

## Outline for Evidence Brief—850 words

### Title (where appropriate, the final report title can be amended in order to highlight the relevance of key findings)

Determining “The Public Interest”: Use of the Public Interest Test for Infrastructure Decisions in Canada

### About the project (very short summary of the project)

The Impact Assessment Act (2019) introduces a public interest test for physical infrastructure approval: an assessment of whether a proposed development is “in the public interest”. We look at where and how the public interest test for infrastructure development appears in Canadian law, and how decision-makers (statutory bodies and the courts) have interpreted and applied these provisions in practice. We do this in an effort to inform policy development and further research on how current regulatory practice in Canada compares to best practices.

### Key findings (summarize the key findings and outcomes of the report, and where possible, highlight policy or other implications of the findings)

Our review revealed:

- **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 the 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” (*Memorial Gardens*

*Association (Canada) Limited v. Colwood Cemetery Company [1958] SCR 353*), 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 revealed 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 cost-benefit analyses (implicit or explicit) in public interest tests and how this compares against best practice; suitability of the test for the purpose of determining infrastructure outcomes; and how the 48 individual decision-making bodies define the “applicable” legislative framework from which they interpret their public interest mandate.

## **Further information (add contact details for researchers, links to relevant websites, etc.)**

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