 1).

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<sup>4</sup> In our definition, we include public interest tests for the following decisions related to an infrastructure project: approval or rejection of a proposed project, recommendation for approval or rejection of a proposed project, and cancellation or otherwise termination of a project.

Table 1 - Selection criteria for initial literature screening

Factor	Initial selection criteria
<b>Temporal</b>	<u>Statutes and regulations</u> : currently in force <u>Court decisions</u> : where the case discussed the public interest mandate of a decision-maker operating under a legislated public interest mandate <u>Regulatory decisions</u> : from a decision-maker operating under a legislated public interest mandate
<b>Geographic relevance</b>	Canada or within Canada
<b>Subject</b>	Public interest determination
<b>Population</b>	"Decision-makers" including regulators, quasi-judicial bodies and other government agencies with a public interest mandate.

From the 45 unique searches, we retained results from 28 for further review, resulting in 1,677 sources. We discarded results from 17 of the searches when there were too many results or the results were not highly relevant.

The research assistants divided the workload by database and scanned the summary section of each of the 1,677 retained documents to ascertain relevance. The summary section differed in nature between literature types (e.g. statute purpose; court decision or regulatory decision report introduction). Based on these summaries, we identified key terms that reflect current law and decision-maker practice for use in a more targeted search. This included the titles of relevant statutes and regulatory decisions, and several specific terms, including: 'approval', 'balance', 'benefits and burdens', 'convenience', 'discretion', 'decision', 'mandate', 'necessity'.

## Phase 2: Detailed review

The research assistants ran 45 searches of unique search strings in 10 databases (the four legal databases cited above plus Canadian Research Index, EconLit, Environment Complete, Google Custom Search, HeinOnline, Primo and publications.gc.ca), drawing on the same terms used in Phase 1. The new terms derived from preliminary findings ('approval', 'balance', 'benefits and burdens', 'convenience', 'discretion', 'decision', 'mandate', 'necessity') were used in additional screening but not new searches. The research assistants also narrowed search results by jurisdiction (i.e., Alberta or PEI), type of law (i.e., natural resources law), and type of document (i.e., legislation, peer-reviewed articles).

To narrow results for detailed review, relevant results were sorted by document type and selection criteria were applied (Table 2):



Table 2 - Selection criteria for detailed literature review

Type of literature	Selection criteria
<b>Statutes and regulations</b>	Only those with a public interest test provision for physical infrastructure development
<b>Decisions</b>	The written decision describing the outcome of a public interest test applied to a physical infrastructure project, or when such a decision was contested in court

From the 45 unique searches, we kept results from 19 for further review, resulting in 1,922 sources. We discarded results from 26 of the searches when there were too many results or results were not pertinent. Again, the research assistants divided the workload by database and reviewed the summary section of each document to identify the most pertinent.

Our priority was to compile an exhaustive list of statutes and regulations with a public interest test for infrastructure development to answer our first two research questions.<sup>5</sup> Our second priority was to compile a list of regulatory and court decisions, to answer our third research question<sup>6</sup> and identify the use and interpretation of the public interest test over time.

In February and March 2020, the research assistants switched to detailed summary and analysis, summarizing 114 sources. Of these, 61 were statutes or regulations, and 36 were regulatory or court decisions<sup>7</sup>, and 17 were academic articles or grey literature. Of the 61 statutes or regulations, 44 contained a public interest test for infrastructure and were retained to inform our results; we added an additional two pieces of legislation we found via the decision summaries. Of the 36 regulatory and court decisions summarized, we retained 13 for inclusion in our analysis<sup>8</sup>. The court and regulatory documents reviewed are a small subset of relevant decisions, and therefore our analysis is not comprehensive. However, they are key decisions (court and regulatory) that provide special insight into application of the public interest test in practice. We used a total of 59 sources in our analysis, supplemented by academic and grey literature.

## 4 Results

In this results section, we discuss findings from our knowledge synthesis, dividing these into four themes:

- how the public interest test is currently used in Canadian environmental law (section 4.1);
- how the public interest is defined under these legislative frameworks (section 4.2);
- who is granted the authority to make public interest decisions for infrastructure development and how much discretion they are allowed (section 4.3); and,

<sup>5</sup> *Where does a 'public interest test' to allow or prevent physical infrastructure projects appear in current Canadian federal and provincial/territorial law and regulation? and What guidance do these statutes and regulations provide about how to determine whether a physical infrastructure project is in the public interest?*

<sup>6</sup> *How have decision-makers applied these provisions in practice?*

<sup>7</sup> Our initial target was at least three court or regulatory decision summaries per piece of legislation, but time and resource constraints meant we were unable to fulfill this goal.

<sup>8</sup> We prioritized by relevance, geography and type of infrastructure project.

- methods of public interest determination, including the types of factors considered and how factors are weighted (section 4.4).

Where appropriate, we link results in Canadian law and practice to concepts outlined in academic and grey literature. We close the section with a brief discussion of gaps in the knowledge base on this matter (section 4.5).

## 4.1 How is the public interest test used in Canadian environmental law?

We found **52 unique public interest tests for infrastructure development in current Canadian law**. This includes provisions in 33 statutes and 13 regulations<sup>9</sup>, with 48 statutory bodies<sup>10</sup> (decision-making authorities) granted the mandate to conduct a public interest test for infrastructure. Appendix B presents the full results of the review.

Here, we discuss how the public interest test appears in Canadian environmental law, and then discuss in detail the findings specific to infrastructure development. Campbell and Marshall (2002) and Pal and Maxwell (2004) distinguish between use of a public interest test for determining both procedural (process-oriented) and substantive (outcome-oriented) decisions. We use this taxonomy to discuss the role of public interest tests in Canadian environmental law.

### 4.1.1 Procedural determinations

In procedural or process-oriented decisions, the test is used to: (1) determine whether it is in the public interest to disclose information; (2) determine the decision-making process; and (3) assess who can represent interests to be considered in the assessment process.

The test may be used to decide ***whether it is in the public interest to disclose information***; for example:

- In the federal Mackenzie Valley Resource Management Act (1998), the review board may disclose information if it “has reasonable grounds to believe that it would be in the public interest to disclose the record because it is required for the public to participate effectively in a preliminary screening, environmental assessment or environmental impact review” (Canada 1998, section 5).
- In the Northwest Territories Oil and Gas Operations Act (2014), the regulator may withhold information from the public if it is satisfied that “(b) the need to prevent disclosure of the information outweighs the public interest in disclosure of orders and proceedings of the Regulator” (GNWT 2014, section 23).

The test is also used to inform assessment process, such as ***whether it is in the public interest to refer an environmental assessment to a review panel***, for example under the repealed CEAA 2012 (section 38) and the IAA (section 36).

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<sup>9</sup> Six statutes contain two public interest tests for infrastructure development.

<sup>10</sup> Depending on the structure of a province’s cabinet at any one time and which ministers are assigned responsibility for administering the acts, this may range from 36 to 48 unique statutory bodies. At present, there are 37 unique statutory bodies with this authority. Six of the statutes and regulations grant public interest authority to two different statutory bodies.

Finally, the public interest test is used to assess “public interest standing”, which is granted ***when an individual or group seeking standing in a regulatory hearing is regarded as representative “of the larger public interest”*** [emphasis added] (Vlavianos 2007).

The commonality in all three procedural uses of the public interest test is the role of information, both information-gathering and information-provision.

#### **4.1.2 Substantive determinations**

The test is used in Canadian environmental law for decisions related to: (1) tariff-setting and market regulation; (2) the development and allocation of natural resources; and (3) infrastructure development.

***Regulation of electricity markets in the public interest***, for example, is often focused on the effective grant of monopoly or franchise through certification of “public convenience and necessity”<sup>11</sup> (see British Columbia Utilities Commission Act (1996, section 45), Ontario Energy Board Act (1998, section 3), or Alberta Gas Distribution Act (2000, section 16)).

The public interest test is used in ***natural resource allocation and use*** decisions in Canada, especially with regards to reserving or allocating rights to public lands, water resources, fisheries, minerals and timber. The process for deciding whether to allocate licences or permits for use of these resources may include a public interest consideration, for example in the BC Forest Act, the Nova Scotia Crown Lands Act, the Nunavut Commissioner’s Land Regulations, the federal Fisheries Act, and numerous water-related statutes.

Finally, the public interest test is used to decide ***whether or not a physical infrastructure project or activity is allowed***, which we discuss in detail in the following section.

#### **4.1.3 Infrastructure development**

In our review, we found **52 unique public interest tests for infrastructure development across 46 statutes and regulations** (Table 3). The test may be used to allow an activity, for example where an activity is allowed to proceed only if it is found to be in the public interest, or to prevent an activity, for example where an activity may be cancelled or the license to operate not granted based on the absence of that activity being in the public interest. The designation of *allowable* is distinct from and broader than approval or rejection in Canadian law, and the terms should not be confounded.

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<sup>11</sup> The term “public convenience and necessity” is treated as synonymous with “public interest” in Canadian law and commentary, though we did not find a definition in our review.

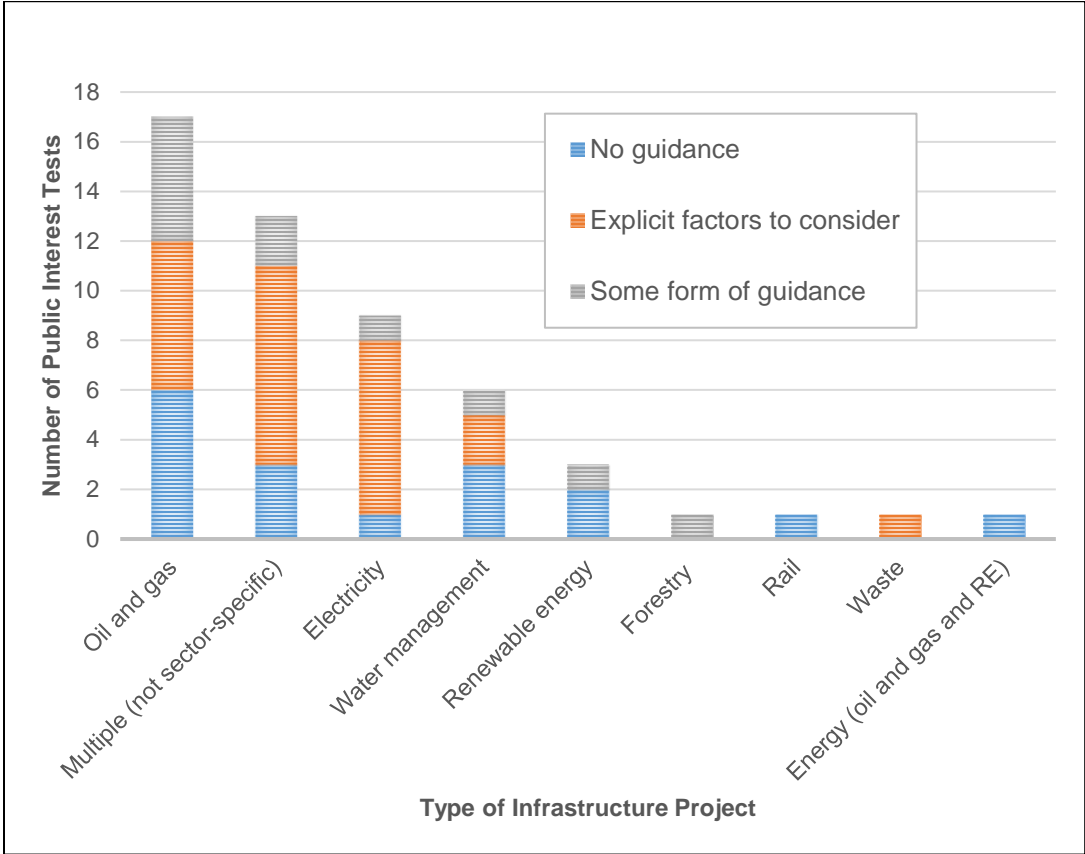
Table 3 - Public interest tests for infrastructure development in current Canadian environmental law and regulation

	Total	Provincial and Territorial	Federal
<b>Unique public interest tests for infrastructure</b>	<b>52</b>	50	2
<b>Statutes with a public interest test for infrastructure</b>	<b>33</b>	31	2
<b>Regulations with a public interest test for infrastructure</b>	<b>13</b>	13	0

Note: Six statutes contain two public interest tests for infrastructure development.

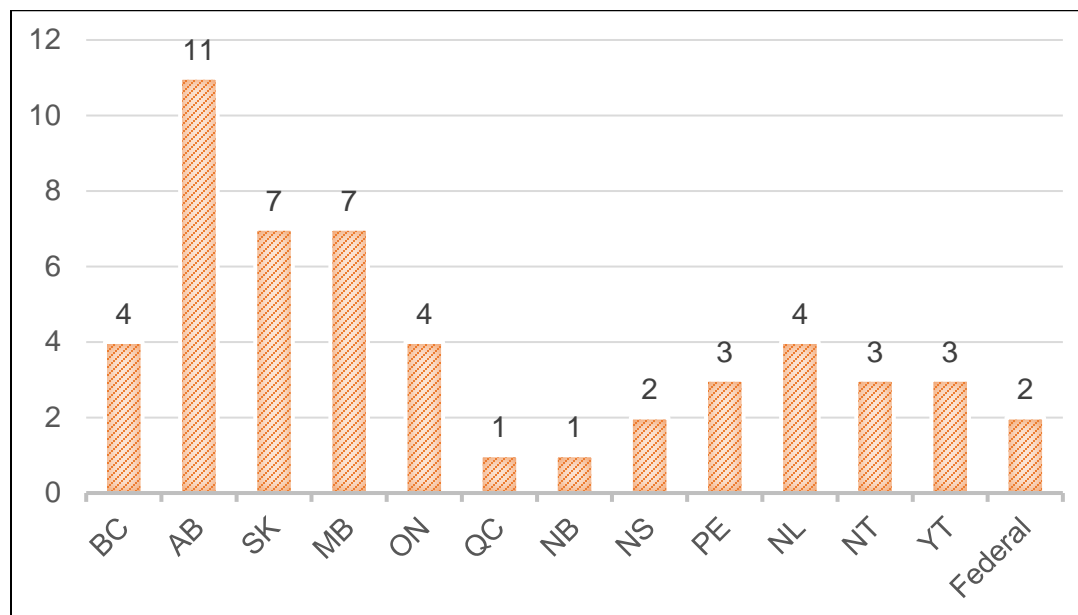
Current public interest provisions were put into force as early as 1978 (Saskatchewan Oil and Gas Conservation Act 1978) and as recently as 2019 (the IAA and the Canadian Energy Regulator Act 2019). **Of the 52 tests, 39 target a particular industrial sector** (oil and gas, electricity, water management, renewable energy, forestry, rail, or waste). Oil and gas represented nearly half of the sector-specific tests (44%), and electricity accounted for 23% (Figure 1). All jurisdictions in Canada other than Nunavut have public interest tests for infrastructure development under current legislative frameworks (Figure 2). The test appears most often in Alberta, Manitoba and Saskatchewan, likely correlated with oil and gas development.

Figure 1 - Public interest tests provided for in law or regulation for infrastructure development in Canada (by type of project)



Note: Proportions based on total number of tests (52) found in current statutes and regulations.

Figure 2 - Number of public interest tests for infrastructure development in Canada by jurisdiction

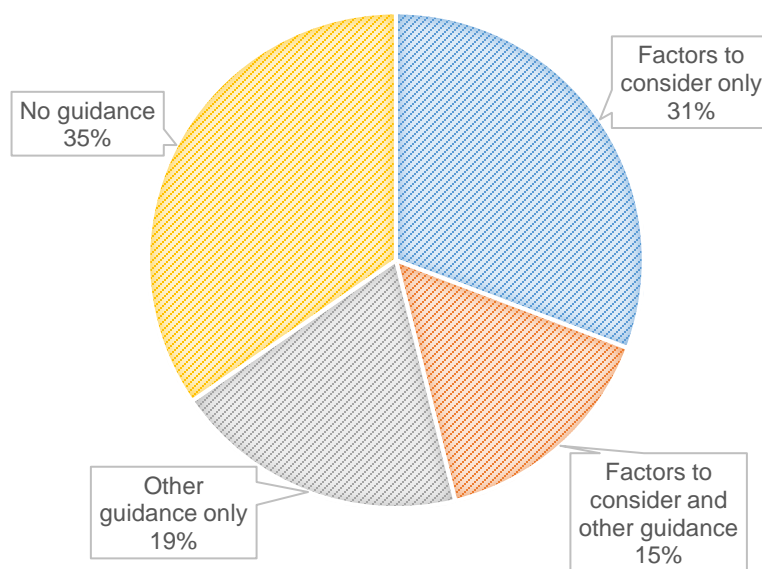


Note: Proportions based on total number of tests (52) found in current statutes and regulations.

### Guidance

**Of the 52 unique provisions to apply a public interest test, 46% provide the decision-maker explicit factors to consider, 65% provide some form of guidance for the test, and 35% provide no guidance at all** (Figure 3). Guidance other than the listing of explicit factors to consider included definition of terms, explicit reference to act purposes, or other details that provide insight into how the test should be applied (see Appendix B for specific provisions).

Figure 3 - Type of guidance provided in public interest test provisions for infrastructure development in Canada



Note: Proportions based on total number of tests (52) found in current statutes and regulations.

## 4.2 How is the public interest defined?

Interpretation of the “public interest” requires interpretation of two components: (1) the public and (2) the interests of that public. Here, we describe current practice in defining and interpreting both concepts in Canadian law.

### 4.2.1 Defining the public

In current practice, regulators and courts have taken “the public” to mean the population to which the decision-maker’s mandate applies. This is specified as the provincial interest in the Manitoba Provincial Planning Regulation (2011), for example, and the national interest in the National Energy Board (NEB)’s interpretation of its mandate (NEB 2007a, 2018). In all 46 statutes and regulations containing a public interest test provision, only the Manitoba Provincial Planning Regulation specifies who is the applicable public. Otherwise, a regulator’s “public” is inferred from the enabling legislative framework, which we discuss further in section 4.3.1.

The Supreme Court of Canada decision *RJR-MacDonald Inc. v. Canada (Attorney General)* clarified that “‘public interest’ includes both the concerns of society generally and the particular interests of identifiable groups” (SCC 1995). This could mean, for example, a provincial regulator considering the interests of the local public in the area surrounding the physical project as well as the public interests of the province as a whole. Public and private interests overlap, and public interest can be argued as the sum of individual interests of affected parties (Doucet 2012). Academic discourse on the issue suggests that the interests of individual attributable persons, however, are not included in the public interest (Barth 1992; Pal and Maxwell 2004). A slightly different view is offered by Long (1990), arguing that impacts on “the important dimensions of the lives of the individuals who make up the relevant public” should be included.

In its public interest determination, a decision-maker is expected to consider all classes and categories of interests that form the general public interest (Federal Court of Justice 1986). Following this, public interest determinations are considered legitimate only to the extent that the processes and mechanisms relied on ensure that interests of potentially affected members of the public are considered and factored in (Perrault et al 2007), an argument previously presented by Barth (1992) and Pal and Maxwell (2004).

### 4.2.2 Defining the public interest

Public interest is interpreted differently by different statutory bodies, and the concept is better defined in some regulatory contexts than others. The concept of “public convenience and necessity”, for example, is used to guide utilities regulation in Canada, and is generally treated as synonymous with public interest throughout the jurisprudence and commentary on these two terms (NEB 2007a). The legislative tools we reviewed vary widely in their specificity of the meaning of the “public interest”. Only three of the 52 public interest test provisions (6%) provide a specific definition, and the factors to consider differ widely across statutes; we discuss this further in section 4.5.

There is broad agreement amongst the courts and regulators that the public interest is a dynamic concept determined in part by the specific context at hand. From this perspective, whether a given activity is in the public interest changes over time and evolves with public values and discourse. The result of this interpretation is that a provision that intends to meet public interest objectives should do the same. A 2007 decision by the Ontario Energy Board provides this insight:

“The public interest is dynamic, varying from one situation to another, if only because the values ascribed to the conflicting interests alter. It follows that the criteria by which the public interest is served may also change according to the circumstances.” (Ontario Energy Board 2007)

The dynamic nature of the public interest as based on changing societal values is recognized in academic literature as a challenge hindering its definition in theory and in practice (Long 1990; Barth 1992; Campbell and Marshall 2002; Pal and Maxwell 2004)

Owing to its fluidity, regulators and courts have been especially cautious not to constrain the definition of public interest. The Alberta Court of Appeal, for example, in its 2009 ruling on the Alberta Energy and Utilities Board’s (EUB) approval of an international power line, refused to categorize even “need to Albertans” as a requisite element of public interest, citing regard for the “flexibility accorded to terms of that nature” (ABCA 2009). This is particularly notable considering the courts and regulatory decision-makers generally determine the “public” by the decision-maker’s geographic jurisdiction (e.g. Albertans, in this case).

The mandate statement of the National Energy Board (NEB)<sup>12</sup>, provides the clearest definition of the term: “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 evolve over time” (NEB 2016). The concepts of values, balance and evolution appear in a number of the regulator and court decisions we analyzed.

Worldwide, it is common that any activity, private or public, “that promotes a public purpose” may be considered to be in the public interest, though some jurisdictions refer to a specific list of activities that are considered to be in the public interest (Perrault et al 2007). Such guidance provides insight into how legislators define the public interest, and is present in Canadian environmental law. For example, under Quebec’s Petroleum Resources Act (2016), the responsible Minister may reserve an area of land from petroleum exploration for any purpose that the Minister considers to be in the public interest, and in particular for the purposes of:

- mining, industrial, port, airport or communications facilities;
- underground conduits;
- the development and utilization of waterpower, power transmission lines, storage tanks or underground reservoirs;
- the creation of parks or protected areas;
- plant-life and wildlife conservation;
- the protection of eskers that may be a source of drinking water; and
- classification as an exceptional forest ecosystem under the Sustainable Forest Development Act (chapter A-18.1) or designation of biological refuges under that Act (section 142).

These activities are thus elevated as “more” in the interest of the public than petroleum exploration.

The 1997 Supreme Court of Canada decision on *Delgamuukw v. British Columbia* provides further insight into what activities are considered to be in the public interest. In this case, the court reaffirmed that vague public interest justifications are not sufficient for infringement of Indigenous

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<sup>12</sup> The NEB is the former federal regulator of interprovincial and international energy transportation infrastructure, replaced by the Canada Energy Regulator in 2019.

treaty rights, and instead listed examples of public activities that would justify such an infringement. These included development of agriculture, forestry, mining, hydroelectric power, “the general economic development of the interior of British Columbia”, protection of the environment or endangered species, the building of infrastructure, and settlement of foreign populations to support those aims (SCC 1997). The majority found that these activities, in theory, meet the two-part “infringement justification test” under section 35(1) of the Constitution, which requires that the reason for infringement (1) furthers a compelling and substantial legislative objective and (2) is consistent with the special fiduciary relationship between the Crown and aboriginal peoples. Importantly, such activities do not always justify infringement, however. The court stated that whether a particular measure or government act can be explained by reference to one of those objectives is “ultimately a question of fact that will have to be examined on a case-by-case basis” (SCC 1997).

### 4.3 Who decides what is in the public interest and how much discretion do they have?

In every case where a public interest test is required for infrastructure approval, a specific authority (decision-maker) is delegated the authority to conduct the test.

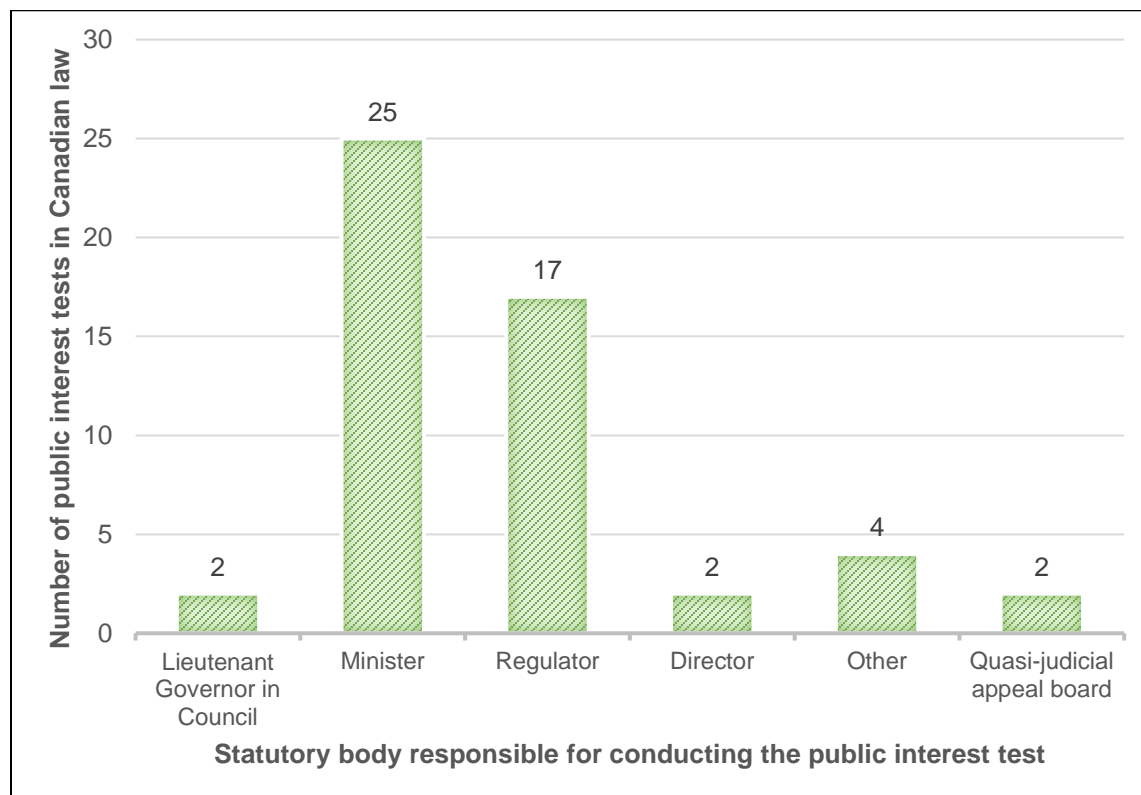
The 46 statutes and regulations designate authority for public-interest determination to a particular statutory body or bodies. The individual types of roles assigned this authority to a diversity include Minister (a member of the Executive Council assigned responsibility for administering that particular statute), Board, Commission, Regulator, Appeal Board, and others. However, ministerial authority is by far the most common designation (48% of tests) (Figure 4). Six of the statutes and regulations grant public interest authority to two different statutory bodies for a total of 48 different public interest mandates. Depending on the structure of a province’s cabinet at any one time and which ministers are assigned responsibility for the acts, between 36 and 48 unique decision-making bodies have a public interest test authority in current Canadian law. At present, there are 37 unique decision-makers with this authority.

In a few cases, more than one decision-maker may have the authority to make a public interest determination on the same project. This is true where (1) there are multiple tests applied to the same project, with different authorities responsible for each test; (2) there is a two-part test with a different authority responsible for each part; or (3) the decision made by one authority may be overturned by a more senior authority. These three scenarios are not necessarily mutually exclusive.

We see this, for example, in the legislative framework for environmental assessment and approval of electricity transmission line projects in British Columbia (BC). Two statutes — the Environmental Assessment Act and the BC Utilities Commission Act — provide for a unique public interest test, each conducted by a different decision-making body (the responsible Minister and the BC Utilities Commission) at different stages of the project assessment process. The BC Court of Appeal in *Kwikwetlem First Nation v. British Columbia (Utilities Commission)* clarified that these are two discrete processes whereby “each decision-maker makes a decision in the public interest taking into account factors relevant to the question on which they are required to form an opinion” (BCCA 2009).



Figure 4 - Type of statutory body with public interest determination authority for infrastructure development in Canada



Note: Proportions based on total number of tests (52) found in current statutes and regulations.

In Ontario, large renewable energy projects are potentially subject to two public interest tests under the Environmental Protection Act (1990). The second test only occurs when an approval decision is appealed on the basis of potential environmental harm. The Director is responsible for deciding whether it is in the public interest to issue a renewable energy approval (section 47.5); the Environmental Review Tribunal's role, in contrast, is limited to considering only "whether engaging in the renewable energy project in accordance with the renewable energy approval will cause serious harm to human health; or serious and irreversible harm to plant life, animal life or the natural environment" (section 142.1). If the decision is brought to the Tribunal and it finds that the harm test is met, the Tribunal may decide that the project is not in the public interest and thereby overturn the public interest decision of the Director (section 145.2.1).

In Alberta, the process for approving critical electricity transmission infrastructure is another example of where one project may be subject to multiple public interest tests. Alberta's approval process requires (1) a decision, made by the legislature or the Lieutenant Governor-in-Council, on whether an electricity transmission line is required to meet the needs of Albertans and whether the technical solution to meet the need is acceptable; and (2) a decision, made by the Alberta Utilities Commission (AUC), on the specific transmission project designed to meet the need identified in the first stage (Province of Alberta 2007b). The only requirement is that the AUC, in conducting the second test, should not address matters already addressed by the legislature when designating a project as critical transmission infrastructure (AUC 2012). The AUC can reject a critical transmission infrastructure project where it determines that the proposed project will have unacceptable impacts and those impacts cannot be mitigated to an acceptable degree, though this is considered an "extreme case" (AUC 2011).

### 4.3.1 Decision-maker discretion

The variable and dynamic nature of the public interest concept and test, as currently used, grants a certain degree of discretion to responsible authorities. The degree of discretion allowed to a decision-maker may be explicit in the legislation, and varies in breadth across public interest mandates.

In our review, the Northwest Territories Oil and Gas Operations Act (2014) grants the broadest authority to a decision-maker. Under the Act, the regulator has “full and exclusive jurisdiction to inquire into, hear and determine any matter” where it appears to the regulator that the circumstances may require it, in the public interest, to take an action (section 19). In contrast, some regulators have narrow public interest mandates. The Ontario Energy Board’s role in determining whether an electricity transmission and distribution project is in the public interest, is strictly confined to considering (1) “the interests of consumers with respect to prices and the reliability and quality of electricity service”; and (2) “where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources” (Ontario Energy Board Act 1998, section 96).

Public interest mandates are rarely so well-defined, however. Only 6% of the public interest tests in our review define the public interest, and 35% do not provide any guidance on how the provision should be interpreted. In cases without guidance, more discretion is awarded to the designated authorities. The NEB described the discretion awarded to regulators operating in the public interest as “room for the application of reasoned judgment, opinion or administrative discretion” and stated that “something more is required than simply reviewing the evidence to determine if a project would meet the minimum regulatory requirements, standards, objectives, or guidelines” (NEB 2004). How much more and exactly what that “something” is, however, is not clear.

A 1958 Supreme Court of Canada (SCC) decision, *Memorial Gardens Association (Canada) Limited v. Colwood Cemetery Company*, is commonly cited as having clarified the degree of discretion appropriate for public interest determinations. The issue before the SCC in this case was whether the BC Public Utility Commission acted appropriately when making a determination of “public convenience and necessity” for approving a cemetery development. In the judgment, Justice Abbott, speaking for the majority said:

“... the question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest, the need and desirability of additional cemetery facilities, and in reaching that decision the degree of need and of desirability is left to the discretion of the Commission.” (SCC 1958, 357)

The discretion described in the quote is two-fold. First, that a decision is an opinion based on facts, and the decision is at the discretion of the relevant statutory body. Second, that discretion over the facts and values used to make that decision is explicitly delegated to that body. Barth (1992) emphasizes the importance of process when there is discretion on the part of the decision-maker, arguing that “otherwise, the public interest is simply determined by the values of those who happen to be in a position of authority.” *Memorial Gardens* further established that a regulator’s decision must be based on the record before it, but is not bound to it. The discretion to act in the public interest is not unlimited, however. Justice Abbott went on to say:

“. . . [I]t would, I think, be both impracticable and undesirable to attempt a precise definition of general application of what constitutes public convenience and necessity. As has been frequently pointed out in the American decisions, the meaning in a given case should be ascertained by reference to the context and to the objects and purposes of the statute in which it is found.” (SCC 1958, 357)

Like in *Memorial Gardens*, courts and regulators in Canada have broadly agreed that the written purposes of an act should inform the relevant authority’s interpretation of the public interest when making a decision. Authorities define their public interest mandate “by reference to the context and to the objects and purposes of the statute in which it is found” (SCC 1958), and from the general legislative framework granting them the power to act in the public interest (BCSC 2004; NEB 2004; SCC 2004). Public interest provisions must be read alongside other applicable statutes, “in the context of and in conjunction with the entire enabling legislative scheme” (OSCJ 2003); for example, the Alberta Utilities and Commission Act alongside the Hydro and Electric Energy Act (see ABCA (2012)) and the Responsible Energy Development Act alongside the Oil Sands Conservation Act (see AER (2018)). An excerpt from a 2018 Alberta Energy Regulator (AER) decision on an in-situ oil sands project provides an example of how the public interest mandate stems from guidance in multiple acts:

“The purposes provisions of the OSCA—especially section 3(b), read with the AER mandate provisions in REDA and the purposes provisions of EPEA and the Water Act—clearly express that in Alberta, the public interest lies in striking a balance between the economic benefits to Alberta and Albertans and protecting the environment, promoting sustainable resource development, and ensuring the conservation and wise use of water.” (AER 2018)

How decision-makers and courts define the boundaries of the applicable legislative framework, however, and how they factor in the different purposive provisions, is not clear. We did not find any examples of regulators or courts explaining in detail how the different legislative provisions within the overarching legislative framework were interpreted to inform a regulator’s public interest mandate.

Generally, courts will defer to the discretion of the responsible authority. For example, when a federal Minister’s public interest determination under CEAA 2012 was challenged in *Interlake Reserves Tribal Council v. Canada (Environment and Climate Change)*, the Federal Court agreed that “great deference must be given to [the Minister’s] decision, which is based on public policy considerations, and involves significant discretion” (Federal Court 2019).

### The role of public policy

As with the federal Minister’s decision in *Interlake Reserves Tribal Council v. Canada*, an authority’s public interest mandate may also include consideration of the public policy context. Public policy generally includes government directions or plans that are not legally binding, such as municipal land-use plans, non-binding targets, and governance strategies. The policy context, such as the degree to which the project aligns or conflicts with current government policy objectives, may be brought in for consideration if positive and negative impacts are more-or-less even (e.g. NEB (2004)), or just generally factor into a regulator’s decision from the outset.

Ontario’s Environmental Review Tribunal, for example, clarified how it takes into account public policy when exercising its public interest mandate under section 145.2.1(4) of the Environmental Protection Act (1990), which deals with the issuing of renewable energy project approvals:

“...the policy of promoting renewable energy is a factor in assessing the public interest but the policy does not automatically override the public interest in protecting against other environmental harm, such as harm to species at risk and their habitat.” (ERT 2016)

A public interest determination is not necessarily required to align with public policy, however, as illustrated in the recent Nova Scotia Supreme Court decision *Rudderham v. Nova Scotia (Environment)*. The Court clarified that, under the province’s Environment Act (1994), “it is open to the Minister to conclude that approval of a quarry is in the public interest even if such approval is inconsistent with municipal planning documents” (NSSC 2019).

## 4.4 Methods for public interest determination

Regulators in Canada use a variety of approaches when assessing whether or not a project is in the public interest. In this section, we describe the approaches decision-makers take, including the factors considered, and the weighting of various interests, values and effects.

Most regulatory decisions we reviewed described the task as taking account of the potential economic, social, and other benefits, and then determining whether they balance or outweigh the project’s costs and negative impacts on the environment, public health, safety, and other social and economic matters (see, for example, BC Oil and Gas Commission (2003), EUB (2003), NEB (2004), Nova Scotia Ministry of Environment and Labour (2007)). Across all sectors and statutes, common themes emerge about “balancing” the social, economic and environmental effects of a project. For example, the approach of the Natural Resources Conservation Board of Alberta (NRCB) is characteristic of the general framework applied by regulators across Canada:

“There is no fixed objective test, but to make the determination, the Board balances the economic, environmental and social interests in the context and time period in which they arise” (NRCB 2018).

Electricity regulation has perhaps the most well-developed and detailed methodology for public interest determination, as well as the most robust guidance and discourse around the concept. Electricity regulators describe the opposing effects they must take into account as “**benefits**” and “**burdens**”, as characterized by this 2004 NEB decision:

“After considering all of the evidence, taking into account all relevant factors, and identifying and weighing the benefits and burdens in Canada of the [international powerline] IPL and Power Plant, the Board has concluded that, on balance, the burdens of the IPL outweigh the benefits. As a result, the Board is unable to come to the conclusion that the IPL is in the Canadian public interest and is and will be required for the present and future public convenience and necessity.” (NEB 2004)

This benefit-burden balance test is used in other sectors, as illustrated in the decision of the joint review panel on the Whites Point Quarry project in Nova Scotia (2007):

“Based on an analysis of the benefits and burdens of the Project, the Panel has concluded that the burdens outweigh the benefits and that it would not be in the public interest to proceed with the Whites Point Quarry and Marine Terminal development.” (Nova Scotia Ministry of Environment and Labour 2007)

The public interest test provision of the Alberta Utilities Commission Act captures the type of guidance characteristic of Canadian environmental law. Under section 17 of the Act, the regulator is required to “...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”

(Province of Alberta 2007a, section 17). Similar language is present in six of the other statutes and regulations identified as providing for a public interest test for infrastructure: the BC Environmental Assessment Act; BC Oil and Gas Activities Act; BC Dormancy and Shutdown Regulation; Alberta Natural Resources Conservation Board Act; Alberta Utilities Commission Act; and Canadian Energy Regulator Act. The requirement to have regard to the three categories of social, economic and environmental effects has been inferred in practice under other statutes, however, such as Alberta's Oil Sands Conservation Act (see AER (2018)), Ontario's Environmental Protection Act (see ERT (2007)), and Alberta's Hydro and Electric Energy Act (see ABCA (2012)).

A 1999 Alberta Court of Appeal decision commenting on the application of the public interest mandate by the Alberta Energy and Utilities Board (EUB) at that time also provides insight:

"The [EUB] carefully assessed the competing views put before it and explained why, in relation to critical matters, it reached its conclusions. ...This weighing and sifting of all the evidence is part of its responsibility." (ABCA 1999)

This approach to regulating in the public interest can be described as utilitarian<sup>13</sup>, whereby the exercise is a balance or compromise of different interests that seeks to maximize good by aggregating interests (Pal and Maxwell 2004). The regulator plays the role of arbitrator to determine the "best nexus of private utility and public interest" (Campbell and Marshall 2002). This is a similar approach to social benefit-cost analysis, whereby benefits and costs to society are assigned monetary values and aggregated to determine if an activity has a net benefit to society (the definition of who is included in society is determined in advance). The 'utilitarian' approach is not the only one; Campbell and Marshall (2002) and Pal and Maxwell (2004) identify other approaches that accommodate different objectives and processes, such as shared values as an "ethical guide for decision-makers" (Pal and Maxwell 2004). These approaches are identifiable to a greater or lesser degree in Canadian environmental law and public-interest decision-making, though utilitarian approaches seem the most common; we discuss further below in section 4.4.2.

Ensuring a **full account** of all of the benefits and burdens and affected interests is considered part of the regulator's obligation under a public interest mandate. As stated by the NEB:

"Parliament has charged the Board with making its determinations in the public interest. Such determinations can only be made by the Board on the basis of a complete understanding of the affected interests and issues raised by all parties. Thus, even when faced with widespread opposition to a project at the outset of a hearing, the Board has a duty to hear the applicant, as well as other parties, on the merits of the application before it." (NEB 2004)

Notably, while in this instance the NEB identified its duty to hear "other parties", this is not the same as hearing from all parties or all publics. The NEB's mandate included hearing from those directly affected or those that had relevant information or expertise. The mandate did not guarantee all interested or affected parties, or all Canadians, would be considered. Likewise, provincial regulatory bodies could exclude benefits and burdens outside provincial boundaries or outside their specific scope of review. This speaks to the importance of regulators' mandate (what

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<sup>13</sup> In the strictest sense, utilitarianism means all affected groups have equal weight, as do the benefits received and costs borne by each group.

publics they consider and the scope of their reviews) and discretion in seeking a full account and subsequent decision-making.

There is an inextricable link between the process of conducting the test and the ultimate decision. As such, if a regulatory decision is contested in court, the regulator's accounting of the benefits and burdens may be used as an indicator of test legitimacy (BCSC 2004; ABCA 2009). In *Sincennes v. Alberta (Energy and Utilities Board)*, for example, the Alberta Court of Appeal found at 167:

"We are satisfied that the EUB's assessment of public interest was made having regard to the broad range of benefits and burdens associated with the construction and operation of the [international power line]. The assessment was made after a comprehensive review of the specific social, economic and environmental effects of the proposed line, including those that are unique to a merchant line. There is no reason to disturb the conclusion reached by the [EUB] with respect to public interest." (ABCA 2009)

The regulator not only has discretion as to how "the public interest" is defined and interpreted, but it also has discretion over what evidence should be considered in coming to that interpretation, and how each piece of evidence should be factored to result in an overall determination. This speaks to the importance of process as part of the method for public-interest decisions; Barth (1992) and Pal and Maxwell (2004) note that a procedural definition of public interest relies on appropriate procedures (such as transparency, fairness, etc.) to ensure decisions and outcomes are in the public interest. In the absence of appropriate procedures<sup>14</sup>, discretion on the part of the regulator could result in outcomes not reflecting the public interest.

#### 4.4.1 Factors to consider in the determination

A statute or regulation may outline specific factors for the decision-maker to assess in its allocations of benefits and burdens. **Of the 52 unique public interest test provisions for infrastructure development in Canada, 24 (46%) included explicit factors to consider.** However, when factors to consider are provided, the decision-maker is not limited to considering these factors alone (Federal Court 2019). In each case, there will be unique and case-specific factors to consider on top of the prescribed questions of the general public interest.

The most detailed guidance we found on regulator practice in this area was the NEB statement that, in operationalizing its mandate to regulate in the public interest, it determines "case-specific public interest factors based on the application, the location, the commodity involved, the various segments of the public affected by the decision, societal values at the time, and the purpose of the applicable section of the NEB Act" (NEB 2004). The NEB repeatedly stated in its decisions that there are no firm criteria for determining the public interest that will be appropriate in every situation (NEB 2004, 2007a, 2015). This position was also supported by the Ontario Energy Board (2007), which concluded that decision-makers must "strike the balance of 'puts and takes', pluses and minuses, that at the particular point in time are considered appropriate."

Factors to consider have changed over time along with the public interest itself. For example, the addition to the IAA of the explicit requirement to consider impacts to the rights of Indigenous

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<sup>14</sup> While out of scope, we note that the importance of process also applies to collection of evidence and the scientific rigour and transparency of collection.

Peoples when determining whether to refer a project environmental assessment to a review panel (section 36(2)).

#### 4.4.2 Weighting

It is common practice for the regulator to “weigh” different contributing factors to come to an overall public interest determination; some may be given little or no weight, others much (Federal Court of Justice 1986).

As we note above, this practice is essentially a form of benefit-cost analysis. The methods used to weigh individual factors, however, are not clear nor well explained in the regulatory decisions reviewed. Critics have argued that this lack of prescriptive weighting of factors allows for greater ambiguity in the interpretation of the public interest (Doucet 2012). Others have argued that regulators may reduce the public interest test to an incomplete benefit-cost analysis that does not adequately incorporate broader socio-ecological concerns (Pal and Maxwell 2004; Fluker 2005). This relates back to the scope and mandate of the regulator, as a limited mandate may result in an incomplete assessment of benefits and costs. That is, if a regulator is restricted to a certain geographical scope, it may inadvertently exclude benefits or burdens relevant to provincial (or national) public interest. Alternatively, if a regulator’s mandate excludes consideration of specific groups, the full accounting of benefits and burdens is incomplete.

Scholars have put forth theoretical frameworks to assist authorities in weighting factors when making public interest assessments (Pal and Maxwell 2004; Perrault et al 2007). More research is required to understand exactly how individual regulators conduct benefit-cost analyses in public interest tests, and compare this against best practice.

Regardless of its approach, a regulator is generally not required to explain its methods or rationale for public interest determination. This principle was recently upheld in the 2019 Federal Court decision *Interlake Reserves Tribal Council v. Canada*:

“Furthermore, where the public interest is engaged, there is no requirement for an administrative decision-maker to provide a detailed weighing of factors in writing, or to map out for the reader exactly how competing objectives were balanced in a decision.” (Federal Court 2019)

This contrasts with some other policy and non-infrastructure regulatory decisions in Canada, which require a benefit-cost analysis and a regulatory impact assessment (Treasury Board of Canada Secretariat 2007, 2018b).

We do know that, in their determination, regulators are not meant to give special weight to the public interest mandates of other statutory bodies. In the Alberta Court of Appeal case *Calgary North H2S Action Committee v. Alberta Energy and Utilities Board*, for example, applicant Calgary Regional Health Authority (CRHA) argued that the EUB, in granting an oil and gas well licence under its public interest mandate, had a greater obligation to respond to CRHA submissions because the CRHA had a statutory duty to protect public health and as such its input should be given greater weight in the decision. Judge Hunt responded at 17:

“But I am not persuaded that the CRHA’s suggestion that special consideration must be given to its point of view is, indeed, arguable. It may be that its statutory responsibilities overlap some of those of the [EUB]. This is undoubtedly also true of many other bodies in Alberta that operate pursuant to legislative mandates. It is hard to imagine how the [EUB] could fulfill its own statutory obligations (including its obligation, under s. 2.1 of the [Energy Resources Conservation Act], to

consider whether a “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”) if it were somehow obligated to pay special attention to the arguments of other bodies that have their own statutory mandates.” (ABCA 1999)

Many regulatory decisions have been contested on the grounds that undue weight was afforded to certain interests over others. A 2004 BC Supreme Court decision, for example, provides special insight. The decision was regarding a petition brought by the Saulteau First Nations to quash an earlier project approval by the BC Oil and Gas Commission (BCSC 2004). The Commission had authorized Vintage Petroleum Canada Inc. to construct and operate an exploratory oil and gas well, and the Saulteau First Nations contested the decision on the grounds that the First Nations’ treaty rights were not appropriately considered and accommodated by the Commission in its decision. In particular, the petitioner argued that undue weight had been given to the province’s economic concerns when compared to other interests, and that the narrow project-level approval process allowed economic benefits to outweigh treaty rights in the long-term as the effects of such developments accumulated (BCSC 2004, paragraph 32). The issue, in brief, was that “the decision maker too narrowly construed what he had to consider as factors relevant to his decision” (paragraph 147). The judge, in his decision, commented that “the balancing of the interests at stake in an application before the Commission is a complex feature of the duty to consult and accommodate” (paragraph 140). The judge applied a correctness test and found that the BC Oil and Gas Commission (the decision maker) correctly approved the well authorization based on the information before them at that time. At paragraph 156:

“I am satisfied that faced with the evidence available to him, in the absence of any contradictory information from the SFN, the Decision Maker took into account all of the relevant factors: he considered the consultation process; he clearly set his mind to the direct and indirect environmental, cumulative and socio-economic effects flowing from the Application; he recognized the importance of the ongoing ability of the SFN to undertake and practice their Treaty 8 rights; he recognized that it was vital to protect the SFN’s treaty rights through the establishment of a planning process; and, finally, he imposed conditions on the Well Authorization.” (BCSC 2004)

Notably, how these individual factors were weighted was not scrutinized. The choice of weight, and which interests and groups to weight, is a value-judgement acknowledged in literature (Long 1990; Burke 1992; Campbell and Marshall 2002; Pal and Maxwell 2004).

## Values

One method for weighting used in regulatory decisions is to identify “core values” or “community values” and weigh factors differently depending on how they align with these identified values. A regulator may assign more weight to burdens and benefits where they are determined to have high value to the public in question (NEB 2004; Nova Scotia Ministry of Environment and Labour 2007; Ontario Energy Board 2007; Province of Manitoba 2011). The process for determining such values was rarely specified in the decisions reviewed. In one case, where a joint provincial-federal review panel assessed a proposed quarry and marine terminal under CEAA 2012 and the Nova Scotia Environment Act (1994), the panel incorporated the core values of the local communities into its assessment as a discrete “valued environmental component” (Nova Scotia Ministry of Environment and Labour 2007). The panel relied at least partly on the region’s strategic policy document to identify these core values, and concluded in its recommendation:



“The Panel considers the community’s core values to be an important Valued Environmental Component. The imposition of a major long-term industrial site would introduce a significant and irreversible change to Digby Neck and Islands, resulting in sufficiently important changes to that community’s core values to warrant the Panel assessing them as a Significant Adverse Environmental Effect that cannot be mitigated.” (Nova Scotia Ministry of Environment and Labour 2007)

## Risk and risk certainty

Another method of weighting factors is assigning a level of certainty to the risks associated with potential burdens of a project. Risks which are seen as less certain are weighted less heavily in decisions (NEB 2004, 2007a, 2007b):

“It is the duty of the Board to consider all factors and to ensure that potential risks are carefully measured in order to satisfy itself that the outcome of assuming such risks is superior to the alternative.” (NEB 2007b)

When assessing the construction of flood damage mitigation infrastructure, for example, the risks associated with not building the infrastructure (e.g. loss of life, damage to buildings, business interruption costs due to a flood event) may be compared against the risks associated with building the infrastructure. From the Natural Resources Conservation Board’s 2018 decision on a flood mitigation project in Canmore, Alberta:

“The Board finds that the Project provides significant public benefits as measured by the reduced risk of loss of life, and avoidance of building damage and business interruption costs. The Board also finds that the Project’s \$700,000 average annualized damage cost avoidance to buildings is an important factor in the Board’s opinion that the Project is in the public interest.” (NRCB 2018)

## Classification of benefits and burdens

As we have established, the specific benefits and burdens assessed by a decision-maker depends on that decision-maker’s mandate and the context of the specific project. In our analysis, however, we found that decision-makers use a variety of criteria to qualify and classify benefits and burdens. This classification exercise is arguably a form of qualitative weighting, and common criteria showed up across the decisions reviewed.

Benefits and burdens, for example, are assessed as:

- Direct or indirect
- Local, regional or national
- Economic, social or environmental
- Looked at in context of need
- Specific to the project, or general to such a development
- Large or small
- Speculative or certain
- Significant or not significant (substantial or insubstantial / considerable or negligible / consequential or inconsequential)
- Concentrated or diffuse

And specific to burdens:

- Acceptable or unacceptable
- Offset by mitigation measures or terms and conditions

- Residual (e.g. the burdens that remain after compliance with any prescribed terms or conditions)

### Weighing specific interests against public interests

A challenge faced by regulators is the weighing of a specific population's interests against the broader public's interests. In practice, this shows up most commonly as the need to balance the interests of local communities with those of the province or country and/or the need to balance private interests with public interests. Indeed, this is the consideration of "particular interests of identifiable groups" called for in *RJR-MacDonald*. Some regulators have interpreted this responsibility as "**maximizing the benefits to the segment of the public to which the legislation is aimed, while minimizing, or mitigating to an acceptable degree, the potential adverse impacts on more discrete parts of the community**" [emphasis added] (NEB 2004, 2007a; Ontario Energy Board 2007; AUC 2009; AUC 2011). Of the 52 unique public interest tests for infrastructure development we found, only one — the BC Dormancy and Shutdown Regulation 2019 — required explicit consideration of impacts on local communities.

The balancing of private and public interests comes up particularly in land-use planning decisions related to a number of municipal planning acts across Canada. The Government of Manitoba for example, in its Planning Regulation, interprets the challenge as follows: "The development of land and resources has both costs and benefits; land use and development decisions must balance private gain with the costs that may be incurred by the public, and evaluate short-term profits against long-term costs" (Province of Manitoba 2011). A criticism of the public interest test under the now-repealed Energy Resources Conservation Board Act in Alberta, for example, was that the regulator, in its interpretation of its public interest mandate, would weigh economic benefits that accrue to the province as a whole against social and environmental impacts experienced at the local level, arguably tipping the scale in favour of the economic factors (Fluker 2005; Hierlmeier 2008). A 2000 NEB decision provides insight into how local and broader interests may be reconciled, as well as how weighting of factors is relative and dynamic:

"Various decisions of the courts have established that a specific individual's or locale's interest is to be weighed against the greater public interest, and if a project is in the greater public interest, the specific interests must give way. However, in this situation, where the benefits of the proposed [international power line] and associated facilities are not substantially in the greater Canadian public interest, the specific locale's interest has more weight than would otherwise be the case." (NEB 2004)

The specific interests of local communities as evidenced by degree of community support, in particular, may be used as a "tie-breaker" where it is otherwise unclear if the benefits outweigh the burdens (NEB 2004), or it may be a core factor considered in the test (NRCB 2018).

Balancing local and regional interests is a particular focus in mining project assessment (Nova Scotia Ministry of Environment and Labour 2007; Province of Manitoba 2011). In these cases, there was concern that the burdens may be disproportionately faced by the local community and surrounding region, while the public benefits would accrue at the broader provincial, national or international scale. Similarly, the local versus broad public interests question comes up often in linear transportation infrastructure decisions (e.g. electricity transmission lines and pipelines), where the need for the project is justified from a provincial, national or even international perspective but it is the local communities along the route that are directly impacted (NEB 2004, 2007a; AUC 2011). In these cases, most of the benefits are national or regional in scope and few

are direct to the local communities, whereas the majority of the burdens are shouldered by the local communities (NEB 2007a).

## 4.5 Research gaps

We were able to review and summarize a number of statutes and regulations that provide for a public interest test. However, because of the complexities and lack of standardized approaches to public interest determinations, our research revealed many knowledge gaps, including:

- How regulators and courts define the boundaries of the “overall” or “applicable” legislative framework from which the public interest mandate is interpreted;
- How individual regulators conduct cost-benefit analyses (implicit or explicit) in public interest tests, and how this practice compares against best practice (for example the practices outlined in the Government of Canada’s Treasury Board policy on cost-benefit analysis);
- How regulators weigh specific interests and factors against one another in a public interest test; and
- Whether a public interest test is the most suitable means for determining whether to approve an infrastructure project.

## 5 Implications

The public interest test appears in a variety of ways across current Canadian environmental law, supported by varying degrees of guidance. This guidance also varies in terms of how the public interest is defined and meant to be assessed. Upwards of 48 unique statutory bodies may be assigned a public interest mandate for infrastructure development under current frameworks, and the mandate of each is distinct. Almost never is the scope of this mandate explicitly defined, and current practice dictates that a decision-maker is not required to explain its methods for weighing interests in coming to the final determination. The main implications of these findings are three-fold.

1. Most regulators are awarded a substantial amount of discretion in exercising their public interest mandate. The ultimate decision of whether an infrastructure project is in the public interest relies heavily on a regulator’s interpretation of its mandate and the weight it assigns to different factors, based on opinion. Discretion gives regulators flexibility to assess projects within each’s specific context, but also means public interest is only vaguely defined in Canadian law and practice. **More information on how each of the statutory bodies derive and interpret their public interest mandate would support improved understanding of how public interest decisions are made.**
2. In practice, public interest determination is essentially a form of cost-benefit analysis. Without a better understanding of regulators’ detailed methods for conducting the test, however, we cannot be sure that such analyses are adequately comprehensive and effective. **There may be room to develop standards or guidelines for how to conduct public interest tests to ensure rigorous, fair analysis.**<sup>15</sup> Relatedly, authorities’

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<sup>15</sup> There are numerous approaches policy-makers can take in introducing guidelines or standards. Pal and Maxwell (2004) suggest a public interest accountability framework which (1) addresses both process and evidence used to evaluate public interest, as well as uses the five dimensions of the public interest

mandates may artificially constrain their assessment of benefits and burdens and definition of affected publics. Discretion may partially offset this, by granting them the ability to hear or bring in evidence technically outside of scope or mandate. This discretion may also lead to relevant evidence being ignored due to bias on the part of the decision-maker. Moreover, discretion can undermine the principles of due process, fairness, and transparency, amongst others that are valuable in maintaining trust in decision-making.

3. Finally, the use of a public interest test for determining infrastructure outcomes has limitations. Guidance needs to be sufficiently vague to accommodate emerging understandings of justice; cumulative effects and project alternatives may not be adequately captured by such an approach (Doelle and Sinclair 2019); the test requires sufficient representation of affected interests to be legitimate (of which there is no objective measure); and it may not be appropriate or even possible to compare interests (e.g. apples and oranges weighed against one another). As noted previously, weighting of benefits and costs is typically in a utilitarian fashion. However, other approaches beyond the utilitarian approach exist. There may be opportunities to explore other approaches beyond benefit-cost analysis when making public interest determinations. **Further research is needed to understand the opportunities and limitations associated with using a public interest test for infrastructure approval decisions.**

## 6 Conclusion

We investigated three research questions about the prevalence and use of a public interest test in Canadian legislation governing the approval of physical infrastructure projects. With regard to how the public interest test occurs in such legislation in Canada, we found:

- 52 unique tests across 33 statutes and 13 regulations (Appendix B).
- The test applies most commonly to oil and gas projects, general environmental assessment, and electricity transmission projects.
- Current public interest provisions were put into force as early as 1978 and as recently as 2019.
- The role most often assigned responsibility for public interest determination was Minister.

With regard to guidance provided by these legislative tools to support the relevant authority in their decision-making,

- 46% of the public interest tests were supported by explicit factors to consider, 65% provide some form of guidance for the test, and 35% no guidance at all.
- Besides factors to consider, other guidance included definition of terms, explicit reference to the act purposes, or other detail that provides insight into how the test should be applied.
- Public interest mandates are rarely explicitly defined in the legislation: only one case specified who “the public” is that must be considered and only 6% of public interest test provisions found in our review define the public interest.

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they identify; and (2) articulates tradeoffs amongst different interest groups. Another approach to more explicit identification of benefits and costs, and the distribution of benefits and costs, is multiple-account benefit-cost analysis (Shaffer 2010). The multiple accounts approach allocates benefits and costs to different accounts to present “results in a disaggregated way, enabling the systematic consideration of non-monetized and distributional effects” (Shaffer et al 2020).

- Where statutes and regulations do not provide any guidance, more discretion is awarded to the decision-maker.

With regard to decision-makers' application of these provisions in practice, we found,

- Discretion: Authorities define their public interest mandate “by reference to the context and to the objects and purposes of the statute in which it is found” (SCC 1958), and from the general legislative framework granting them the power to act in the public interest. As such, public interest provisions must be read alongside other “applicable” statutes.
- Methods to make the decision: Regulators in Canada use a variety of approaches when assessing whether or not a project is in the public interest. Electricity regulation has perhaps the most well-developed and detailed methodology for public interest determination, as well as the most robust guidance and discourse around the concept. Across all sectors and statutes, common themes emerge about “balancing” the social, economic and environmental effects of a project. Quasi-methods that emerged in our review include the use of the following as frameworks for decision-making: community values, risk and risk certainty, specific versus public interests, and classification of benefits and burdens.
- Factors to consider: The regulator is not limited to considering prescribed factors alone. In each case, there will be unique and case-specific factors to consider on top of the prescribed questions of the general public interest. Ensuring a full account of all of the “benefits and burdens” and affected interests is considered part of the regulator’s obligation under a public interest mandate. Factors to consider change over time along with the public interest itself, and this is reflected in the evolution of specific legislative provisions.
- Weighting of factors and risks: It is common practice for the regulator to “weigh” different contributing factors to come to an overall public interest determination. This practice is implicitly a form of benefit-cost analysis. The methods regulators used to weigh individual factors, however, are not clear nor well explained in the decisions we reviewed. Regardless of its approach, a regulator is generally not required to explain its methods for public interest determination. This is in contrast to other policy and non-infrastructure regulatory decisions in Canada.

### **Gaps in our knowledge synthesis**

The knowledge we synthesized is over-representative of (1) Alberta, (2) the electricity sector, and (3) the NEB. We believe this is because these sources produce the most literature on the subject and are cited most frequently in related court cases. Our methods could have been adjusted to capture a more representative sample of jurisdictions and industrial sectors.

Due to limited resources, we did not complete a comprehensive review of regulatory decisions. As such, our understanding of how decision-makers have applied the tools in practice is incomplete.

## Future areas of research

We are currently conducting phase two of the knowledge synthesis, to **compare recent practice with best practice as set out in academic and grey literature**. Specifically, we aim to:

- a. Conduct a systematic review of regulatory decisions (areas of research include how regulators balance benefits and burdens, how weights and values are assigned and how this compares with cost-benefit analysis best practices)
- b. Review academic discourse on public interest determination in general and specific to infrastructure projects in Canada

Beyond phase two of the knowledge synthesis, we note there is a role for research into the following areas (among many):

- a. How each of the statutory bodies derive and interpret their public interest mandate.
- b. Comparing public-interest decisions in Canadian environmental law to best practice in academic and grey literature
- c. Comparing public-interest decisions in Canadian environmental law to alternative approaches to decision-making
- d. The role of decision-maker discretion in public-interest tests, and alignment with the concept of the public interest.
- e. Developing and applying a framework for assessing regulator decision-making.

## 7 Knowledge Mobilization Activities

We have two primary audiences — academic and non-academic — for the results of this knowledge synthesis and our subsequent research on questions identified above. Here, we outline the knowledge products relevant to both audiences and our knowledge mobilization plan.

First, we will post this report online<sup>16</sup> as a working paper and share with our networks for comment and feedback. Moreover, Appendix B of this report summarizes and categorizes Canadian environmental law that includes the public interest test for infrastructure development. We describe the relevant details of these documents:

- document type (statute or regulation);
- year enacted;
- the sector and type of infrastructure the document applies to;
- the public-interest test provision language;
- the number of unique tests;
- how the test is used (to allow or prevent infrastructure);
- whether the public interest test includes factors to consider, and what the prescribed factors are;
- whether the test includes additional guidance, and the language of that guidance; and
- the decision-making body applying the public interest test.

Our summary and categorizing of public interest tests for infrastructure development in Canadian environmental law is a useful resource for scholars, policymakers and decision-makers interested

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<sup>16</sup> Dr. Winter will use her personal website ([www.jenniferwinter.ca](http://www.jenniferwinter.ca)) and GitHub repository to host the report. Permanent URL for the report: [https://jenniferwinter.github.io/website/GWW\\_PublicInterest\\_KS\\_Report.pdf](https://jenniferwinter.github.io/website/GWW_PublicInterest_KS_Report.pdf).

in Canadian environmental law, public interest tests and Canadian infrastructure development. To our knowledge, we have constructed the first comprehensive and exhaustive synthesis of this type. We will post the appendix online<sup>17</sup> as a resource for others to use in future research.

Second, we expect this knowledge synthesis to expand into multiple academic papers, each covering different aspects of the use of the public interest test in Canadian law, including the future areas of research we identified above. Knowledge mobilization activities in this sphere would include submission of articles to academic journals, presentations at conferences, such as the Congress of the Humanities and Social Sciences, workshops (internal and external to our respective universities), and seminar presentations.

Third, we intend to adapt the knowledge synthesis report for publication as a peer-reviewed policy research paper in *The School of Public Policy Publications*, a policy-focused lay-language journal. This open-access journal targets both academics and policy practitioners and each publication is accompanied by a media release, providing broader dissemination of our results to both types of audiences. We expect to speak to the media as a result of this service.

*The School of Public Policy Publications* also supports publication of shorter, internally-reviewed papers in several formats. This includes one- or two-page briefs<sup>18</sup> on a policy issue, supported by data visualization, and longer (5 page and 10-15 page) formats with more discussion and analysis. This is an ideal way to communicate key findings from our research agenda to policymakers and the broader public. Where appropriate, we will use this venue to communicate results and findings in a format more conducive to consumption by non-academics.

Finally, we will write a longer-form discussion of our results and findings for publication in *The Conversation* or *Policy Options*.

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<sup>17</sup> Dr. Winter will use her personal website ([www.jenniferwinter.ca](http://www.jenniferwinter.ca)) and GitHub repository to host the appendix. Permanent URL for the appendix:

[https://jenniferwinter.github.io/website/GWW\\_PublicInterest\\_KS\\_Appendix.pdf](https://jenniferwinter.github.io/website/GWW_PublicInterest_KS_Appendix.pdf).

<sup>18</sup> An example is Goodday (2019), which compares the types of projects subject to the Impact Assessment Act compared to the Canadian Environmental Assessment Act (2012).

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# Appendix A: List of Search Strings

"public interest" and (infrastructure or project)  
"public interest" and project  
public interest AND project  
public interest AND infrastructure AND energy  
public interest AND infrastructure AND energy AND Alberta  
public interest and natural resources and infrastructure  
public interest determination and impact assessment and natural resources and Canada  
public interest and infrastructure and Canada  
public interest and energy and Canada  
public interest decision makers  
public interest test AND (approve or reject)  
"public interest"  
"public interest" and infrastructure  
public interest and infrastructure  
Public interest test  
making decision in the public interest AND infrastructure  
making decision in the public interest AND infrastructure AND Canada  
making decision in the public interest AND project AND Canada  
"in the public interest" AND project AND Canada  
(in the public interest) AND Canada AND infrastructure  
(in the public interest) AND Canada AND natural resources  
public interest determination and infrastructure and natural resources  
public interest determination  
public interest AND (Canada or Canadian or Canadians or in Canada) AND natural resources  
In the public interest AND energy  
in the public interest AND infrastructure AND oil gas  
"public interest" and "project"  
"public interest test"  
"Public Interest" and Decision  
"Public Interest" and Test  
"Public Interest" and Assessment  
"Public Interest" and Regulatory  
"Public Interest" and Regulation  
"Public Interest" and Environmental Impact Assessment  
Public Interest  
Public & Interest  
Public Interest and Determination  
Public & Interest and Determination  
"Public Interest" and Determination  
"Public Interest" and Indicator  
"in the public interest"  
"in the public interest" AND Physical infrastructure  
"in the public interest"  
Public Interest  
"Public Interest"

\*Public Interest\*

"public interest test" "decision"

"public interest" and renewable

"public interest" and hydro

public interest in infrastructure decisions

Public interest AND (subdivision or planning)

environment assessment decisions AND ("Public Interest")

utilities AND ("Public Interest")

# Appendix B: Public Interest Tests for Infrastructure Development in Canadian Environmental Law

Appendix B: Public Interest Tests for Infrastructure Development in Canadian Environmental Law

Jurisdiction	Statute or Regulation	Year	Document Type	Sector	Type of Infrastructure	Public Interest Test Provision	Number of unique tests	Use of test: Allow or prevent infrastructure?	Factors to consider?	Additional guidance?	Factors to consider (prescribed)	Additional Guidance	Decisionmaking body
Alberta	Environmental Protection and Enhancement Act	2000	Statute	Multiple	Multiple	<b>No approval or registration on Minister's order 64</b> (1) Where the Minister is of the opinion that a proposed activity should not proceed because it is not in the public interest having regard to the purposes of this Act, the Minister may at any time by notice in writing to the proponent, with a copy to the Director, order that no approval or registration be issued in respect of the proposed activity.	1	Allow	No	Yes	None	<b>Purpose of Act 2</b> The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following: (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society; (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning; (c) the principle of sustainable development... (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions; ... (i) the responsibility of polluters to pay for the costs of their actions	Minister
Alberta	Gas Distribution Act	2000	Statute	Electricity	Gas pipeline	<b>Application for franchise area approval 16(1)</b> A person who proposes to construct a rural gas utility must first apply for a franchise area approval in respect of the rural gas utility. <b>Issue of franchise area approval 17</b> (4) The chief officer shall not issue a franchise area approval unless the chief officer is satisfied that it is in the public interest to do so, having regard to the availability of other sources of gas, the present and future need for the extension of gas service throughout rural Alberta and any other circumstances that in the chief officer's opinion are relevant to the public interest.	1	Allow	Yes	No	- the availability of other sources of gas - the present and future need for the extension of gas service throughout rural Alberta - any other circumstances that in the chief officer's opinion are relevant to the public interest	None	Chief officer
Alberta	Hydro and Electric Energy Act	2000	Statute	Electricity	Electricity transmission line	<b>Approval of Commission 25</b> (2) Approval under this section shall not be given unless the Commission is satisfied, having regard to the availability of any other source of electric energy and to any other circumstances, that it is in the public interest having regard to those circumstances and the present and future need for the extension of electric service throughout Alberta.	1	Allow	Yes	Yes	- The availability of any other source of electric energy - Any other circumstances - The present and future need for the extension of electric service throughout Alberta	<b>Purposes of the Act 2</b> (a) to provide for the economic, orderly development of hydro energy that is in the public interest in Alberta, (b) to secure the observance of safe and efficient practices in the public interest in the development of hydro energy and in the generation, transmission and distribution of electric energy in Alberta, ... c, d <b>Critical transmission infrastructure 13</b> 13.1(1) In this section, "critical transmission infrastructure" means critical transmission infrastructure as defined in the Electric Utilities Act. (2) The construction, connection and operation of a transmission line or part of a transmission line that is designated as critical transmission infrastructure is required to meet the needs of Alberta and is in the public interest. <b>Power of Commission re applications 19</b> (1) On an application for an approval, permit or licence under this Part, or for an amendment of an approval, permit or licence, the Commission may grant the approval, permit, licence or amendment subject to any terms and conditions that it prescribes or may deny the application. (1.1) Notwithstanding subsection (1), the Commission shall not refuse an approval of a transmission line or part of a transmission line designated as critical transmission infrastructure as defined in the Electric Utilities Act on the basis that, in its opinion, it does not meet the needs of Alberta.	Alberta Utilities Commission
Alberta	Natural Resources Conservation Board Act	2000	Statute	Multiple	Multiple	<b>Purpose of Act 2</b> The purpose of this Act is to provide for an impartial process to review projects that will or may affect the natural resources of Alberta in order to determine whether, in the Board's opinion, the projects are in the public interest, having regard to the social and economic effects of the projects and the effect of the projects on the environment.	1	Both	Yes	No	- the social and economic effects - the effect on the environment	None	Natural Resources Conservation Board
Alberta	Oil Sands Conservation Act	2000	Statute	Oil and Gas	Oil and gas development	<b>Approval of scheme or operation 10</b> (3) The Regulator may, with respect to an application referred to in subsection (1), (a) if in its opinion it is in the public interest to do so, and with the prior authorization of the Lieutenant Governor in Council, grant an approval on any terms and conditions that the Regulator considers appropriate, (b) refuse to grant an approval, (c) defer consideration of the application on any terms and conditions that the Regulator may prescribe, or (d) make any other disposition of the application that the Regulator considers appropriate. <b>Approval of a processing plant 11</b> (same provisions as Section 10 above)	2	Allow	No	Yes	None	<b>Purposes of the Act 3</b> The purposes of this Act are (a) to effect conservation and prevent waste of the oil sands resources of Alberta, (b) to ensure orderly, efficient and economical development in the public interest of the oil sands resources of Alberta, ...	Regulator
Alberta	Water Act	2000	Statute	Water	Water works	<b>Approvals, licences, transfers, registrations not available 34</b> (1) If the Minister is of the opinion that a proposed (a) activity, (b) diversion of water or operation of a works for the diversion of water, or (c) transfer of an allocation of water under a licence, should not proceed because it is not in the public interest, the Minister may make any order referred to in subsection (2). <b>Issuance of approvals 38</b> (1) Subject to section 34, the Director may issue or refuse to issue an approval to an applicant to commence or continue an activity. <b>Renewal may issue 60</b> (3) The Director may decide not to renew a licence only if (a) the Director is of the opinion that it is not in the public interest to renew the licence,...	1	Allow	No	No	None	None	Minister; Director
Alberta	Alberta Utilities Commission Act	2007	Statute	Electricity	Multiple	<b>Public interest 17</b> (1) Where the Commission conducts a hearing or other proceeding on an application to construct or operate a hydro development, power plant or transmission line under the Hydro and Electric Energy Act or a gas utility pipeline under the Gas Utilities Act, it shall, in addition to any other matters it may or must consider in conducting the hearing or other proceeding, give consideration to whether construction or operation of the proposed hydro development, power plant, transmission line or gas utility pipeline is in the public interest, having regard to the social and economic effects of the development, plant, line or pipeline and the effects of the development, plant, line or pipeline on the environment. (2) The Commission shall not under subsection (1) give consideration to whether critical transmission infrastructure as defined in the Electric Utilities Act is required to meet the needs of Alberta.	1	Allow	Yes	No	- social effects - economic effects - effects of the project on the environment.	None	Alberta Utilities Commission
Alberta	Electric Utilities Act	2007	Statute	Electricity	Electricity transmission line	<b>Alleviation of constraints or other conditions on transmission system 34</b> (1) When the Independent System Operator determines that an expansion or enhancement of the capability of the transmission system is or may be required to meet the needs of Alberta and is in the public interest, the Independent System Operator must, subject to the regulations, prepare and submit to the Commission for approval a needs identification document that (a) describes the constraint or condition affecting the operation or performance of the transmission system and indicates the means by which or the manner in which the constraint or condition could be alleviated, (b) describes a need for improved efficiency of the transmission system, including means to reduce losses on the interconnected electric system, or (c) describes a need to respond to requests for system access service. (2) On its own initiative or in response to views expressed by the Commission, the Independent System Operator may amend a needs identification document submitted to the Commission for approval. (3) The Commission may, subject to the regulations, (a) approve the needs identification document, (b) refer the needs identification document back to the Independent System Operator with directions or suggestions for changes or additions, or (c) refuse to approve the needs identification document.	1	Allow	No	No	None	None	Alberta Utilities Commission



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Alberta	Transmission Regulation (Parent statute: Electric Utilities Act)	2007	Regulation	Electricity	Electricity transmission	<b>Applications to the Commission under section 34(1) of Act 38</b> Whether considering whether to approve a needs identification document under section 34(3) of the Act, the Commission must (a) have regard for the principle that it is in the public interest to foster (i) an efficient and competitive electricity market, (ii) a transmission system that is flexible, reliable and efficient and preserves options for future growth, and (iii) geographic separation for the purposes of ensuring reliability of the transmission system and efficient use of land, including the use of rights of way, corridors or other routes that already contain or provide for utility or energy infrastructure or the use of new rights of way, corridors or other routes, notwithstanding that geographic separation for the purposes of ensuring reliability of the transmission system or efficient use of land may result in additional costs.	1	Allow	Yes	No	Contribution to... - electricity market efficiency and competition - transmission system flexibility, reliability, efficiency and options for future growth - geographic separation for the purposes of ensuring reliability of the transmission system and efficient use of land - providing consumers the benefit of unconstrained transmission access to the competitive electricity market	None	Alberta Utilities Commission
Alberta	Emerging Resources Royalty Regulation (Parent statute: Mines and Minerals Act)	2016	Regulation	Oil and Gas	Oil and gas development	<b>Project approval 7</b> (1) The Minister may approve a project if... and (c) the Minister is of the opinion that (i) there is a large development potential of hydrocarbons from the target formation, (ii) the project would not be commercially viable if not approved, (iii) positive net royalty from the production of hydrocarbons from the target formation is likely if the project is approved, and (iv) it is in the public interest to approve the project.	1	Allow	No	No	None	None	Minister
British Columbia	Utilities Commission Act	1996	Statute	Electricity	Electricity plant or system	<b>Certificate of public convenience and necessity 45</b> (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation. (2) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest. (3) In giving its approval, the commission (a) must grant a certificate of public convenience and necessity, and (b) may impose conditions about (i) the duration and termination of the privilege, concession or franchise, or (ii) construction, equipment, maintenance, rates or service, as the public convenience and interest reasonably require.	1	Allow	Yes	No	- public convenience - public necessity	None	British Columbia Utilities Commission
British Columbia	Oil and Gas Activities Act	2008	Statute	Oil and Gas	Multiple	<b>Purposes 4</b> The purposes of the commission include the following: ... (b) to provide for effective and efficient processes for the review of applications for permits and to ensure that applications that are approved are in the public interest having regard to environmental, economic and social effects;	1	Allow	Yes	No	- environmental effects - economic effects - social effects	None	Oil and Gas Commission
British Columbia	Environmental Assessment Act	2018	Statute	Multiple	Multiple	<b>Decision on application for environmental assessment certificate 29</b> (4) Subject to subsection (5), on receipt of a referral under subsection (1), the ministers (a) must consider, in addition to the material referred to in subsection (2), the sustainability purpose referred to in section 2 (2) (b) (i), the reconciliation purpose referred to in section 2 (2)(b) (ii) and the prescribed matters, if any, (b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and (c) must, within 30 days of receiving the referral, (i) issue an environmental assessment certificate to the proponent and attach any conditions to the certificate that the ministers consider necessary, including, without limitation, conditions respecting payments to be made for initiatives to mitigate effects of the project, or (ii) refuse to issue the certificate to the proponent.	1	Both	Yes	Yes	- <b>2(2) i:</b> is the project consistent with the promotion of sustainability by protecting the environment and fostering a sound economy and the well-being of British Columbians and their communities - <b>2(2) ii:</b> does the project support reconciliation with Indigenous peoples in British Columbia	<b>Required assessment matters 25</b> (2) The following matters must be considered in every assessment: (a) positive and negative direct and indirect effects of the reviewable project, including environmental, economic, social, cultural and health effects and adverse cumulative effects; (b) risks and uncertainties associated with those effects, including the results of any interaction between effects; (c) risks of malfunctions or accidents; (d) disproportionate effects on distinct human populations, including populations identified by gender; (e) effects on biophysical factors that support ecosystem function; (f) effects on current and future generations; (g) consistency with any land-use plan of the government or an Indigenous nation if the plan is relevant to the assessment and to any assessment conducted under section 35 or 73; (h) greenhouse gas emissions, including the potential effects on the province being able to meet its targets under the Greenhouse Gas Reduction Targets Act; (i) alternative means of carrying out the project that are technically and economically feasible, including through the use of the best available technologies, and the potential effects, risks and uncertainties of those alternatives; (j) potential changes to the reviewable project that may be caused by the environment; (k) other prescribed matters.	Ministers
British Columbia	Dormancy and Shutdown Regulation (Parent statute: Oil and Gas Activities Act)	2019	Regulation	Oil and Gas	Oil and gas wells	<b>Identifying priority sites 5</b> The commission may identify a type A, B or C site as a priority site, by giving to a permit holder for the site a written notice, if the commission considers, having regard to the following factors, that it is in the public interest that the site be decommissioned, assessed and restored on an expedited basis: (a) the age of the site; (b) public safety, including human health; (c) the environment; (d) social and agricultural values; (e) impacts on local communities; (f) cultural and environmental values of local Indigenous nations; (g) the capacity and portfolio of the permit holder.	1	Prevent	Yes	No	- age of the site - public safety and health - the environment - social and agricultural values - impacts on local communities - cultural and environmental values of local Indigenous nations - the capacity and portfolio of the permit holder	None	British Columbia Oil and Gas Commission
Federal	Impact Assessment Act	2019	Statute	Multiple	Multiple	<b>Minister's decision 60</b> (1) After taking into account the report with respect to the impact assessment of a designated project that is submitted to the Minister under subsection 28(2) or at the end of the assessment under the process approved under section 31, the Minister must (a) determine whether the adverse effects within federal jurisdiction — and the adverse direct or incidental effects — that are indicated in the report are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest, or (b) refer to the Governor in Council the matter of whether the effects referred to in paragraph (a) are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest.	1		Yes	No	<b>Factors — public interest 63</b> The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors: (a) the extent to which the designated project contributes to sustainability; (b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are significant; (c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate; (d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982; and (e) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.	None	Minister

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Federal	Canadian Energy Regulator Act	2019	Statute	Oil and Gas	Oil and gas pipeline; Electricity transmission line	<b>Report 183</b> (1) If the Commission considers that an application for a certificate in respect of a pipeline is complete, it must prepare and submit to the Minister, and make public, a report setting out (a) its recommendation as to whether or not the certificate should be issued for all or any part of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation; and (b) regardless of the recommendation that the Commission makes, all the conditions that it considers necessary or in the public interest to which the certificate would be subject if the Governor in Council were to direct that the certificate be issued.	1	Allow	Yes	No	<b>Report 183 - Factors to consider</b> (2) The Commission must make its recommendation taking into account — in light of, among other things, any Indigenous knowledge that has been provided to the Commission and scientific information and data — all considerations that appear to it to be relevant and directly related to the pipeline, including: (a) the environmental effects, including any cumulative environmental effects; (b) the safety and security of persons and the protection of property and the environment; (c) the health, social and economic effects, including with respect to the intersection of sex and gender with other identity factors; (d) the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes; (e) the effects on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982; (f) the availability of oil, gas or any other commodity to the pipeline; (g) the existence of actual or potential markets; (h) the economic feasibility of the pipeline; (i) the financial resources, financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; (j) the extent to which the effects of the pipeline hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change; (k) any relevant assessment referred to in section 92, 93 or 95 of the Impact Assessment Act; and (l) any public interest that the Commission considers may be affected by the issuance of the certificate or the dismissal of the application.	None	Canada Energy Regulator
Manitoba	The Environment Act	1987	Statute	Multiple	Multiple	<b>Action by minister respecting proposal 49</b> (2) Upon receiving the report from the commission with respect to an abatement project under subsection (1), the minister may approve the abatement project in whole or in part or with such variations and subject to such terms and conditions as the minister deems advisable in the public interest or may refuse to approve the abatement project.	1	Allow	No	Yes	None	<b>Definitions 1</b> (2) In this Act, "abatement project" means a project for the abatement of an undesirable environmental condition affecting premises by (a) the removal and relocation of the development causing the condition; or (b) the removal and relocation of the premises affected by the condition; (+ operation the deputation +)	Minister
Manitoba	The Provincial Railways Act	1994	Statute	Rail	Railway line	<b>Issue of approval to construct railway line 32</b> The superintendent may issue an approval to construct or alter a railway line if (a) the superintendent is satisfied that the proposed construction or alteration is in the public interest; and (b) the location of, and plans and specifications for, the construction or alteration of the railway line comply with this Act and are approved by the minister.	1	Allow	No	No	None	None	Superintendent of Railways appointed under section 14.1)
Manitoba	Provincial Planning Regulation (Parent statute: Planning Act)	2011	Regulation	Multiple	Multiple	<b>Policy Area 10: Development Plans</b> While land use decisions are a local responsibility, the Province has a vested interest in how land and resources are planned and how development occurs across Manitoba. The PLUPs express this interest and development plan by-laws must be generally consistent with them. "Generally consistent" means that development plan by-laws will embody the principles of sound land use planning as expressed in the PLUPs, and the goals, plans and policies contained in development plan by-laws will reflect the spirit and intent of the PLUPs.	1	Allow	Yes	Yes	- balance private gain with the costs that may be incurred by the public - evaluate short-term profits against long-term costs - (sector-specific factors outlined in regulation)	<b>Part 2 Introduction: Why Provincial Land Use Policies?</b> Public interests — a traditional motivation for land use planning is the protection of the public interest. The development of land and resources has both costs and benefits; land use and development decisions must balance private gain with the costs that may be incurred by the public, and evaluate short-term profits against long-term costs.  <b>Policy Area 4: Renewable Resources, Heritage and Recreation</b> The Province has a public and stewardship interest in maintaining the sustainability of renewable resources, while ensuring a balance between conservation and development. Land use planning can support this interest by identifying renewable resource areas and protecting them from incompatible development, fragmentation and degradation, while at the same time, capturing the economic opportunities, environmental and social benefits and values they provide.  <b>Policy Area 8: Mineral Resources</b> It is in the provincial interest to honour mineral access and development rights associated with mineral disposition and ensure that appropriate security of tenure is achieved. ... This non-renewable resource [aggregate and quarry minerals] has no cost-effective substitute for most end uses, and it is therefore in the public interest to protect high-quality aggregate and quarry mineral resources from conflicting surface land uses to minimize both construction and environmental costs.	Lieutenant Governor in Council; Planning Authorities
Manitoba	The Forest Act	2015	Statute	Forestry	Cutting and removal of Crown timber	<b>Suspension and cancellation of licence, etc. 39</b> (1) The minister or any person acting under his authority may, for cause, suspend for any stated period of time or until a condition is met, any licence, permit, or agreement, issued, granted, or made under this Act; and after notice and hearing, if in the opinion of the minister it is in the public interest to do so, he may cancel the licence, permit or agreement, as the case may be.	1	Prevent	No	Yes	None	<b>Definitions 1</b> (1) In this Act, "forest management licence", "timber sale agreement", "timber permit", means any forest management licence, timber sale agreement or timber permit granted under this Act authorizing the cutting and removal of Crown timber  <b>Notice and hearing before cancellation 39</b> (2) Before cancelling a licence, permit or agreement under subsection (1), the minister shall cause to be served upon the holder of the licence, permit or agreement, as the case may be, a notice in writing requiring him to attend before the minister or before such other person or persons designated by the minister, upon a day specified in the notice, which shall be not less than 30 days after the date of the notice, to show cause why the licence, permit or agreement should not be cancelled.	Minister
Manitoba	The Water Resources Administration Act	2016	Statute	Water	Water works	<b>Rights of minister with respect to water control works 5</b> The minister may (a) construct or operate, or construct and operate, in any part of the province such water control works as he may deem necessary or expedient in the public interest;	1	Allow	Yes	No	- necessity - expediency	None	Minister
Manitoba	The Gas Pipe Line Act	2019	Statute	Oil and Gas	Gas pipeline	<b>Circumstances to be considered 17</b> Upon considering an application for a construction permit for a gas transmission line, the minister shall have regard to all circumstances that appear to him to be relevant, and in particular, but not so as to limit the generality of the foregoing, shall have regard to (a) the financial responsibility of the applicant; (b) any public interest that, in the opinion of the minister, may be affected by the granting or refusal of the application; (c) the needs and general good of the residents of the province as a whole.	1	Both	Yes	No	- the financial responsibility of the applicant - the needs and general good of the residents of the province as a whole	None	Minister; Public Utilities Board (for alterations of conditions in the public interest)
Manitoba	The Water Rights Act	2019	Statute	Water	Water works	<b>Suspension and cancellation of licence, permit or registration 19</b> (1) In addition to any suspension or cancellation of a licence, permit or registration that may be authorized under any other provision of this Act, the minister may, for cause, (a) suspend a licence, permit or registration for any stated period of time or until a condition is met; (b) where in the opinion of the minister it is in the public interest to do so, cancel a licence, permit or registration whether or not it has first been suspended under clause (a).  [Where a licence is required to construct, establish, operate or maintain any works including water control works.]	1	Prevent	No	Yes	None	<b>Notice and hearing before cancellation 19</b> (2) A licence, permit or registration shall not be cancelled under subsection (1) or any other provision of this Act until after notice and a hearing in accordance with subsections (3), (4) and (5).	Minister
New Brunswick	Pipeline Act	2005	Statute	Oil and Gas	Oil and gas pipeline	<b>Permit to construct 4</b> (1) No person shall construct a pipeline or any part of a pipeline, or undertake any operations preparatory to constructing a pipeline, unless the person holds a permit.  <b>Considerations by the Board 7</b> In considering an application for a permit, the Board shall take into account all matters that it considers relevant and shall consider (a) the location of the proposed pipeline and its effect upon public health and safety and the environment, (b) the financial responsibility of the applicant, (c) in the case of a pipeline for the transmission of natural gas, the existence of present and future markets for the pipeline, and (d) such other matters as it considers relevant in the public interest.	1	Allow	Yes	No	- the location of the proposed pipeline and its effect upon public health and safety and the environment - the financial responsibility of the applicant. - the existence of present and future markets for the pipeline (if for transmission of natural gas)	None	Board (Energy and Utilities Board)

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Newfoundland and Labrador	<a href="#">Environmental Protection Act</a>	2002	Statute	Multiple	Multiple	<b>Refusal if not in public interest 79</b> (1) Where the minister is of the opinion that a proposed activity should not proceed because it is not in the public interest having regard to the purpose of this Act, the minister shall not issue an approval with respect to the proposed activity. (3) When deciding if a proposed activity should proceed, the minister shall consider whether or not (a) the proposed activity contravenes a policy of the government of the province; (b) the location of the proposed activity is unacceptable; and (c) there would be adverse effects from the proposed activity.  <b>Release 67</b> (5) Notwithstanding subsection (1), (2) or (3), or another section of this Part, the Lieutenant-Governor in Council may halt further environmental assessment of an undertaking and direct that the undertaking not proceed where the Lieutenant-Governor in Council is of the opinion that it is in the public interest to halt the assessment and give that direction.	2	1 allow; 1 prevent	Yes; No	Yes; No	- does the proposed activity contravenes a policy of the government of the province - is location of the proposed activity is unacceptable - would there be adverse effects from the proposed activity	<b>Purpose 46 - Environmental Assessment</b> The purpose of this Part is to (a) protect the environment and quality of life of the people of the province, and (b) facilitate the wise management of the natural resources of the province, through the institution of environmental assessment procedures before and after the commencement of an undertaking that may be potentially damaging to the environment.  [The Act purpose is not stated]	Minister
Newfoundland and Labrador	<a href="#">Water Resources Act</a>	2002	Statute	Water	Sewage works; water works	<b>Approval of sewage works 36</b> (3) The minister may, after considering the plans, specifications, report and other information that he or she may require under subsection (1), and after considering the regulations relating to qualities, properties and treatment of sewage, or standards for effluent release, grant a permit for the construction of the proposed works, subject to those terms and conditions that the minister considers necessary. (4) Where, in the opinion of the minister, it is in the public interest to do so, the minister shall refuse to grant a permit under subsection (3).  <b>Approval of waterworks 37</b> (4) Where, in the opinion of the minister, it is in the public interest to do so, the minister shall refuse to grant a permit under this section, or shall grant a permit on those terms and conditions that the minister considers necessary.	2	1 prevent; 1 both	No; No	No; No	None	None	Minister
Northwest Territories	<a href="#">Oil and Gas Land Regulations</a> (Parent statute: <a href="#">Northwest Territories Lands Act</a> )	2014	Regulation	Oil and Gas	Oil and gas development	<b>Exploration Agreements 29</b> (1) The Minister may, subject to this section, enter into an exploration agreement with a person relating to undiscovered lands. (5) In selecting a proposal submitted under this section for the purpose of negotiating an exploration agreement, the Minister shall take into account any factors the Minister considers appropriate in the public interest but is not bound to select any particular proposal submitted.	1	Allow	No	No	None	None	Minister
Northwest Territories	<a href="#">Oil and Gas Operations Act</a>	2014	Statute	Oil and Gas	Oil and gas development; oil and gas pipeline	<b>Jurisdiction 19</b> (1) The Regulator has full and exclusive jurisdiction to inquire into, hear and determine any matter ... (b) if it appears to the Regulator that the circumstances may require the Regulator, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any act, matter or thing that is prohibited, sanctioned or required to be done by this Act, any regulation, order or direction made under this Act, or an operating licence or authorization issued under section 10.  <b>Transmission of oil and gas 48</b> Extension of facilities (3) If the Regulator finds that no undue burden facilities will be placed on the holder and if it considers it necessary or desirable in the public interest, the Regulator may require a holder operating a pipeline for the transmission of oil or gas to provide adequate and suitable facilities for (a) transportation of oil and gas products; (b) storage of oil and gas products; (c) pipeline junctions].	2	Both	No; Yes	No	- necessity - desirability - "undue burden facilities" on operator	None	Regulator
Nova Scotia	<a href="#">Environment Act</a>	1994	Statute	Multiple	Multiple	<b>Decision not to approve proposed activity 52</b> (1) Where the Minister is of the opinion that a proposed activity should not proceed because it is not in the public interest having regard to the purpose of this Act, the Minister may, at any time, decide that no approval be issued in respect of the proposed activity if notice is given to the proponent, together with reasons. (2) When deciding, pursuant to subsection (1), whether a proposed activity should proceed, the Minister shall take into consideration such matters as whether the proposed activity contravenes a policy of the Government or the Department, whether the location of the proposed activity is unacceptable or whether adverse effects from the proposed activity are unacceptable.	1	Both	Yes	Yes	- does the proposed activity contravenes a policy of the Government or the Department - is the location of the proposed activity is unacceptable - are the adverse effects from the proposed activity unacceptable	<b>Purpose of Act 2</b> The purpose of this Act is to support and promote the protection, enhancement and prudent use of the environment while recognizing the following goals: (a) maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society; (b) maintaining the principles of sustainable development, including... (ii) the precautionary principle will be used in decisionmaking so that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation; (v) the linkage between economic and environmental issues, recognizing that long-term economic prosperity depends upon sound environmental management and that effective environmental protection depends on a strong economy, and...	Minister
Nova Scotia	<a href="#">Gas Distribution Regulations</a> (Parent statute: <a href="#">Gas Distribution Act</a> )	1998	Regulation	Electricity	Gas pipeline	<b>Franchise Approval 3</b> (1) After reviewing one or more applications made pursuant to the Act and these regulations and after considering all of the evidence received and allowed in connection therewith, and after conducting such inquiry or hearing as the Board is required to hold or has considered necessary or desirable in the circumstances, the Board may by order: (a) if it is satisfied that to do so is in the public interest, grant a franchise and attach to the franchise such terms and conditions as it considers to be in the public interest; or (b) refuse to grant any franchise.  [Where franchise means a franchise granted pursuant to the Act to construct and operate a gas delivery system]	1	Allow	No	Yes	None	<b>Franchise evaluation 5</b> Subject to Section 6, the Board shall not grant a franchise over an area unless... (c) the applicant has submitted to the Board a Socio-Economic Impact Statement that shall include (i) a benefits plan, together with a written undertaking that if the applicant is granted a franchise, the applicant will take all reasonable measures to implement the benefits plan, (ii) evidence that the applicant is fully aware of any significant socio-economic effects of the proposed franchise, has measures in place to mitigate adverse socio-economic impacts and promote positive outcomes, and is committed to carrying out those measures in order to ensure that the franchise benefits the people directly affected by it with minimal disturbance to desirable aspects of their way of life, (iii) the probable benefits of the construction and operation of the delivery system, and (iv) the nature and extent of the impact of the sale and consumption of natural gas within the proposed franchise area.	Nova Scotia Utility and Review Board
Ontario	<a href="#">Environmental Protection Act</a>	1990	Statute	Renewable Energy	Renewable Energy	<b>Director's powers 47.5</b> (1) After considering an application for the issue or renewal of a renewable energy approval, the Director may, if in his or her opinion it is in the public interest to do so, (a) issue or renew a renewable energy approval; or (b) refuse to issue or renew a renewable energy approval. 2009, c. 12, Sched. G, s. 4 (1). Terms and conditions (2) In issuing or renewing a renewable energy approval, the Director may impose terms and conditions if in his or her opinion it is in the public interest to do so. 2009, c. 12, Sched. G, s. 4 (1). <b>Other powers</b> (3) On application or on his or her own initiative, the Director may, if in his or her opinion it is in the public interest to do so (a) alter the terms and conditions of a renewable energy approval after it is issued; (b) impose new terms and conditions on a renewable energy approval; or (c) suspend or revoke a renewable energy approval. 2009, c. 12, Sched. G, s. 4 (1).	2	1 both 1 prevent	No; No	No; No	None	<b>Part V.0.1 Renewable Energy - Purpose 47.2</b> (1) The purpose of this Part is to provide for the protection and conservation of the environment.  <b>Contents of notice requiring hearing, s. 142.1 hearing</b> 142.2 (1) An applicant for a hearing required under section 142.1 shall state in the notice requiring the hearing, (a) a description of how engaging in the renewable energy project in accordance with the renewable energy approval will cause, (i) serious harm to human health, or (ii) serious and irreversible harm to plant life, animal life or the natural environment,  <b>Consistency with policies 145.2.2</b> A decision or order of the Tribunal under this Part in respect of a renewable energy approval shall be consistent with any policies issued by the Minister under section 47.7 that are in effect on the date of the Director's decision. 2009, c. 12, Sched. G, s. 13	Director, Environmental Review Tribunal

Jurisdiction	Statute or Regulation	Year	Document Type	Sector	Type of Infrastructure	Public Interest Test Provision	Number of unique tests	Use of test: Allow or prevent infrastructure?	Factors to consider?	Additional guidance?	Factors to consider (prescribed)	Additional Guidance	Decisionmaking body
Ontario	Ontario Energy Board Act	1998	Statute	Electricity	Electricity Transmission Line	<p><b>Part VI Transmission and distribution lines</b></p> <p><b>Order allowing work to be carried out 96</b></p> <p>(1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work, 1998, c. 15, Sched. B, s. 96.</p> <p>[Where applications under sections 90 and 91 are for hydrocarbon lines or stations; applications under section 92 are for electricity transmission or distribution line]</p> <p><b>Applications under s. 92</b></p> <p>(2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:</p> <p>1. The interests of consumers with respect to prices and the reliability and quality of electricity service.</p> <p>2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. 2009, c. 12, Sched. D, s. 16.</p> <p><b>Part IV Gas marketing</b></p> <p><b>Amendment of licence 52</b></p> <p>The Board may, on the application of any person, amend a licence if it considers the amendment to be,</p> <p>(a) necessary to implement a directive issued under section 27, 27.1 or 28.7; or</p> <p>(b) in the public interest, having regard to the objectives of the Board. 2003, c. 3, s. 37; 2010, c. 8, s. 38 (7).</p>	1	Both	Yes	Yes	<p>For electricity transmission or distribution line, the Board shall only consider:</p> <p>- The interests of consumers with respect to prices and the reliability and quality of electricity service.</p> <p>- Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.</p>	<p><b>Board objectives, gas 2</b></p> <p>2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:</p> <ol style="list-style-type: none"> <li>1. To facilitate competition in the sale of gas to users.</li> <li>2. To inform consumers and protect their interests with respect to prices and the reliability and quality of gas service.</li> <li>3. To facilitate rational expansion of transmission and distribution systems.</li> <li>4. To facilitate rational development and safe operation of gas storage.</li> <li>5. To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.</li> <li>5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.</li> <li>6. To promote communication within the gas industry and the education of consumers.</li> </ol>	Ontario Energy Board
Ontario	Exploration Licences, Production and Storage Leases for Oil and Gas in Ontario (Parent statute: Mining Act)	2018	Regulation	Oil and Gas	Oil and gas wells	<p><b>Well licences 23</b></p> <p>(1) Despite any rights granted or implied in an exploration licence, production lease or storage lease, but subject to section 40 of the Ontario Energy Board Act, 1998, the Minister may issue a well licence under the Oil, Gas and Salt Resources Act for a deviated or horizontal well that will traverse the area described in an exploration licence, production lease or storage lease to a person other than the licensee or lessee if,</p> <p>(a) the proposed well is necessary to reach an oil and gas target or storage zone located on licensed or leased lands held by the person;</p> <p>(b) the affected lands have been utilized in a manner acceptable to the Minister;</p> <p>(c) in the opinion of the Minister, the proposed well will not interfere with or adversely affect existing exploration, production or storage operations; and</p> <p>(d) the well is in the public interest. O. Reg. 263/02, s. 23 (1).</p>	1	Allow	No	No	None	None	Minister
Prince Edward Island	Renewable Energy Act Development Permit Regulations (Parent statute: Renewable Energy Act)	2008	Regulation	Renewable Energy	Large capacity renewable energy generation facility	<p><b>Construction of large capacity renewable energy generation facility, restriction 2</b></p> <p>(1) No person shall construct a large capacity renewable energy generation facility, or cause a large capacity renewable energy generation facility to be constructed, unless a development permit has first been issued by the Minister that authorizes the construction of the large capacity renewable energy generation facility.</p> <p>issuance of development permit 3 (2) The Minister may, on receipt of an application for a development permit made in accordance with subsection (1), issue a development permit to the applicant where the Minister is satisfied that it is in the public interest to do so.</p>	1	Allow	No	No	None	None	Minister
Prince Edward Island	Environmental Protection Act Materials Stewardship and Recycling Regulations (Parent statute: Environmental Protection Act)	2014	Regulation	Waste	Recycling facility	<p><b>Requirements for issuance of permit 4</b></p> <p>(b) The Minister shall issue a permit to an applicant if the Minister is satisfied that,</p> <p>(d) the issuance of the permit is in the public interest having regard to the matters referred to in clauses (2)(a) to (f).</p> <p>[Where a permit is required for a recycling facility.]</p>	1	Allow	Yes	No	<p><b>Material to be submitted 4</b></p> <p>(2) An applicant shall submit with an application made under subsection (1) a detailed written proposal outlining:</p> <p>(a) the location of the proposed recycling facility;</p> <p>(b) the distance from the active recycling area to (i) the nearest property boundary, and (ii) the foundation of the nearest off-site structure used for commercial, industrial, residential or institutional purposes;</p> <p>(c) the types of recyclable material and designated material, if any, to be acquired;</p> <p>(d) the plans for the acceptance, collection, storage, sorting, handling, preparing for transport and transporting of recyclable material and designated material;</p> <p>(e) the quantity of recyclable material and designated material expected to be acquired annually; and</p> <p>(f) a contingency plan for the prevention, detection, handling and containment of leaks or spills of recyclable material and designated material or contamination resulting from the handling of recyclable material and designated material.</p>	None	Minister
Prince Edward Island	Water Act	2017	Statute	Water	Multiple	<p><b>Decision that no approval to be issued for proposed activity 7</b></p> <p>(1) Where the Minister is of the opinion that a proposed activity, matter or thing should not proceed because it is not in the public interest having regard to the purpose of this Act, the Minister may, at any time, with the approval of the Lieutenant Governor in Council, decide that no approval shall be issued in respect of the proposed activity, matter or thing, if notice is given to the proponent, together with reasons.</p> <p>(2) When deciding, pursuant to subsection (1), whether a proposed activity, matter or thing should not proceed, the Minister and the Lieutenant Governor in Council shall take into consideration such matters as whether the proposed activity, matter or thing contravenes a policy of the Government or the Department, whether the location of the proposed activity, matter or thing is unacceptable and whether adverse effects that may result from the proposed activity, matter or thing are unacceptable.</p>	1	Both	Yes	Yes	<p>- whether (the proposed activity) contravenes a policy of the Government or the Department</p> <p>- whether the location of the proposed activity, matter or thing is unacceptable</p> <p>- whether adverse effects that may result from the proposed activity, matter or thing are unacceptable</p>	<p><b>Purpose and goals 2</b></p> <p>The purpose of this Act is to support and promote the management, protection and enhancement of the water resources within the jurisdiction of the province, in recognition that</p> <p>(a) the Government has a guardianship role to play in ensuring that the quality, quantity, allocation, conservation and protection of water is managed in the interests of a common good that benefits and accommodates all living things in the province and their supporting ecosystems; ...</p> <p>with the following goals:</p> <p>(i) that decisions with respect to water management be made by applying consistent, science-based assessment processes; and decisions with respect to water allocation take into account seasonal conditions, climate change and the need to protect the long-term availability of groundwater, the security of aquatic ecosystems and the integrity of wetlands.</p>	Minister; Lieutenant Governor in Council
Quebec	Petroleum Resources Act	2016	Statute	Oil and Gas	Oil and gas development	<p><b>Special Powers 142</b></p> <p>The Minister may, by order, reserve to the State or withdraw from any petroleum exploration, production or storage-related work or activity any land containing a pool, brine or an underground reservoir if necessary for any purpose that the Minister considers to be in the public interest, in particular, for the purposes of</p> <ol style="list-style-type: none"> <li>(1) mining, industrial, port, airport or communications facilities;</li> <li>(2) underground conduits;</li> <li>(3) the development and utilization of waterpower, power transmission lines, storage tanks or underground reservoirs;</li> <li>(4) the creation of parks or protected areas;</li> <li>(5) plant-life and wildlife conservation;</li> <li>(6) the protection of eskers that may be a source of drinking water; and</li> <li>(7) classification as an exceptional forest ecosystem under the Sustainable Forest Development Act (chapter A-18, 1) or designation of biological refuges under that Act.</li> </ol>	1	Prevent	No	Yes	None	(Section 142 lists types of activities in the public interest)	Minister

Jurisdiction	Statute or Regulation	Year	Document Type	Sector	Type of Infrastructure	Public Interest Test Provision	Number of unique tests	Use of test: Allow or prevent infrastructure?	Factors to consider?	Additional guidance?	Factors to consider (prescribed)	Additional Guidance	Decisionmaking body
Saskatchewan	Oil and Gas Conservation Act (1978)	1978	Statute	Oil and Gas	Oil and gas development	<b>Issuance of licences 9</b> (1) The minister may: (a) issue a licence if the minister is satisfied that: (i) the applicant has complied with this Act, the regulations and any orders made pursuant to this Act; (ii) the applicant meets the prescribed eligibility requirements; and (iii) it is in the public interest to do so; or (b) refuse to issue the licence.	1	Allow	No	Yes	None	<b>Purpose of Act 3</b> (3) The minister may determine when the public interest requires that one purpose set out in subsection (1) be given priority over another. (Where purposes are: (a) to minimize waste and prevent wasteful operations; (b) to regulate all operations for the production of oil and gas in such manner that the greatest possible ultimate recovery thereof by prudent and proper operations and practices may be realized; (c) to allow each owner the opportunity of obtaining that owner's share of the oil or gas from a pool; (d) to develop, process, utilize, protect and conserve the oil and gas resources of Saskatchewan; (e) to protect the environment, property and the safety of the public with respect to the operations of the oil and gas industry; (f) to regulate the injection, storage and withdrawal of substances into or from subsurface formations in a manner that ensures that: (i) the substance is properly stored; (ii) the environment, property and the safety of the public are protected; and (iii) other subsurface resource uses are not unduly diminished; (g) to regulate the injection of oil and gas waste and non-oil-and-gas substances into subsurface formations; (h) to regulate the withdrawal of substances from a well for commercial, industrial or other uses, including increasing or improving oil or gas recovery or operations; and (i) to regulate wells and facilities for non-renewable resource management purposes, including primary production of minerals other than oil and gas.	Minister
Saskatchewan	The Pipelines Act	1998	Statute	Oil and Gas	Oil and gas pipelines; water pipelines	<b>License 5</b> (2) Subject to subsection (3), no person shall construct, alter, operate or abandon a pipeline or discontinue the operation of a pipeline unless that person holds a licence authorizing the construction, alteration, operation, abandonment or discontinuation.  <b>Issuance of licence 8</b> (2) The minister may: (a) issue a licence if the minister is satisfied that: (i) the applicant has complied with this Act, the regulations and any applicable directives; and (ii) it is in the public interest to do so; or (b) refuse to issue the licence.	1	Allow	No	No	None	None	Minister
Saskatchewan	The Petroleum Research Incentive Regulations (Parent statute: Financial Administration Act)	1999	Regulation	Oil and Gas	Field pilot projects	<b>Minister may approve by entering into agreement 5</b> (1) Subject to subsection (2), if the minister is satisfied that a project meets the requirements of these regulations and that it is in the public interest to do so, the minister may approve the project by entering into an agreement with the operator that contains terms respecting the following matters...	1	Allow	No	No	None	None	Minister
Saskatchewan	The Environmental Management and Protection Act	2010	Statute	Multiple	Multiple	<b>Amendment, suspension, cancellation of permits, accepted environmental protection plans and status of qualified persons 28</b> (1) The minister may cancel, amend, alter or suspend any permit or any accepted environmental protection plan, in whole or in part, if: ... (b) the minister is satisfied that it is in the public interest to do so.	1	Prevent	No	No	None	None	Minister
Saskatchewan	The Water Security Regulation (Parent statute: The Water Security Agency Act)	2015	Regulation	Multiple	Multiple (any within a reservoir development area)	<b>Permit required 4</b> (1) Subject to subsection (2), no person shall undertake any development within a reservoir development area without a permit. <b>Issuance of permit 7</b> After considering the factors listed in section 6, the corporation may: (a) issue a permit to the applicant if the corporation is satisfied that: (i) the applicant has complied with the Act and these regulations; and (ii) it is appropriate and in the public interest to do so; or (b) refuse to issue a permit if the corporation is satisfied that: (i) the applicant has not complied with the Act or these regulations; (ii) the applicant has provided incomplete, false, misleading or inaccurate information in support of the application; or (iii) having regard to the factors listed in section 6, issuing the permit is not appropriate or in the public interest.  <b>Amendment, suspension or cancellation of permit 9</b> (1) Subject to section 10, at any time during the term of a permit, the corporation may amend, suspend or cancel the permit if: (a) in the opinion of the corporation, it is in the public interest to do so;	2	1 both, 1 prevent	Yes; No	No	<b>Review of application 6</b> On receipt of an application pursuant to section 5, the corporation shall consider: (a) the current and predicted future impact of the proposed development on the safe and efficient operation of the reservoir and the impact on the quality of water in the reservoir; (b) the compatibility of the proposed development with any hazards in the reservoir development area; (c) whether the proposed development is likely to result in damage to persons or property within or outside of the reservoir development area; (d) the current and predicted future impact of the proposed development on the safety of the reservoir development area for recreation, public access or other public purposes; and (e) whether the proposed development may result in increased expenditures by the Government of Saskatchewan associated with damage caused by hazards in the reservoir development area.	None	Water Security Agency
Saskatchewan	The Water Power Regulations (Parent statute: The Water Power Act)	2016	Regulation	Electricity	Hydropower works	<b>Issuance of licence 6</b> (1) Subject to section 10, after consideration of the factors mentioned in section 5, the corporation may: (b) subject to section 11, refuse to issue the licence if the corporation is satisfied that: (i) the applicant has not complied with these regulations; (ii) the applicant has provided incomplete, false, misleading or inaccurate information in support of the application; or (iii) having regard to the factors mentioned in section 5, issuing the licence is not appropriate or in the public interest.	1		Yes	No	<b>Review of application for licence 5</b> On receipt of an application for a licence, the corporation (the Water Security Agency) shall consider the following factors: (a) the current and future impact of the water power works, including predicted future cumulative impacts; or (i) the property and property rights of other persons or entities existing at the date of the application; (ii) hydrology or water quality; and (iii) any other factor the corporation considers relevant; (b) whether the impacts mentioned in clause (a) can be mitigated by the applicant; (c) any other matter with respect to water management that the corporation considers reasonably relevant.	None	Water Security Agency
Yukon	Subdivision Regulations (Parent statute: Subdivision Act and Municipal Act)	1999	Regulation	Multiple	Multiple	<b>Appeal Board 17</b> The appeal board, in determining an appeal pursuant to the Subdivision Act or the Municipal Act, shall review the decision of the approving officer to determine if it was made in accordance with: (a) the Subdivision Act, the Municipal Act and these regulations as the case may be; (b) technical requirements established by any other enactment of the Legislature or any standards documents sanctioned by an Act of the Legislature; (c) the requirements of natural justice applicable to the decision; and (d) the public interest.	1	Both	Yes	Yes	- Public benefit	<b>Definitions 1</b> "subdivision for the public interest" means a subdivision of land with the primary purpose of providing the land for the public benefit, such as rights-of-way, bridgeheads, protected areas, conservation areas, lands for public use, and lands for recreational, institutional or public facilities or infrastructure; + intérêt public	Approving officer; Appeal board
Yukon	Oil and Gas Act	2002	Statute	Oil and Gas	Oil and gas development	<b>Minister's powers 28</b> (1) The Minister may (a) accept the surrender of, cancel or refuse to renew a disposition as to all or part of its location when the Minister is of the opinion that any or any further exploration for or development of the oil and gas in the location or that part of the location is not in the public interest, subject to the holder of the disposition being compensated in accordance with the regulations for the holder's interest under the disposition; (d) if the Minister is satisfied that it is in the public interest to do so, agree from time to time with the holder to extend the term of the holder's disposition other than an oil and gas permit for an additional period, whether or not the term has expired when the extension is agreed to;  [Where "disposition" or "oil and gas disposition" means (a) an oil and gas permit or oil and gas lease, or (b) any other instrument or contract issued or entered into under this Act that conveys rights to oil or gas or both in Yukon oil and gas lands, and includes a federal disposition; + titre d'allocation +]	1	Both	No	Yes	None	<b>Objectives of the Act 2</b> The objectives of this Act are... (b) to provide for the economic, orderly, and efficient development in the public interest of the oil and gas resources of the Yukon consistent with the principle of sustainable development, the maintenance of essential ecological processes, and the preservation of biological diversity by, among other means, (i) providing for integrated consideration of environmental and socio-economic effects in oil and gas decision-making (ii) effecting the conservation of, and the prevention of waste of, those oil and gas resources; (iii) regulating oil and gas activities throughout the Yukon, and (iv) securing the observance of safe and efficient practices in the course of conducting oil and gas activities;	Minister
Yukon	Public Utilities Act	2002	Statute	Oil and Gas; Renewable Energy	Oil and gas development; Oil and gas pipeline; Electricity generation	<b>Applications for certificates 39</b> An application for an energy project certificate or energy operation certificate shall be made to the Minister and shall contain the prescribed information. <b>Grant or refusal of applications 42</b> (1) On receipt of the report and recommendations of the board, the Minister, may (a) refuse the application; or (b) grant the application subject to any terms or conditions the Minister considers to be in the public interest.	1	Allow	No	No	None	None	Minister