THE GROWTH OF PUBLIC PARTICIPATION IN DECISIONS OF THE ENERGY RESOURCES CONSERVATION BOARD

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This paper addresses the issue of public participation in one of Alberta's most important administrative tribunals, the Energy Resources Conservation Board (ERCB). The ERCB makes significant decisions regarding the exploration for, and development of, natural resources in Alberta. In the past twenty-five years the public has taken an increasing interest in the types of issues which face the ERCB. The following essay discusses the legislative scheme which permits and encourages public participation in these decisions. It also addresses the increase in public participation, and focuses on two specific events: the Crown of the Continent Project in the Waterton Lakes area of Alberta and the Caroline/Beaverhill Lake Gas Development Applications.

*Le présent article se penche sur la question de la participation publique à l'un des tribunaux administratifs les plus importants de la province, l'Energy Resources Conservation Board (ERCB). L'ERCB prend des décisions importantes en matière d'exploration et d'exploitation des ressources naturelles en Alberta. Au cours des 25 dernières années, le public a manifesté un intérêt grandissant envers le type de questions dont traite l'ERCB. L'auteur examine le texte législatif qui permet et encourage la participation du public à la prise de décisions. Il examine l'augmentation de cette participation à la lumière de deux projets particuliers: celui de «*Crown of the Continent*», dans la région albertaine des lacs de Waterton, et celui des «*Gas Development Applications*» dans le secteur de Caroline-Beaver Lake.*

TABLE OF CONTENTS

I. INTRODUCTION

In the past twenty-five years there has been a dramatic increase in the participation of the public in decisions regarding the exploration for, and development of, natural resources in Alberta. Those decisions are made by the Energy Resources Conservation Board ("ERCB" or the "Board"). The first part of this paper will present a brief history of the ERCB. This will be followed by a description of those provisions of the legislative scheme governing the ERCB which encourage public participation. The third part of the paper will describe the increase in public participation in the past twenty-five years and will focus on two situations in which public participation has, in the author's view, contributed significantly to resource development in Alberta, albeit in two completely

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different ways. The first of these involves three decisions of the ERCB in the 1980s which permitted drilling for natural gas in the Pincher Creek/Waterton Park region and which were the impetus for the current Crown of the Continent project. This project, discussed in greater detail later in this essay, attempts to coordinate the concerns of environmentalists, resource developers and local residents with respect to the future development of a particular area of southwestern Alberta. The second example is the recent decision in the Caroline/Beaverhill Lake Gas Development Applications which involved the competing applications of Shell Canada Limited (Shell) and Husky Oil Operations Ltd. (Husky) to process gas from a large reservoir near Caroline, Alberta. The concluding section will offer some comments regarding the effectiveness of public input into decisions affecting resource development, including a brief discussion of the ERCB's negotiation process and some recommendations for future approaches to conflict resolution.

As will be seen, the interest of the public in the decisions of the ERCB is driven primarily by environmental concerns. This paper, however, will not include any detailed examination of the jurisdiction of the ERCB to consider environmental issues[1] or of the interplay between the ERCB and Alberta Environment.[2]

II. THE HISTORY OF THE ERCB

Even prior to the *Natural Resources Transfer Agreement*,[3] which transferred the ownership of natural resources from the federal Crown to Alberta in 1930, there existed a concern regarding the orderly development of these resources. As early as 1924, with the first discovery of natural gas at Turner Valley, large amounts of gas were being wasted. In 1932, the province enacted the *Turner Valley Gas Conservation Act*.[4] The Turner Valley Gas Conservation Board, the first predecessor of the ERCB, was charged with the administration of this *Act*. The principles upon which the Board was founded were threefold: to encourage development of these resources, to protect the public interest and to ensure that the resources were not wasted. Former Premier Ernest Manning, who was involved in setting up the first Turner Valley Gas Conservation Board, remarked in 1987 that the principles upon which the Board was founded are just as valid and useful today, and for the foreseeable future.[5]

With the discovery of oil at Turner Valley in 1936, the *Turner Valley Gas Conservation Act* was replaced with the *Oil and Gas Conservation Act*[6] and a new board

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1 Some discussion of this issue is found below in the context of Shell's applications to drill sour gas wells in the Crown of the Continent area. See also S. Blackman & P. McLaws, "The Environmental Mandate of the ERCB in Well Licence Applications" (1989) 28 Resources 1 (Canadian Institute of Resources Law).

2 See F.M. Saville & R.A. Neufeld, "The Energy Resources Conservation Board of Alberta and Environmental Protection" (1988-89) 2 Can. J. of Admin. L. & Prac. 287.

3 *Alberta Natural Resources Act*, S.C. 1930, c. 3 and c. 21.

4 S.A. 1932, c. 6.

5 Energy Alberta, *Energy Resources Conservation Board Review of Alberta Energy Resources in 1987* (Calgary: ERCB, 1987) at 8.

6 S.A. 1938, c. 15.

constituted under the name the Petroleum and Natural Gas Conservation Board. The re-enactment of the *Oil and Gas Conservation Act* in 1957,[7] resulted in the Board being renamed the Oil and Gas Conservation Board. Until 1971, the Board was concerned principally with the orderly exploration for and production of oil and gas in Alberta. Accordingly, it addressed primarily the interests of competing resource developers and of land owners upon whose land a developer proposed to explore for or produce oil and gas. Relatively limited provision was made for the involvement of other interested parties.[8]

In 1971, the Board was reconstituted as the ERCB. The new *Energy Resources Conservation Act*[9] expanded the Board's jurisdiction to all energy resources in Alberta.[10] Of further significance in the context of this essay was the introduction of s. 29(2), discussed below, which expanded the opportunity for the public to participate in the ERCB process.

III. LEGISLATIVE SCHEME

The ERCB is constituted pursuant to the *Energy Resources Conservation Act* ("*ERCA*").[11] This *Act* provides the general powers of and procedures to be followed by the Board. The *Oil and Gas Conservation Act* ("*OGCA*")[12] is one of the statutes administered by the ERCB and contains the statutory framework for the exploration for and production of oil and gas in Alberta. One need only look at the purpose sections of these two statutes to find a basis for public input into the ERCB decision making process. For example, pursuant to the *ERCA*, the ERCB is empowered to effect the conservation of and to prevent the waste of the energy resources of Alberta[13] and to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of the energy resources of Alberta.[14] These goals are echoed in the *OGCA* which explicitly states as one of its purposes the provision of economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta.[15]

The involvement of the public is encouraged by s. 29(2) of the *ERCA* which provides:

> Notwithstanding subsection(1), if it appears to the Board that its decision on an application may directly and adversely affect the rights of any person, the Board shall give the person

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7 S.A. 1957, c. 63.

8 *Ibid.* s. 106 which provided for notice to be given in "contentious matters" (not defined) and s. 113 which provided for notice to be given at the Board's discretion in other matters.

9 S.A. 1971, c. 30.

10 The Board's jurisdiction was extended to coal and hydro-electricity. The Board currently administers 7 statutes: *Oil and Gas Conservation Act*, R.S.A. 1980, c. O-5; *Gas Resources Preservation Act*, S.A. 1984, c. G-3.1; *Oil Sands Conservation Act*, S.A. 1983, c. O-5.5; *Turner Valley Unit Operations Act*, R.S.A. 1980, c. T-12; *Pipeline Act*, R.S.A. 1980, c. P-8; *Coal Conservation Act*, R.S.A. 1980, c. C-14; *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13.

11 R.S.A. 1980, c. E-11.

12 R.S.A. 1980, c. O-5.

13 *Supra* note 11, s. 2(b).

14 *Ibid.* s. 2(c).

15 *Supra* note 12, s. 4(c).

(a) notice of the application,
(b) a reasonable opportunity of learning the facts bearing on the application and presented to the Board by the applicant and other parties to the application,
(c) a reasonable opportunity to furnish evidence relevant to the application or in contradiction or explanation of the facts or allegations in the application,
(d) if the person will not have a fair opportunity to contradict or explain the facts or allegations in the application without cross-examination of the person presenting the application, an opportunity of cross-examination in the presence of the Board or its examiners, and
(e) an adequate opportunity of making representations by way of argument to the Board or its examiners.

In addition, the ERCB Rules of Practice devote specific rules to the submissions of interveners.[16] In general, the criteria for standing to intervene are much broader than the criteria for local interveners' costs discussed below.[17] If an applicant is concerned about the length and resulting costs of permitting too many interventions, a wiser course might be to ask the Board to impose terms to restrict the ambit of an intervener's role.[18]

In 1978, the *ERCA* was amended to introduce an important provision into the legislative scheme, local interveners' costs.[19] These are costs paid by the applicant to a "local intervener", regardless of the outcome of the application. As the Board has no inherent jurisdiction to award costs, it is important that an intervener qualify as a "local intervener" pursuant to s. 31 of the *ERCA* in order to recover its costs. Local intervener is defined in s. 31 as:

a person or a group or association of persons who, in the opinion of the Board,
(a) has an interest in, or
(b) is in actual occupation of or is entitled to occupy
land that is or may be directly and adversely affected by a decision of the Board, in or as a result of a proceeding before it, but unless authorized by the Board, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.

Due to the Board's restrictive view of s. 31, discussed below, most public interest groups will not be indemnified for the considerable costs which can arise in an intervention. While there is no requirement that interveners have legal representation before the ERCB, the costs associated with presenting expert evidence of the environmental impact of a proposed resource facility are significant.

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16 Alta. Reg. 149/71, as am. by Alta Reg. 60/83, ss. 12-16.

17 *Petro-Canada Inc. Application for a Sour Gas Pipeline* (31 October 1983), No. D 83-25 (ERCB).

18 *E.g., Gulf Canada Resources Inc. Well Licence Application* (8 June 1982), No. D 82-23 (ERCB) where the Canadian Wildlife Federation was permitted to intervene in an application involving public lands. Its intervention was restricted to cross-examination and final argument.

19 *Energy Resources Conservation Amendment Act*, S.A. 1978, c. 57, s. 30.1.

In one of its early decisions interpreting s. 31, the ERCB denied the argument that "interest in land" means interested in or concerned with the land.[20] Rather, it adopted a more legal view of that term. A local intervener must have a present or future ownership interest in the land. Similarly, the occupation of the land must be a legal right to occupy, such as that granted by a grazing lease or a forestry management agreement. Visitors, trespassers and usufructuary[21] users are not entitled to costs. The Board has specifically rejected the contention that, because each citizen of the province has a right to use public lands, a concerned member of the public is a local intervener contemplated by the section.[22]

Further, the application must have a direct or adverse effect on the local interveners' land. What does this entail? The concerns of the local intervener need not be restricted to the land itself. Such concerns may relate to health, noise or odour, and they may relate to the impact on animals or buildings.[23] There must be a direct and adverse effect on the land or at least the reasonable prospect thereof. Land is directly and adversely affected where there is an actual physical encumbrance such as a pipeline on the land. Normally where an intervener owns land adjacent to a facility, his or her land will be directly and adversely affected. Where the intervener owns land some distance from the proposed facility, he or she "may" be affected, although in this instance the onus is on the intervener to satisfy the Board that the concern is reasonable.

An important limitation on the entitlement to local interveners' costs is that the issues raised in the intervention must affect the land or its use and enjoyment. "If an intervener chooses to pursue broad general issues, he does so at his own expense."[24] Accordingly, where an intervener chooses to question the need for the facility at all or the broader impact of resource development on the environment, he or she will not be entitled to costs. However, where the Board invites submissions on wider ranging general issues,[25] it will award to the otherwise qualified intervener the proportion of those costs related to the general matters as long as they are considered by the Board to be reasonable.[26]

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20 *Local Interveners Costs Applications Respecting the Jumping Pound Processing Plant, the Quirk Creek Processing Plant, and the Proposed Moose and Whiskey Fields Pipeline Hearing* (30 June 1983), No. D 83-8 (ERCB).

21 *Ibid.* at 16. The term "usufructuary" is not defined by the Board nor, to the author's knowledge, interpreted by the Board in any subsequent decisions. Arguably, it means the right to use or enjoy property in which the intervener has no property interest (*e.g.*, fishing in a stream on public lands).

22 *Ibid.* at 15.

23 *Ibid.* at 17.

24 *Ibid.* at 19.

25 Jurisdiction to invite such submissions would appear to come from the general purpose sections of the *ERCA* (s. 2) and the *OGCA* (s. 4).

26 For example, in *Local Intervenors' Costs Respecting Shell Canada Limited's Prairie Bluff Well Licence Applications* (27 March 1989), No. D 89-5 (ERCB), the members of the Pincher Creek Area Environmental Association owned or occupied land near the proposed well site. No costs related to that portion of its intervention regarding the impact of increased emissions from a pre-existing gas plant were allowed. However, as one of the issues being addressed was the potential for a blow out and as some of the association's members resided close enough to the well that their evacuation could be contemplated, costs were awarded with respect to that portion of the intervention.

The impact of these decisions on interveners with a more general concern with resource development and its effect on the environment is severe. Such public interest groups should include persons who own or occupy land in the area of the proposed facility. However, to qualify for local interveners' costs, it will still be necessary to establish that the application directly and adversely affects those lands.

Local interveners' costs have provided an incentive for applicants to address the concerns of the public prior to the hearing stage through a negotiation process. While this has the advantage of possibly avoiding a hearing, there is currently no legislative provision for the payment of the interveners' costs incurred during the negotiation process.

IV. THE INCREASE IN PUBLIC PARTICIPATION: POSSIBLE REASONS AND RESULTS

Any discussion of public participation in this area must take into account the fact that very few applications made to the ERCB result in public hearings. The ERCB annually receives thousands of applications for licences to drill. These are often routine and seldom have adverse impacts. Consequently, only one in 500 applications of this nature requires a public hearing. In fact, the first hearing for a well licence did not occur until 1975. On the other hand, one in every four applications for the construction of a sour gas processing plant results in a hearing.[27] Nevertheless, the public today involves itself to a much greater degree than it did in 1966. The increase in public participation in the past twenty-five years is attributable to many factors including the specific legislative provisions contained in ss. 29 and 31 of the *ERCA* discussed in the previous section. In addition, today's public is more aware of and demands greater involvement in all matters which affect their lives. The public is generally better educated than it was twenty-five years ago and has a greater awareness of the impact of resource developments on the environment. This, to a certain extent, was triggered by the Lodgepole blowout. From October 17, 1982 to December 23, 1982 a sour gas well blew out of control near Lodgepole, Alberta. In a failed attempt to cap the well, two workers died when they were overcome by lethal hydrogen sulphide gas. Hydrogen sulphide levels reached 55 times the provincial standard and the odour was detected as far away as Winnipeg.[28] Subsequently, the Board conducted a lengthy inquiry in two phases. Phase I considered the causes of the blowout, the adequacy of response and resulting impact upon public health and the environment.[29] Phase II examined issues relating to sour gas well blowouts generally with a view to preventing similar accidents.[30] As a result of this experience, Albertans took a new interest in the effects of hydrogen sulphide on their health and of the measures that were in place to prevent a similar disaster.

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27 V. Millard, "Recent Experience in Alberta with Public Involvement and Environmental Negotiation in the Energy Industry" (1987) 2:2 Canadian Environmental Mediation Newsletter (York University) 1.

28 *Calgary Herald* (24 December 1982) A1.

29 *Lodgepole Blowout Inquiry, Phase I Report* (11 December 1984), No. D 84-9 (ERCB).

30 *Lodgepole Blowout Inquiry, Phase II, Sour Gas Well Blowouts in Alberta: Their Causes, and Actions Required to Minimize their Future Occurrence* (25 April 1984), No. D 84-5 (ERCB).

In addition to this single event, the density of both population and oil and gas facilities has increased significantly in the last two decades. The population of Alberta has grown from 1.6 to 2.5 million. Cities and towns have expanded. Many people choose to live in the country and commute to a city or town to work. From 1971 to 1991 the number of wells drilled in Alberta increased from 40 thousand to 135 thousand, the length of pipeline in the ground increased from approximately 50 thousand to 210 thousand kilometres and the number of gas plants grew from 150 to 620.[31]

Clearly, a significant number of Albertans now live and work near resource facilities. While the concerns still tend to be primarily those of people in rural Alberta, urban residents are becoming more concerned as towns and cities expand. Furthermore, urban residents have an increased awareness of, and a greater concern for, developments in areas of Alberta which have no direct impact on the urban dweller.

The impact of public participation in resource development is not always apparent at the time of the actual ERCB hearing or decision. In the Crown of the Continent scenario discussed below it was the public involvement in a series of hearings that resulted in an initiative to address public concerns more effectively. In the Caroline/Beaverhill application, also discussed below, public involvement prior to the hearing was a key element in the ultimate decision of the Board.

A. THE CROWN OF THE CONTINENT

The Crown of the Continent is a geographic area containing Waterton National Park in Alberta and Glacier National Park in Montana as well as adjacent mountains, foothills and forest areas in Alberta, British Columbia and Montana. It is called the Crown because of its position on the Continental Divide. From Triple Divide Peak in Glacier National Park, rivers originate that flow to the Pacific Ocean, the Hudson Bay and the Gulf of Mexico. The Crown contains an ecosystem nurturing an abundance of plant and animal life. It receives particular attention as a habitat of the grizzly bear now declared to be an endangered species in Montana. The Crown is also the locale for numerous competing interests: forestry, coal mining, oil and gas development, tourism, recreation and the environment.

Since 1960, Shell has operated its Waterton Gas Processing plant near the town of Pincher Creek. It is the second largest sour gas processing plant in the world, and is a major employer in the area. The supply of gas for that plant comes from the Waterton Field which extends through much of the Crown of the Continent area. Over the years, Shell obtained from the Province of Alberta mineral surface leases throughout the area. By 1986, it had drilled sixty-five wells in the Waterton Field.

In 1977, the Province approved a document entitled "A Policy for Resource Management of the Eastern Slopes" (the "Eastern Slopes Policy"). Its purpose was to

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[31] G.J. DeSorcy, "Involvement of the Public in the Planning for Energy Projects" (Address to the Willow Valley Trophy Club, 12 January 1991) [unpublished].

provide for integrated resource management and planning for the entire Eastern Slopes area of approximately 35,000 square miles of predominantly mountain and foothills terrain. The Waterton Field and much of the Alberta portion of the Crown of the Continent are located in the Eastern Slopes. The Eastern Slope Policy divided the Eastern Slopes into three broad land use zones. Each of these zones was then further divided such that there were eight sub-zones. The prime protection zone encompassed a large area and was intended to preserve environmentally sensitive terrain. Petroleum and natural gas exploration and development were expressly prohibited.[32] In 1984, the Eastern Slopes Policy was revised such that eight zones were created ranging from "prime protection" and "critical wildlife" (Zones 1 and 2) to "industrial development" and "facility development" (Zones 7 and 8).[33] In 1985, after completion of further studies on development in this area, the provincial government approved the Castle River Sub-Regional Integrated Resources Plan (the "Integrated Resources Plan"). The Integrated Resources Plan recognized the importance of the Castle River to watershed protection and to recreation. It adopted the same zoning system as the revised Eastern Slopes Policy. Zone 1 (prime protection) was still intended to preserve environmentally sensitive terrain, but it encompassed a smaller area than in the original policy. Petroleum and natural gas exploration was not normally permitted within Zone 1, except under very exceptional circumstances. Zone 4 was designated as general recreation and was intended to retain a variety of natural environments within which a wide range of outdoor recreation opportunities might be provided. In this zone, petroleum and natural gas exploration and development were recognized as permitted uses that might be compatible with the intent of the zoning in certain circumstances and subject to certain controls.

During the latter part of the 1980s, the Board considered a series of applications by Shell for licences to drill sour gas wells in the Crown of the Continent area. The first of these applications, the South Castle River (Jutland) Application[34] involved an exploratory well in an area originally designated as Zone 1 (prime protection) under the 1977 Eastern Slopes Policy but subsequently reclassified, as a result of the 1984 revision to the policy and the subsequent approval of the Integrated Resources Plan, as Zone 4 (general recreation). A number of individuals and public interest groups expressed their concerns to the Board which directed that a public hearing be held. The ERCB, however, would not review the rezoning decision of the government (which arguably it had no jurisdiction to do anyway). More importantly, it refused to consider the impact of future wells on the area, restricting the hearing to a consideration of the single application before it.

Twenty-six parties intervened, including the Alberta Wilderness Association, the Pincher Creek Area Environmental Association, the Waterton Biosphere Reserve Management Committee and the Sierra Clubs of Alberta and Montana. The Town of Pincher Creek, its Chamber of Commerce and the union representing the employees of the Shell plant supported the application. Most interveners were in opposition. They

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32 The remaining two zones were Zone 2 (resource management) and Zone 3 (development).

33 The remaining zones are Zone 3 (special use), Zone 4 (general recreation), Zone 5 (multiple use) and Zone 6 (agriculture).

34 *A Report on an Application by Shell Canada Limited to Drill a Critical Sour Well in the Jutland (Castle River South) Area* (3 June 1986), No. D 86-2 (ERCB).

questioned the need for a well when there was a surplus of gas in Alberta. The well, they argued, would interfere with the natural habitat of wildlife, particularly the grizzly bear. The increased human access to the area would also put wildlife at risk. Others submitted that the well would interfere with recreational use of the area. There were also concerns about a potential blowout placing the lives and health of the area residents at risk.

Nevertheless, the Board granted the licence. It was satisfied that the measures proposed by Shell to reduce the impact of the well on the environment were a sufficient response to the concerns of the interveners.

A year later, Shell applied for licences to drill two critical sour gas wells[35] approximately 15 kilometres north of the Jutland well in an area known as Prairie Bluff.[36] The cast of interveners was similar to that of the previous year, although this time the provincial Department of Forestry, Lands and Wildlife intervened in support of the application. Together with Shell, it had prepared a study which identified Prairie Bluff as an important winter and spring habitat for bighorn sheep. While Shell acknowledged that the well and the access road would affect the migration of these animals, its studies indicated that the impact would be minimal if certain mitigative measures were taken. The opposing interveners continued to express concern for the wildlife in the area. The Board again granted the licences. It was satisfied that Shell would take the measures necessary to reduce the impact of the wells on the area.

The hearing involved heated discussion. The embittered interveners were so incensed by the decision that they formed a human chain against the bulldozers at the well site until Shell obtained an injunction restraining them from entering upon the area of the well site.[37]

History repeated itself in 1988 when Shell applied for another licence to drill in the area, this time near Whitney Creek.[38] The proposed well and access road were in Zone 5 of the Integrated Resources Plan designated as multiple use and providing expressly for a full range of resource development including natural gas. Shell, in an effort to allay the concerns of the interveners, proposed that any development would be subject to special conditions to ensure protection of recreational use and of the wetland character of the area.

Again the interveners suggested that the well-by-well approval process was inadequate. They submitted that the potential cumulative effect of this and future wells should be weighed in determining whether to grant this licence. In their submission there was

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35 A critical sour well is designated as such due to its proximity to an urban centre and its maximum potential hydrogen sulphide (H_2S) release rate during the drilling stage. More specific distances and release rates are described in ERCB Interim Directive 87-2 as amended 13 June 1988.

36 *Shell Canada Limited Well Licence Applications Waterton/Prairie Bluff Area* (26 October 1987) No. D 87-16 (ERCB).

37 E. Bailey, "Whose Crown is This? No Sweeter Place on Earth" (Summer 1991) Environment Views, Alberta Environment at 14.

38 *Shell Canada Limited Application for a Well Licence Waterton Field* (22 December 1988), No. D 88-16 (ERCB).

insufficient environmental information contained in the application to assess the impact of future drilling in the area. They wanted a full environmental impact assessment. The position of some opponents was that the purpose sections of the *ERCA* and the *OGCA*,[39] together with the discretionary wording relating to the granting of licences contained in s. 14(1) of *OGCA*[40] were sufficiently broad to give the Board jurisdiction to deny the licence. They argued that the Board's earlier decisions in Jutland and Prairie Bluff, which had relegated environmental considerations to a matter of mitigation, reflected the wrong approach.

Shell responded that the Integrated Resources Plan contemplated multiple use and not one use to the exclusion of others. It submitted that in effect the ERCB did not have the jurisdiction to deny a licence for reasons of environmental impact alone and that the Board's mandate was to provide for the development of natural resources while at the same time ensuring environmental conservation and pollution control. The ambit of the Board's jurisdiction was thus placed squarely before it as a result of the conflicting submissions.

The Board concluded that it had the jurisdiction to deny an application if it was satisfied that the impact of the well on the environment was unacceptable or if the overall economic impact of the surface and environmental effects were significantly greater than the economic benefit to be derived from drilling the well. Further, it agreed with the interveners that the Board must consider environmental cost as well as potential royalty benefit in furtherance of its mandate to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta. However, this victory on the ambit of the Board's jurisdiction was hollow for, once again, the Board granted the licence. It was satisfied that Shell could adequately mitigate the environmental impact. Although it had rejected Shell's narrow view of jurisdiction, the Board supported its decision by reference to the Integrated Resources Plan.

Clearly, the well-by-well approach was unsuited to address adequately the concerns of the public on what was, for many area residents, a very emotional issue. As one resident described the process: "[i]t's just a continuous assault on the landscape down here — drill a well, then a step-out well, then another and another — it's like a cancer on the landscape."[41]

However, at the conclusion of its decision in the Whitney Creek application, the Board observed that the concerns of all parties could have been more adequately addressed through continued consultation rather than through the hearing process. The Board's call

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39 *Supra* notes 11 and 12. The specific purposes relied upon were s. 2(d) of the *ERCA*, to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy, and s. 4(c) of the *OGCA*, to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta.

40 *OGCA*, *ibid.* s. 14(1):

> On receiving an application for a licence, the Board may grant the licence subject to any conditions, restrictions and stipulations that may be set out in or attached to the licence or it may refuse the licence.

41 *Supra* note 37 at 14.

for a better approach through consultation was answered by the area residents. The individual to lead such a process was Hilton Pharis, a well-respected rancher and businessman who had intervened in the three hearings. In March 1990, thirty-five people, including deputy ministers of various provincial departments, were invited to attend a round table meeting to discuss how the competing interests in the Crown of the Continent region could be addressed. A task force of seven was appointed to study how such a group would operate. After a second round table meeting in November 1990, it was agreed that the group would become a non-profit organization registered pursuant to the *Societies Act*.[42] In May 1991, the Crown of the Continent Society (the "Society") was formed. Its board of eleven directors is chaired by Hilton Pharis. Seven of its members were on the original task force. The board is comprised of local area residents of varied backgrounds including a retired coal miner, a rancher, the Waterton Park Superintendent and the president of the Pincher Creek Snowmobilers Association. As of September 1991, it boasts a membership of 50. While the ERCB is not represented on the board of directors, it is a member and has contributed the services of its Director of Communications, Jack Bales, as a resource person. Similarly, while there are no representatives of Shell on the board, it is a member and has contributed funds and the assistance of a resource person, Gordon Lawrence, Community Affairs Officer, Shell Oil, Pincher Creek. To date its membership also includes Amoco Canada Limited, the Waterton Biosphere Management Association, the Canadian Parks and Wilderness Association and a member of the Peigan Band.

The mission of the Society is "to help ensure for future generations of all living things a masterpiece of Nature known as the Crown of the Continent, through a locally-based cooperative approach that strives to ensure the preservation, wise use and restoration of the natural environment and the well-being of area communities."[43] Its objectives are:

1. To provide a means by which residents of southwestern Alberta may interact with special interest groups, government, and resource developers, to ensure that planning for the future of the Crown Ecosystem always takes into consideration the preservation, wise use and restoration of the natural environment and the well being of area communities;
2. to serve as a central gathering spot for various kinds of information related to the Crown of the Continent and as the major information resource on that subject;
3. to work with its membership to formulate and carry forward to the relevant authorities, both short and long-range plans for the ecosystem known as the Crown of the Continent;
4. to represent to developers of all kinds and to branches and departments of government, the ecosystem concerns of members of the Society;
5. to be prepared to implement various planning and conflict resolution programs in order to effectively assist in examining the plans proposed by various local and outside interests; and
6. to provide a meeting place for the consideration and discussion of questions affecting the interest of the Crown ecosystem.[44]

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42 R.S.A. 1980, c. S-18.

43 Crown of the Continent Society, *Statements of Mission, Values and Objectives, Draft One* (15 April 1991) [unpublished].

44 *Ibid.* at 2.

The Society is not a lobby group, nor does it wish to be an intervener in future ERCB hearings, although this may happen. With respect to proposed developments, the Society hopes that the developer will present its plans to the Society before initiating the formal approval process. The Society will have information about the ecosystem that can assist the developer and through the consultation process it is hoped that acrimonious, adversarial hearings can be avoided. Recently, Shell advised the Society that it would be applying to drill another well in the area. (This is the first well since Whitney Creek.) In fact, Shell outlined its plans for the next seven wells so that the Society would be aware of these plans prior to the formal approval process. While the possibility of a hearing still exists, the consultation process may alleviate some concerns and may eliminate the need for a hearing. Ironically, the suggestion of the ERCB which arguably spawned the Society may ultimately reduce the Board's involvement to that of mere pro forma approval of these applications.

The Society plans to work with its Montana counterpart, the Crown of the Continent Coalition, and with residents of British Columbia who reside in and are concerned about the area. To date there is no formal organization in that province.

B. THE CAROLINE/BEAVERHILL LAKE GAS DEVELOPMENT APPLICATIONS

In January 1986, Shell discovered the Caroline/Beaverhill gas reservoir, the largest discovery of gas in Western Canada in twenty years. While the fifteen working interest owners had originally proposed that the gas be processed partially at the existing Husky Ram River plant and partially at a new plant to be constructed near the Caroline field, Husky (who had subsequently acquired the working interest of Canterra) withdrew its support for that proposal. This resulted in two competing applications to process the gas. Shell proposed to construct a new facility near the Caroline field. Husky applied to expand its existing Ram River plant and to construct a gas distribution plant near the field, together with a fifty-five kilometre pipeline to transport the gas to the plant.

In 1987, the applicants began their communication with the local public through numerous open houses, meetings and mailings. By January 1988, the Caroline Advisory Board had been formed in an effort to ensure continued, effective communication. A number of local groups were formed to address the concerns of area residents. By the commencement of the hearing on April 17, 1990, there were twenty-seven "public interest" interveners.[45] These interveners were categorized by the Board into three groups: the local government group comprised of the various towns and municipal districts; the local business interest group which included numerous individual business entities and the various Chambers of Commerce; and the local citizens group consisting of individuals who appeared on their own behalf and of organized groups who represented a number of individuals with generally similar interests. To describe in sufficient detail the involvement by Shell and Husky with the public prior to the hearing is the subject of

[45] The term "public interest" here is used to describe all of those interveners who were neither working interest owners nor corporations who chose to intervene (CP Rail, CN Rail, Nova Corporation of Alberta, Canadian Hunter Exploration Ltd. and G.E. Allison Construction Ltd.).

another paper. Of interest in the context of this essay is the importance of the public input into the Board's final decision.

While some interveners advocated that neither application should proceed because there was no need for production from the Caroline field at this time,[46] the Board determined that the negative impacts of development would be outweighed by the economic benefits and, as such, "proceeding with either of the proposed developments would thus be in the public interest."[47]

The Board has traditionally considered a number of factors in assessing applications of this nature. Those factors include economic efficiency (the total economic benefit to be generated by the project), technical feasibility, operating reliability, environmental impact, risk to public safety and socio-economic impact. Public input into each of these factors is obviously important and relevant. However, this decision considered a new factor which to the best of the author's knowledge had not previously received separate treatment by the Board. This was "public acceptability". "Public acceptability" has been described as a measure of how well a proponent has satisfied the definition of public interest in the eyes of those who live in the region of a proposed development.[48]

In considering "public acceptability", the ERCB attempted to weigh the overall public support for the two proposals. As anticipated, the local government and local business interest groups tended to support the project which would be located nearest to them. This resulted in a greater number of these interveners favouring the Shell application. The group described as local citizens represented more than 650 individuals who either made submissions, signed them or held memberships in groups which appeared at the hearing. Those supporting the Shell proposal expressed the view that the Shell project, with its related benefits, should be in the same area where the majority of the people would have to accept the risks of development. Accordingly, many of those who lived near the proposed Shell plant and who were prepared to accept the risks inherent in such a project believed that they should obtain the benefits of the Shell proposal. Those supporting the Husky application tended to be people owning property in the vicinity of the proposed Shell facilities who did not want to incur the possible negative impacts of development.

The predominant feature in the Board's consideration of public acceptability was the route and site selection. This had also been considered in the contexts of environmental and socio-economic impacts and public safety. Because both applicants had made such considerable efforts to consult with the public on the selection of the sites, any suggested relocation at the hearing stage would have to demonstrate significant advantages over the existing sites. In other words, many of the issues which might otherwise have been

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46 *E.g., Caroline/Beaverhill Lake Gas Development Applications* (31 August 1990), No. D 90-8 (ERCB), Intervention of R.E. Wolf at 3-14.

47 *Ibid.* at 14-1.

48 G. J. DeSorcy, "The Caroline Decision and the Gas Processing Industry" (Address to the 30th Anniversary Conference Canadian Gas Processors Association and Canadian Gas Process Suppliers Association, 24 September 1990) [unpublished].

considered at the hearing had already been resolved through public consultation long in advance of the hearing.

The Board approved Shell's application. In addition to the overall general public acceptability of the Shell project, many of the interveners' suggestions were incorporated into the decision as conditions of Shell's approval. These included requirements that Shell endeavour to employ local residents and that its shifts be timed so as not to interfere with school bus schedules. Among the more novel conditions was the requirement of an ongoing audit of the success of the environmental and socio-economic impact assessments in predicting impacts. This will provide valuable information on the effectiveness of these assessment procedures.

It is submitted that the Board's emphasis on public acceptability will increase the bargaining power of the public with respect to the approval of energy projects. While one may speculate whether the extent of prehearing consultation and accommodation would have been as great if there had not been competing applications, the Caroline process demonstrates the importance of public participation in the approval of major facilities. In a speech given by ERCB Chairman Gerry DeSorcy shortly after the Caroline decision was rendered, the Board gave full marks to the industry for its efforts to communicate with the public regarding the Caroline project.[49] Because the costs of legal representation and environmental consultation for most of the interveners were paid by Shell or Husky, this permitted those groups to bring relevant information before the Board. Most of this funding was voluntary, perhaps marking a new era of public participation for those who would not otherwise qualify for local interveners' costs. While the ERCB is not bound by precedent, it is suggested that the Caroline process is an approach which will be followed in future development proposals.

V. CONCLUSION

The two examples discussed above suggest that there are ways in which the legislated adjudicative approval process can be supplemented or in some instances replaced. The ERCB currently advocates a more negotiated approach to disputes between industry and the public. The Board has experienced considerable success in its negotiated approach to well licence applications. For approximately twenty years the ERCB field inspectors have been effectively mediating disputes between surface owners and mineral owners respecting the location of wells and access roads. The relatively small number of hearings regarding these applications can, in part, be attributed to the success of mediation. However, the major energy facilities of the past two decades have posed a challenge to the Board to develop a mediation process more suited to these projects.

The type of mediation used in a well licence application is not necessarily viable for these large proposals where many more people are potentially affected. In the early 1980s, the Board conducted a review of those cases where the public hearing process appeared to have failed. It concluded that the disagreements between the proponent and the public

[49] *Ibid.* at 3.

were a result of two factors: an inadequate exchange of information and a lack of understanding about the concerns of the public. The Board recommended that the exchange of information begin even prior to the formal application.[50] Despite genuine efforts by industry to increase public consultation, it became apparent that public objection to proposed facilities is often founded on concern with the soundness of the government standards to protect the environment. Accordingly, for any mediation process to be successful, the government must be also involved.

Since 1983, the Board has been experimenting with various approaches to resolve public concerns respecting proposed wells and more major facilities. The Crown of the Continent project and the Caroline/Beaverhill application represent two initiatives to respond to these concerns. Another approach involves meeting with the affected parties in order to negotiate a solution. The meetings may range from an exchange of information to the provision of further expert studies regarding the impact of a proposal. At times the negotiation may involve the proponent and the ERCB undertaking activities to mitigate adverse impacts. At other times, the government becomes involved in the consultative process to explain the existing standards and their underlying rationale. The negotiated approach has resulted in the elimination of hearings in a number of cases.[51]

This essay commenced with a discussion of two legislative provisions which encouraged public participation in the ERCB's process; sections 29 and 31 of the *ERCA*. However, it will be evident to the reader that the two examples of public participation discussed above and the ERCB's interest in negotiation are not contemplated by those sections. The effect of developments such as the Crown of the Continent Society may be to eliminate the hearings contemplated by section 29, although under the existing legislation well licences and processing plants would continue to require ERCB approval.[52] The payment by the applicants of the interveners costs in the Caroline application clearly exceeds the statutory requirements of section 31.

While sections 29 and 31 will continue to have application where a hearing is required, it is recommended that the *ERCA* be amended to provide for some payment of interveners' costs during the negotiation process. This would lend force to the ERCB's desire to mediate and negotiate and would provide incentive for consultation between industry and the public. This would be particularly necessary where the approval sought is not by way of competing applications. Such an amendment might also contemplate increasing the types of interveners who qualify for costs. Such legislation would require careful thought and appropriate safeguards.[53]

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50 *Supra* note 27 at 3.

51 For example, a table produced in 1987 indicates that of the 12 cases where the ERCB introduced negotiation techniques prior to a public hearing, six were approved without a public hearing. See *ibid.* at 5.

52 *Supra* note 12, s. 11 and s. 26.

53 V. Millard, "Alberta Experience With Public Participation and Intervenor Funding" (5 May 1987) [unpublished].

The ERCB has continually adapted and expanded its original mandate to protect the public interest. In the 1970s and 1980s, this meant an expansion of the hearing process to include interveners and to compensate certain interveners for some of the costs incurred in making representations at those hearings. However, it would appear that the future holds a more negotiated approach to issues involving industry and the public. This approach is consistent with trends in private dispute resolution. It is hoped that the public interest will continue to be served by the ERCB. Henceforth, the public interest in resource development in Alberta cannot be ignored.