THE PARTICIPATORY ENVIRONMENT IN ALBERTA*

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At present in Canada there is much concern about what government is doing to protect our environment from over-exploitation and from damaging development. Due to public protests, most governments have developed some policies in attempts to provide some solutions to the problems which result from such development. In this article the author examines the extent to which the public in Alberta has the opportunity of providing input to the policy-making process and he also examines the effect such input has had on the policies forthcoming from the Alberta government. The author studies the Environment Conservation Authority, looking at its philosophy, its responsibilities, its procedures and particularly its hearing process. Also considered are the activities of the Energy Resources Conservation Board and the Department of the Environment. To conclude, the author suggests several reforms he feels are necessary.

I. INTRODUCTION

This article was originally intended to evaluate environmental management in Alberta from several aspects, including that of public participation. I have attempted to overcome the problem of the all-inclusive nature of the term "environmental management" by concentrating on pollution of the natural environment. This meant excluding areas such as urban planning and development, land use, and resource exploitation generally.[1]

Even with this parochial focus, time and resources precluded an overall analysis of the effectiveness of Alberta's environmental agencies. I therefore chose to survey the environmental activities of the provincial government from the point of view of the public's present and proper roles in the decision-making process.[2]

After defining my use of the term "public participation", I shall discuss whether participation in government is desirable. Next, I shall examine the main participative agency in Alberta, the Environment Conservation Authority. Following a general look at its philosophy, responsibilities and procedures, I shall undertake a case study of its hearing process, using as an example the hearing on the environmental impact of surface mining in Alberta. The legislation resulting from this process will be examined, as will the usefulness of the ECA hearing mechanism.

Next, public participation in the activities of the Energy Resources Conservation Board and the Department of the Environment will be considered.

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[1] The latter would tempt me to discuss aspects of the political and economic analyses of Walter Gordon, Mel Hurtig and Mel Watkins. See also the White Paper of Taxation for a moderate (but abandoned) position on taxation of the resource extraction industries.

[2] I define this process to include the development of value assumptions; goals or objectives expressive of these values; the establishment of priorities among them; the consideration of alternative strategies to achieve them; choice of the most suitable alternatives; the implementation of appropriate policies or programs and the monitoring of the effect of policy and objectives. There are many different uses for each of these terms but as I use them, they descend in order from the most general to the most particular.

Finally, I shall try to derive specific suggestions for reforms and conclude by suggesting that this piece is a mere prologue to the issues we must confront. After a brief exposé of my own bewilderment and ambiguity, I shall end with more concern than hope.

II. WHAT IS "PUBLIC PARTICIPATION"?

Without being exhaustive, I should explain my meaning of the term "public participation". First, I will assume that the phrase includes conventional (and relatively ineffective) avenues whereby private citizens can affect public policy or seek redress of grievances from government. In our representative democracy, the main avenues seem to be voting, direct contact with elected representatives or bureaucrats, whether individually or through an interest group, and reporting illegalities to government agencies. Also possible are other forms of political action, such as obtaining publicity, taking part in a political party, and so on. One can take civil action in the courts to protect the integrity of one's property or person, aspects of which I have treated elsewhere[3] and ignore in this discussion. Although it is done rarely, it is also possible to carry on a private prosecution if government refuses to prosecute offenders for breaching the law.

Very few strides have been taken in Canada beyond the conventional avenues just listed. The inability of the legal system to effect significant change is obvious but, from personal experience, I also have serious doubts about the efficacy of the political party or individual approaches to government as mechanisms for change. Also, I reject as farcical the notion of so-called "contemporary democratic theory" that voting is in any way a meaningful form of participation in decision-making. This theory is even more ludicrous in its view that participation should be limited to elections to choose leaders, and that the level of participation of the majority should not rise above the minimum necessary to keep the electoral machinery working. For more on this point, see Pateman, *Participation and Democratic Theory* (1970).

More importantly for this paper, participation includes other possibilities. For example, selected members of the public may be appointed to an advisory council of government. More significantly, public hearings could be required as a prerequisite to certain decisions, and impact assessment procedures could be imposed, either with or without public hearings.[4]

Further, the courts could be much more accessible to individuals or groups who wish to prevent or ameliorate environmental degradation.

It is my thesis that new and formal channels for participation are a prerequisite to real involvement in the decision-making process, which in turn is a prerequisite to humanizing our society. During the course of this article, I will comment further on this point and on the adequacy of mechanisms such as the Environment Conservation Authority of Alberta.

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[3] Elder, *Environmental Protection Through the Common Law (1973)* 12 W. Ont. L. Rev. 107.

[4] In the U.S., under the National Environmental Policy Act, no public hearing is contemplated, but the environmental impact statement must be published, and there is access to the courts if one claims the statutory requirements have not been met.

III. WHY PARTICIPATION?

One of the most significant social changes in Canada over the past decade has been the phenomenal increase in public demand for involvement in decision-making. For many years, the traditional respect of Canadians for authority had resulted in a "government knows best" attitude, at least in the mainstream of our society.[5]

Clearly this has changed. The tendency to form interest groups has spread beyond vested interest lobbies (which have always had the ears of cabinet ministers and mandarins) to citizens at all levels of society. From middle-class coalitions to oppose public housing in their neighbourhood to welfare rightists and environmentalists, no cause about which people feel strongly, lacks its self-appointed spokesman (whether representative or not of the affected population).

Rather than try to explain this increased interest in decision-making, my concern is to examine briefly its possible roles. Should the trend be encouraged?

Particularly relevant is the remarkable increase in the past five years in the importance of environmental considerations. Such a shift, challenging as it did the use of our common resources of air and water as a dump, resulted in contestation, because of the polarization of views. This was duly reported by the media, and the resulting publicity had the effect of encouraging the use of public pressure to force change. The clamour therefore increased.

Yet in spite of this climate, there are few formal channels through which to seek direct redress for group grievances. Parliamentary representatives are usually not effective in obtaining policy changes—even though individual injustices might be corrected by representations to bureaucrats or by astute use of the question period.

Apart from the fact that there are strong demands for participation, the question remains—of what use is participation? Can "the people" fashion better policies than trained and expert decision-makers, or, to put the question in a less polarizing way, can "the people" and so called "experts" in concert make better decisions than the latter in isolation?

There is a considerable body of literature on public participation, much of it superficial. Some commentators would limit mass participation to voting; others view it as a panacea for any present and future ills in society. It is as if they imagine that bureaucrats and politicians spend most of their time devising ways to subvert what little progressive social policy we have. Although some evidence is consistent with this, anyone who has dealt with senior governmental officials realizes that this is absurd. For better or for worse, they reflect the values and abilities of the dominant classes in Canada. Indeed, with the possible exception of the federal cabinet during the Second World War, we probably have never had in Canada a more able and sophisticated body of governors, man for man, than we do today. Although I believe that most of them make fundamentally wrong assumptions (which accounts for their wrong-headed policies), my point here is that these basic assumptions are still shared by a majority of Canadians.

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[5] Although it has always been clear to a minority that our society has been long on rehetoric about justice and short on performance, these minorities have usually been unsuccessful, at least in the short run, in attempts to alter public policy.

Participation as a panacea also assumes that "the people"—a mystical concept—can easily adopt just the right mix of policies. This is by no means obvious, particularly since the interests of one constituency—no low cost housing, high rises, freeways in our neighbourhood—may directly clash with the perceived interests of another portion of the public. As well, there is the difficult question of making trade-offs among competing values in the same geographical location—wilderness versus energy extraction, for example.

More than one bureaucrat believes the prime purpose for designing participative mechanisms is to minimize confrontation. If participation is designed to diffuse criticisms of arbitrariness by giving the illusion of input, it is both manipulative and cynical. There are more positive aspects, however. Many bureaucrats believe that one of the main reasons for environmental protests is public misunderstanding of the true intent of a particular policy. Participation mechanisms, such as public meetings, are seen as a chance for government to educate people on the merits of its policy. By appearing to consider public input, and possibly amending proposals, it is probable that public support will be obtained. As well, it is argued, satisfaction from having been heard will decrease feelings of alienation from government.

On the whole, this is a manipulative view of participation, but largely because it does not go far enough. Given a broad perspective, these goals are legitimate. But is that all there is?

Proponents of participation cite many examples of misguided projects which were either cancelled or amended due to public pressure—Village Lake Louise, the Spadina Expressway, *etc.* Examples abound of local issues in municipalities being affected by participation. Grass-roots pressure has elected "reform councils" in Vancouver and Toronto on platforms of reducing the use of public resources for private profit.

These examples seem to justify new kinds of participation—especially in a time of social change. Far from being sensitive to public opinion, it can be argued that the communication lines of traditional institutions tend to reach only representatives of the *status quo*. In most projects, the conventional assumptions of the industrial or commercial elite justify the decision to proceed. It must surprise the proponents of each to hear allegations that they have failed to consider other factors such as environmental considerations. After all, they have the technical information, not the outsiders, and they are as aware as anyone that environmental factors are important. They intend, however, to build in acceptable standards.

Yet the developers have been challenged systematically on scientific and technical data by voluntary groups forced to gain information "informally" or else from sources outside the government. Although hampered by the unavailability of much prime information (our governments are obsessed with keeping secret information which they gather to make decisions for us), the volunteers, operating from different assumptions and values, can create vigorous interest and debate involving the man in the street. It is becoming clear to everyone that technical proposals with far-reaching implications are underlaid with important value assumptions. Once these are exposed to view, laymen are as competent as anyone at assessing them, and can also understand the thrust of scientific data when stripped of detail and jargon.

Viewed from either of two perspectives, participation seems amply justified. First, the amended decision in many of these environmental projects has been in the public interest—that is to say, a "better" decision, in my opinion, was made. Secondly, and more importantly, the public clamour resulted in the issue becoming highly visible and important to the electorate. As a general principle, increased public information and awareness should result in better—or at least more careful—decisions in the future.

Participation in this analysis is useful to slow down a development so that public assessment can be made. This is particularly important at a time when values are shifting. Public debate sensitizes people to the issues, and allows time for a consensus to emerge. Also, one imagines that fair-minded decision-makers might be influenced by rational alternative solutions. It seems safer, however, to rely on the public pressure created by the debate, given the seemingly pig-headed approach of the governments of Manitoba and Quebec in the Churchill River diversion and James Bay schemes, respectively.

The existence of a forum is important—whether it be public hearings in the Spadina and Lake Louise controversies, or the coincidental availability of the Quebec courts because of legal claims by the native people.

Several fears are expressed about mechanisms for public participation. For example, it is claimed that the role of our elected representatives may be downgraded, that the mechanisms may hinder their effectiveness and even be a denial of the efficacy of representative democracy.

A book is merited on this issue. It suffices to say that the role of the elected representative is imperiled by far more important trends than the provision of participative channels. The tremendous increase in powers of the executive, at both cabinet and department levels; the difficulty which representatives experience in obtaining necessary information; their meagre support staff; the emphasis on assisting individual constituents; the committee system (which increasingly provides an input for representatives); all of these contribute much more to the spreading of a representative's energies too thinly to be effective. It may also be observed that Cabinet Ministers tend to trust their departmental advisers for information and policy advice, and their own instinct for gauging the public mood. By definition, *they* are the expert politicians.

As for challenging the concept of representative democracy, it is true that any change in the process of decision-making implicitly criticizes the previous one. It is not necessary, however, to view procedures for release of government information, impact assessment and public hearing mechanisms as the thin edge of the wedge of government by plebiscite. Rather, democratic theory presupposes an informed electorate and the mechanisms described probably offer a more reliable reading of public opinion than letters from constituents, Saturday clinics, and chats with cronies.

The assumption about participation, however, is that it provides more than a technique for a development "snow job" or for taking the public pulse. It also involves a process of learning and assessment of information in a public forum so that the public reaction can be based on facts presented by various interests. As well, it is to be hoped that co-operative

planning techniques can be evolved so as to decrease the need for participation by confrontation, which is still the most frequent kind by far.

Does participation lend itself to demagoguery or manipulation of the public? It is hard to see how a channel for the communication of minority opinion is a threat to the present system, especially in the light of the amount of manipulative information offered in support of it. It should, in my view, be viewed as a counterweight to established interests which already have access to the decision-makers.

A good brief summary of the case for public participation was made in the preliminary report of the B.C. Provincial Task Force on Citizen Participation, Man and Resources Project, April 1973:

1. Governments exist through consent of the governed, therefore, legislation affecting a broad segment of the population (*e.g.*, zoning, regional planning, pollution standards) requires the acceptance and support of the public to be effective and enforceable.
2. No single individual, politician, or decision-maker, has the clairvoyance to anticipate and evaluate public opinion on every issue over a four-year period without continuous and comprehensive public input, no matter how great his electoral support.
3. Public attitudes are continually changing over time and with new information, and should therefore, be continually reassessed in making and monitoring decisions.
4. Frequently public opinion has been an important source of information providing the impetus for new legislation (*e.g.*, in pollution control) and as such, should be provided for by statute.
5. Public participation provides alternatives from which decision-makers can choose. Ours is a pluralistic society and often technical reports contain the social educational economic biases of their writers and do not take into account the interests and needs of different socio-economic groups.
6. No one knows better than the people themselves where they want to go in the future and what development trends they are willing to support.
7. At present there is no way to estimate the relative worth of intangibles such as 'clean' water or 'pleasant' views; therefore, there is no basis on which planners or decision-makers can make a 'rational' choice. When trade-offs must be made between two intangibles, it is the citizens who must live with the solution who are in the best position to make the choice.
8. When it comes to implementation of policy, decisions which have been reached with maximum public involvement are most likely to have minimum opposition, thus reducing friction, easing implementation, and perhaps avoiding expensive reversal of decisions.
9. Public involvement increases public understanding, knowledge, and acceptance of necessary technical developments (*e.g.*, sewage treatment plants), in this way acting as an educational system to benefit all parties concerned.

It may be appropriate to conclude from the individual's viewpoint, rather than at the broad policy level. I make some simple assumptions, which to me adequately justify public participation. First, to the maximum possible extent, every person should have control over her life[6]—whether one defines this in terms of political and economic freedom or more basically as opportunity for self-fulfillment. Second, given unfearful freedom, humans tend increasingly with experience to learn, to grow and to seek optimal solutions. That is, "persons have a basically positive direction."[7]

Thus, if life is viewed as a changing and exciting process of learning and growth, it is not appropriate even to ask whether the people can

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[6] When I use the feminine, it is of course general and includes the masculine.

[7] Rogers, *On Becoming a Person* (1961) at 26.

fashion "better" policies than experts. What is better? Given adequate and objective information and experience at making decisions of this sort, what people themselves choose to do will usually be better for them, and unilateral and/or manipulative policy-making by experts is an enemy to be resisted, as a paternalistic interference with one's life. Only one criterion for policy can be ultimately meaningful, and this must be measured by the "recipient": does this policy maximize the opportunity for her personal growth, maturity and love? If so, let it be done. If not, none of the political theories of individualism or collectivism, capitalism or socialism can be relied upon for support. Only insofar as these theories meet the same criterion should they even be discussed.[8]

I conclude that public participation is, in the foreseeable future, here to stay, and that this is desirable. I also regard participatory democracy in all social institutions as a prerequisite to genuine human growth and fulfilment. Let us now turn to an examination of the Environment Conservation Authority of Alberta.

IV. THE ENVIRONMENT CONSERVATION AUTHORITY OF ALBERTA

This body is perhaps the key to public participation in environmental matters in Alberta. Originally established by the Social Credit government in 1970,[9] the ECA was conceived of as a kind of environmental ombudsman, reporting to the Lieutenant Governor in Council. Summaries of its recommendations on various matters were to be included in its annual report, which had to be tabled within a short time in the Legislative Assembly.

The original mandate included, *inter alia,* "a continuing review of policies . . . on matters pertaining to environment conservation . . .;" inquiring "into any matter pertaining to environment conservation" (either of its own initiative or by order of the Lieutenant Governor in Council); the holding of public hearings on any such matter; engaging experts; and "in co-operation with and primarily through" the Department of the Environment, trying to achieve co-ordination of government policies.[10]

The stated aim of the government was to create an independent body which could receive complaints and inquire into specific problems, as well as freely inquiring into more general matters.

Section 11 of the Environment Conservation Act also enabled the Authority to appoint and prescribe the duties and functions of public advisory committees.

The Authority's mandate is particularly striking, given the scope of the definition of "environmental conservation":

1. the conservation, management and utilization of natural resources;
2. the prevention and control of pollution of natural resources;
3. the control of noise levels resulting from commercial or industrial operations in so far as they affect the environment in the vicinity of those operations;

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[8] It is for these reasons that "environmental impact assessment" is far too inhibiting a term. Rather, all policies should be tested by a rigorous (including subjective and personal) analysis of their potential for increasing "conviviality". "Conviviality assessment," then, is a far more descriptive term.

[9] R.S.A. 1970, c. 125.

[10] *Id,* s. 7.

4. economic factors that directly or indirectly affect the ability of persons to carry out measures that relate to the matters referred to in clauses 1, 2 and 3;
5. any operations or activities, whether carried on for commercial or industrial purposes or otherwise,
   (i) that adversely affect or are likely to adversely affect the quality or quantity of any natural resource, or
   (ii) that destroy, disturb, pollute, alter or make use of a natural resource or are likely to do so;
6. the preservation of natural resources for their aesthetic value;
7. laws in force in Alberta that relate to or directly or indirectly affect natural resources.[11]

Partly because of the recommendations of the ECA, the Social Credit government also established the first Department of the Environment in Canada,[12] as well as the Clean Air Act[13] and the Clean Water Act.[14]

It is somewhat ironic that a Social Credit government not, in my opinion, noted for its concern for participation created such an independent authority, and also held extensive hearings on a proposed Wilderness Act (the results of which hearings it unfortunately ignored). On the other hand, the present Progressive Conservative government, which has shown much more awareness of the possibilities of this technique, has moved to decrease the Authority's independence. Indeed, when the 1972 amendments to the Environment Conservation Act were proposed by the Honourable William Yurko, Minister of the Environment, the Public Advisory Committee of the ECA publicly accused the government of restraining the Authority.

Basically, the amendments were designed to confirm that the Authority is an agency of government, and not a rival of the Department of the Environment. Their thrust was to require "consultation" with the Minister before inquiring into any matter (s. 7(1)(b)), or before appointing a Public Advisory Committee and prescribing its duties (s. 11), to allow the Authority to hire experts only for projects approved by the Minister (s. 7(1)(h)) and to seek co-ordination of policies solely, instead of primarily, through the medium of the Department of the Environment (s. 7(1)(i)). Indeed, even banking arrangments now require his approval (s. 8(1))![15]

Generally, the reports formerly going to the Lieutenant Governor in Council now go to the Minister, although the same provisions for tabling the annual report exist.

It is not surprising that these amendments caused considerable resentment within the Authority. Little has been heard since about an environmental ombudsman, and Mr. Yurko feels that the Authority's role should be "to lead the government into new areas of policy requirements, not tell us what we are doing wrong in regard to enforcing legislation; we already know that."[16] In passing, I must agree that this suggested role is a vital one.

The legal effect of the amendments is not entirely clear. The same reports still must be tabled in the Legislative Assembly, and one could argue that so long as the Authority has "consulted" with the Minister, it

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[11] *Id*, s. 3 (a-g).

[12] Department of the Environment Act, S.A. 1971, c. 24.

[13] S.A. 1971, c. 16.

[14] S.A. 1971, c. 17.

[15] Environment Conservation Amendment Act, S.A. 1972, c. 38.

[16] Bob Scammel, quoted from "Environment—1970 in Alberta; Hung Jury," (newspaper column).

can proceed even in spite of his protests (the Minister himself apparently agrees with this interpretation). Also, the Authority's power to hold public hearings of its own initiative has not been affected in the legislation. In any case, no one suggests that Mr. Yurko is likely to interfere with the Authority (indeed, one person whom I interviewed suggested that the Authority's thinking is slightly behind the Minister's).

The problem, common throughout the entire area of environmental management in Alberta, is that the Minister of the Environment has a wide discretion. Although we can probably depend on its present exercise in the environmental interest, what might a poor Minister do with such a wide mandate? (Of course, the enactment of the above amendments in itself shows how tenuous the Authority's independence is, even though presently guaranteed by statute).

Presently, the Authority apparently accepts *de facto* financial control by the Minister. Its budget, apart from staff salaries, which come directly from the Provincial Treasury, consists of a one line item without any breakdown. Within its budget, which includes overhead and so on, the Authority, may inquire into any matter, after consultation with the Minister, or hold its own public hearings without any consultation at all. A devious Minister, however, would find it very easy to block such activities, merely by assigning enough mandatory work to exhaust the Authority's rather modest budget. This possibility, however, existed under the original legislation as well.

Far from contemplating such tactics, the present Minister actively seeks suggestions for possible topics of public hearings from interested environmental groups. Indeed, it would seem that public interest aroused by the Society for Pollution and Environmental Control and The Alberta Fish and Game Association was directly responsible for hearings on the impact of surface mining on the environment in Alberta, to which subject we shall return.

The philosophy of the Environment Conservation Authority is interesting. It rejects the myth that political accountability for environmental decisions exists through the ballot box. Obviously, a vote every four years on a complex series of issues is a meaningless way to register disagreement with a particular sector of policy. The hearing, however, is a valuable way for people to contact their elected representatives between elections.

Assuming that the objective of the government is to preserve forever an optimum physical environment for people, a broad perspective is automatically indicated. The Authority believes it is equally important to preserve livelihoods in the long run, in order to ensure a viable human society in Alberta. It therefore refuses to act as a single-minded "watchdog of the environment". Instead, it attempts to balance the various interests involved, in the hope that "technically feasible, politically possible recommendations"[17] can be made to Cabinet. Naturally, the Authority is non-partisan, and it views "the restoration and maintenance of an environment best suited to man and other forms of life . . ."[18] as a goal of all political parties.

It is not entirely clear how desirable it is for an appointed body of persons, untrained in politics, to presume to make judgments as to what

[17] Walter Trost, Chairman, Environment Conservation Authority, in interview, September 24, 1973.

[18] Environment Conservation Authority, *Annual Report* (1971) at 28.

is "politically possible." Many commentators criticize bureaucrats in various governments for their lamentable tendency to judge, on their Minister's behalf, what "the public will accept." As a result, many worthwhile alternative policies never come to the Minister's attention, because they were deemed politically unacceptable by a public servant almost totally insulated from the process of partisan politics.

In my view, the ECA should try to discern public opinion in the formulation of its recommendations. To anyone who believes in participation and open government, it is vital that the "public will" be discerned and followed, assuming that the necessary information, alternative arguments and time are given for a consensus to form. Public hearings, however, may not mirror a pre-existing consensus. Where two different perspectives are vigorously presented (for example, the coal industry and conservationists), how can the hearing itself indicate the public mood? One can hardly count the number of briefs, and say that 70 per cent favour strict controls on the industry, and extrapolate that the majority of Albertans have this opinion.

The Authority, therefore, seeks to ascertain public opinion by commissioning public opinion polls as "corroborative or check-point information."[19] One wonders what the Authority would recommend if it discovered that most Albertans favoured exploitation of coal resources, even at the expense of serious environmental damage.[20]

Since the Authority publishes complete information from the hearings,[21] it is arguable that the recommendations should be as environmentally sound as possible, and that the Cabinet should be left to assess the political meaning of the trends shown. Clearly the Ministers will do so anyway, and filtering recommendations through two political assessments is apt to result in very bland decisions indeed.

On the other hand, I have the impression that the ECA, by stressing the political acceptability of its recommendations, is trying to reassure the Cabinet that it can do "the right thing" environmentally speaking, without being open to a public outcry. To that extent, everything which helps to bring the government along is quite welcome.

Misgivings about the recommendations of the Authority might also rest on its determination to provide balanced recommendations rather than environmentally biased advice. Balanced recommendations may differ from politically possible recommendations, at least in theory, because weighing public opinion overall is different from balancing competing interests (public opinion may favour one interest to the exclusion of others).

The danger in attempting to balance the interests is that industries or corporations will strongly represent their point of view both at the hearing and before the Departments which regulate them. Thus, their interest will be argued strongly at least twice—the environmental interest, on the other hand, will be diluted once by the ECA's balancing act, and again when other Ministers argue in Cabinet in favour of their own

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19. *Id* at 25.

20. In fact the public are concerned—see *infra*, text accompanying n. 63.

21. The transcript of the hearings is kept for inspection at the Authority's office, although it is not published. For the surface mining hearings, the three volumes published include the Consultant's Report, background papers, all written submissions and letters, questions asked at the hearing by the Authority, a report by the *ad hoc* sub-committee of the Public Advisory Committee, and the report and recommendations of the Authority, including the public opinion survey.

views. This is not meant as a criticism of the other Ministers, but it illustrates the wisdom of Mr. Yurko's reported approach in Cabinet. He views himself as the environmental spokesman and reasons that other ministers will adequately represent other special interests. In this writer's view, the Environment Conservation Authority should do the same.

One feels slightly uncomfortable, however, advising a public body to slant its advice, and it cannot be denied that the approach of the Authority can be supported in the statute. Its authority regarding "environment conservation" is defined in the Environment Conservation Act to include "economic factors that directly or indirectly affect the ability of persons to carry out measures that relate to management of natural resources."[22] Clearly, the legislation contemplates the weighing of the conflicts between environmental and economic costs.

Another aspect of the Environment Conservation Act should be mentioned briefly. The appointment of a Public Advisory Committee has been referred to, and this[23]

> is deemed to be the principle [sic] instrument developed by the Authority to bring about participation from the public in a continuing way through the Authority on matters of policy, in the determination of environmental objectives and in respect of specific environmental problems that affect the public interest.

The membership of this body is broadly representative of all sectors of the public, and the first appointments were made after seeking nominations from 65 organizations, institutions and groups. It has considerable autonomy, and its 1973 annual meeting made some heady statements indeed. For a start, it passed resolutions which called for, among other things, more research into the environmental problems of developing the Athabasca tar sands; the release of the civil service report which called for a slowdown in tar sands development until technological and environmental problems have been solved; funding for urban transit and waste recycling programs; and legislation to discourage wasteful consumption of energy.[24]

During the same meeting, members of a panel roundly attacked the proposed development of the Athabasca tar sands from political, technological, and environmental points of view. On the latter two points, the primary misgiving was the overwhelming lack of knowledge.[25]

If these results are anything to go by, the government has a tiger by the tail, and should be praised for not having set up a safe and docile advisory council as other jurisdictions have done.

Before entering into an analysis of the surface mining hearings, a short description of the process followed by the ECA might be useful.[26]

1. It begins by establishing terms of reference for the hearings, and no one familiar with environmental matters will be surprised to learn that these can evolve to very general levels. For example, the recent hearings on land use on the eastern slopes began with two or three specific problems, until someone saw their systematic nature.

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[22] *Supra*, n. 9, s.3.

[23] *Supra*, n. 18 at 19.

[24] Calgary Herald, Dec. 8, 1973.

[25] *Id.*, Dec. 7, 1973.

[26] This account is a compilation of material from interviews and published documents.

2. Next, background material is gathered, both of a general and a specific nature. Pre-hearing documentation is provided. In the case of the surface mining hearings, this consisted of a prospectus, principles of proposed legislation and a situation report on coal mining.

The public advisory committees are also encouraged to participate, and often reports are received from government departments as well.

3. Much of this information is placed in information centres across the province two months or more before the hearings, if possible. As well, some information (the prospectus and principles of legislation for the surface mining hearing) is mailed out to interested individuals or groups on a lengthy mailing list.

4. The hearings then take place, with each submission being followed by an opportunity for questions from the Authority and the audience. Rebuttal opportunities are extended where appropriate.

5. As soon as possible thereafter, the transcript is prepared, all evidence evaluated, and the proceedings, summary, report and recommendations are readied for publication. Upon tabling of the report by the Minister of the Environment, all volumes become available to the public, the report and summary volumes at no cost.

V. CASE STUDY OF THE PUBLIC HEARING PROCESS

Now that we have looked at the ECA's philosophy and procedure, it is appropriate to examine how an issue is handled from start to finish.

The hearings on the impact on the environment of surface mining in Alberta arose from public pressure from three main sources. In April, 1969, the Society for Pollution and Environmental Control (SPEC) submitted to the Government of Alberta a brief which demonstrated severe environmental damage in mountainous areas of the province, and stated the obvious fact that control of reclamation should not be left to the Department of Mines and Minerals. Damage included "devastation of scenery, pollution and silting of streams by mine wastes, extreme soil loss by increased erosion, and loss of wild life habitation."[27] Indeed, the report alleged that "no strip mine in the foothills of Alberta has ever been reclaimed and reseeded."[28]

These appalling conditions had also been of concern to the Alberta Fish and Game Association for some time. After resolutions of concern passed regularly at its annual meeting, the association finally lost patience and financed a private report on the dreadful situation at a particularly shocking mine site.

About the same time, Mr. Allan Bill, outdoor writer for the Calgary Herald, wrote an article about a strip mining proposal on the Elbow River watershed, which caused a public outcry. As a direct result, the Minister of Mines and Minerals called a public meeting, which was attended by more than 500 people, to discuss the proposal. Present were the Ministers of Mines and Minerals and Lands and Forests, senior officials from these departments, and officials of the mining company. Shortly thereafter, the company dropped the proposal to develop in the area.

In case more documentation of the shocking conditions is needed,

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[27] Society for Pollution and Environmental Control, *Coal Mining Damage in Alberta* (1969), abstract.

[28] *Id.*, at 9.

Rowbotham D.C.J. made the following remarks in *Buchta* v. *Fox Coulee Coals Ltd. and the Surface Reclamation Council*:[29]

> After hearing the evidence, after viewing the surface of the lands and inspecting them thoroughly by walking over them, and after viewing adjacent and comparable lands in the area, it is my opinion that the condition of the surface of the lands in question is totally unsatisfactory . . . briefly, the lands were left in a mess.
>
> I cannot understand the basis upon which the council issued reclamation certificates. Either it was incompetent, careless or indifferent to its duties concerning the administration of the Act or it was more concerned with assisting the operator than with proper administration of the Act.

In consequence of this analysis, the judge required specific work to be done within one year from the date of judgment.

As a result of these events, the Minister of the Environment in November, 1971 "directed the Authority to move with particular urgency on those aspects of the hearings and on the impact on the environment of surface mining for coal."[30] As was indicated earlier, background material was provided, and lengthy public hearings were held. Representatives of industry, government agencies, conservation, outdoor and anti-pollution groups were heard, as well as numerous private citizens. In all, 106 briefs were submitted, 85 during the five hearings, and 21 before, during and after the hearings by persons unable to attend.[31]

As may be expected, the submissions tended to take two perspectives. Although the coal mining and related industries were prepared to agree that as much reclamation as possible should occur, its view of practicality was markedly different from the overwhelming majority of non-industrial briefs. (The industry's perspective is also reflected in the present nature of reclamation work in the province). The only four briefs which indicated concern over industry's cost-price squeeze came from the industry. Other submissions considered, at least implicitly, that the full cost of the operation should be borne by the company concerned, and that environmental damage should be minimized. This was reflected in a recommendation by the Authority that "all reclamation costs should be included as part of the mining costs and should be included in the market price of the coal".[32]

On the whole, the briefs by the industry tended to be a rearguard action to decrease the cost of the inevitable tightening up of government regulations. This is a legitimate role of an interested group, and the men in the industry honestly disagree with the emphasis of other sectors on environmental concerns. Living as they do in the commercial world, their insistence on the economic necessities of coal extraction is an important viewpoint. A useful function of the hearings, it seems, was to expose the arguments of all sectors of opinion to comment by each other and members of the public. No doubt the mood during the hearings impressed the industrial representatives, and made everyone more aware of the others' positions.

The major concerns expressed during the hearings were deterioration of wildlife habitat (22 briefs), effects on flow of water (20), sedimentation

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[29] [1971] 2 W.W.R. 476 at 477.

[30] Environment Conservation Authority, *The Impact on the Environment of Surface Mining in Alberta, Proceedings*, at iii (hereinafter cited as *Proceedings*).

[31] *Id.* at vii.

[32] E.C.A., *The Impact on the Environment of Surface Mining in Alberta, Report and Recommendations*, at 61 (hereinafter cited as *Report*).

in the water (16), chemical pollution of water (13), erosion (16), land disturbance (13), and the notion that alternative uses were really more economical (13), and conflict with recreation (11).[33]

It is convenient to assess the ECA's report relative to the major trends emerging from the hearings, to determine if the ECA's recommendation had been mentioned in the background documents given out before the hearings, and finally to describe the approach taken in the resülting legislation.

Although there are apparent inconsistencies between general and particular statistical tables (due to errors of editing),[34] the major recommendations emerging from the hearings appear to have been the following:

1. Selected Areas of the Province Should be Closed to Strip Mining (44 briefs)

Numerous examples were given as possibilities, including land above 5,000 feet in altitude, wildlife habitats, and headwater areas of various river systems.

(a) The Authority's approach

The Authority, although stressing a careful case-by-case approach to the possibility of adequate reclamation, did recommend that if "sites cannot be developed in areas of great sensitivity without permanent impairment of their values, then areas should be entirely reserved against exploration and mining activities."[35] In another general recommendation, it suggested that the Minister should have authority to reserve any site, in the light of the sensitivity of foothills and mountains.[36] It is not clear why both recommentations were felt necessary, but they underline the mood of the hearings.

The Authority also specifically recommended the prohibition of mining to protect waterfalls of great natural beauty, or "wild rivers."[37]

(b) Background documents

The consultant's report advised restrictions on development of land adjacent to parks and in areas, such as alpine tundra, where there are "extremely delicate ecosystems which are difficult or impossible to restore."[38]

A government task force, in a document entitled "Principles Underlying Proposed Surface Reclamation Legislation", contemplated giving the Minister power to prohibit physical erosion, or degradation of the surface, and to prohibit the "cultural, scenic and aesthetic deterioration of the land surface" (shades of King Canute).[39] These powers, however, are consistent with an individual assessment of each project by the Minister

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[33] *Id.* at 78.

[34] The general table (*Report supra*, n. 32, Table 2 at 21) and text of the report (*supra*, n. 32 at 56) indicate that the main recommendation from the hearings was that selected zones be restricted from surface mining (44 briefs), and that comprehensive land use planning was suggested 21 times. In the "more complete and detailed breakdown" in appendix 2 (*supra*, n. 32 at 19); however, the former is not mentioned at all, and comprehensive land use planning is listed as recommended only 15 times. Indeed, the text of the report (*supra*, n. 32 at 19) states that the most frequent recommendations were for restricted areas and more research. Yet in the table on page 21 the need for research (18 briefs) is listed as third, with comprehensive land use planning recommended by 21 briefs.

[35] *Report, supra*, n. 32 at 57.

[36] *Id.* at 66.

[37] *Id.* at 43.

[38] *Proceedings, supra*, n. 30 at 33.

[39] *Id.* at 1029.

to see if these possibilities exist, as well as with the creation of restricted areas.

(c) Resulting legislation

Under the Land Surface Conservation and Reclamation Act,[40] the Minister may prohibit or curtail any kind of geophysical operation in any area for all or any part of the year. As well, the Lieutenant Governor in Council may by regulation prescribe circumstances and areas in which no approval of any specified kind of regulated surface operation will be granted.[41] No criteria are established in the Act for the exercise of these discretionary powers.

2. Comprehensive Land Use Planning (21 briefs)

Perhaps the best elaboration of this recommendation is to be found in the consultant's report:[42]

> Solutions to resource conflicts posed by surface mining must be based on sound land use policies and a clearly defined system of land management zones. These zones should be delineated by considering physiographic and economic boundaries and the needs of people.

(a) The Authority's approach

The Authority was concerned about "a growing conflict"[43] between surface mining and tourism and recreation in the foothills and mountains. Although mines usually have a lifetime of 20 years or less, recreation activities will last as long as the land is available for it. However, the Authority contented itself with recommending that, in the case of irreconcilable conflicts, the best solution should be chosen—that is, the conflict "should be resolved in favour of the larger and longer-lived social and economic benefits, taking into account the measurable social and economic values for each activity in a community."[44]

Various techniques were suggested in this context, ranging from prohibition (*supra*) to bonding, reclamation plans, etc.

Regarding surface mining on the plains, the Authority explicitly recommended early policy planning "by Government, to ensure that prairie coal mining is included in an integrated land management pattern for areas under which coal deposits are proven or inferred."[45] This can be read merely as encouragement of mining activities, as well as an exhortation to plan integrated land use, especially since the ECA explicitly recognized that "aside from considerations which must apply to successful reclamation, the question of economic benefit to the province is of paramount importance."[46] The evidence established the comparative ease of reclamation on the prairies, and noting this ambiguity is not intended as a criticism of the point.

Nevertheless, the need for planning was accepted by the ECA and it also stressed the need for comprehensive reclamation plans to be approved by regional and local authorities (planning units) as well as by the land owner.[47]

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[40] S.A. 1973, c. 34, s. 10.

[41] *Id.* s. 25(1)(d).

[42] *Proceedings, supra*, n. 30 at 45.

[43] *Report, supra*, n. 32 at 46.

[44] *Id.* at 47.

[45] *Id.* at 52.

[46] *Id.* at 60.

[47] *Id.* at 49.

(b) Background documents

As indicated, the consultant's report stressed this point as well. The government task force on legislation talked about "comprehensive environmental planning before the fact,"[48] but this could apply to the planning of each project to minimize impact, rather than comprehensive land use planning.

(c) Resulting legislation

There is no hint in the legislation that land use policies are relevant to the question of surface mining, unless considering each application on its merits amounts to comprehensive land use planning. No criteria are laid down in the Act for this exercise, although the Minister must (no discretion!) coordinate the compilation of an inventory of natural resources in the province.[49]

3. Increased Environmental Research (18 briefs)

(a) The Authority's approach

The Authority made six recommendations for increased research, development of technology, publishing of manuals of reclamation, and the training and licensing of reclamation technologists.

(b) Background documents

The consultant's report also made recommendations on research in several areas, including water, wildlife and economics.[50]

(c) Resulting legislation

As already mentioned, the Minister of the Environment must compile an inventory of Alberta's natural resources. Apart from this, and provision for the assessment of each application, the Act does not seem to contemplate a research program.

4. Operators Should Have to Post Security Bonds (16 briefs)

(a) The Authority's approach

Bonding was recommended by the Authority, both in respect of upland and prairie operations, with inspection and progressive release of funds as reclamation proceeds.[51]

(b) Background documents

The consultant's report mentioned this possibility and the government task force on legislation recommended it as well.[52]

(c) Resulting legislation

Section 25(g) of the Act authorizes the Minister to require applicants for, or holders of, approvals to give security to the government, returnable when the reclamation of the land is completed, as certified by a reclamation certificate issued under s.30.

5. The Operator Must Develop a Reclamation Plan (16 briefs)

(a) The Authority's approach

The ECA recommended that a comprehensive reclamation plan be required,[53] and that in the foothills or mountain areas it should consist of

[48] *Proceedings, supra,* n. 30 at 1024.

[49] *Supra* n. 40, s. 5.

[50] *Proceedings, supra,* n. 30 at 57.

[51] *Report, supra,* n. 32 at 47 and 52 respectively.

[52] *Proceedings, supra,* n. 30 at 56 and 1029 respectively.

[53] *Report, supra,* n. 32 at 47 and 49.

a detailed engineering plan signed by a professional engineer registered in Alberta.[54]

(b) Background documents

The consultant's report endorsed this concept[55] and the government task force on legislation implicitly may have assumed this requirement.

(c) Resulting legislation

The legislation enacted allows the Minister to require comprehensive reclamation plans (s.25), but does not require him to do so. It is hard to see why not.

6. Public Participation (Public Hearings) on Environmental Impacts (15 briefs)

(a) The Authority's approach

The ECA devoted the final section of its report to this matter, noting a "strong public demand for a share in resource policy formulation."[56] Therefore, it recommended public hearings, "under certain conditions,"[57] to consider new surface mining operations. Presumably, the conditions are those implied in another recommendation that the Minister should have power to order hearings, and the ECA should be able to hear the matter upon petition of the public.

Part of the process here, the Authority felt, should include the preparation and publication of environmental impact statements for public information.

(b) Background documents

The consultant's report suggested that the reviewing body have the power to hold public hearings where sufficient interest or resource conflict justified it.[58] The government task force proposed that irreversible developments be debated in the Legislature and that others require public hearings.[59]

(c) Resulting legislation

This is a rather curious area. On my reading of the Environment Conservation Act, the Authority already has the power to hold any hearings it wishes, and the Minister can order any hearings he wishes. Apparently, Mr. Yurko proposed to bring forward, in 1974, amendments to that Act to permit the public to demand hearings as a prerequisite to any particular development.[60] Why the Authority feels these recommendations are important is unclear, but it seems to reveal a rather unadventurous view of its present mandate.

The Land Surface Conservation and Reclamation Act[61] neither contemplates nor precludes public involvement in the assessment process. No hearings are provided for, and, although the Minister "may" order an environmental impact assessment, the Act does not require this to be published.

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[54] *Id.* at 54.

[55] *Proceedings, supra*, n. 30 at 54.

[56] *Report, supra*, n. 32 at 67.

[57] *Id.* at 68.

[58] *Proceedings, supra*, n. 30 at 54.

[59] *Id.* at 1025.

[60] Calgary Herald, November 1, 1973.

[61] S.A. 1973, c. 34.

7. General Comments on the Recommendations

Other recommendations include the supervision of reclamation by qualified personnel (16 briefs), general, rather than specific, legislation (14 briefs, 11 from industry), the execution of cost-benefit analyses before approval of projects (13 briefs), and many others. Generally, the ECA faithfully reported all recommendations made more than once during the hearings and reflected, to a greater or lesser degree, the trends shown by the submissions.

The ECA recommendations might be criticized for being too vague, as they were generally lacking in specifics regarding several problem areas of mining operations, such as road construction and reclamation procedures. The Authority argues, however, that it had to present recommendations which would be flexible enough to apply to the variety of environmental and geographic situations in question. An example is the section dealing with site investigation and classification.[62] As already noted, numerous environmental groups proposed reservation of specific areas or particular classes of areas from surface mining. The response of the Authority was to recommend regulations which could allow for the reservation of any such areas.

The recommendations are not specific as to who will be responsible for activities such as site investigation and classification, or review of applications for permits. The briefs suggested a variety of techniques.

Contrary to the recommendations in several briefs, there is no specific definition offered by the ECA for "surface disturbance" which would include a variety of mining and non-mining activities, or for "reclamation," although, on the latter, it is clear that consideration should be given to alternate post-mining uses, rather than returning the land automatically to its original state.

8. The Land Surface Conservation and Reclamation Act—Overall View

60a. After the article went to print, the following regulations were proclaimed: Land Conservation Regulations (Alberta Regulations 125/74 and 170/74) and Coal Conservation Regulation (Alberta Regulation 229/74). The reader is advised to refer to them for the most current information.

Before embarking on an overall assessment of the usefulness of the whole process of public hearings described above, it seems helpful to examine briefly the structure and provisions of the Land Surface Conservation and Reclamation Act.[63]

Because of the extraordinary discretion given to the Minister by the Act, it is difficult to tell what requirements a would-be disturber of land surface in Alberta would have to fulfil. Ten of the 66 sections of the Act give either the Minister or Lieutenant Governor in Council the power to make regulations. Another nine sections give the Minister discretion on what, to me, are significant points, such as the power to require an environmental impact assessment (s.8), the power of entry on land (s.17), and the power to issue stop orders (s.9) (the latter type of discretion is common in most jurisdictions).

Assuming that the Lieutenant Governor in Council exercises power to pass the many kinds of regulations contemplated, the proposed procedures would probably look like this:

(a) All land in Alberta, except residential land, subdivided land intended for residences and that used for agricultural operations, is covered by the Act (s.2). The Crown is bound by the Act (s.3).

[62] *Report, supra*, n. 32 at 57.

[63] *Supra* n. 61.

(b) Potentially, surface operations which may be brought under the Act by regulation include wells, mines, quarries, waste disposal sites, pipe or transmission lines, geophysical operations which will result in surface disturbance, processing plants, roads, any water impounding structures and preparation of land to be used for industrial sites or recreational developments.

(c) Regulations under s.23 can declare any of these operations, under any or all circumstances, to be a regulated operation in any or all parts of Alberta.

(d) Once any s.23 regulations are passed, no one can commence that type of operation on that area of land without approval of the Minister (ss.24 and 27). Regulations may be passed specifying procedures, terms and duration of approvals.

(e) If regulations are passed under s.24, security deposits can be required (except from government departments or agencies).

(f) The Minister may require an environmental impact assessment, containing various items including "economic factors that directly or indirectly affect the ability of applicants to carry out" certain measures to conserve natural resources, control pollution and control noise levels (s.8). Also, the application must be in such detail as the regulations require.

Only when regulations have been promulgated will any of the above apply.

(g) A Land Conservation and Reclamation Council is created by s.15 of the Act, consisting of representatives of the Departments of the Environment, Lands and Forests and Mines and Minerals; other persons appointed by order-in-council; and representatives of local authorities and regional planning commissions (in each case, only the representatives whose geographical area is affected by the application would sit in review of it).

(h) The Council presently has authority to hold an inquiry (s.40(2)) and, if warranted, to make reclamation orders (ss.32 and 40(3)), covering either land where the operation occurs or other disturbed land, in respect of several of the categories listed in s.23 of the Act (the first 6 items in (b) (above) and others if designated by regulations). The Council will be able to make reclamation orders in respect of other items in s.23 only when the necessary regulations are passed. If an order is not carried out, the Minister can arrange for the work to be done and invoice the person, to whom the reclamation order was directed, for that amount (s.43).

(i) Regulations may be passed authorizing the Minister to give grants or loans, upon conditions, for reclamation costs (s.12).

(j) Provisions exist for abandoned operations (ss.44-46).

(k) When the Council believes the surface of land is in satisfactory condition (presumably after an inquiry held under s.50 or 51), it must issue a reclamation certificate, whereupon the deposit will be returned, either partially or completely, either immediately or following the passage of the necessary period of time to confirm that the reclaimed area is in good shape.

(l) Under certain circumstances, an inquiry may be required to review the reclamation certificate. Appeals to the courts exist.

The Act has been proclaimed, but no regulations have been passed as of 1974.

Potentially, this Act could have an extremely broad effect since very few activities (except agriculture) are excluded. One expects, however, that land within municipal boundaries will be exempted from its provisions.

In summary, we have noted that there are no provisions for public hearings of applications, nor for the publication of any environmental impact assessments which *may* be required, although I am informed that these assessments will probably be released to the public as a matter of policy.

The Coal Conservation Act,[64] assented to on October 30, 1973, overlaps the Land Surface Conservation and Reclamation Act in respect of coal mining operations. The former requires application to the Energy Resources Conservation Board for a permit to develop a new coal mine or coal processing plant or recommence operations which have been suspended (ss.11 and 23). The application, which must be accompanied by a reclamation scheme, is to be referred to the Minister of the Environment for his approval with or without conditions (ss.21 and 24). Regulations may require the deposit of a "specified performance bond" (s.9(1)(3)).

In several other ways, the Acts also resemble each other. It is my guess that the Coal Conservation Act will be used on a trial basis before the much broader powers of the Land Surface Conservation and Reclamation Act are utilized. Regulations in regard to coal are almost ready for promulgation.[65]

9. *The Usefulness of the Environment Conservation Authority Hearings*

First of all, some criticisms particular to the surface mining hearings could be levelled at the ECA, but some of the procedural and timing problems resulted from inexperience and urgency. This was, after all, only the second set of hearings held by the Authority.

For example, although the Authority attempts to have the technical material in the information centres two months before the hearings, delays have occurred, which have prevented the public from having time to digest the data and prepare thoughtful submissions. In the case of the surface mining hearings, even the prospectus was not available until November 11, for hearings due to start December 13. In these hearings, the first draft of the "resulting legislation" was prepared after the hearings, but *before* the publication of the ECA Report. Details of any subsequent amendments are not available to me, but my information is that this version was very similar to the final legislation.

This point may cause some to ask the purpose of hearings, or even to state, as one contributor did, that the purpose of the hearings is to allow the government to find out what it can get away with without causing a public uproar. This sequence, however, is not the general rule, and more lead time has changed the situation in later hearings.

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[64] S.A. 1973, c. 65.

[65] By letter of December 21, 1973, the Minister stated that there: "have been no regulations passed under the Land Surface Reclamation and Conservation Act [sic], however, regulations with respect to coal are in the final stages of preparation."

In any event, the hearings appear to have been satisfying for participants, who were heard fairly and fully, and who also learned about other perspectives. Although they apparently did not have a major innovative impact on public policy (58 of the 95 recommendations by the Authority were mentioned in the original consultant's report, and most of the remainder are not traceable to the hearings), the submissions confirmed the desirability of a majority of the recommendations. Including duplication of recommendations, 51 of the Authority's recommendations were supported by conservation and anti-pollution groups, 17 by industry and six by farmers.

The public opinion survey showed that most of the general public was concerned about the problem. Indeed, about three quarters of the sample strongly supported vigorous government regulation and speedy and complete restoration, although only one fifth would be willing to pay all the "reasonable costs" through higher electricity rates.[66]

The process, then, appears to have shown (or helped to create) a consensus, and to have given the government confidence that it was moving in the desired direction. As well, the apparent opportunity for input into the final legislation may have had a psychologically inhibiting effect on later protest by non-participants. In other words, potential protesters are educated, given a forum, and perhaps partly co-opted into the decision-making process, while government, having tested the waters, can take action which appears both vigorous and popular. The public interest, it is submitted, is the winner in this process. I note a distinction here, however, between the right to make representations to persuade decision-makers (partial participation) and the power to share in the decision itself (full participation). The ECA incorporates only the former, while, as my peroration implies, I believe we must systematically develop the latter.

VI. A NEGATIVE EXAMPLE

I would not wish to imply that all is sweetness and light in Alberta. A recent example of token public participation gives cause for concern.

The Minister of the Environment, the Honourable William Yurko, has established a Citizen Advisory Committee on Resource Development. Having already decided that a dam was needed on the Red Deer River for the usual engineering reasons, he proceeded to ask the committee for advice on the question of site selection and gave it a large number of alternatives from which to choose. Some citizens on the committee (which included mayors, representatives of Chambers of Commerce and other associations, such as the Alberta Fish and Game Association) were unconvinced of the need for any dam, given its purpose and the unlikelihood of floods. By committee vote, however, the group decided to recommend three sites for further study, all well up-river from the city of Red Deer, and west of Sundre.

Almost as soon as Mr. Yurko received the committee's recommendations, he announced in the Legislature that a different site had been selected for further study. To the consternation of his advisory committee, the site announced was near the confluence of the Raven and Red Deer Rivers—*east* of Sundre—and it will probably have a very harmful effect on fine trout fishing in the Raven River.

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[66] *Id.* at 28.

I am in no position to judge the desirability of building the dam, much less the choice of site, but merely note, from the point of view of conservationists, an apparent cavalier attitude in this case toward the advice of citizens.

VII. PUBLIC PARTICIPATION THROUGH THE ENERGY RESOURCES CONSERVATION BOARD

Formerly the Oil and Gas Conservation Board, the ERCB's mandate now includes electric energy and coal, as well as petroleum and natural gas. One of the objects of the Energy Resources Conservation Act[67] is to "control pollution . . . in the exploration for, processing, development and transportation of energy resources and energy."

The so-called "one window approach" seeks to avoid a duplication with other government departments. Generally, persons wishing to pursue the exploitation of energy resources in the province must apply for one permit from the ERCB. In turn, the relevant energy statutes require, where applicable, referrals to the Minister of the Environment and often the Minister of Lands and Forests for approval. Any conditions which either Minister attaches, unless overridden by the Lieutenant Governor in Council, must be imposed by the Board if it determines that the application is acceptable from its point of view.[68]

Public participation is an integral part of the Board's procedure. The Energy Resources Conservation Act requires the Board to provide notice, and to observe certain other procedures characteristic of natural justice if it appears to the Board that the rights of any person may be directly and adversely affected. This seems so obviously desirable that one wonders why the same requirements are not included in the licence and permit procedures under the Clean Air Act and the Clean Water Act.[69] These rights, however, do not necessarily involve a hearing, unless the relevant Act specifically requires it (s.29(1)). If the person will not otherwise have a fair opportunity to contradict or explain the application, the Board is required to give an opportunity for cross-examination.

Except for questions of law or jurisdiction (s.42 of the Energy Resources Conservation Act), the Board's decisions are not open to review in any court (s.28), nor can the Board be restrained by injunction, prohibition, *etc.*, nor are proceedings removable by *certiorari* or otherwise into any court (s.43).

The rules of practice made by the Board are subject to the Administrative Procedures Act.[70]

The Board may propose to decide an application after publication of a notice without a hearing, but if non-frivolous objections are lodged, the Board will consider holding a hearing. An intervention filed with the Board will be considered in any event. The Board, under its rules of practice, takes a broad view of its mandate, and generally, where

[67] S.A. 1971, c. 30 s. 2(d).

[68] As this is a composite picture, I am not citing the relevant sections. Interested readers should consult:
Coal Conservation Act, S.A. 1973, c. 65.
Energy Resources Conservation Act, S.A. 1971, c. 30.
Gas Resources Preservation Act, R.S.A. 1970, c. 157.
Hydro and Electric Energy Act, S.A. 1971, c. 49.
Oil and Gas Conservation Act, R.S.A. 1970, c. 267.
Pipe Line Act, R.S.A. 1970, c. 275.

[69] S.A. 1971, c. 16 and 17 respectively.

[70] R.S.A. 1970, c. 2.

protests are lodged after advertising, the Board will hold a hearing. It also liberally interprets the question of direct and adverse affect in favour of the intervener so long as the intervener has "a *bona fide* interest."[71] Indeed, for developments such as gas plants, all land owners within a two mile radius are given notice and there are mailing lists of oil companies and environmental groups as well.

What can an intervener do about environmental matters? First, no evidence or information submitted to the Board can be withheld from persons interested in the application (s.28 of the rules). It is rather difficult, however, for volunteer groups to obtain the necessary expert advice to hypothesize environmental problems from design and process information.

Furthermore, the hearing is not scheduled until the Department of the Environment has approved the application. If the Department states at that time that the proposed installation will not involve the breaching of any provincial pollution standard, there is little to be gained from pursuing the matter before the Board. The effect on the environment is not considered as such, for an intervener will not be allowed to question the adequacy of provincial standards, and it is unlikely that a challenge to the Department of the Environment's calculations of pollution levels would succeed. In the past, the most difficult questions at the hearings on this subject have come from the technical staff of the Board itself.

In the absence of a provincial standard for a particular effluent, the Board could set one, and representations could be helpful in such a case. An example is the Board's decision not to allow smoke emissions from installations requiring its approval, even though the Department of the Environment has a less stringent standard.[72]

The difficulty is illustrated by the story of the Pincher Creek sour gas plants. Numerous complaints were received over the years from property owners, but since provincial pollution standards could not be proved to have been exceeded, the government refused to intervene and even told the farmers that their complaints were psychosomatic. The property owners disagreed, since farmers do not usually fall off tractors, and neither livestock nor babies are psychosomatic. They therefore retained counsel and sued the oil companies owning the plants. Over a period of time, the lawyers had their clients keep a diary of the complaints and wind direction and these correlated closely with production and emission data of the companies. As a result of this resourceful preparation, there was an out-of-court settlement of about three quarters of a million dollars.

It would appear, then, that the ERCB hearing does not offer much scope for the airing of environmental concerns. Catharsis and education are the main benefits for interveners.

Consistently my sources indicate that there has been considerable competition between the Department of the Environment and the ERCB on pollution matters. The enforcement of anti-pollution standards in gas plants is vested in the ERCB, and industry is being caught in the middle. After vigorous interdepartmental activity, explanatory documents were issued to the industry,[73] delineating the respective roles. The

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[71] Alta. Reg. 147/71 (1971), s. 21.

[72] Alta. Reg. 10/73 (1973), ss. 9 and 10.

[73] *Pollution Control in the Oil and Gas Industry, Roles of the Department of Health and the Oil and Gas Con-*

Minister has made it clear that there are to be no public struggles between the ERCB, the ECA and Department of the Environment.

VIII. PUBLIC PARTICIPATION IN THE DEPARTMENT OF THE ENVIRONMENT'S ACTIVITY

The most important kind of participation in DOE activities appears to be the lodging of complaints. The enforcement staff of the province is overworked (about 25 field officers in the Department of the Environment) and though continuing discussions are held with various segments of industry regarding abatement programs, enforcers must depend largely on hunters, fishermen and city dwellers for reports of violations.

As mentioned previously, the three main Acts administered by the Department give dangerously wide discretion to the Minister. In fact, other than breaches of control or breaches of stop orders, the issuance of which is discretionary, there are few pollution offences in provincial statutes.

Although s.9.1 of the Clean Water Act creates the offence of depositing or permitting the deposit of "a deleterious substance of any type in a watercourse . . . or in any place . . . where a deleterious substance . . . may enter any watercourse or surface water," the approval of the Attorney General is required to prosecute. Further, the holder of a licence or permit is not guilty of an offence under this section if emissions are within the terms of his approval. In any case, the definition of a deleterious substance is such that the Crown would have to prove that the substance "would"—not "could"—degrade the water, so that prosecution under the Federal Fisheries Act[74] would be easier.

The potential for private prosecutions is not as bleak as it first seems. Both the Clean Air Act and Clean Water Act prohibit the commencement of construction of various facilities without permits, and prosecution here should be straightforward. Further, failure to comply with the terms in these approvals is an offence (ss.4(12) and 4.1(8), of each Act)[75] and the permits are available to the public on request.[76]

Rather more scope is offered in the regulations. Apparently, the drafters failed to realize that the Clean Water (General) Regulations[77] create a broader offence than s. 9.1 of the Act under which the approval of the Attorney General is required. Here, the offence is allowing the deposit into surface water or a watercourse of "*any substance capable* of changing the quality of the water or of causing water contamination" [my italics]. The analagous provision in the Clean Air (General) Regulations appears to be the prohibition against releasing "toxic contaminants."[78] Further, although one needs much more scientific data, there are specific effluent levels in the Clean Air Regulations[79] and of-

servation Board in Areas of Mutual Concern, July 1970, ECOLOG Alberta-56; *Environmental Management and Pollution Control Gas Processing Operations, The Energy Resources Conservation Board and the Department of the Environment, Information Letter IL G-72-20, id.*; *Interdependent Roles of Department of the Environment and the Energy Resources Conservation Board*, March 1973, *id.* at 84.

[74] R.S.C. 1970, c. F-14, as amended by R.S.C. 1970, c. 17 (1st Supp). I have heard that, on occasion, recommendations for prosecution have been made by officers of the Fish and Wildlife Division, Department of Lands and Forests, but that no prosecutions by the Department of the Environment were forthcoming.

[75] Although s. 4.1 (8) (a), on operating licenses, may not, when read literally, create the intended offence.

[76] Letter dated December 21, 1973, from the Honourable W. J. Yurko, Minister of the Environment.

[77] Alta. Reg. 216/73 (1973), s. 11(1).

[78] Alta. Reg. 215/73 (1973), s. 5(1).

[79] Alta. Reg. 10/73 (1973).

ficials of the Department of the Environment state that Alberta has accepted the "desirable" or most stringent standards under the federal Clean Air Act[80] as the "maximum" allowed in Alberta.

To date, there have been no known private prosecutions under the three main Alberta statutes. There have been two prosecutions by the government and approximately fifteen emission control or stop orders have been issued and periodic Department of the Environment press releases.[81]

Having covered the possibility of complaints and private prosecutions, I have almost exhausted the extent of public involvement in this field.[82] No provision exists for intervention in the licensing of industrial or municipal plants, other than the provisions earlier described for the ERCB. If an installation is proposed within a municipality, however, opportunities for participation may exist at the planning board or council level.[83]

IX. MORE NEGATIVE EXAMPLES

The whole permit system, and promulgation of regulations, seems predicated on the assumption that the Minister or the Department will exercise discretion in the public interest. Given the history of resource give-aways in Alberta, a topic beyond this paper, one perhaps may be allowed some scepticism. The best and most recent example is the Syncrude deal. At the 1973 annual meeting of the Public Advisory Committee of the Environment Conservation Authority, panelists were severe in their criticism of the project. Indeed, one panelist "repeated what his firm has already told the Lougheed Government in the report tabled in the House last spring. The environmental aspects of the Tar Sands are staggering, and the absence of data precluded an in-depth study of the impact."[84]

It is noteworthy that the DOE has certified to the ERCB that the project will not breach any Alberta pollution laws. One wonders to whom the government listens, if a consultant's report and a confidential report of an interdepartmental committee of civil servants to the same effect are both ignored. If it can state with confidence that provincial pollution standards will not be breached, while lacking an in-depth study of possible environmental impact of a massive project, surely the government's fundamental philosophy is wrong.

Three days after air pollution in Calgary reached an all time high (since exceeded), a newspaper story quoted the Minister of the Environment as saying that his department had no contingency plans to deal with air pollution from the automobile, which is responsible for over 85 per cent of the air pollution problem in Calgary.[85] Just before that, on the radio, the chief of the DOE offices in Calgary had threatened to set up roadblocks to prevent motorists from driving downtown if the problem repeated itself. Present environmental legislation does not authorize such drastic (but effective) action, but the history of random

[80] S.C. 1971, c. 47.

[81] *Supra*, n. 76, and periodic Department of the Environment press releases.

[82] In passing, I express doubt that riparian rights exist in Alberta. By s. 4(1) of the Public Lands Act, R.S.A. 1970, c. 297, the title to the shores of watercourses in the province are reserved to the Crown in Right of Alberta (subject to specific grant, and federal property). This means, of course, that no owner would own lands abutting a watercourse, which is necessary to support a riparian claim.

[83] *See* Laux, *The Zoning Game: Alberta Style*, (1971) 9 Alta. L. Rev. 268; (1972) 10 Alta. L. Rev. 1.

[84] Calgary Herald, December 7, 1973.

[85] *Id.*, October 15, 1973.

roadblocks to catch drinking motorists shows that this is not a fatal objection.

These counter-examples should not blind us to the generally sound job being done by Alberta's Department of the Environment within the confines of the assumption that emission standards will give adequate protection. Basically, it uses a negotiation approach somewhat similar to that of Ontario, and although the Minister is apparently prepared to move into a more vigorous prosecution phase, the informations have yet to be sworn. The main point to be made is that the public has no place in this part of the environmental decision-making process.

X. CONCLUSIONS

Within the present governmental framework, Alberta has made a constructive beginning on public participation through the Environment Conservation Authority, and the public input mechanisms before the Energy Resources Conservation Board are also praiseworthy. An obvious improvement, however, would be to open up DOE's permit-granting process to the public, both by publishing all the relevant material and by allowing for public hearings. Perhaps the Land Surface Reclamation and Conservation Act is intended to do this for all projects, but this appears unlikely.

Other obvious recommendations are to require the preparation and publication of environmental impact statements and then to allow the requisition of hearings. Again, this may be the intention of amendments to the Environment Conservation Act promised by the Honourable William Yurko.

The right to be heard, however, should not stop there. Legislation should provide the right to a clean environment, so that any person could prevent any action, private or public, which threatens its degradation. An interesting example is the Environment Protection Act of Michigan.[86]

A cautious government could begin by allowing private citizens to take action in public nuisance instead of reserving this right to the Attorney General. It also seems essential to finance *bona fide* interest groups, either by establishing an automatic solicitor-client tariff of costs for successful plaintiffs and indemnifying expenses of unsuccessful plaintiffs or more simply by major grants of funds for research and legal action.

Of course, the public should have access to all reports prepared for the government with public funds.

These reforms, however, would still only scratch the surface. The longer one looks at environmental problems, the more apparent their systematic nature becomes. "It is impossible to believe that the mere absence of pollution will provide an end to our present malaise."[87] Indeed, an elementary principle of ecology tells us that "everything affects everything else." Pollution being the effect, not the cause, it must be obvious that an intelligent response to the problem requires a fundamental analysis of our present condition. In that sense, all that I have written

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[86] Michigan Compiled Laws Annotated ss. 691-1201-7 (Supp. 1972). *See also* Sax, *Michigan's Environmental Protection Act of 1970: A Progress Report*, (1972) 70 Mich. L.R. 1004.

[87] Steinhart, *Search for a Future*, report for the Ford Foundation (1970).

here is a rather trivial prologue for a much broader piece.[88] A fundamental analysis would profoundly reveal the roots of the present turmoil of individuals and institutions—that is, it would offer an understanding of our true human condition and provide the basis for intelligent, not counter-productive, action. It would establish that we are in such a deep cultural crisis that "those of us who live now live during the death of one great culture and the creation and clarification of another."[89]

My hypothetical article would demonstrate how, without a sense of community, compassion or conviviality in the world, there is no hope; how a shift in perception of "reality" is needed to bring this about; and finally it would offer constructive proposals for individuals and groups wishing to actualize a new culture.[90]

Change on this scale can neither be coerced nor prevented. But since we are living on the brink of disaster, we must hope that changes of this sort can be encouraged and hastened. Political leaders who feel these thoughts in their bones will have to speak up (and act).[91]

The rewards of decisive leadership could be our salvation, whereas more of the same means disaster.

At this point, readers may perceive an inconsistency. If I believe so strongly in participatory, people-centered government, (where "leaders" would have to devote their energy to fulfilling the expressed wants of the people), why do I end with a plea for directive leadership?

The answer is this. We have to start from where we are—a nation propagandized by a productive-consumptive machine, and imbued with the need for leadership. In these circumstances, how do reforms occur?

> The men and women in England who abolished slavery, created the educational system, or gave women the vote were not acting on hypotheses of what the voters wanted. They were afire with faith in what people ought to want and in the end they persuaded their lethargic compatriots to give them enough support to warrant a change.[92]

In the end, of course, western society not only took these reforms for granted but came strongly to favour them.

It seems to me that reforms and value shifts occur dialectically, and at the moment one has to stress the possibility of change through credible leadership. Although I am confident that values are shifting, we can wait neither for their predominance over established ideology nor for hind-headed leaders to perceive that the people are far ahead of them. Ultimately, as people gain experience in autonomous decision-making, informed public debate will flourish. But until there is a "critical mass" of citizens attuned to the need for autonomy, equality and tolerance, and

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[88] *See* Elder and Besecker, *Looking Ahead: A Radical Solution*, to be published in the proceedings of the Second International Man and His Environment Conference (Banff, May 1974).

[89] Nelson, *Society: Today and Tomorrow, or What Can we Make of a World Like This?*, Speech to the Ontario Camping Association, March 1972.

[90] My proposal includes public ownership of natural resources, or at least a radical redefinition of private property; encouraging smaller, human-size institutions; massive redistribution of our resources; realignment of Canada with other economically dominated nations (join OPEC?); renovating all institutions (including educational) to encourage responsible decision-making by people of all ages; decentralization and democratization of decision-making; and requiring a "conviviality assessment" of all proposals for significant technological, environmental and social changes. All of this implies that the economic system must be subordinated to our social requirements. The invisible hand mentality, it seems to me, is an amoral cop-out.

[91] In this regard, *see* the Honourable Allan J. MacEachen's speech, *It is Time to Humanize Technology*, delivered at University of North Carolina, February 15, 1971, and the Right Honourable P. E. Trudeau's commencement address at Duke University, May 12, 1974. As this is being written, however, the Prime Minister is being conspicuously silent about those critical issues during an election campaign.

[92] Vickers, *Value Systems and Social Processes* (1968), at 46.

corresponding institutional reform, a call for leadership will be appropriate.

APPENDIX "A"—LIST OF INTERVIEWS—FALL, 1973

1. R. E. Bailey, Assistant Deputy Minister, Environmental Planning and Research Services, Alberta Department of the Environment (DOE) (in conference).
2. Victor Bohme, Manager, Development Department, Energy Resources Conservation Board.
3. R. N. Briggs, Director, Pollution Control Division, DOE.
4. T. Scott Hammond, Farmer, Pincher Creek (by telephone).
5. D. G. Harrington, Director, Land Conservation and Reclamation Division, DOE (in conference).
6. Henry Hogge, Director, Standards and Approvals Division, DOE.
7. Gordon Kerr, Director, Fish and Wildlife Branch, Alberta Department of Lands and Forests.
8. William Kerr, Geologist, Calgary.
9. Brent Markham, Habitat Development and Protection Biologist, Fish and Wildlife Branch, Department of Lands and Forests.
10. David Neave, Habitat Development and Protection Biologist, Fish and Wildlife Branch, Department of Lands and Forests.
11. David Percy, Assistant Professor of Law, University of Alberta.
12. Richard Pharis, Professor of Biology, University of Calgary (by telephone).
13. Robert Scammel, Barrister and Solicitor, President, Alberta Fish and Game Association, Red Deer.
14. Peter Schmidt, Solicitor, DOE.
15. Gordon Smart, Head, Forest Land Use Branch, Department of Lands and Forests.
16. K. R. Smith, Director, Interdepartmental Relations Division, DOE (in conference).
17. Walter Solodzuk, Assistant Deputy Minister, Environmental Engineering Support Services, DOE (in conference).
18. G. Thompson, Fisheries Biologist, Fish and Wildlife Branch, Department of Lands and Forests, Calgary.
19. Henry W. Thiessen, Assistant Deputy Minister, Environmental Coordinating Services, DOE.
20. Walter Trost, Chairman, Environment Conservation Authority.
21. Philip Ullman, Regional Engineer, Pollution Control Division, DOE, Calgary.