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EVIDENCE BRIEF

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SSHRC's Imagining Canada's Future initiative mobilizes social sciences and humanities research to address emerging economic, societal and knowledge needs for Canada, and help guide decision-making across all sectors towards a better future. This evidence brief addresses the Future Challenge Area of: **Informing Best Practices in Environmental and Impact Assessments**.

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

About the project

The *Impact Assessment Act* (2019) introduced a "public interest test" for approving physical infrastructure projects, whereby a proposed project is assessed based on whether it is "in the public interest." This practice is common in environmental decision-making; however, little is known about the use and utility of public interest tests for impact assessment. This synthesis examines where 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. The goal is to inform policy development and further research on how current regulatory practice in Canada compares to best practices.

A two-phase literature review identified all provincial, territorial and federal statutes and regulations in Canada with a public interest test for infrastructure development, as well as key court and regulatory decisions that provide insight into how the test is applied. This review and analysis was supplemented with a limited "snowball sample" of academic and grey literature discussing the concept of public interest and its use in decision-making. Results can be used by those in policy, law and academia when analyzing and evaluating impact assessment legislation and decision-making.

Key findings

The review revealed that:

- 52 unique public interest tests for infrastructure development exist in Canadian federal, provincial and territorial law, across 33 statutes and 13 regulations.
- Although the test appears most frequently in legislation in the Prairie provinces, all jurisdictions except Nunavut have at least one statute containing a public interest test for infrastructure development.
- Public interest tests are used to approve or recommend approval of a proposed project, reject or recommend rejection of a proposed project, or terminate an existing project.
- 39 of the 52 tests target a specific industrial sector (oil and gas, electricity, water management, renewable energy, forestry, rail or waste); oil and gas represent nearly half of the sector-specific tests (44%), and electricity accounts for 23%.
- Of the 52 public interest tests, 65% provide some form of guidance on how to conduct the test and 46% provide explicit factors to consider; 35% provide no guidance on how to conduct the test.
- 48 statutory bodies are authorized to conduct a public interest test for infrastructure development, ranging from a potential 36 to 48 unique decision-making agencies at any one time.

Each of the 48 statutory bodies has a distinct mandate, the scope of which is almost never explicitly defined. Current practice dictates that a decision-maker is not required to explain how it weighs interests or evidence when determining what is in the public interest. Legislation rarely explicitly defines public interest mandates, and only 6% of public interest test provisions reviewed 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. Decision-makers and courts did not define what constitutes an applicable statute, however, nor how the purposive provisions of the primary statute should be factored in.

Across all sectors and statutes, common themes emerge about "balancing" the social, economic and environmental effects of a project. In the decisions reviewed, it was common practice for the decision-maker to "weigh" different contributing factors to arrive at an overall public interest determination. Although this is implicitly a form of benefit-cost analysis, the methods decision-makers used to weigh individual factors are unclear and not well-explained. Regardless of its approach, a decision-maker is generally not required to explain its methods for determining public interest, unlike other policy and non-infrastructure regulatory decisions in Canada. The electricity sector showed the best-developed and detailed methodology for determining public interest, as well as the most robust guidance and discourse on the concept.

Policy implications

Significant gaps exist in the knowledge base around how the public interest test is applied by decision-makers in Canada. Importantly, public interest itself is frequently undefined in Canadian law. More information on how each of the statutory bodies derives and interprets its public interest mandate would support improved understanding of how public interest decisions are made. Future research should include:

- how decision-makers conduct benefit-cost analyses (implicit or explicit) in public interest tests and how this compares against best practice;
- whether a public interest test is a suitable instrument for approving or rejecting infrastructure projects; and
- how responsible decision-making bodies define the "applicable" legislative framework from which they interpret their public interest mandate.

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FURTHER INFORMATION:

▷ **Read the full report**

▷ **Appendix**

The Impact Assessment Agency of Canada (IAAC) is a federal body accountable to the minister of Environment and Climate Change. The IAAC delivers high-quality impact assessments that contribute to informed decision-making on major projects in support of sustainable development.

SSHRC is a funding agency of the Government of Canada. Through research grants, fellowships and scholarships, SSHRC supports research that provides key insights on the social, cultural, environmental and economic challenges and opportunities of our ever-changing world.

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