THE JURISDICTION OF ALBERTA'S ENERGY AND UTILITIES BOARD TO CONSIDER BROAD SOCIO-ECOLOGICAL CONCERNS ASSOCIATED WITH ENERGY PROJECTS

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The Alberta Energy and Utilities Board is increasingly asked to consider the broad social, economic and environmental implications of energy exploration in Alberta. This article argues that s. 3 of the Energy Resources Conservation Act *requires the AEUB to seriously consider these broad socio-ecological implications and challenges the Board's reluctance to undertake these considerations. The article also highlights the fact that this reluctance and the Board's narrow view of its s. 3 authority have yet to be assessed by the Alberta Court of Appeal.*

On demande de plus en plus au Alberta Energy and Utilities Board d'envisager les vastes implications sociales, économiques et environnementales des explorations de l'énergie en Alberta. Cet article fait valoir qu'en vertu des dispositions de l'article 3 de la Energy Resources Conservation Act *le AEUB devrait sérieusement en tenir compte, et questionne l'hésitation du AEUB à les considérer. L'article souligne aussi le fait que la Cour d'appel de l'Alberta n'a pas encore évalué cette hésitation ni la perspective réductionniste de l'autorité accordée au AEUB en vertu de l'article 3.*

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I. INTRODUCTION

On 16 December 2003, the Alberta Energy and Utilities Board (AEUB or Board) issued its decision to deny a well licence for an exploratory gas well in the Whaleback region of Alberta.[1] The *Polaris Decision* was based on evidence submitted to the Board during a two-week public hearing that garnered significant media attention. The *Calgary Herald* published regular articles concerning the hearing and the issuance of the *Polaris Decision* was reported by at least one evening news telecast in Calgary. Well licence applications, submitted to the Board by the thousands every year, rarely receive such attention.

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1 *Applications for a Well Licence, Special Gas Well Spacing, Compulsory Pooling, and Farling Permit — Polaris Resources Ltd.* (16 December 2003), AEUB Decision 2003-101, online: AEUB <www.eub.gov.ab.ca/bbs/documents/decisions/2003/2003-101.pdf> [*Polaris Decision*].

One reason for the attention here was the fact that this application concerned Alberta's Whaleback region, a unique area located along the eastern slopes (southern region) of the Rocky Mountains, southwest of Calgary. This area was the subject of a September 1994 well licence decision, wherein the Board denied an application by Amoco Canada to drill an exploratory gas well.[2] Subsequent to the *Amoco Decision*, the Alberta government designated the Whaleback region as a protected area candidate for its ecologically unique features. Ultimately, the Alberta government created two protected areas in the Whaleback: the Bob Creek Wildland Park and the Black Creek Heritage Rangeland.[3] These protected areas cover most, but not all, of the surface lands in the Whaleback region.

The Polaris well was proposed for lands neighbouring the newly created protected areas. Some hearing participants argued that the Board ought to deny the application because the gas well would impair the ecological value of the protected areas. Other participants, including several local residents, asked the Board to deny the application because gas exploration was simply an undesirable land use activity in the Whaleback region.[4]

The AEUB denied the Polaris application based upon inadequacies in Polaris' planning, public consultations, experience and financial resources. The Board stated that it "does not feel Polaris has the ability to execute a project of this type in a manner consistent with the public interest."[5] Essentially, the Board denied the application on technical grounds.[6]

The *Polaris Decision* is generally disappointing for what it failed to address. The Board did not offer any guidance as to whether energy exploration is a desirable land-use activity in ecologically significant areas of Alberta. Nevertheless, the Board's reliance on technical grounds to deny the application is not surprising given the Board's historical reluctance to address broad socio-ecological concerns intertwined with an individual energy project. In a 1986 well licence decision, for example, the Board expressly denied having the legal authority to address broader environmental or social concerns regarding the applied-for well licence.[7]

I argue that the Board has a legal obligation to judge the desirability of an individual energy project, such as the proposed Polaris well, on broad socio-ecological concerns. The AEUB's obligation in this regard comes, in part, from s. 3 of the *Energy Resources Conservation Act*:

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2 *Application for an Exploratory Well — Amoco Canada Petroleum Company Limited, Whaleback Ridge Area* (6 September 1994), ERCB Decision D94-8 [*Amoco Decision*].

3 See O.C. 318/2003, A. Gaz. 2003.I.1710 (*Provincial Parks Act*, R.S.A. 2000, c. P-35) and *Heritage Rangelands Designation Order*, O.C. 319/2003, A. Gaz. 2003.I.1712 (*Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, R.S.A. 2000, c. W-9), designating the Bob Creek Wildland Park and the Black Creek Heritage Rangeland.

4 *Polaris Applications No. 1276521 & 1276489*, CD ROM: Alberta Energy and Utilities Board (5 September 2003) [archived with author].

5 *Polaris Decision*, *supra* note 1 at 33.

6 *Ibid.* at 33-34.

7 *A Report on an Application by Shell Canada Limited to Drill a Critical Sour Gas Well in the Jutland (Castle River South) Area* (3 June 1986), ERCB Decision D86-2 [*Jutland Decision*].

> Where by any other enactment the Board is charged with the conduct of a hearing, inquiry or other investigation in respect of a proposed energy resource project, it shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation, give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.[8]

In contrast to the argument presented here, the Board has narrowly interpreted its obligations under *ERCA* s. 3, suggesting that this provision falls short of providing the Board with authority to address broad socio-ecological concerns associated with energy projects. My purpose in this article is to note some deficiencies with the Board's narrow interpretation and highlight that the Board's view has yet to be assessed by the Alberta Court of Appeal.[9]

II. A BRIEF HISTORY OF THE AEUB

The AEUB was formed in 1995 on the amalgamation of Alberta's Public Utilities Board and Energy Resources Conservation Board (ERCB).[10] The ERCB began as the 1932 Turner Valley Gas Conservation Board with a mandate to reduce the level of natural gas flaring in the Turner Valley oil field.[11] The Turner Valley Board was disbanded after legal challenges, immense opposition from industry and political unrest during the 1930s.[12] Alberta's interest in implementing resource conservation did not subside, however, and in 1938 the Alberta government created the Petroleum and Natural Gas Conservation Board with expanded powers to regulate the ever increasing production of oil and natural gas from the Turner Valley field.[13] By 1950, the oil and gas industry had begun its rise to prominence as Alberta's dominant economic sector and the Petroleum and Natural Gas Conservation Board was a key decision-maker, promoting oil and gas exploration and recovery while implementing resource conservation. In 1971, the Board became known as the ERCB, with expanded authority to regulate the exploration and development of any source of energy in Alberta. The ERCB and its predecessors had evolved from a bold attempt to implement resource conservation on a

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8 R.S.A. 2000, c. E-10, s. 3 [*ERCA*]. Section 3 was initially enacted as s. 2.1 in 1993.

9 My LL.M. thesis examines the Board's authority in *ERCA* s. 3 to address broad socio-ecological concerns associated with energy projects. The thesis critiques the Board's interpretation of this authority in well licence decisions along the eastern slopes of the Canadian Rocky Mountains, and the thesis uses the concept of ecological integrity to suggest how this authority should be interpreted and applied by the Board. The thesis includes an examination of Alberta Court of Appeal jurisprudence to assess whether the Board's narrow interpretation of *ERCA* s. 3 is a substantive jurisdictional error. See Shaun Fluker, *The Alberta Energy and Utilities Board: Ecological Integrity and the Law* (LL.M. Thesis, University of Calgary, 2003) [unpublished]. The limited scope of this article draws from the thesis, and interested readers should consult the thesis for additional analysis.

10 I am not concerned with the Public Utilities Board so my historical discussion focuses solely on the background of the Energy Resources Conservation Board. Throughout this article I refer to the ERCB and the AEUB interchangeably as the context dictates.

11 David H. Breen, *Alberta's Petroleum Industry and the Conservation Board* (Edmonton: The University of Alberta Press, 1993). Breen notes this was Alberta's first formal regulatory attempt to implement resource conservation in the infant oil and gas industry (*ibid.* at 79-94).

12 *Ibid.*

13 Resource conservation is commonly defined as ensuring maximum ultimate resource recovery with minimal waste (*ibid.* at xxvii-xxxi).

reluctant, relatively isolated industry in Turner Valley to a widely respected regulator of all energy resources and a key player in a dominant economic sector.[14]

The Board was, and remains, a creature of statute; currently the *Alberta Energy and Utilities Board Act*.[15] AEUB decision-making authority is governed in part by the purpose provisions in the umbrella *ERCA* and several resource-specific statutes such as the *Oil and Gas Conservation Act*.[16]

III. THE NEED TO ADDRESS BROAD SOCIO-ECOLOGICAL CONCERNS

The AEUB is increasingly asked to consider the broad social, economic and environmental implications of energy exploration in Alberta.[17] While strong arguments have been made against addressing broader concerns in an individual energy project review, there will be times where an individual energy project review can fill gaps in broader land use policies and/or initiate evolution at this broader level to accommodate changing socio-ecological values in a region.[18]

For example, the Board's 1994 *Amoco Decision* effectively reversed existing provincial land use policy in the Whaleback region. Prior to this decision, the provincial government had issued subsurface mineral rights to Amoco Canada for energy exploration in the Whaleback. The Board denied Amoco's well licence application, citing the need to preserve nature in the region.[19] Ultimately the provincial government created two protected areas in the Whaleback, effectively removing these areas from future subsurface mineral rights disposition. Had the Board approved Amoco's exploratory well in 1994, the Whaleback might be a producing gas field today. Instead, the Board's decision initiated an evolution in provincial land use policy to accommodate socio-ecological values that had been articulated during the well licence hearing. Accordingly, even if it lacks the ultimate authority to implement solutions to broad socio-ecological problems, the AEUB can address these problems by initiating a process towards those solutions.[20]

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14 The Board is currently responsible for administering a wide range of energy and utilities legislation in Alberta. See *e.g.* online: Alberta Energy and Utilities Board <www.eub.gov.ab.ca>.

15 R.S.A. 2000, c. A-17, s. 2 [*AEUB Act*].

16 R.S.A. 2000, c. O-6 [*OGCA*]. Additional resource-specific statutes include the *Coal Conservation Act*, R.S.A. 2000, c. C-17 and the *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7.

17 For example in Strathcona County, a densely populated region east of Edmonton, elected officials sought to meet with AEUB staff to address the County's concerns over a proposed application to drill several gas wells in the County. Their concerns included the absence of a policy that addresses issues particular to drilling wells in areas of high human populations (Humberto Bonizzoni, "Strathcona to meet with EUB officials" *This Week [Sherwood Park]* (14 February 2003) 13).

18 Steven Kennett & Monique Ross, *In Search of Public Land Law in Alberta* (Calgary: Canadian Institute of Resources Law, 1998) at 32-37; my LL.M. thesis argues this point in more detail. See Fluker, *supra* note 9. See also Michael Wenig, "Cumulative Effects: Oil, Gas, and Biodiversity" (2002) 27:2 *Law Now* 27. Wenig argues that the AEUB is capable of influencing the broader land use policy to seriously consider cumulative effects of oil and gas development in Alberta.

19 *Amoco Decision*, *supra* note 2 at 33-34. In its discussion of land use issues, the Board expressed its concerns for preserving ecological integrity in the Whaleback, describing the region as relatively undisturbed by humans.

20 Interestingly, the Board has expressly disagreed with the suggestion that its project decisions can be the initiator for change in broader land use decision-making. See *Applications for well licences — Moose Mountain Area Husky Oil Operations Ltd.* (11 March 1994), ERCB Decision D 94-2 [*Moose Mountain*

Implicitly or explicitly, however, the AEUB assumes that the desirability of an individual energy project can be assessed apart from these broader concerns. This assumption allows the Board to avoid an inclusive, integrated consideration of the socio-ecological effects intertwined with energy projects.

The Board's reluctance to address these broader concerns is also consistent with the resource ethic that guides it. The Board promotes resource conservation; the maximum recovery of energy resources with minimal waste. The Board regulates the supply of resources from an ecological system to a social system. This approach is consistent with the dominant western worldview that nature is simply a collection of resources available for humans to use in their quest for happiness.[21]

In the 1994 *Amoco Decision*, the Board denied project approval in order to protect nature. This decision reflected the introduction of a preservationist philosophy into western thought and, subsequently, the Board's decision-making process.[22] The need to preserve areas of nature apart from human influence is based on the view that humans are destined to destroy nature.[23] The preservation ethic is arguably the resource ethic in new clothing. Nature remains a collection of resources. According to this version, however, an ecological system is a more valuable resource than humans themselves and thus ought to be preserved from the influence of social systems.[24]

These dichotomous approaches, whereby the needs of humans and nature are understood as mutually exclusive and the human-nature relationship is a hierarchical one, avoids difficult questions concerning the desirability of energy projects in Alberta.[25] Should energy projects be located in or near densely populated areas of the province? Should regional health concerns, human or otherwise, prevent the Board from approving an individual project

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Decision].

21 Aldo Leopold critiques the morality of the resource ethic in his seminal essay the "Land Ethic." See Aldo Leopold, *A Sand County Almanac and sketches here and there* (New York: Oxford University Press, 1949) at 202. See also Carolyn Merchant, "Reinventing Eden: Western Culture as a Recovery Narrative" in William Cronon, ed., *Uncommon Ground: Rethinking the Human Place in Nature* (New York: W.W. Norton & Company, 1996) 132. Merchant conceptualizes the dominant western worldview as a male recovery narrative that begins with the fall from the Garden of Eden. Humans (males) are striving to recover from the fall using science and capitalism as tools to subdue the Earth and transform it into the Garden.

22 A recent example of a preservationist philosophy that argues nature ought to be preserved from human influence is Laura Westra, *An Environmental Proposal for Ethics: The Principle of Integrity* (Lanham, Md.: Rowman & Littlefield Publishers, 1994).

23 *Ibid.*

24 Bruce Morito, "Examining Ecosystem Integrity as a Primary Mode of Recognizing the Autonomy of Nature" (1999) 21 Environmental Ethics 59.

25 The problems presented by the human/nature dichotomy are thoroughly explored in *Uncommon Ground: Rethinking the Human Place in Nature*, *supra* note 21. Legal scholars have also devoted some attention to the troublesome aspects of this dichotomy. See Eric. T. Freyfogle, "The Ethical Strands of Environmental Law" (1994) U. Ill. L. Rev. 819 at 833: "The dominant moral view today is largely dualistic — humans are subjects, nature is an object — and the implications of this duality are as plain as they are destructive." See also Carol M. Rose, "Given-ness and Gift: Property and the Quest for Environmental Ethics" (1994) 24 Environmental Law 1. Rose observes that dominant western ethics view nature either as ethically neutral and "up-for-grabs" or as a gift to be preserved from use altogether. Rose argues that we need normative guidance in the middle of these two extremes, a norm of "use with restraint" (*ibid.* at 7-14).

decision? When they are put to the Board, these questions require the AEUB to consider integrated socio-ecological concerns rather than a partial consideration that implicitly selects economic development (resource ethic) over environmental preservation (preservation ethic) or vice versa on a case-by-case basis.

Human social systems rely upon the energy and components of their surrounding ecological systems for sustenance. In the process of sustaining themselves, social systems alter the structure and processes of ecological systems by, for example, developing new energy projects. An altered ecological system, in turn, influences a social system in desirable or undesirable ways. Section 3 of the *ERCA* explicitly requires the Board to consider the integrated social, economic and environmental effects of an individual energy project as part of its decision-making process. The section is an acknowledgement that the Board's decision to issue or deny regulatory approval is, in essence, a choice between broader views concerning desirable socio-ecological states and an opportunity to select the desirable from the undesirable socio-ecological relationships in a region.

Prior to 1993 most commentators and the courts agreed that the Board's jurisdiction to address the broad socio-ecological effects of energy projects was limited. While commentators generally agree that the 1993 enactment of *ERCA* s. 2.1 (now s. 3) enhanced the Board's jurisdiction to consider socio-ecological concerns, the Board has stated that the 1993 enactment simply confirmed the *status quo*. The two Alberta Court of Appeal decisions that have considered the Board's *ERCA* s. 3 obligations contribute little to this debate.

IV. PRIOR TO 1993: THE RESOURCE ETHIC

In the late 1970s the ERCB approved an oilsands project in northern Alberta. During the project review process, local First Nations communities requested the ERCB to condition its approval on the implementation of an affirmative action program. The federal government endorsed the request and a subsequent ERCB project report to the Alberta government was also sympathetic to the program. Nevertheless, at the hearing the ERCB held that it did not have jurisdiction to attach the condition to its project approval.

Ultimately the Supreme Court of Canada held that the ERCB was correct. Referring to the purpose provisions of the then governing Alberta legislation, the Court unanimously found the ERCB's jurisdiction was

> limited to the regulation and control of the development of energy resources and energy in the Province of Alberta. The powers with which the Board is endowed are concerned with the natural resources of the area rather than with the social welfare of its inhabitants, and it would, in my view, require express language to extend the statutory authority so vested in the Board so as to include a program designed to lessen the age-old disadvantages which have plagued the native people since their first contact with civilization as it is known to the great majority of Albertans.[26]

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[26] *Athabasca Tribal Council v. Amoco Canada Petroleum Co.*, [1981] 1 S.C.R. 699 at 708, aff'g (1980), 22 A.R. 541 (C.A.) [*Athabasca Tribal Council*]. The ERCB governing legislation at this time was identical, in all material respects, to the current content of *ERCA*, *supra* note 8, s. 2 and *OGCA*, *supra* note 16, s. 4, but did not include the subsequently enacted *ERCA*, *ibid.*, s. 2.1.

In subsequent years, several commentators have relied on *Athabasca Tribal Council* as limiting the Board's jurisdiction to consider the social or environmental impacts from energy projects.[27] P.S. Elder noted that the Supreme Court of Canada took a narrower view than did the Alberta Court of Appeal in its interpretation of the ERCB's jurisdiction.[28] The Court of Appeal distinguished between project-related social impacts and pre-existing social problems, holding that the ERCB had jurisdiction to address the former:

> In considering the extent of the Board's jurisdiction over social problems, I distinguish between those problems which might be expected to be created by the project and those which exist without it. The ERCB has attempted in its report and recommendations to anticipate those problems which would be created by the project and to propose remedies and solutions for them. In doing so, it was in my opinion acting within the jurisdiction given it by the *Energy Resources Conservation Act* and the *Oil and Gas Conservation Act*. It would, however, in my opinion require clear and express language to confer on the Board a jurisdiction to solve the pre-existing social problems of Alberta in the course of approving or disapproving such a project.[29]

Elder argued that the Supreme Court of Canada, while endorsing the Court of Appeal result, rejected any distinction between project-related and pre-existing social issues: "The narrower view would imply that the ERCB enjoys little, if any, mandate to make approval conditions regarding social impacts and *a fortiori* cannot require or hear evidence for these purposes."[30] *Athabasca Tribal Council* has also been relied on for the proposition that "the Board cannot deny a well licence application purely for environmental reasons.... This is a policy issue best left to elected representatives."[31]

The Supreme Court of Canada, along with most commentators prior to 1993, endorsed the ERCB's resource ethic and its view of nature as simply a collection of resources available for humans to use in their quest for happiness.

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27 See *e.g.* Michael J. Bruni & Keith F. Miller, "Practice and Procedure before the Energy Resources Conservation Board" (1982) 20 Alta. L. Rev. 79 at 83-84; Peter McLaws & Susan Blackman, "The Environmental Mandate of the ERCB in Well Licence Applications" (1989) 28 Resources 1 at 2-3; Francis M. Saville & Richard A. Neufeld, "The Energy Resources Conservation Board of Alberta and Environmental Protection" (1989) 2 Can. J. Admin. L. & Prac. 287 at n. 8; Francis M. Saville & Richard A. Neufeld, "Project Approvals under Proposed Alberta Environmental Legislation" (1991) 4 Can. J. Admin. L. & Prac. 275 at 289-90.

28 P.S. Elder, "Environmental Impact Assessment in Alberta" (1985) 23 Alta. L. Rev. 286 at 303-305.

29 *Athabasca Tribal Council v. Amoco Canada Petroleum Company Ltd.* (1980), 22 A.R. 541 at para. 20 (C.A.), aff'd [1981] 1 S.C.R. 699. The Court of Appeal was divided. Morrow J.A., in dissent, held that the appellant's concerns could be addressed by the ERCB:

> [J]ust as the Board must work from the environment as it finds it now, so must it take as part of this environment, as it were, the social conditions. Environment surely does not just mean trees, birds and animals. I should hope that in the semi-virginal area in which the proposed development under consideration here the nature of the existing settlements, social structure of the residents, and their state of economic and social development is both apparent and has to be of concern to anybody, as in this case, the Board, called upon to recommend in 'the public interest' (*ibid.* at para. 43).

30 Elder, *supra* note 28 at 304.

31 McLaws & Blackman, *supra* note 27 at 3. Saville and Neufeld offered a contrasting view: "[I]t is clear from the purpose provisions of the ERCA that protection of the environment in the course of energy development is one of the objectives which the legislature has determined ought to be pursued by the Board" (Saville & Neufeld, "The Energy Resources Conservation Board of Alberta and Environmental Protection," *supra* note 27 at 289).

V. THE 1993 ENACTMENT OF *ERCA* SECTION 2.1 (NOW SECTION 3)

In the early 1990s, the Province of Alberta began a review of its environmental legislation.[32] One aspect of this renewal process was the 1991 release of an environmental legislative review report.[33] The mandate of the Environmental Legislation Review Panel was to obtain, consider and report to the provincial Minister of the Environment on public opinion concerning proposed omnibus environmental legislation.[34] Many public comments suggested that the ERCB mandate ought to include jurisdiction to reject project proposals on environmental grounds.[35] The Panel, however, felt "that the ERCB inevitably must give priority to energy development, given its legislated mandates."[36] Asking a board charged with energy resource development to reject an energy project on environmental grounds was seen as asking too much.[37] Nevertheless, the Panel recommended the ERCB's governing legislation include a provision analogous to that governing Alberta's Natural Resources Conservation Board (NRCB),[38] a provision requiring the Board to consider the economic, social and environmental effects of an energy project.[39] Consequently, s. 2.1 of the *ERCA* was enacted in 1993.[40]

Some members of the Environmental Legislation Review Panel argued that *ERCA* s. 2.1 enhanced the ERCB's environmental jurisdiction.[41] Commentators have subsequently argued

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32 The impetus for change included the legal entrenchment of environmental assessment at the federal level. *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1989] 26 F.T.R. 245 (T.D.), aff'd [1990] 2 W.W.R. 69 (F.C.A.), is the seminal judicial ruling that, to the surprise of the federal government, declared federal environmental assessment guidelines to be mandatory and legally enforceable. Subsequently in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, the Supreme Court of Canada held these guidelines to be *intra vires* Parliament.

33 Alberta, *Report of the Environmental Legislation Review Panel* (Edmonton: Government of Alberta, 1991).

34 The proposed legislation is now enacted as the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

35 *Report of the Environmental Legislation Review Panel*, *supra* note 33 at 31.

36 *Ibid.* at 36.

37 Brian O'Ferrall, "The E.R.C.B. and the N.R.C.B.: Are they equivalent?" (1992) 7:2 Environmental Law Centre News Brief 1.

38 The NRCB provides an overview of itself on its internet site, online: NRCB <www.nrcb.gov.ab.ca>. The NRCB reviews non-energy resource projects in Alberta, such as forest, recreation, mining and water management projects. NRCB board members are appointed by provincial cabinet, and its decisions must be approved by provincial cabinet.

39 *Report of the Environmental Legislation Review Panel*, *supra* note 33 at 36. Alternatively, the panel recommended that energy projects, otherwise subject to ERCB approval and requiring an environmental assessment, be required to obtain NRCB approval (*ibid.*). Wendy Francis, a panel member, noted that "[t]he Panel recommended that the Board's legislation be amended to give it powers analogous to those wielded by the Natural Resources Conservation Board" (Wendy Francis, *Sustainable Development and Environmental Assessment in Alberta: Not Heaven in a Single Bound* (LL.M. Thesis, University of Calgary, 1994) at 115 [footnote omitted] [unpublished]).

40 *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3, s. 246(5). Section 246(5) states:

> *The Energy Resources Conservation Act is amended ... by adding the following after section 2:*
> 2.1 Where by any other enactment the Board is charged with the conduct of a hearing, inquiry or other investigation in respect of a proposed energy resource project, it shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation, give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment [emphasis in original].

41 O'Ferrall, *supra* note 37 at 3; Francis, *supra* note 39 at 115.

that *ERCA* s. 2.1 has broadened the ERCB's jurisdiction to consider cumulative socio-ecological effects and implement sustainable development.[42]

However, not everyone agrees with these views. In 1992 Phil Prince, then Vice-Chairman of the ERCB, argued that the introduction of *ERCA* s. 2.1 was intended to communicate more effectively the already existing ERCB role in protecting the environment.[43] Prince suggested that the potential for conflict between development and the environment was a primary justification for the existence of the ERCB.[44] Section 2.1 of the *ERCA* simply confirmed that the ERCB must adjudicate the conflict by weighing the benefits of energy development against its social and environmental costs: "When, after all possible mitigation, the costs of using the environment still exceed the benefits, the activity should be precluded."[45] According to Prince, *ERCA* s. 2.1 simply confirmed the *status quo* concerning the Board's mandate: the obligation to govern the appropriateness of an energy project with a cost/benefit analysis.

VI. THE AEUB INTERPRETATION OF *ERCA* SECTION 3

In a March 1994 well licence decision, the Board itself observed that *ERCA* s. 2.1 (now s. 3) did not fundamentally alter its mandate.[46] In its September 1994 *Amoco Decision*, the Board confirmed that addressing the socio-ecological effects of a gas well requires the Board to ask whether the potential "benefits" to be derived from a successful well exceed the "costs" measured in social or ecological terms:

> Ultimately, each applicant is responsible for identifying issues and addressing those issues to the degree to which it believes appropriate. The Board is then charged with measuring the application against the broad test of "public interest", including environmental, social, and economic costs and benefits.
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> ...
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> While the Board accepts Amoco's right to explore for and develop hydrocarbons in the Whaleback and therefore its need for the well, the Board does not believe that either the acquisition of mineral rights or a surface lease agreement in any way automatically confers the right of an applicant to a well licence. The Board must balance Amoco's need for the well against the potential economic, social, and environmental costs and benefits accruing to the public from the exploration well.... The Board must be convinced that certain safety, social, and environmental impacts can be or will be satisfactorily mitigated before the well would be approved.
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> ...

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42 See *e.g.* Steven Kennett, "The ERCB's Whaleback Decision: All Clear on the Eastern Slopes?" (1994) 48 Resources 1; Steven Kennett, "The Castle — A Litmus Test for Alberta's 'Commitment' to Sustainable Resource and Environmental Management" (2003) 83/84 Resources 1 at 4; George L. Hegmann & G.A. Yarranton, *Cumulative Effects and the Energy Resources Conservation Board's Review Process* (Calgary: Macleod Institute for Environmental Analysis, 1995) at 4; Neil J. Brennan, "Private Rights and Public Concerns: The 'Public Interest' in Alberta's Environmental Management Regime" (1997) 7 J. Envtl. L. & Prac. 243 at 251; Wenig, *supra* note 18 at 29.

43 Phil Prince, "The E.R.C.B. and the N.R.C.B.: A response to Mr. O'Ferrall" (1992) 7:3 Environmental Law Centre News Brief 3.

44 *Ibid.* at 4.

45 *Ibid.* at 5. Prince noted that some "costs" are difficult to quantify, therefore subjective assessments are sometimes required (*ibid.* at n. 4).

46 *Moose Mountain Decision supra* note 20 at 12 .

> In the Board's view, the most significant issue is whether the benefit of the information which would be supplied by the exploratory well outweighs the environmental, social, and economic costs associated with such a development within the Whaleback.[47]

The AEUB views s. 3 of the *ERCA* as confirmation that it must ask whether the economic benefits of an energy project exceed its immediate social and environmental costs. Where the economic benefits of the project exceed its immediate social or environmental costs, the AEUB approves the project. Where the costs exceed the benefits, project approval is denied unless the costs can be sufficiently mitigated with conditions or otherwise.

Utilitarian cost/benefit analysis is popular with public decision-makers, in part, because it purports to produce unambiguous decisions by weighing the good consequences of an action against the bad.[48] However, benefits and costs are typically valued monetarily and non-measurable or qualitative consequences are discounted or excluded altogether in these calculations.[49] In addition, as Mark Sagoff explains:

> This approach denies the educative function of political discussion.... The reasons people give for their views ... are not to be counted; what counts is how much individuals will pay to satisfy their wants. Those willing to pay the most, for all intents and purposes, have the right view; theirs is the better judgment, the deeper insight, and the more informed opinion.[50]

Critics of cost/benefit analysis agree that it is a useful decision-making tool, particularly when efficiency is the goal. They disagree, however, that its conclusions ought to be the decisive factor in decision-making.[51]

The Board relies exclusively on a cost/benefit analysis to assess the desirability of an energy project's socio-ecological impact. As such, the Board relies on unsubstantiated and

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47 *Amoco Decision*, *supra* note 2 at 10, 12-13, 34. The Board had relied on the cost/benefit approach prior to 1993. For example, see the *Jutland Decision*, *supra* note 7, and the *Shell Canada Limited Application for a Well Licence, Waterton Field* (22 December 1988), ERCB Decision D88-16 [*Whitney Creek Decision*]. For additional statements from the Board confirming its cost/benefit application of *ERCA* s. 3 see *Application to construct and operate two sour oil effluent pipelines and associated facilities — Husky Oil Operations Ltd., Moose Field* (9 April 1998), ERCB Decision 97-17 (Addendum) at 6-8 and *Application for a well licence — Shell Canada Limited, Ferrier Field* (20 March 2001), AEUB Decision 2001-09 at 29, 34, online: AEUB <www.eub.gov.ab.ca/bbs/documents/decisions/2001/2001-09.pdf> [*Ferrier Decision*]. For a recent cost/benefit interpretation by the Board see the *Polaris Decision*, *supra* note 1 at 3, 5, 33.

48 Bruce Morito, *Thinking Ecologically: Environmental Thought, Values and Policy* (Black Point, N.S.: Fernwood Publishing, 2002) at 105-106.

49 *Ibid.* at 45-51. Morito notes that the preference for quantitative data developed at a time when mechanistic cause-and-effect was replacing metaphysical explanations in the pursuit of knowledge.

50 Mark Sagoff, *The Economy of the Earth: Philosophy, Law, and the Environment* (Cambridge: Cambridge University Press, 1988) at 41-42.

51 There is a vast literature concerning the debate over the merits of cost/benefit analysis as a decision-making tool. I only scrape the surface of this debate. For an introduction to the area see Donald VanDe Veer & Christine Pierce, eds., *The Environmental Ethics and Policy Book: Philosophy, Ecology, Economics*, 3d ed. (Belmont, CA: Wadsworth, 2003) at 336-50. This introductory source provides a concise summary of arguments for and against the use of cost/benefit analysis as a decision-making tool.

unstated assumptions in making its energy project decisions.[52] For example, the Board assumes that measurable quantities form the only basis of knowledge.[53] This assumption enables the Board to exclude or discount non-measurable socio-ecological information without justification; information that typically reveals broader views on the desirability of an energy project's socio-ecological impacts but which, at the same time, would cloud the Board's seemingly unambiguous cost/benefit analysis.

VII. JUDICIAL CONSIDERATION OF *ERCA* SECTION 3

The Alberta Court of Appeal has considered *ERCA* s. 3 (2.1 as it was then) on two occasions and referred to the section in several leave to appeal applications.[54] In its two decisions, however, the Court failed to provide any insight towards how *ERCA* s. 3 should be interpreted.

In *Rocky Mountain Ecosystem Coalition v. Alberta (Energy and Utilities Board)*[55] leave to appeal was granted on two grounds, namely: (a) did ERCA s. 2.1 have any impact on the general policies and procedures of the Board in fulfilling its functions in relation to applications for gas removal permits; and (b) regardless of (a), has the Board, in deciding the matter at hand, complied with its *ERCA* s. 2.1 mandate? The Court held that *ERCA* s. 2.1 did not alter the discretion of the AEUB to issue or deny gas export permits, but the Court expressly declined to affirm the AEUB's general interpretation of *ERCA* s. 2.1:

> Although the Board does not expressly state that the amending s. 2.1 imposes no further obligation on the Board to consider the social, economic and environmental effect, it is clear that it views the amendments as confirming what the Board has in fact been considering at the various stages requiring its approval.
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> ...
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> We affirm the Board's decision that the export permit stage is an inappropriate point to consider anew the social, economic and environmental impact beyond the Board's existing policies and procedures. It is thus not necessary and we do not decide that the amendments require the Board to expand or alter its existing policies and approval procedures to comply with the amendments. We do note, however, the explicit mandate in 2.1 that the Board: "*shall, in addition* to any other matters it may or must consider ... [determine] whether the

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52 My LL.M. thesis argues this point in more detail. See Fluker, *supra* note 9.

53 See *Bonterra Energy Corp. Application for a Well Licence, Pembina Area* (24 January 2003), AEUB Decision 2003-008, online: AEUB <www.eub.gov.ab.ca/bbs/documents/decisions/2003/2003-008.pdf>. In this decision, the Board discounted observational evidence on wind direction because it was not based on any science or technical measurements. In the *Jutland Decision*, the Board discounted qualitative evidence provided by local commercial operators opposing the gas wells (*Jutland Decision, supra* note 7 at 22). The Board similarly discounted non-quantitative evidence in *Whitney Creek Decision, supra* note 47 at 21-22. The Board has consistently lamented the absence of quantitative data to measure socio-ecological impacts from energy projects. For another example see *Ferrier Decision, supra* note 47 at 27-29.

54 The Court has referred to *ERCA* s. 3 in several leave applications: *Calgary North H2S Action Committee v. Alberta (Energy & Utilities Board)*, 1999 ABCA 323; *ConCerv v. Alberta (Energy & Utilities Board)*, 2001 ABCA 217; *Pembina Institute for Appropriate Development v. Alberta (Energy & Utilities Board)*, 2002 ABCA 184. Section 41 of the *ERCA* states that leave to appeal a Board decision must be obtained from the court before the appeal will be heard. For a recent statement from the court concerning the test for granting leave, see *Prince Resource Corp. v. Alberta (Energy and Utilities Board)*, 2003 ABCA 243.

55 (1996), 178 A.R. 106 (C.A.) [*RMEC*].

> project is in the public interest, having regard to the social and economic effects of the project." It would appear to be arguable that the Board can continue with its existing policies and procedures regarding the earlier stages of its approval process without some express heed to the mandatory words of the amendments. However, that issue is not before us. Apart from our observation, we do not decide that matter.[56]

The Court's refusal to address the Board's general *ERCA* s. 2.1 mandate is astonishing in light of the fact that leave had been granted precisely on this question.[57]

The second case, *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy and Utilities Board)*,[58] involved the review of an AEUB approval allowing an increase in the processing capability of a gas facility.[59] In its decision, the AEUB acknowledged that the increased processing would result in an increase of sulphur dioxide emissions.[60] It also acknowledged community concerns regarding the potential health effects on animals resulting from general oil and gas operations in the area.[61] Nevertheless, the AEUB refused to hear evidence during the hearing regarding the impact of these increased emissions on local cattle. The AEUB indicated that it would rely on the findings of a broader, concurrent Alberta Cattle Commission study, not yet finalized at the time of the hearing. The Coalition challenged this refusal to hear site-specific evidence and deferral to the broader study.

The appellants contended that the AEUB, by refusing to hear the site-specific evidence, failed to meet its *ERCA* s. 2.1 obligations. The Court disagreed, stating that "the decision of the Board to limit the evidence it will hear does not indicate that it has or will fail to comply with the requirements of s. 2.1."[62] The Court offered little substantive analysis of what *ERCA* s. 2.1 allows or requires the AEUB to consider, limiting its discussion to three points. First, the Court noted that social, environmental and economic effects were considered by the Board as part of its facility construction review several years earlier. Second, the Court noted that the current proposal would be subject to examination by the "environmental authorities."[63] Finally, the Court held that the AEUB did not err by delaying a consideration of the emissions issue until after the completion of the broader study.

However, the Court was not unanimous. Justice Conrad, in dissent, noted that *ERCA* s. 2.1 required the AEUB to consider the social and environmental effects of projects in its deliberations. This legislative direction, together with the AEUB's acknowledgement of community concerns, led her to conclude that the emissions evidence was relevant in this

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56 *Ibid.* at paras. 7, 10 [emphasis in original]. The emphasis in the text suggests that the Court intended to say the Board "cannot" continue with its existing policies. Otherwise, the Court appears to contradict itself in this paragraph of the judgment.

57 Nigel Bankes, "Environmental Security and Gas Exports" (1996) 53 Resources 1 at 3.

58 (1996), 187 A.R. 205 (C.A.) [*Caroline Shell Plant*].

59 *Shell Canada Limited — Application for increased throughput sour gas plant — Caroline Field* (9 April 1997), AEUB Decision 97-5.

60 *Ibid.* at 6.

61 *Pre-hearing meeting Shell Canada Limited* (27 June 1996), AEUB Decision 97-5.

62 *Caroline Shell Plant*, *supra* note 58 at para. 17.

63 *Ibid.* at para. 20. This observation implies that the Court did not view the AEUB as an environmental authority, consistent with the 1981 Supreme Court of Canada *Athabasca Tribal Council* decision, *supra* note 26.

case. Unlike the majority decision, Conrad J.A. provided some substantive analysis of *ERCA* s. 2.1:

> Section 2.1 requires that the Board inquire into 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. The effects of the incremental increase on cattle would be relevant to that statutory obligation, just as it is necessary to consider the effects of the incremental increase on human health.
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> ...
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> Ranchers have filed complaints saying that the existing level of emissions are showing visible signs of affecting cattle. What could be more relevant? To hold that actual observations of cattle at various times, in various weather conditions, at various rates of emissions are not relevant would be patently unreasonable and an error.
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> ...
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> The Board has declined jurisdiction by refusing to recognize the statutory duty imposed on it by s. 2.1 of the *E.R.C. Act* to hear evidence of the impact on cattle before making its decision. It cannot delegate its duty to deal with that problem to another body, or at a later date.[64]

The failure by the majority judgment in *Caroline Shell Plant* to offer any insight into how s. 3 of the *ERCA* should be applied is disappointing. In its two decisions, the Court of Appeal has either avoided the issue altogether or it has simply referred to the section without analysis. Over a decade has passed since the enactment of *ERCA* s. 3. We still await substantive judicial assessment on the appropriateness of the AEUB's limited treatment of the complexities of intertwined economic, social and environmental values in energy development, and the appropriateness of the Board's view that the 1993 enactment of *ERCA* s. 3 simply confirmed the *status quo*.

VIII. CONCLUSION

The AEUB, the primary energy project decision-maker in the province, should play a crucial role in Alberta's social fabric by identifying socio-ecological possibilities in the province and making socio-ecological choices with its energy project decisions. The legal structure of Alberta's public land use decision-making framework channels debate over broad socio-ecological values into the Board's project review process. The language of *ERCA* s. 3, a key provision in the Board's governing legislation, acknowledges this important AEUB decision-making role, requiring the Board to consider the social, economic and environmental effects of an energy project in its decision.

In the *Polaris Decision*, the Board once again confirmed its view that *ERCA* s. 3 requires that it ask whether the benefits of the individual project exceed its immediate costs. With this narrow interpretation of *ERCA* s. 3, the Board avoided making a judgment as to the desirability of energy exploration in the Whaleback region. While the Board was presented with evidence from which to make a judgment concerning the broader implications of energy

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[64] *Caroline Shell Plant*, *supra* note 58 at paras. 43, 47-48.

projects in the region,[65] the Board chose not to do so. The Board believes that the desirability of an individual energy project can be assessed apart from broad socio-ecological concerns.

Consistent with this, the Board maintains that the 1993 enactment of *ERCA* s. 3 simply confirmed the *status quo*. This view is particularly troublesome in light of the shortcomings of its narrow cost/benefit approach to considering the social, economic and environmental effects of an energy project. The Alberta Court of Appeal, as the reviewing body over AEUB decisions, has failed on two occasions to provide any insight as to how *ERCA* s. 3 should be interpreted. There is a glaring absence of judicial analysis explaining why it is sufficient for the AEUB to interpret its *ERCA* s. 3 mandate solely as a cost/benefit calculation; An interpretation that discounts non-measurable socio-ecological information without justification and adheres to an overly simplistic view that the human nature relationship can be described primarily as an allocation of economic benefits and ecological costs. The Board's current approach is, at best, an incomplete attempt to meet its *ERCA* s. 3 obligation.

[65] *Polaris Applications No. 1276521 & 1276489*, *supra* note 4.