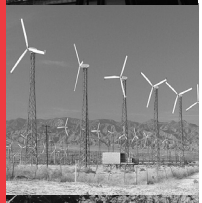
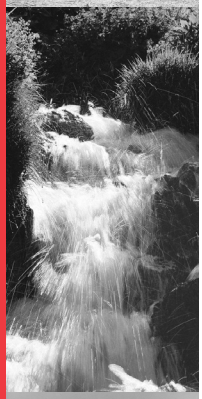
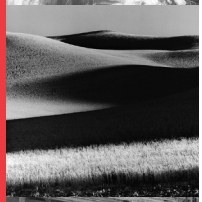
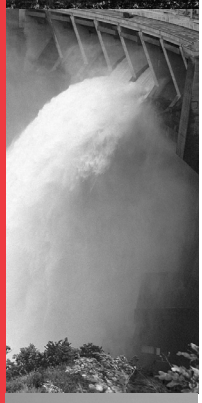
Canadian Institute of Resources Law
Institut canadien du droit des ressources

RESOURCES

NUMBER 108 – 2010

THE ISSUES AND CHALLENGES WITH PUBLIC PARTICIPATION IN ENERGY AND NATURAL RESOURCES DEVELOPMENT IN ALBERTA

Article by Nickie Vlavianos

A. Introduction

Public participation is a key feature of energy and natural resources development in Alberta. The provincial government often expresses its desire for meaningful and effective participation by Albertans in its policy and planning processes.[1] At the project approval stage, project proponents regularly conduct public consultation programs and regulatory boards hold public hearings and award costs to interveners.

Yet there are signs that public participation is not all that it seems in the Alberta energy and resources development context. Increasingly, Albertans seem frustrated and dissatisfied with the current level or type of public participation available.[2] Applications for leave to appeal decisions of energy tribunals on issues of public participation and procedural fairness seem to be on the rise.[3]

The Canadian Institute of Resources Law (CIRL) is currently engaged in a research project, funded by the Alberta Law Foundation, which is focusing on legal and policy questions in relation to public participation in the Alberta energy and natural resources development context. Some of the following areas are being explored: the sources of, and rationale for, public participation; the current approaches to public participation in Alberta at the policy making, land-use planning, and project approval stages of resources development; and the pressure points and challenges facing public participation in this context.

To obtain input on public participation issues and challenges in this context, CIRL held a Round Table discussion at the University of Calgary on April 16, 2010. There were 20 participants in attendance, all of whom have experience (some for many years) with public participation issues in the energy and natural resources development context in one way or another. There was representation from landowners, regulators, industry, the regulatory bar, environmental and natural resources organizations, multi-stakeholder consultation groups, policy and energy consultants, and academia. By limiting the number of participants to a small group of well-informed professionals, and by providing a neutral setting, the Round Table allowed for a frank and informative exchange of ideas.

This article outlines the key themes that emerged from the discussions at this Round Table. It synthesizes and highlights the main points that were made over the course of the day. The goal in this article is to bring clarity to the issues and the challenges so that we can work towards a mutually beneficial solution. Not a single participant at the Round Table suggested that public participation in energy and natural resources development is not a valid and worthwhile exercise. For most, effective and meaningful participation brings with it the prospect of better and richer decision making in this context. It is a legitimate goal to strive for, to work towards, even though we may not all, at first instance, agree on the means for getting there.

Resources is made possible with the financial support of: nexen

RÉSUMÉ

La participation du public est un aspect fondamental du développement des ressources énergétiques et des ressources naturelles en Alberta. Cependant, cette participation fait face à de nombreux défis. En avril 2010, l'Institut canadien du droit des ressources (ICDR) a réuni une Table ronde d'experts pour discuter des questions de participation du public dans ce domaine. Cet article identifie les principaux thèmes qui ont émergé de cette discussion. Ce faisant, l'article clarifie les principales questions et les défis que pose la participation du public dans le domaine du développement des ressources énergétiques et des ressources naturelles dans la province.

A couple of preliminary comments about scope are necessary. First, although the Round Table focused on "public participation" generally, it did not deal with Aboriginal consultation or the Crown's duty to consult with Aboriginal peoples in regard to energy and natural resources development. While there is overlap, the constitutional obligations with respect to Aboriginal peoples raise different legal issues and require separate analysis.[4] Second, for purposes of this Round Table (and the underlying project), the term "public participation" was used as an all-encompassing label to describe any all mechanisms that allow anyone other than government/governmental agencies and project proponents to communicate their views and influence decision making

B. Policy and Planning Stages

There are several stages in energy and natural resources development in Alberta that occur prior to an application for a particular project. Participants at the Round Table noted that the availability and type of public participation opportunities currently vary depending on the stage in the development process.

With respect to the policy and planning stages of energy and natural resources development in Alberta, it was noted that there is currently no legislated requirement for public participation. Any public consultation that occurs does so through *ad hoc* processes at the discretion of the provincial government. That said, there is a history in Alberta of large, province-wide public participation processes designed to assist the government in developing public policies in this context. Recent examples discussed at the Round Table included the work of the Cumulative Environmental Management Association (CEMA), a multi-stakeholder consensus-based partnership tasked with managing cumulative effects in the Athabasca Oil Sands region, and the Oil Sands Consultations that occurred throughout the province in 2006-2007. Another process discussed in detail was that in regard to the provincial government's recent legislated authority to establish regional land-use plans for the province.[5]

Generally, participants did not express the view that public participation processes at the policy and land-use planning stages of government decision making are not worthwhile and appropriate. The successes of the multi-stakeholder Clean Air Strategic Alliance (CASA) in reducing flaring from oil and gas operations in the province were explicitly noted. Rather, there was a general view that perhaps more, and certainly more effective, public participation should occur early on in the policy and planning stages for energy and resources development. For one thing, this would prevent policy issues from arising down the road at the project approval stage which might, it was submitted, be an inappropriate venue or come too late in the decision making process.

Participants tended to agree that the extent to which there should be public participation, and how it should occur, raise difficult yet important political questions. As Barry Barton has noted, such questions go "straight to the heart of a nation's political values, its concept of the state and the state's relationship with its citizens, and its concept of how public business is properly carried out".[6] No one at the Round Table expressed the view that

simply voting every four years suffices as public participation in the context of policy development.

Nonetheless, participants were clear that there are issues and challenges with current levels of public participation at the policy and planning stages of resources development in Alberta. Many of the processes established by the government have suffered from a lack of commitment both in terms of a failure to provide adequate resources and a failure to ensure that the outputs of the processes are given adequate weight and consideration. Processes often lack specific and detailed guidelines regarding the mandate, terms of reference and the expectations of stakeholder involvement. Participants were clear that for public participation to be meaningful, process rules must be detailed and set out plainly at the outset. There must also be a strong sense that participants will in fact have an opportunity to, and will indeed, influence the government's decision-making processes.

With respect to CEMA in particular, although in some ways an idyllic form of multi-stakeholder consultation, participants agreed that the high expectations of this process were never met. Some of the problems identified were: unrealistic objectives, a lack of focus, inadequate resources, deficiencies in the design and implementation of the process (e.g. decision making with limited information and uncertainty, a lack of incentive structure for participants), the underlying pace of development, and lack of a policy and planning context within which to do its work. Moreover, government failed to provide a regulatory backstop in the sense of telling CEMA that if it did not make decisions within a specified time frame, the government would make the decisions instead.[7]

With respect to the 2006-2007 Oil Sands Consultations process, although an interim and final report was generated with detailed action plans for implementing the panel's recommendations, it is unclear whether, or how, the outcome of this public consultation process is reflected in the government's current plan for oil sands development in the province.[8]

There was significant discussion at the Round Table about the recent regional advisory committee (RAC) established under *ALSA* to provide advice to Cabinet on the development of the Lower Athabasca Regional Plan (LARP). The mandate given by the government to this RAC was for it to provide strategic advice with respect to four key areas: economic growth and development scenarios; land conservation objectives; regional air and water thresholds; and human development considerations. Participants at the Round Table observed that the "advice sheets" (i.e. the recommendations, rationales, and dissents) used by the Lower Athabasca RAC and submitted to government are simply advice to Cabinet and therefore do not have to be released to the public. There is no requirement to do so in the legislation; nor is there any requirement that the government consider or follow the advice of the RAC. At the end of the day, participants were of the view that this RAC process was a closed and non-transparent one which did not really involve the public. Generally, "public" representation on RACs consists of hand-selected representatives; in the case of the Lower Athabasca RAC, 15 members were appointed by government.

Stakeholders identified the following challenges with the Lower Athabasca RAC process: (i) a lack of clear instructions about what questions should be answered (and therefore a lack of clarity on what was relevant or not); (ii) a lack of access to necessary information (including a lack of necessary knowledge on the part of participants); and (iii) a lack of a clear understanding about how the ultimate recommendations would be used in developing a regional plan. Without clear guidelines, this RAC found it difficult to draft workable recommendations that would balance the interests of the various stakeholders.

Still, participants at the Round Table noted that, despite the frustrations (and the often significant unpaid time commitments involved), many stakeholders would still participate in such consultation processes. If they are not part of the process (however murky and tenuous), then who will represent their interests? It is hoped that perhaps one day public pressure on government will prevail and these processes will lead to meaningful and enforceable results. There is also

merit in simply being at the table if only to observe and listen. Sometimes, though, it was noted that a tipping point can be reached and stakeholders will walk away from such processes. This may or may not lead to necessary changes to get the process back on track.

Generally, participants at the Round Table submitted that Alberta's approach to public participation at the policy and planning stages for energy and natural resources development is not an example of citizen empowerment. Although they may be consulted, Albertans do not have the power to really affect policy and planning outcomes. Because there is no legal requirement for the government to adopt and implement the recommendations from these *ad hoc* processes, there is no ability for stakeholders to ensure that their views will be heeded to by government. A well-known article on citizen engagement has called this type of participation/consultation mere "tokenism" or "manipulation"; it does not represent meaningful and effective public participation.[9] Participants noted that a more serious treatment of public participation in this context is warranted.

As far as measuring outcomes is concerned, participants noted that there do not seem to be many recent objective studies or surveys by the government to measure satisfaction with existing processes in the province.[10] This is surprising in light of the literature from the field of alternative dispute resolution which strongly suggests there is value in frequent measurement of participant satisfaction. One way of measuring or evaluating impact, which is what most participants likely want, would be to trace the comments made in various forums into the final policy documents to see whether and how they have been manifest there. Without reflecting upon "lessons learned" from previous public participation processes, we are doomed to repeat the same costly mistakes.

The challenges noted at the Round Table with respect to the *ad hoc* public consultation processes adopted by the government with respect to policy and planning can be summarized as follows: (i) there is a need for strong government commitment to these processes in terms of funding, setting clear process rules and providing regulatory backstops; (ii) defined rules of procedure must be established and well understood from the outset; (iii) terms of reference must be clear and realistic (and adequate resources must be granted to accomplish these); (iv) the issue of relevance must be carefully considered at the outset (i.e. what is relevant to deliberations and what is not); (v) time lines and incentives must be set forth at the outset; (vi) there must be adequate knowledge and experience available in order to tackle the terms of reference in an informed way (or there must be resources available to provide that information and knowledge as needed); and (vii) participants must know that the outputs from these processes will be carefully considered by government. Generally, participants did not express the view that the government *must* adopt the recommendations from such processes (ultimately, final policy decisions rest with the government), but stakeholders in such processes must feel that their work will not be in vain.

Finally, there was discussion at the Round Table about funding for the costs of attendance and participation in these consultation processes. There seemed to be general agreement that Albertans cannot participate effectively in such processes unless they can afford to. They must have the time and ability to become educated about the issues. There was no discussion, however, of how such funding issues should be addressed.

C. Crown Mineral & Surface Rights Disposition

Although tied to policy and planning (or at least they should be), mineral rights disposition and the granting of access to the surface of public lands in Alberta represent separate stages in the current resources development process in Alberta. Despite the public nature of the majority of the province's natural resources, it was noted at the Round Table that there are no mechanisms for public participation in the current disposition decision-making processes. Whatever review processes occur are purely internal to government.

Participants noted that the disposition of Crown mineral rights is a critical stage in the

resource development process in that it creates legally-enforceable property rights. Once a property right is granted, the holder of that right has an advantage in any decision-making process. The view was expressed that once the government gives someone property rights, it cannot take those away without compensation. It was submitted that the decision about whether or not development of these minerals is in the public interest occurs once they are disposed of.

For grants of rights to access the surface of Crown lands, there was some discussion about the need for energy proponents to obtain consents from other Crown disposition holders (e.g. pursuant to forest management agreements or grazing leases), but it was observed that the Alberta government currently does not engage in broad-based public consultation in making surface disposition decisions.

D. Project Approval Stage

At the stage where an energy proponent seeks approval for a particular project, there are three main avenues for some type of public participation in Alberta. First, there is participation through industry consultation and notification pursuant to required participant involvement programs. Second, there is some opportunity, albeit limited, to comment upon environmental impact assessments conducted pursuant to the province's key environmental legislation, *EPEA*.[11] Third, and most importantly, there is the possibility of triggering and participating in a public hearing to express one's interests and concerns directly to an energy regulator.[12]

1. Consultation by Industry

Participants at the Round Table noted that regulators in Alberta require project proponents to consult with affected stakeholders prior to bringing forth their applications. In some cases, personal face-to-face consultation is required; in others, written notification suffices.[13]

Some participants expressed the view that this is a critical stage for public participation in the development process and that, as much as possible, it is the job of industry and affected stakeholders to resolve any concerns without intervention by the regulator. The regulator can assist in the process through services (like alternative dispute resolution) but ultimately where a hearing can be avoided, this should be viewed as a "success".

Other participants were of the view that some project proponents treat public consultation as simply a "box" to be checked off on their application form. Concerns over power imbalances between rural landowners and companies in this consultation process were also expressed. Landowners often do not have the requisite knowledge and expertise to understand all the issues and to challenge the information provided by the company. As well, at times landowners want to be heard by the actual decision maker rather than the project proponent. On the other hand, it was noted that the threat of a hearing on the part of a landowner is a powerful tool that gives companies a strong incentive to negotiate and compromise.

Other issues with consultation by industry from the point of view of "public participation" that were raised at the Round Table included: (i) how "public" is such consultation and how much does it involve Albertans as citizens rather than as immediately affected landowners?; (ii) while good business practice for industry, does such consultation really amount to "public participation in energy and natural resources development in Alberta"?; and (iii) how relevant are such consultations to the ultimate decisions made by the regulators "in the public interest" (discussed below)?

2. Environmental Impact Assessment (EIA)

There was brief mention of the possibility of public participation through the EIA process pursuant to *EPEA* at the Round Table. *EPEA* and its regulations allow anyone who is "directly affected" by a proposed activity subject to EIA consideration to submit written statements of interest and concern to Alberta Environment (AENV).[14] It was noted, however, that even when an EIA occurs under *EPEA*, there is no deliberative process that results. Written statements of concern are simply filed with AENV, and once AENV deems the EIA to be complete, it forwards the EIA on to the energy/

natural resources regulator. There is no evaluation or public deliberation process at the EIA stage.[15]

3. Public Hearings

Often when people think of public participation in energy and natural resources development in Alberta, they think of the public hearings that are sometimes held to determine whether or not a project will be approved. Participants at the Round Table recognized that these hearings can be important avenues for public input. It was noted that other jurisdictions, like British Columbia and Saskatchewan, do not allow for comparable hearing processes in this context.

While important from the point of view of public participation, one view holds that success comes when there are no hearings held and proponents and affected stakeholders are able to reach resolutions on their own without regulatory board intervention. Some participants at the Round Table argued that the fact that only a very small percentage of applications in Alberta currently go to a hearing demonstrates that the system is working.

Generally, participants at the Round Table noted that effective participation at hearings, when they are held, can be a real challenge. Hearings can be costly, time-consuming and adversarial. It was submitted that quasi-judicial hearings may not be the best way to get public input on a project; boards should have more flexibility to get public input in different formats, without the quasi-judicial aspects of a hearing (e.g. cross-examination). Rather than spending a lot of time and money on a hearing process simply to allow a few landowners to express their concerns, perhaps there are other ways of achieving the main goal of landowners which is simply to be heard by someone in authority.

Nonetheless, from the point of view of landowners, it was noted that at least in the current system, a decision is issued after a hearing so participants can see that their views were considered. Landowners need to know that they were heard and that the outcome of a hearing is not a *fait accompli*. Even if the final decision is not want was wanted, landowners and other stakeholders need reassurance that they were heard by an actual decision maker; this helps to legitimize the process.

Participants at the Round Table spent a significant amount of time discussing the issues and challenges with the current regulatory board public hearing process. Although there is overlap, it is useful to consider the issues under two broad categories: the "public interest test" and "the test for standing"

a. The Public Interest Test

In approving projects, the ERCB, AUC and NRCB are mandated to consider whether they are in the "public interest", having regard to their economic, social and environmental effects.[16] What constitutes the "public interest" and how it is determined generated considerable discussion at the Round Table.

Participants acknowledged that the public interest is not easily defined and that it is a difficult issue for tribunals to address. How can boards balance all the factors in the public interest? How can all the views representing the public interest be expressed before a board? Perhaps owing to these difficulties, participants noted that, in practice, boards have interpreted the public interest test as amounting to nothing more than a cost-benefit analysis where the impacts (social and environmental) of a particular project are weighed against the benefits (social and economic), or *vice versa*. Some participants noted, however, that it is not entirely clear from the legislation that a cost-benefit analysis is what the "public interest" test demands. Government must provide boards and Albertans with more detailed guidance on what the "public interest" test entails.

Participants at the Round Table also wondered whether "public interest" determinations have already been made before applications get to the boards. For instance, in the case of oil and gas project applications, the government has already disposed of the minerals (and in the case of Crown lands, has granted surface access). Do these disposition decisions not already indicate that developing these minerals is in the public interest according to the government?

Once before the regulator, participants suggested that there seems to be a presumption that all

proposed projects are in the public interest as long as they meet the boards' technical requirements. This comes to light most clearly when one considers routine applications (i.e. ones that do not go to a hearing but meet all technical requirements). Routine applications are approved without public review; this must mean that they meet the public interest test because that is the standard the boards must apply in their review. Participants questioned who represents the public interest for those applications. Perhaps the public interest is reflected in the technical requirements, the standards of the day? Even for those applications that do go to a hearing, participants noted that regulators seem to take the view that as long as the project complies with the standards of the day and there is a plan to mitigate harm to acceptable levels, the project will be deemed to be in the public interest.

Ultimately, the Round Table revealed two opposing views on what the "public interest" test demands of regulators. On the one hand, it was argued that the "public interest" test at this stage in the development process requires boards to determine whether the particular project, as designed, meets with current requirements and mitigates impacts to acceptable levels. If so, the project is in the public interest as far as the project approval stage is concerned. On the other hand, the view was expressed that the "public interest" test, as set out in the relevant legislation, requires consideration of broad questions of policy which include questions around the nature, type, pace, intensity, etc. of development. On this view, even if a project adheres to the technical rules, boards can reject applications on broad policy grounds.

The different views on what the public interest test demands lead to different views on what is relevant argument and evidence before the boards. It also leads to distinct views on who should be entitled to participate at public hearings, as discussed in the next section below. On the question of relevance, participants at the Round Table focused on the fundamental question of whether broad policy issues properly belong at the regulatory hearing stage. Some participants took the view that regulatory boards are ill-equipped to handle broad policy questions and they are, in any event, not the appropriate decision making body in this regard. Policy is the domain of government, not an independent quasi-judicial tribunal. Board members are appointed because they have technical expertise with respect to the particular projects reviewed not because they are policy makers. Another problem with considering broad policy questions at the regulatory hearing stage is that not all the players will be "at the table".

It was also argued that if the public interest test demands this type of broad policy inquiry at board hearings, then perhaps it is the wrong test for this stage in the development process. Rather than broad inquiry, the costly and time-consuming nature of these quasi-judicial hearings suggests that there should be better and more detailed scoping of the issues prior to a hearing to ensure efficiency, relevance and fairness. For instance, if Albertans are given five minutes of "air time" at the microphone during such hearings (without being sworn in) as they sometimes are in practice, will they be subject to cross-examination, how much weight will be given to their arguments and evidence, and should time and resources be spent challenging their arguments? The answers to such important questions are unclear. It was suggested that perhaps public hearings are not the best way to capture the public interest in this broad policy sense. Perhaps we are confusing quasi-judicial processes with broad-based public consultation?

Participants at the Round Table noted that Albertans are in fact increasingly trying to use board hearings as a forum to debate policy. This is so despite the fact that the regulators take the position that they do not have jurisdiction over broad questions of policy.[17] Issues raised by interveners may not relate to specific details of the project, but they might relate, for instance, to questions about whether coal bed methane should be pursued in the province or questions about impacts on lands not directly involved in the project. Ultimately, it was noted that the process can lead to frustration and disillusionment on the part of hearing participants since, although they were allowed to 'vent' at the hearing, the policy issues that they raised will typically not appear in the regulator's decision report.

Not all participants at the Round Table agreed with the view that policy debate is inappropriate at board hearings. For one thing, given the lack of other opportunities elsewhere in the development process, often the hearing is the only vehicle available for those affected by development to voice their concerns about the policy issues. Secondly, the legislative provisions setting out the public interest test can be read broadly as requiring a consideration of a wide range of policy issues. Further, representation of broad public interests at regulatory hearings can aid in the boards' understanding of the broader issues and can help to contextualize the impacts of the particular project under review. Lastly, it was observed that Albertans do not generally care about or understand the divisions of labour and mandates between the government and regulatory boards; what they really want is to have their say as efficiently as possible. Sometimes a regulatory hearing best serves this purpose.

Others noted that even if regulatory boards do consider policy issues, they should not make up the public interest as they go. It is incumbent on the government to provide the boards with detailed guidance on the policy issues. Project approvals must be based on sound policy and planning decisions that have been made at a higher level.

b. The Test for Standing

The ability to trigger a regulatory hearing in Alberta depends on meeting the test for "standing" set out in the relevant legislation.[18] Although there are differences in the statutory provisions, participants at the Round Table agreed that they are all versions of the "directly affected" test.

The different boards interpret their legislation slightly differently, but generally speaking, participants noted a current trend to interpreting these standing provisions strictly rather than liberally. The ERCB, for instance, focuses on safety or economic or property rights and requires a close connection in terms of proximity to the proposed project. The ERCB also looks to see if the person seeking standing is affected differently than the general public. Participants at the Round Table queried whether the recent decision of *Kelly v. Alberta Energy Resources Conservation Board*[19] eliminates this need to be "differently" affected. The NRCB, on the other hand, has taken a broader view of who may be directly affected. This allows for more participation. But even the NRCB has, compared to its earlier days, begun to narrow its approach to standing.

Participants at the Round Table agreed that defining who is "directly affected" in any given instance is the biggest challenge facing the boards in applying the test for standing. For instance, does" directly affected" in the legislation include taking impacts caused by cumulative effects into account?

Generally, it was noted that there is pressure on regulators to avoid hearings and therefore to narrow standing. Project proponents want to avoid the costs and time-consuming nature of hearings. There are also budget constraints facing the boards themselves. Moreover, a narrow approach to standing is justified by an interpretation of the public interest test as requiring only a consideration of the specific details of the project under review (as discussed earlier). Only those stakeholders (typically landowners) that will be directly affected by the design or type of project should be heard so as to make required adjustments to the nature of the project proposed. It was noted that increasingly in Alberta energy boards are conducting issue-focused hearings with the participation of a narrow group of interveners rather than broad-based policy hearings.

Participants noted, however, that if, as discussed above, the public interest test requires a broader consideration of interests and concerns (including broad energy policy issues), then there is currently a disconnect between the narrow approach to standing (i.e. one focused on economic and property rights) and the public interest test. How can a few landowners contribute to an understanding of what constitutes the "public interest" in this broad sense? The narrow approach to standing focuses only on the details of the specific project being proposed and not on the criteria by which the application is to be judged (i.e. the broad public interest). It was submitted that if boards do not hear from a broad range of people and interests, their decisions will not reflect the public interest at large. To ensure the public

interest is heard, it was suggested that perhaps something other than the current standing tests are required. Perhaps there is a need for regulators to allow "public interest standing" as courts have done? And perhaps the financial burden of more hearings should be imposed on all sectors to allow for broader consultation?

Participants noted that applications by Albertans for standing to trigger a regulatory hearing in this context seem to be on the rise. One possible explanation may be that there is no other vehicle through which most Albertans can discuss policy issues in the context of energy and natural resources development. At least a board hearing offers the opportunity to have your voice heard.

Of particular concern to participants at the Round Table was the fact that the narrow approach to standing is very problematic in cases of projects on public lands. Unless there is someone with an economic interest (e.g. a surface disposition holder), there is usually no one that can meet the directly affected standing test with respect to public lands. The ERCB has, for example, denied standing to recreational users of public lands.[20] Participants thus wondered who speaks to the public interest for applications on public lands. Compounding the problem is the current lack of land-use plans. How is the public interest being determined with respect to development on public lands?

Participants were also concerned about the current lack of clarity with respect to the standing rules in practice. The practice of the ERCB in particular was discussed. Although it takes a very restrictive view and only allows a hearing to be triggered at first instance by someone with a closely affected property or economic interest, the ERCB will sometimes allow others to participate (as "discretionary participants") to some extent once a hearing has been called by someone with proper standing. For example, the ERCB might allow (unsworn) parties to have air time at the microphone during a hearing. This raises questions as to whether those parties need to be cross-examined and as to the weight and value that should/will be given to their submissions. Generally, clarity is needed on the exact rules of the game to ensure fairness and transparency at these hearings.

Lastly, participants at the Round Table discussed the issue of costs of participation at regulatory hearings. Funding plays a significant role not only in the ability to participate, but also in doing so effectively. Each board is governed by its own legislation and has its own rules around the awarding of intervener costs.[21] Generally, it was noted that the applicable tests for eligibility for costs are narrower than those for standing. Participants observed that even where a broad view of standing is adopted, a significant deterrent to effective participation remains because of the possible inability to recover at least some costs.

E. Conclusion

The primary issues and challenges identified at the Round Table organized by CIRL on April 16, 2010 can be summarized as follows:

1. There is a need for more effective public participation at the policy and planning stages for energy and natural resources development in Alberta. This includes decision making in regard to the setting of energy policy and the establishment of regional land-use plans for the province. Early public participation would help remove policy discussions from the possibly ill-suited project approval stage. To be effective, these processes must be supported by strong government commitment in terms of the provision of resources and the implementation of outputs. Specific and detailed guidelines must also be provided with respect to the mandate, terms of reference, expectations, and rules of the process.

2. There is a need for public participation at the Crown mineral and surface rights disposition stages. In most cases, the sale of mineral rights leads to the development of those rights. Disposition decisions by government with respect to Crown resources are critical decisions that determine the course of energy and natural resources development in the province. They represent important public interest decisions that should be made through consultation with Albertans.

3. There is a need to address several aspects of existing participation processes at the project approval stage. Does stakeholder consultation by industry really amount to public participation in energy and natural resources development decision making? How relevant are such consultations to the ultimate decisions made by regulators "in the public interest"? With respect to the public interest test, how is the public interest considered in the case of routine applications that do not go to hearing? For those that do go to a hearing, does the public interest test require a project-specific analysis of technical issues or a broader analysis of policy issues? What is the appropriate test for standing in light of the public interest test? How does a narrow approach to standing support a public interest determination where public lands are involved?

By addressing these issues and challenges, public participation in energy and natural resources development in Alberta will be strengthened, and government decision making enhanced.

◆ Nickie Vlavianos is an Assistant Professor with the Faculty of Law at the University of Calgary. Many thanks to Will S. Randall II for his meticulous note-taking and to all the participants at a Round Table held on April 16, 2010 at the University of Calgary for their enthusiastic and candid exchange of ideas and experiences. Those insights and experiences form the basis for this article. Thanks also to the Alberta Law Foundation for generously funding a project on public participation in energy and natural resources development in Alberta of which this article forms a part. Lastly, thanks to Monique Passelac-Ross and Jenette Yearsley for their review of this article.

Notes

1. Two recent examples are the government's consultation commitments with respect to its "Regulatory Enhancement Project" and its development of regional land use plans for the province: see Government of Alberta, Regulatory Enhancement Project Stakeholder, online: <http://www.banister.ab.ca/AlbertaEnergyREPWebsite/> and Government of Alberta, Land-Use Framework FAQs, online: <http://www.landuse.alberta.ca/AboutLanduseFramework/LUFFAQs/Default.aspx>.
2. See, for example: Lyn Gorman, "Another step back for democracy in Alberta" 628 *Vue Weekly* (30 October 2007), online: <http://vueweekly.com/front/story/bill_46_another_step_back_for_democracy_in_alberta/>; Environmental Law Centre, "Comments on Bill 46 — Alberta Utilities Commission Act" (19 July 2007); Dan Woynillowicz & Steve Kennett, "Passage of Bill 46 Perpetuates EUB Shortcomings" (5 December 2007), online: <http://alberta.pembina.org/op-ed/1566>; Nickie Vlavianos, "Public Participation and the Disposition of Oil and Gas Rights in Alberta" (2007) 17 J.E.L.P. 205; Alice Woolley, "Enemies of the State? The Alberta Energy and Utilities Board, Landowners, Spies, a 500 kV Transmission Line and Why Procedure Matters" (2008) J.E.L.R. 234; and Shaun Fluker, "Standing Against Public Participation at the Alberta Energy and Utilities Board", online: <http://ablawg.ca/wp-content/uploads/2008/02/sf_sawyer.pdf>.
3. See, for example: *Prince v. Alberta (Energy Resources Conservation Board)*, 2010 ABCA 214; *Cheyne v. Alberta (Utilities Commission)*, 2009 ABCA 94; *Berger v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 158; *Lavesta Area Group v. Alberta (Energy and Utilities Board)*, 2009 ABCA 155; *Domke v. Alberta (Energy Resources Conservation Board)*, 2008 ABCA 232; *Kelly v. Alberta (Energy and Utilities Board)*, 2008 ABCA 52; *Graff v. Alberta (Energy and Utilities Board)*, 2007 ABCA 246; *Graff v. Alberta (Energy and Utilities Board)*, 2007 ABCA 20; *Lavesta Area Group v. Alberta (Energy and Utilities Board)*, 2007 ABCA 194; *Sawyer v. Alberta (Energy and Utilities Board)*, 2007 ABCA 297; *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68, leave to appeal to the Supreme Court of Canada dismissed [2005] S.C.C.A. No. 176; and *Whitefish Lake First Nation v. Alberta (Energy and Utilities Board)*, 2004 ABCA 49.

4. For a consideration of the rights of Aboriginal peoples in the Alberta energy and resources development context, see: Verónica Potes, Monique Passelac-Ross & Nigel Bankes, *Oil and Gas Development and the Crown's Duty to Consult: A Critical Analysis of Alberta's Consultation Policy and Practice*, Alberta Energy Futures Project Paper No. 14 (Calgary: Institute for Sustainable Energy, Environment and Economy, 2006); and Monique Passelac-Ross & Verónica Potes, *Crown Consultation with Aboriginal Peoples in Oil Sands Development: Is it Adequate, Is it Legal?*, Occasional Paper No. 19 (Calgary: Canadian Institute of Resources Law, 2007).
5. See the *Alberta Land Stewardship Act*, S.A. 2009, c. 26.8 (*ALSA*). Although the government has expressed its commitment to establish regional plans for the province with the input of Albertans, *ALSA* does not require their development. It grants Cabinet discretion to do so: see *ALSA*, s. 4.
6. Barry Barton, "Underlying Concepts and Theoretical Issues in Public Participation in Resources Development" in Donald Zillman, Alastair Lucas & George (Rock) Pring, eds., *Human Rights in Resources Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (New York: Oxford University Press Inc., 2002) at 77.
7. For more on CEMA, see Integrated Environments and Tumbleweed Consulting Ltd., *Independent Strategic and Program Evaluation of the Cumulative Environmental Management Association*, prepared for the Athabasca Tribal Council and the Government of Alberta (January 2008), online: <http://environment.gov.ab.ca/info/library/8029.pdf>; Chris Severson-Baker, Jennifer Grant & Simon Dyer, *Taking the Wheel: Correcting the Course of Cumulative Environmental Management in the Athabasca Oil Sands* (Drayton Valley: Pembina Institute, 2008); and Steven Kennett, *Closing the Performance Gap: The Challenge for Cumulative Effects Management in Alberta's Athabasca Oil Sands Region*, Occasional Paper No. 18 (Calgary: Canadian Institute of Resources Law, 2007).
8. The government's current plan seems to be contained in a report, issued by the Treasury Board in February 2009, entitled *Responsible Actions: A Plan for Alberta's Oil Sands*, online: <http://www.treasuryboard.alberta.ca/ResponsibleActions.cfm>, which outlines Alberta's "strategic approach to responsible development of the oil sands resource" (at 4). While the report states that it "builds on" (at 5) extensive stakeholder consultations including those from the Oil Sands Consultations, it is very short on specifics in this regard.
9. See Sherry Arnstein, "A Ladder of Citizen Participation" (1969) 35 Journal of American Institute of Planners 216.
10. An exception may be Integrated Environments and Tumbleweed Consulting Ltd, supra note 7.
11. *EPEA* is *Alberta's Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.
12. The key regulators at the project approval stage for energy and natural resources development projects in Alberta are the Energy Resources Conservation Board (ERCB) for oil and gas projects, the Alberta Utilities Commission (AUC) for electricity generation projects, and the Natural Resources Conservation Board (NRCB) for forestry, mining and water management projects.
13. See, for example, ERCB, *Directive 056: Energy Development Applications and Schedules* (16 June 2008) and AUC, *Rule 007: Applications for Power Plants, Substations, Transmission Lines and Industrial System Designations* (21 April 2009).
14. See *EPEA*, ss. 44(6) and 73(1) and *Environmental Assessment Regulation*, A.R. 112/93. See also Jason Unger, *A Guide to Public Participation in Environmental Decision-Making in Alberta* (Edmonton: Environmental Law Centre, 2009).
15. Further, the majority of energy project applications (i.e. oil and gas wells) are exempted from the EIA process under *EPEA*: see *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, A.R. 111/93, Schedule 2(e).
16. See: *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 3 (*ERCA*); *Alberta Utilities Commission Act*, S.A. 2009, c. 37.2, s. 17(1) (*AUC Act*); and *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3, s. 2 (*NRCB Act*).
17. See, for example, AUC Decision 2010-021, *TransAlta Wind, Ardenville Wind Plant and Substation* (15 January 2010).
18. For the ERCB, the standing test is in s. 26(2) of the *ERCA* (rights may be directly and adversely affected by the project). For the AUC, it is in s. 9(2) of the *AUC Act* (rights may be directly and affected; see also s. 9(3) for circumstances when the AUC can waive a hearing). For the NRCB, the test is in s. 8(3) of the *NRCB Act* (directly affected by a proposed

Notes (continued)

project; see also s. 8(2) which gives opportunities to submit evidence and make representations to the Board for directly affected persons but also for "any other person [the Board] considers necessary").

19. 2009 ABCA 349.
20. See *Sawyer v. Alberta (Energy and Utilities Board)*, 2007 ABCA 297.
21. For the ERCB, see s. 28 of the *ERCA* (person or group that has an interest in or is in actual occupation or is entitled to occupy land that is or may be directly and adversely affected by a decision of the Board). For the AUC, see s. 22 of the *AUC Act* (person or group who has an interest in land and is in actual occupation or is entitled to occupy land that is or may be directly or adversely affected). For the NRCB, see s. 11(1) of the *NRCB Act* (individuals or groups that may be directly affected by a reviewable project).

Subscribe electronically to *Resources*
Please provide your e-mail address to cirl@ucalgary.ca
All back issues are available online at:
www.cirl.ca

Canadian Institute of Resources Law
Institut canadien du droit des ressources

MFH 3353, University of Calgary, 2500 University Drive N.W., Calgary, AB T2N 1N4
Telephone: 403.220.3200 Facsimile: 403.282.6182 E-mail: cirl@ucalgary.ca
Website: www.cirl.ca

RESOURCES

NUMBER 108 – 2010

Resources is the newsletter of the Canadian Institute of Resources law. Published quarterly, the newsletter's purpose is to provide timely comments on current issues in resources law and policy. The opinions presented are those of the authors and do not necessarily reflect the views of the Institute. *Resources* is e-mailed free of charge to subscribers. (ISSN 0714-5918)

Editors: Nancy Money and Sue Parsons

THE INSTITUTE

Canadian Institute of Resources Law
Institut canadien du droit des ressources

The Canadian Institute of Resources Law was incorporated in September 1979 to undertake and promote research, education and publication on the law relating to Canada's renewable and non-renewable natural resources.

The Institute was incorporated on the basis of a proposal prepared by a study team convened by the Faculty of Law at the University of Calgary. The Institute continues to work in close association with the Faculty of Law. It is managed by its own national Board of Directors and has a separate affiliation agreement with the University of Calgary.

THE BOARD