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NATURE OF REGULATION AND PUBLIC HEARINGS: CASE STUDIES IN ALBERTA RESOURCE AND LAND DEVELOPMENT

by

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ABSTRACT

This thesis examines the regulation of economic development from its philosophy and objectives, the process of establishing specific regulations, to its effectiveness in meeting the objective of serving the public interest.

Proceeding from Michael Harmon's definition of the public interest as dynamic and individualistic, descriptive, and procedural, from an approach to administrative responsibility which balances political accountability with subjective discretion (similar to W.D.K. Kernaghan), and from a bureaucratic politics model of the political decision-making process (similar to R. Schultz), as well as the prevailing culture of participation in government decision-making, the author analyses two diverse areas of Alberta regulation -- energy resources development: coal and electricity, and urban land development.

The regulatory process was originally designed to correct deficiencies in the economic market system, and involves considerable administrative discretion concerning such values as personal freedom, equity, efficiency, and procedural fairness, as regulation now determines development and allocation of resources as well as costs and benefits to various groups, regions, or industries. Analysis indicates that a variety of public interests must be served by a variety of political and bureaucratic actors who pursue competing goals. The result is that each development proposal is subject to the vagaries of

negotiation, conflict, delay, and ad hoc decision-making. Rather than promoting the public interest, regulation is, in many cases, merely the provider of an expanded arena for individual interests who must compete for control. Fairness, justice, and efficiency are not the automatic result.

The writer concludes that the nature of the regulatory process is such that effective reform is extremely elusive, and therefore, the alternative lies in selective deregulation and political action which returns more initiative to the individual, encouraging voluntary co-operation rather than government coercion.

In policy areas where regulation must remain to protect the public interest, such as environmental regulations, provisions for effective public participation could be the key to enhanced natural justice and administrative responsibility, as well as to public confidence and support for public policy. However, in the interest of efficiency, a change of participatory mechanism is indicated; increased use of policy-making inquiries could supplant the present practice of restating issues at the public hearing of each project application.

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INTRODUCTION

This thesis examines the nature of the regulation of economic development: its philosophy and objectives, the process of establishing specific regulations, and the effectiveness in meeting the objective of serving the public interest.

Regulation, as defined in the Report of the Special Committee on Statutory Instruments, Canada 1968, is:

> ... a rule of conduct, enacted by a regulation-making authority pursuant to an Act of Parliament, which has the force of law for an undetermined number of persons; it does not matter if this rule of conduct is called an order, a decree, an ordinance, a rule, or a regulation.

In more academic perspective, Theodore Lowi defined regulation as a basic form of governing device involving direct coercion of specified persons who perceive the coercion.[1]

As per these definitions, the regulatory process includes all activities subsequent to the enabling legislation enacted by Parliament or Provincial legislatures which lead to the final coercion of specific rules of conduct upon a specific group of people or industry or development proposal. Any authority which takes part in the formation of specific rules applicable to a specific industry or a specific development proposal can be considered a participant or actor in the regulatory process,

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1. Theodore Lowi, "Four Systems of Policy, Politics and Choice", Public Administration Review, Volume 52, July-August 1972. pp. 298 - 310.

whether that authority is elected or administrative, whether a municipal council or a development officer, whether a regulatory agency, departmental officials, or cabinet.

Philosophy and Objectives of Regulation

The regulatory process, originally designed to correct deficiencies in the economic market system, and involving considerable administrative discretion concerning such values as personal freedom, equity, efficiency, and procedural fairness, has become the dominant tool of political leadership for increasing governmental control over many areas of decision-making and policy development. The development and allocation of resources, as well as the costs and benefits to various groups, regions, or industries, are determined mainly through the regulatory process.

There is no truly free-enterprise society. Regulation of some sort has always occurred and it proliferates in pace with the growing complexity of society. However, the present confusion, delays, and contradictions within the regulatory process, the complexity of the resulting public policy, and the questionable effects upon the economy and society have prompted examination of the objectives of regulation and the mechanics of the process.

The good produced by free enterprise has been taken for granted. In an inevitably imperfect society, well-meaning leaders have concentrated upon deficiencies and have attempted to cure the ills through government manipulation of the free market. Regulation has been rationalized as a tempering of private interests or a balancing of private interests with the public interest.

Most private-sector businessmen agree that some social values must be considered in regulation. All interests, whether governments, consumers, private industries, or individual citizens which are affected by regulation, must be considered in an evaluation of the process. However, the concept of the public interest is extremely nebulous. This thesis questions the effectiveness of the extensive use of the device of regulation to further the public interest, partly because the public interest is defined as individualistic rather than a whole greater than the sum of its parts, as dynamic, descriptive and procedural,[2] and partly because of the dynamics of the regulatory process itself.

The Regulatory Process

The establishment of specific rules and regulations applicable not only to particular groups of people or particular industries but also to particular development projects, has necessitated considerable delegation of authority to subordinate officials or agencies, most of whom are appointed rather than elected. The presently accepted approach to administrative responsibility, which balances political accountability with subjective discretion,[3] allows appointed regulatory authorities to pursue not only the public interest, but also professional and career goals and expanding spheres of influence. No action is completely free of self-interest, including

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2. See Michael Harmon, "Administrative Policy Formulation and the Public Interest", Public Administration Review, Volume 35, September-October 1969. pp. 483 - 491.

3. See W.D.K. Kernaghan, "Responsible Public Bureaucracy: A Rationale and a Framework for Analysis", Canadian Public Administration, Volume 16(4) 1973. pp. 572-603.

actions of government. Yet, governments have convinced citizens that "big brother can do it better", and by the 1980s, regulation has become so pervasive as to touch nearly every facet of our lives.

The decision-making and policy-making process is characterized by the "bureaucratic politics" model which suggests that negotiation, competition and bargaining are endemic to the process, and indicates that competing political and bureaucratic actors each pursue their own diverse goals and objectives through ever-increasing regulation.

Finally, the culture of participation adds dimension to the regulatory process. In a complex and urbanized society, characterized by improved communications and educational standards, affluence and mobility, interests are so diverse that a participatory style of policy-making is desired, and the decision-making becomes very diffused. In the long term, both narrowly-based groups such as industry associations, and widely-based groups such as consumer or environmental organizations, exert considerable influence on regulatory decisions. With widespread disenchantment for traditional government institutions, the public hearings of the regulatory process have become an alternative formal access to the political system for input from individual citizens and citizen groups, as well as a commonplace forum for adjudication of private enterprise undertakings. Provision for effective public participation in the regulatory process could be its redeeming feature, but this thesis questions whether policy issues should be argued and restated at the public hearing on each project application, or whether more specific policy could be better formulated in a non-adversary inquiry.

Effectiveness of Regulation

Considering the nebulous and individualistic definition given the public interest by both politicians and citizens, the difficulty of ensuring adequate accountability of regulatory actors to the public, and the value conflicts inherent in the decision-making and policy-making processes, this thesis questions whether the extensive regulation of economic development serves the public interest better than the competitive market system might serve similar public interests. After decades of regulatory control, the economy is not healthy, and social values such as individual initiative and a personal sense of social responsibility have been eroded. The Economic Council of Canada agrees that "relaxation of regulatory restrictions would often promote economic efficiency and be of great benefit to Canadians",[4] adding that "interplay of market forces generates strong pressure for firms to eliminate waste and inefficiency, to innovate, and to become more responsive to consumer needs. ... Those benefits are reinforced by the advantages of the market system in promoting individual freedom and in acting as an impartial arbiter of how rewards are to be distributed."[5]

PART ONE of this thesis describes those elements of political and social environment which influence the nature of regulation. The public interest is defined in a manner very compatible with increasing growth of the regulatory system. Also defined is a concept of administrative responsibility which complements increased use of

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4. Economic Council of Canada, Reforming Regulation, (Minister of Supply and Services Canada, 1981). p. 136.

5. Ibid.

delegation of discretionary powers, and the model of "bureaucratic politics" in decision and policy-making. The final chapter of PART ONE describes the role played by citizen participation, especially as manifested in the public hearing component of the regulatory process.

PART TWO contains an analysis of Alberta regulation of energy resources development. Coal and coal-based electricity are used as case studies because there is little direct federal intervention in the regulation of their development. Energy resources development regulation in Alberta has been reviewed and reorganized in the past ten to twelve years, and is among the more rationalized examples in Canada. Yet, the basic nature of the process, as set forth in PART ONE, is evident: a variety of public interests must be served by a variety of political and bureaucratic actors who pursue competing goals. The result is that each development proposal is subject to the vagaries of negotiation, conflict, delay, and ad-hoc decision-making.

Similarly, in PART THREE, analysis of the regulation of urban land development, also falling mainly within the provincial sphere, with the added dimension of local government, demonstrates similar dynamics. Rather than promoting the public interest, regulation is, in many cases, merely the provider of an expanded arena for individual interests who must compete for control. Fairness, justice, and efficiency are not the automatic result.

The writer concludes that solution lies in political action which returns more initiative to the individual and encourages voluntary co-operation with government objectives. In many cases, government can guide the free market with incentives rather than orders. In other cases, deregulation may be in order. However, in policy areas

where regulation must remain, such as environmental protection, provision for effective public participation could be the key to enhanced natural justice and administrative responsibility, as well as public confidence and support for public policy. However, in the interests of efficiency, a change of participatory mechanisms is suggested. Increased use of policy-making inquiries could hear representations from broadly-based interests such as environmental groups, consumer groups, industry associations and professional organizations in order to resolve the broader issues for more specific legislation, thus making regulatory policy more predictable and more politically accountable to the general public. The adjudicative public hearings of the regulatory process could then be rightfully limited to only those persons directly affected by the development of a project in their community. The responsibility for determination of "the public interest" would be somewhat shifted back to the elected representatives. At the same time, regulatory procedures for individual development proposals would be shortened.

PART ONE

THE ENVIRONMENT OF REGULATION

THE PUBLIC INTEREST

Regulation may be described as a tempering of private interests or as a balancing of private interests with public interest. The meaning of the term "public interest", however, is very elusive. Our society is composed of a great diversity of values, ideals, and interests.

Even those with strong belief in the free enterprise system agree that economic development is no longer an adequate indicator of the well-being of society, although it is an extremely important component. New indicators, such as safety, healthy environment, leisure and recreation opportunities, education, and culture, as well as intangibles such as security and personal freedom, must be considered in an evaluation of our quality of life.

The traditions of liberalism, suggesting individual freedoms, equality of opportunity, and economic free enterprise, still dominate the value systems of Canadians. The concept of pluralism adds friendly and beneficial competition among a variety of interest groups presided over by a watchdog government. Conservative traditions add the dimension of community values which formed the basis for John A. Macdonald's National Policy. Economic necessity prompted Canada's first experiments with public ownership. Emerging social democratic theories, emphasizing equality of human condition, abetted by the depression of the nineteen thirties, promoted the feeling that the economy and the social welfare of the population should be planned by government. Canada has a history of attempting to reconcile all these values by a system of public ownership in such fields as transportation, communications, and utilities, mixed with private enterprise regulated by

government. In the last twenty years, a strong federal government has met fierce competition from strong provincial governments for control of the economy. Meanwhile, bureaucracies have multiplied at all levels of government and regulation has burgeoned.

It becomes clear that there is no single public interest. The state must serve many public interests, and governments must choose which public interests to pursue. The public interest is not static, but is continually changing and adapting to economic conditions, demographic changes in the population, and to world conditions. Michael Harmon's definition of the public interest as dynamic, individualistic rather than a whole greater than the sum of its parts, descriptive rather than prescriptive, and procedural rather than substantive or idealistic, sums up this view.[1]

In a society of very divergent interests and values, the disciplined party system of responsible government, with central control situated in Cabinet, has been unable to articulate a public interest or simple policy directives encompassing all situations. Legislatures have created broad and generalized legislation, enabling various interpretations and applications to diverse situations. Professionalism and special units for policy planning have emerged. Regulatory boards and agencies have proliferated and created thousands of pages of regulatory legislation. Administrative discretion concerning such values as equity, efficiency, personal freedom, and procedural fairness, has become an alternative to the traditional legislative and judicial bodies in many areas of decision-making and

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1. Michael Harmon, supra footnote 2 in INTRODUCTION, pp.483-491.

policy development.

Public policy is based upon public interests, and can be defined as the position taken by a government on an area of significant concern.[2] It may involve not only what a government does, but what a government does not do. The term refers not only to legislation, but also includes policy guidelines and dispositions of government agencies and officials. Decision-making and policy-making are not interchangeable terms. Decisions are individualized, a micro concept; policies are broad and complex, a macro concept.[3]

In many cases, enabling legislation sets up regulatory bodies to supervise a broad area of concern such as development of energy but enumerates few specifics about the direction the policy should take. Government policy eventually emerges from a series of decisions taken upon adjudication of specific interests. In recent years, some agencies hold public inquiries specifically to hear presentations from all interests with a stake in a particular policy. The resulting policy and attendant regulations may also be a compromise suitable to noone. However, the opportunity for government, business, and other groups within the public to communicate concerns to one another leads to better understanding of one another's problems.

In summary, the regulatory process is very compatible with the view of public interest as individualistic, dynamic, descriptive and procedural. In turn, this view of the public interest makes increasing growth of regulation probable.

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2. Theodore Lowi, "Decision-making versus Policy-making", Public Administration Review, Volume 39, May-June 1970. pp. 314 - 325.

3. Ibid.

II. THE BUREAUCRATIC POLITICS MODEL

> Bureaucratic politics is the process by which people inside government bargain with one another on complex policy questions.[4]

In a recent study of the politics of transport regulation, Richard Schultz[5] compared the usefulness of a "unitary actor" model, such as used by Richard Simeon,[6] with a bureaucratic politics model for the explanation of regulatory processes. With the unitary actor model, central control of policy is assumed. In federal-provincial negotiations in a federal parliamentary system, it is assumed that each First Minister can speak authoritatively for his government. Dissension within the government or influence of interest groups is negated. On the other hand, the bureaucratic politics model proceeds from the assumption that generally there is no single unified decider of public policy, but rather a number of political actors, with differing goals and objectives, each striving to influence government decisions. The latter model more aptly explains the regulatory process and the resulting policy, as analysis of two areas of Alberta regulation will indicate. Previously, scholars such as Schultz or Cairns[7] have described federal-

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4. I.M. Destler, Presidents, Bureaucrats and Foreign Policy: The Politics of Organizational Reform, (Princeton University Press, Princeton, 1972). p. 52.
5. Richard Schultz, Federalism, Bureaucracy and Public Policy, (McGill-Queen's University Press, Montreal, 1980).
6. Richard Simeon, Federal-Provincial Diplomacy: The Making of Recent Policy in Canada, (University of Toronto Press, Toronto, 1972).
7. Allan Cairns, "The Other Crisis of Canadian Federalism", Canadian Public Administration, Volume 22 (2), 1979.

provincial negotiations in terms of bureaucratic politics. This writer feels that the model applies as well to the decision-making process within the provincial level of government and in the provincial-local sphere.

Within the regulatory system, there are many examples of overlapping areas of jurisdiction and function between the agencies and departments. This encourages competition and rivalries between them. Values and goals are diverse, and conflict, competition, and negotiation are endemic to the process. The policy-making process is a very complex bargaining process and the resultant policy may be somewhat confused and more reactive than innovative.

> The bureaucratic political process can produce "no policy at all", stalemate; "compromised policy", where changes in the ad hoc grouping of elites point policy first in one and then in another direction. It can result in contradictory policy, where different government organizations pursue conflicting courses; "paper policy", officially promulgated without the support needed for effective implementation; or "slow policy", since competition and consensus-building take time.[8]

Concrete examples of the bureaucratic political process will be enumerated in PART TWO and PART THREE of this thesis.

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8. I.M. Destler, supra footnote 4, p. 74, as quoted by Richard Schultz, supra footnote 5, p. 9.

III. ADMINISTRATIVE RESPONSIBILITY

Complementary to the bureaucratic politics model is an approach to administrative responsibility which balances political accountability with subjective discretion guided by professionalism and direct responsiveness to the public, while recognizing that the ultimate policy-maker is the elected body of government. As early as 1973, a noted scholar on this subject wrote:

> The relative influence of the British administrative model has diminished and the American model has clearly emerged as the predominant external influence on Canadian public administration.[9]

The bureaucratic politics model allows that, in the Parliamentary system of government, hierarchical controls do exist and ministerial responsibility is favored, but assumes that in reality there is no guarantee that preferences of Cabinet or even of top bureaucrats will prevail at all times. The multitudes of professionals in the bureaucracy see the state as "the company" through which to advance their own careers and their own ideals of economic and social planning.

Anthony Downs set out a typology of bureaucratic actors from "purely self-interested officials" (i.e. climbers and conservers) to "mixed-motive officials" (zealots, advocates, and statesmen).[10]

W.D.K. Kernaghan believes that value conflicts are

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9. W.D.K. Kernaghan, Bureaucracy in Canadian Government, (Methuen, Toronto, 1973). p. 14.

10. Anthony Downs, Inside Bureaucracy, (Little Brown, Boston, 1967). p. 88.

inevitable in three categories: 1) between personal values and administrative values, for example between accountability and ambition; 2) between and among administrative values, for example accountability versus professional competence; and 3) between administrative values and values of other policy participants.[11]

In essence, the "decisions made by governments are no less likely than business decisions to sacrifice public interests for the varied interests of those who make the decisions".[12]

Two theories have been advanced in the past concerning the behavior of regulatory agencies: the captives theory, suggesting that agencies are controlled by their clientele, the regulated industries,[13] and the theory that in a parliamentary system the political leaders control the agencies. The answer is not as simplistic as either of these two alternatives. The captives thesis is based on American cases, whereas in Canada, "the presence of elite accommodation can lead to a degree of aggressiveness on the part of government officials at the later stages in an organization's life rather than merely at the beginning", and can also "imply mutual adjustments rather than one-way capitulation by government officials".[14]

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11. W.D.K. Kernaghan, "Responsible Public Bureaucracy: A Rationale and a Framework for Analysis", Canadian Public Administration, Volume 16 (4), 1973. p. 593.

12. Cairns, supra footnote 7, p. 184.

13. Samuel Krislov and Lloyd Musolf, The Politics of Regulation, (Houghton Mifflin, Boston, 1964). p. 228.

14. Bruce Doern, Ian Hunter, Donald Swartz, Seymour Wilson, "The Structure and Behavior of Canadian Regulatory Boards and Commissions", Canadian Public Administration, Volume 18 (2) 1975. p. 193.

Analysis of federal agencies, Atomic Energy Control Board, Canadian Transport Commission and National Energy Board drew this conclusion:

> ... it is clear that the wide and vague scope of their mandates, their wide degree of multi-functionality, the significant opportunities for Cabinet and ministerial intervention, the presence of large corporations as part of their clientele, and their administrative dependence on other federal and provincial departments, all suggest that Canada's major regulatory agencies are more accurately viewed as being intended to perform a managerial function over their policy fields rather than strictly regulatory policemen. ... Hence, if captivity exists, it is more of a governmental or state captivity than a clientele captivity as such.[15]

Demands and pleas for support may flow two ways, not only from industry to government, but from government to industry or interest group.[16] There are no villains, just a diversity of values and objectives which promotes rivalries to dominate the policy-making process.[17]

In summary, regulatory bodies are no longer an implementation or policing mechanism only, but a political mechanism which makes important decisions determining development and allocation of resources as well as costs and benefits to the various groups, industries or regions. Departments, too, are organized along professional lines, and senior and middle-level bureaucrats initiate or influence most policy decisions. Although legislatures set broad guidelines, these important decisions steer public

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15. Bruce Doern, ed., The Regulatory Process in Canada, (Macmillan, Toronto, 1978). p. 28.

16. Graham Wooten, Interest Groups, (Prentice Hall, Englewood Cliffs, 1970). pp. 96 - 98.

17. Richard Schultz, supra footnote 5, p. 144.

policy, and bolstered by the research and advisory functions of many regulatory bodies, make administrative influence in policy development an obvious fact. As J.E. Hodgetts told a conference of Canadian Public Administrators:

> The relevant point for present purposes is that public administrators, through no sinister bureaucratic plot, have been brought very much into the traditional role of the politician as arbitrator, conciliator, and thereby definer of the interests to be fostered, placated, rewarded or penalized through public policy. There probably never was a time when this was not true, but the extensive involvement of government, bringing in its train highly organized interests seeking to impose their demands on the political system, has led to the accretion of substantial discretionary power on the public service. [18]

It has long been accepted that the idea of policy and administration cannot be separated in practical reality, but the power of the knowledge held by bureaucracy, and its interpretation of the facts to legislators, can cause concern. It is therefore mandatory that regulatory decision-making be made as open as possible. The public participation process can bring regulatory decision-making into the open.

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18. J.E. Hodgetts, "Government Responsiveness to the Public Interest", presentation to Institute of Public Administration of Canada conference, Ottawa, August 1980, and published in Canadian Public Administration, Volume 24 (2) 1981.

IV. THE CULTURE OF PARTICIPATION

Plans and regulations originated by bureaucrats and promoted by politicians have not always coincided with public opinion. In a democratic system, the requisite of legitimacy is that policies put forth in the public interest should coincide, for better or for worse, with public opinion. Policies which are not supported by a public already disenchanted with traditional political institutions and methods of participation, evoke reaction.

Examples such as urban redevelopment and land use planning sparked the beginnings of active public participation in Canada in the 1960s. It began as a protesting reaction to disruptive urban renewal policies, and progressed through noisy groups and get-tough protestors to well-organized groups.

A significant factor has been not only the strengthening of the traditional interest groups, but a great increase in the number of new groups, especially those concerned with urban and environmental problems.[19]

Strategies, too, have changed significantly in the past decade or two. Whereas the traditional methods were lobbying of politicians and bureaucrats, strategies have progressed through letters to the editor and politicians, increased use of the media, preparing briefs for public hearings adjudicating particular matters, to policy workshops, and presenting briefs to inquiries, to public demonstrations, and recently through successful use of the

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19. P. Pross, Pressure Group Behavior in Canadian Politics, (McGraw Hill, Toronto, 1975).

courts.[20]

Governments encourage participation because they seek legitimacy and they like to demonstrate the democratic nature of their activities. Making specific provisions for participation in legislation dealing with controversial

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20. Although there is no right to review government or administrative decisions on merit, citizens can petition the courts on questions of jurisdiction and questions of procedure.
For example, failure to follow proper procedures has cost the City of Calgary several recent decisions:
(1) Early in 1981, upon suit by residents, Court of Queen's Bench ruled a decision to route Light Rail Transit on 9A Street invalid because the decision was in conflict with an earlier bylaw designating 10th Street as the LRT route. (1981 Alta D 2943-01)
(2) Residents of four inner city communities filed a lawsuit in March 1981 against a City of Calgary decision to rezone the Stampede grounds site for a coliseum and won the decision on May 15, 1981, in Alberta Court of Queen's Bench. Justice Brennan ruled that the City did not comply with the intent and spirit of the Alberta Planning Act in that it failed to deliver copies of the proposed rezoning bylaw to the Clerk's Office at least twenty-one days prior to the December public hearing. The rezoning bylaw, which had received final reading in Council on March 3, 1981, was quashed.
(3) Several community groups have won right to appeal approvals by Development Appeal Board of developments which did not conform to Area Redevelopment Plans. Bridgeland's case will be described in PART THREE.

In 1980, a citizen group challenged the jurisdiction of the Energy Resources Conservation Board to hear application by Calgary Power Ltd. to construct a transmission line to be linked at the Alberta-British Columbia border with BC Hydro. Supreme Court of Canada ruled for Calgary Power Ltd. and the ERCB. (1 RCS(1981) 153)

On June 25, 1982, Alberta Justice Cavanagh upheld appeal of an ERCB mine permit, which had been granted in 1977, by a man who claimed he had not been notified of the public hearing on the matter. See Highvale Mine Case in PART TWO.

policy areas seems a good strategy. Administrators or elected officials may rationalize that participation is a good method for transmitting of public opinion, and for receiving input on particular issues, for settling disputes among the various diverse groups of society, or just for placation of restive groups and individuals. Confident that they will always be the senior partner, they also like to have citizen groups share with them and take from them responsibility for decisions which may otherwise seem indefensible.

Provisions for public participation are included in legislation dealing with controversial policy areas such as land-use planning, energy, or environment.

The Alberta Planning Act requires that before second reading of proposed land-use bylaws, area redevelopment plans or area structure plans, municipal general plans, or bylaw amendments relating to land-use, notice must be served in newspapers and individually to each registered owner affected. Public hearings must be held, at which written or oral submissions may be presented by any person affected by the proposed bylaw, as well as "any other person that wishes to make representations and that Council agrees to hear".[21]

The Calgary Plan 1973 states on pages 14.3 and 14.4 that concerned citizens and developers "be given ample opportunity to participate effectively and constructively in design brief preparation".

The Alberta Energy Resources Conservation Act and the Public Utilities Act both require that a public hearing be held in any matter which might adversely affect

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21. Alberta Planning Act 1977, Section 123 (1)(b).

the rights of any person. The cost of advertising hearings is usually carried by the applicant industry. The PUB was one of the first agencies in Canada to award costs to groups and individuals appearing before it, and these costs are usually borne by the industry whose application is being considered.[22] In 1978, an amendment to the Energy Resources Conservation Act authorized the Board to award costs to owners and occupants of land who may require expert assistance and financial assistance to present evidence in defense of their interests.[23] This legislation provides that the applicant of the proposed energy development will normally pay the costs, and "regulations established pursuant to the Act set out the manner in which costs provisions are to be administered by the Board".[24] Discretion in this matter of awarding costs is not nearly so wide as the discretion allowed in matters of energy development and management.

All of these legislative provisions for participation may be characterized more as an opportunity to participate rather than a right,[25] since the agency has discretion concerning need for a hearing, unless a specific Act under its administration requires one. The closest example of a right to participate is in land-use planning regulation, where a hearing must be held unless exemption has

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22. Alberta Public Utilities Board Act, RSA 1971, Section 60.
23. Energy Resources Conservation Act, Statutes of Alberta 1971, Section 30.1 (1978, c. 57 s. 2).
24. ERCB Annual Report, Conservation in Alberta, 1978. p. 10.
25. A.R. Lucas, "Legal Foundations for Public Participation in Environmental Decision-making", Natural Resources Journal, Volume 16, January 1976. pp. 74 - 102.

been received from the Minister of Municipal Affairs.[26] However, in practice, only routine matters pass without a public hearing in Alberta in the 1980s.

There are no provisions for members of the public to initiate hearings or inquiries, and a private citizen in Alberta cannot initiate a lawsuit to stop an industry's pollution transgressions without permission from the Attorney General. An inspector of the Standards and Approvals Branch of Alberta Environment will, however, investigate complaints, and an agency may decide to hold a hearing or inquiry to look into particular circumstances, such as the ERCB hearing to investigate "circumstances surrounding a pipeline rupture which occurred in the Millwoods area of the City of Edmonton".[27]

Mechanisms of public participation have included the following:

(1) Citizen Advisory Councils:

These are a relatively ineffectual form of participation. Planning Advisory Councils or Environmental Advisory Committees are really little more than "sounding boards for departmental ideas, usually ideas at very early stages of consideration".[28]

(2) Creation of a Public Participation Group within the Environmental Assessment Division of Alberta Environment Department:

The 1979 Annual Report states that this Group set up several citizen participation programs, encouraging public involvement in the early planning stages of projects.

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26. Alberta Planning Act 1977, Section 122.

27. Allan McLarty, "The ERCB Hearing Process", Conservation in Alberta: Annual Report of the ERCB 1979. p. 2.

28. A.R. Lucas, supra footnote 25, p. 90.

> Regional staff were heavily involved in helping citizens to articulate their concerns before formal government hearings sponsored by the Energy Resources Conservation Board. (Cold Lake Tar Sands Plant, Genessee Power Plant, and Keephills-Ellerslie 500KV Power Line).[29]

Environmental Impact Assessment Guidelines now in practice in Alberta require a developer to present his project plans in reasonable detail to the affected community at least forty-five days before the formal public hearing of the project by the Energy Resources Conservation Board (ERCB). Generally, a public meeting is held in the affected community, where the developer will describe the project and answer questions. The purpose is to inform the public about a proposed project, so that any interested person or group may prepare and present views during the formal hearing process. Since these are only guidelines, they are not necessarily followed.

However, the potential benefit which can be derived from involving the public early in the project planning process is best demonstrated by an example where an industry carried the community participation program even further than required. In the effort to attune industry planning to community concerns, and thus avoid problems which might delay regulatory procedures, Calgary Power Ltd. (now TransAlta Utilities) initiated programs in the early planning stages of the Highvale Mine Extension and Keephills Power Plant project to involve citizens of the immediate and surrounding area of the proposed site. By working closely with community groups in the hamlet of Keephills and County of Parkland, two-way communication brought

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29. Alberta Environment Annual Report 1979. p. 70.

better understanding of technical, economic, and environmental problems which defy easy solution.[30] To add extra credibility to the participation efforts, government was also involved, particularly Alberta Environment, to act as a resource of expertise for the community groups.

First contacts with the community of Keephills were in October 1976, the month before formal application was submitted to the ERCB. Family interviews, newsletters, and informal open houses in community halls preceded the required "public disclosure" meeting held January 13, 1977. By this time, the Committee on Keephills Environment (COKE) was formed by community members, with no company or government members included.[31] By unanimous motion of seventy-eight members of the community present at the January 4, 1977 meeting, the COKE committee received the mandate to represent the community at the public hearings and in ongoing communications between the company, the government, and the community.[32] At the public hearings:

> COKE submitted an intervention that included fourteen pages of commentary. ... An additional 120 pages of correspondence was filed by COKE, documenting commitments by the Company, and illustrating the dialogue which took place between the community, the company, and the government.[33]

This approach to community involvement in project planning and regulatory approvals was innovative and voluntary, and

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30. Presentation by a panel representing Alberta Environment, Calgary Power Ltd., and the Committee on Keephills Environment (COKE), "Public Participation: An Industrial Perspective", at Canadian Conference of Public Participation, Banff, Alberta, October 4-7, 1977.

31. Ibid., p.6.

32. Ibid., p.7.

33. Ibid.

the community reacted favorably. Subsequent to the public hearings, COKE filed a brief with the ERCB and the Ministers of Energy and Environment which:

> called for the provision of financial assistance to groups in similar circumstances as themselves, and recommended significant changes to the coal policy regaring public participation into the planning and evaluation of future developments. It was COKE's opinion that the coal policy did not go far enough in its requirements for public participation, and suggested that if Calgary Power had followed the minimum requirements under the coal policy, COKE could have been present at the public hearings with a negative, less constructive attitude. COKE recommended that the coal policy be improved to reflect the practices and programs applied by Calgary Power in dealing with the Keephills Power Plant.[34]

The ERCB reacted favorably to the COKE initiatives,[35] and based its approval of a project with potentially negative social impact, on the spirit of co-operation between the company and the community. The co-operation is on-going to this day, with a steering committee composed of community, company and government representatives guiding the relocation of the entire hamlet of Keephills to a new site approximately seven kilometers away. The park-like setting was chosen by the residents, and the new homes, community center, and school, as well as the moving costs, have been funded by Calgary Power Ltd. (TransAlta Utilities). The location of the present hamlet will be included in the extended coal mine.

Town hall meetings continue between the community

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34. Ibid., p. 8.

35. ERCB-AE Report 77AA in the matter of application by Calgary Power Ltd. for the Extension of the Highvale Mine and the Construction and Operation of a proposed South Sundance Thermal Power Plant (Now known as Keephills). Also refer back to page 21, footnote 23.

and senior company officials, including a Senior Vice-President and consultant sociologists, as for example, in Keephills on Thursday evening, July 8, 1982. The new hamlet is nearing completion of construction and the relocation of people is imminent.

The most famous Canadian case of project failure because of public pressure was the halting of construction at the half-way point of the Spadina Expressway in Toronto. According to one analyst:

> The planning process failed largely because it did not adequately include the public in the decision-making. There were no available mechanisms by which the public could have adequately participated in the planning and decision-making process; confrontation and political pressure were the only avenues left open to the public.[36]

Within the last decade, however, citizens have become increasingly involved in urban policy statements such as design briefs, area redevelopment plans, and transportation plans. For example, the Calgary Inglewood-Ramsey community made significant input into their community's design brief. The predominantly working-class community, a mixture of residential neighborhoods, light and heavy industry, old retail and commercial establishments, and railway yards, was incited to organize when they became alarmed by industrial expansion in their area and the proposal for Deerfoot Trail Freeway, which was planned to cut through their community. Through the early 1970s, with the help of a volunteer resource group headed by architect Jack Long, the community worked with the City

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36. Paul Wilkinson, "Public Participation in Environmental Management: A Case Study", Natural Resources Journal, Volume 16, January 1976. p. 117.

to "integrate as sensitively as possible a freeway through the community".[37] Mr. Long, now a Calgary alderman, wrote:

> There were several enduring results from all these activities. First, the Inglewood community was creating a new shared interest in its future. Second, it was learning to work effectively with resource people and government. Third, it began to understand a whole range of political, psychological, and economic issues: the meaning and necessity for persistence, the value of strategy, the need for a plan, the cost factors involved in projects, the commitments involved, when to fight, when to apply pressure, and when to compromise. Fourth, it proved to itself and others that community people with intimate local knowledge can contribute to the resolution of planning problems.[38]

Community groups in many inner-city or older areas of Calgary have been active in formulating issues to be taken into account in their communities' policy statements, while in newer subdivisions design briefs are undertaken by developers in the effort to cut as much as a year from the regulatory processes and development time.[39]

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37. John Long, "Neighborhood Improvement: What it Means in Calgary, Vancouver, and Toronto", City Magazine, Volume 1 (Nos. 5 & 6), September 1975, p. 16.

38. Ibid., p. 16.

39. Al Bell of Jager Holdings in Calgary, an official of HUDAC (Housing and Urban Development Association of Canada) and a former Calgary Development Appeal Board member, showed me a flow chart of the Beddington subdivision, indicating that by undertaking to prepare the design brief for the area completely on his own rather than waiting for the City to do it, the development process was shortened by about one year. He took it upon himself to consult the neighboring communities, but noone expressed any objections or concerns. Alderman Nelson, also present February 23, 1978, in aldermanic offices, agreed. Nelson is an ex-official of one of the neighboring communities, all of which were in his ward.

Although the Alberta Planning Act 1977 gives bylaw status to municipal general plans, area structure plans, and area redevelopment plans, neither City Council, Planning Commission, nor Development Appeal Board always comply with them when adjudicating specific projects.[40] Therefore, value of public participation in them is diminished to a certain extent.

(3) Public Inquiries:

These are a mechanism of public participation not utilized to the full. Inquiries such as the Berger inquiry into the impact of the MacKenzie Valley Pipeline in 1974, which got excellent response from the public, offer an opportunity for participation in the defining of issues and policy formulation.

In Alberta, an agency which might be considered a permanent committee for public inquiry is the Environmental Council of Alberta. At one time, public hearings could be held by the Council's predecessor, the Environment Conservation Authority, at its own discretion or upon request by a group of the "public". However, since the new Council was established in November 1977, it may hold hearings only upon request of the Minister of the Environment, and its permanent staff is limited to a chief executive officer who is automatically a member of the panel of every hearing conducted by the Council. A vice-chairman of the panel is chosen by the Minister of Environment, and other panel members are selected from a variety of backgrounds, depending upon the subject matter of the hearing or investigation. Each panel holds office only until the hearing is completed and the report is handed to

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40. See footnote 20 (3) on page 19 of this thesis.

the Minister. Its authority is strictly advisory. About one dozen inquiries have been conducted, but their reports have been more general than specific.[41]

Reports from the Environmental Council of Alberta may or may not influence the Standards of Performance in environmental matters. These standards are created by staff of the Department of the Environment, who also take into consideration the recommendations of the staff from other government departments. The so-called consultation with industry often consists of informing about already prepared draft regulations.[42] Senior departmental officials do make an effort to keep relations with business on a cordial basis; however, it is very difficult to obtain the studies or data upon which environmental standards are based,[43] and input by industry occurs mainly through reaction, and by presentation of their own studies and supporting data in the final stages of the process of

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41. Inquiries have included: The Impact on the Environment of Surface Mining in Alberta, The Conservation of Historical and Archaeological Resources in Alberta, The Environmental Effects of the Operation of Sulphur Extraction Gas Plants in Alberta, Land-Use and Resources Development in the Eastern Slopes, The Restoration of Water Levels in the Peace-Athabaska Delta, The Environmental Effects of Residential Development in Leduc-International Airport Area, The Flow Regulation of the Red Deer River, Erosion of Land in Northwestern Alberta, Environmental Effects of Forestry Operations in Alberta, Management of Water Resources Within the Oldman River Basin.
    Listed in the Environmental Cope Kit prepared by Student Legal Services of Edmonton, August 1979.

42. This will be demonstrated in the Highvale Mine case in PART TWO of this thesis.

43. Ibid.

negotiation.

Some inquiries receive little response from the public, especially if the issue is too broad. One hearing concerning the future of Wood Buffalo National Park in northern Alberta was attended by only one person who was not a government employee, and he was an industry representative. Members of the public, however, are gaining confidence and are presenting their views to inquiries on specific subjects, such as recent hearings to review surface rights legislation.

In response to increasing complaints from farmers about amounts of compensation or delays in Surface Rights Board hearings, a Select Committee of the Alberta Legislative Assembly was formed in 1980 to review legislation and policy pertaining to surface rights. Newspapers throughout the province carried a noticable boxed advertisement announcing public hearings to be held simultaneously in nine rural centers located throughout Alberta. The hearings drew the biggest response from people already affected by surface rights proceedings. Although farmers claim food production should rate equal importance with energy production, they are not using this argument to deny access to their lands, but to demand higher compensation.[44]

The Select Committee of the Legislature, composed of six rural MLAs and three urban MLAs with no connection to resource industries, recommended increased compensation and a "force-take provision" requiring an advance of $1000 to $5000 per acre for "right of entry" by industry. The

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44. Evidence presented in hearings such as the ERCB hearing re Genessee Power Plant, August 1978.

farmers support the Report; however, some politicians and industry spokesmen have criticized the lack of industry representation in the Committee membership.[45]

An inquiry of this kind can be seen as legitimate only if all sides are heard, if the panel or committee is balanced or completely unbiased, and if the resulting recommendations result in specific legislated policy, therefore reducing the number of cases requiring arbitration.

(4) Adjudicative Public Hearings:

Although participation at the early stages of issue formulation could be more influential, as well as much less economically costly to individual projects which suffer from long delays, adjudicative public hearings seem to have captured the favor of governments. The role participation plays in public hearings varies from agency to agency and with styles of chairmanship.

Development Appeal Board hearings in Calgary limit interveners to five minutes oral time, and cross-examination by other interveners in these and in City of Calgary planning hearings is limited and informal. Written submissions must be in the hands of the City Clerk not later than 9:00AM one week before the hearing. Additional material may be distributed at the hearing subject to approval by the Mayor, while City documents must be filed three weeks prior to the hearing and may be inspected at the Clerk's office.[46] Hearings seldom last longer than a day or two, and although community groups have scored many victories in

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45. "Surface Rights Bind", Alberta Report, May 10, 1982. p. 40.

46. This information is contained in all public notices for Calgary hearings, as seen in Calgary newspapers.

planning decisions, the sheer weight of public protest may have had more bearing on results than evidence presented in public hearings. A.R. Lucas generalized that:

> The public is involved largely for the public relations benefit to the agency and the elected representatives to whom it is responsible. Members of the public are informed; to a lesser degree they are consulted and allowed some opportunity to respond to the proposal before the agency. Procedures established are usually consistent with this emphasis on informing rather than consulting and effectively involving the public.[47]

In spite of rhetoric to the contrary, this seems true of City of Calgary public hearings, and to an even greater extent, to ERCB hearings.

However, ERCB hearings do go to extreme lengths to make people feel they are being heard. Though few hearings are of the complexity and size of those held in respect to Esso Resources Cold Lake in-situ oil sands which received over fifty interventions, or the Calgary Power (TransAlta Utilities) 500 KV line from east of Calgary (Langdon) to Phillips Pass on the British Columbia border, which received 248 interventions in 1979, public hearings have been increasing in frequency and complexity. The two projects mentioned resulted in a total of almost four months of hearings,[48] but one to two weeks is average, and a hearing in June 1981, respecting an extension to the Keephills Power Plant referred to earlier in this chapter, lasted only two days and received no public interventions since plans had been worked out previously between company and community.

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47. A.R. Lucas, supra footnote 25, p. 83.

48. Allan McLarty, supra footnote 27, p. 1.

Generally, hearings are held as near as possible to the community of the proposed site for the development. Timing of hearings takes into consideration the convenience of the community and the work cycle of farmers.[49] For example, although the application for the 500 KV Transmission Line from Langdon to Phillips Pass was filed on December 12, 1978, examination of the project by the Board plus spring seeding resulted in deferment of the public hearing until June 1979. However, one day into the planned five-week public hearings, they were adjourned to October 9, 1979. In spite of evidence that all affected landowners who could be located had been contacted more than a year previously, and should have had ample time to prepare for the hearings, the ERCB accepted the farmer-interveners' word that with haying and then harvest, it would be unfair to hold hearings before mid-October. Subsequently, hearings were held in Calgary, High River and Pincher Creek from October to December 1979.[50]

Interveners, particularly a faction of the Foothills Protective Association (a coalition of farmers and ranchers), had attempted to defer the hearings by challenging the Board's jurisdiction to hear an application involving tie with British Columbia Hydro, but when the hearings went on, they took the challenge to the courts. On June 26, 1980, the ERCB issued its report and recommendation for approval, after satisfying itself that this tie with British Columbia is needed to maintain reliability of service, and analysing all factors concerning not only the three alternative routes proposed by Calgary Power Ltd.

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49. Ibid.

50. ERCB Report 80-D re 500 KV Line from Langdon to Phillips Pass.

(TransAlta Utilities), but also two alternative routes proposed by interveners.[51]

Opponents of the project attempted, in August 1980, to have the ERCB reopen the hearing, but were denied, according to Board solicitor Michael Bruni, because the evidence they were presenting had already been heard at the original hearings.[52] The opponents then attacked the ERCB as a non-representative agency, and decided to make the issue political; they took their alternative route to the Premier and Cabinet's Economic Planning and Resource Committee.[53] They also suggested that final approval should be deferred until a review of the role of the ERCB had been conducted.[54]

At the same time, the opponents' spokesman was speaking to the press regularly, making allegations not entirely factual, and receiving coverage in the widely distributed daily, the Calgary Herald, among others. He did not admit to understanding that such projects require approval-in-principle by the same Cabinet Economic Planning and Resource Development Committee he later visited, as well as Executive Council (consisting of all Cabinet Ministers) long before the matter goes to public hearing. He denied that the Board gave his route alternative any

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51. Ibid. Of a total 22 pages devoted to analysis of five alternatives, approximately 8 pages are devoted to Foothills Protective Association's proposed route (pp. 3 to 11, Section 6) and about 4½ pages to the "Canelk route" (pp. 12 to 16, Section 6) proposed by another group.

52. Bruce Masterman (Herald High River Bureau), "Failure to reopen power line hearing riles opponents", Calgary Herald, September 12, 1980. p. B8.

53. Ibid. Also, Masterman, "Cabinet asked for new rules for power lines", Calgary Herald, September 18, 1980.

54. Ibid., p. D20.

consideration.[55] Typically, while interveners and protesters attempted to get media support, the company refrained from comment.

Finally, more than twenty-seven months after the date of application, the Alberta Order-in-Council, dated March 25, 1981, approved the route through central Alberta which had been recommended by the ERCB, excepting a short span running east from the British Columbia border. Prior to the Order-in-Council, the Supreme Court of Canada had upheld the jurisdiction of the ERCB in this case (1 RCS 153) and awarded costs to Calgary Power Ltd. (TransAlta Utilities). The opponents went back to the press.[56]

Subsequent to the Order-in-Council, the ERCB sent out notice of inquiry, inviting submissions addressing alternative interconnection points (with B.C. Hydro) to be filed with ERCB prior to August 17, 1981. Further public hearings began in Blairmore on October 27, 1981, and ran for four days. Submissions were received from the Municipality of Crowsnest Pass, the Foothills Protective Association (FPA), and from Mr. D. Walker, who had formerly been the outspoken spokesman for the FPA. Each submission suggested a different mountain pass as the best interconnection point. Mr. Walker did not appear at the hearing to speak to his submission.[57] The Board arranged a bus tour to inspect the various transmission line routes on October 29, 1981; all participants in the hearing were invited to take part.[58]

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55. Ibid. Also refer back to footnote 51.

56. Bruce Masterman, "Sparks fly over power line plan", Calgary Herald, March 28, 1981. p. B14.

57. ERCB Report 82-A. p. 2-2.

58. Ibid., p. 2-1.

On January 6, 1982, the Board issued its report and recommendation reaffirming its original decision that Phillips Pass be the interconnection point. April 14, 1982, an Alberta Order-in-Council gave the project final approval.

This project study epitomizes the worst examples in regulatory delay due to public protest and participation. In 1979 dollars, the project was estimated by Calgary Power Ltd. (TransAlta Utilities) to cost 43 million dollars, not including purchase of land, with completion expected in 1983. Now, the completion date is expected to be 1985, provided regulatory procedures on the British Columbia side of the interconnection do not delay it further. In 1982 dollars, the cost of the project is estimated at 75 million dollars. Besides the fourteen to fifteen percent inflation rate, a major cost increase is interest on capital expenditures, since the completion date was delayed after major purchases were made. While the participation efforts met with little effective influence, the cost of electricity to consumers has been increased by thirty to thirty-five million dollars.

Generally, the ERCB hearings are open and orderly. Written submissions are required to be filed with the ERCB one week prior to the hearing. Applicants, upon request, must provide each interested person with a copy of the application. All submissions are open to the public at Board offices prior to the hearing. At the hearing, after presentation by the applicant and cross-examination, each intervener has the opportunity to elaborate upon his submission or present witnesses of relevance, and must be prepared to answer questions put forth by any other intervener, then by ERCB staff, then Board members. After each has had his turn, the applicant may present rebuttal evidence. There are no time limits for presentations, and

although interveners are expected to keep their submissions relevant to the subject matter, they are seldom stopped even when the subject matter, such as compensation for land, is clearly outside the jurisdiction of the ERCB.[59] Questions not pertinent to the hearing at hand are generally not accepted from professionals such as staff of Alberta Environment or ERCB,[60] but members of the public are given extraordinary leeway.[61]

As stated by a former Board solicitor:

> In general terms, the Board considers its jurisdiction encompasses matters of the environment and matters of the public interest, as well as the more clearly recognized matters of conservation and orderly development. ... Over the past several years a perceptible change in focus of Board hearings has occurred. With more substantial public involvement in Board hearings, matters of concern in recent hearings have tended to focus more on environmental, public interest, and safety matters and less on more traditional conservation and technically oriented matters.[62]

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59. At the ERCB hearing re Genessee Power Plant, August 1978, the Concerned Citizens Group, pro-project, based its brief upon wish to receive industrial rather than agricultural prices for their land. This is a matter for the Surface Rights Board.

60. See Highvale Mine case in PART TWO of this thesis.

61. At the Genessee hearing (supra footnote 59), a spokesman for an environmental group, STOP, questioned the applicant, City of Edmonton, at length about the economics and advantages of gas-fired thermal over coal-fired, while the Board patiently waited and the applicant patiently answered, even though government policy proscribes replacing of gas with coal as a fuel for thermal power plants. This same environmental group presented a witness from Toronto, who identified himself as a "quasi-professional paleontologist" and talked about possible fossils which might be destroyed in coal mining, then launched into a statement to the effect that all utilities should be government-owned.

62. Allan McLarty, supra footnote 27, p. 6.

To summarize, public hearings have become the foremost technique of public participation, and are particularly popular for input into land development and energy development decisions. Because environmental concerns and regulations have implications not only for industry but also for the labor associated with that industry, it is unlikely that environmentalism will ever become the predominant political force. Environmentalists, therefore, have found the piece-meal regulatory process and the case to case adjudication of projects particularly to their advantage.

As a mechanism for reconciling public interests with group or private interests, hearings provide a valuable alternative formal access to the political system. Citizens and interest groups can vocalize concerns, are often placated, and in the process, political efficacy increases. At the same time, fresh ideas and new alternatives to problem solution are injected into the decision-making process.

From the point of view of elected leadership, hearings provide a scapegoat if a final decision is unpopular with some groups of society. If public hearing tribunal recommendations are definitely not politically palatable, the Cabinet can ignore them in most cases where an appeal board is not involved.

It is, however, also apparent that public hearings have drawbacks. Their expense to the taxpayer and the economy as a whole, as well as to the private industries being regulated, seems obvious. Attempts at rational planning can be subverted, as demonstrated in the case of the Langdon to Phillips Pass Transmission Line.

The socio-political impact is perhaps even more

serious. Decision-making is undertaken or seen to be undertaken by appointed officials rather than the elected officials who can be held accountable to the public. Public hearings have proliferated in the current climate of disillusionment with the formal structures of government, and with this proliferation, legislatures and backbench MLAs see their influence wane. Public respect for the usefulness of the legislature further decreases, while public policy is not necessarily more in the public interest.

Styles of hearing panel chairmanship which encourage the public to not only express their sincere concerns about a particular project which affects them, but also to use hearings for grandstanding, for expressing political views, or for attracting the media, do not serve the public interest to full advantage. The rights of the public to influence development decisions should not mean that there can be no rules for interveners making vocal presentations to hearings. The time limits imposed by Calgary Development Appeal Board for oral summary of written submissions are an example of a method for imposing responsibility upon interveners, for controlling rambling and irrelevant grandstanding, and for controlling the length of hearings and the attendant costs.

Public hearings, in recent years the favored mechanisms for reconciling public and private interests, do serve to enhance natural justice and administrative accountability, and their effect upon economic efficiency could be minimized by strong chairmanship of hearing panels and rules of procedure which require that interveners demonstrate responsibility too.

SUMMARY: The Environment of Regulation

In a society where attitudes range from right-wing capitalism to left-wing socialism, from the work ethic and individual initiative to dependence upon government support and responsibility, from regional desires to national aspirations, from rule by majority to rights for minorities, governments have difficulty enunciating and pursuing an idealistic "public interest". In this setting, governments have taken a positive role, attempting to serve many diverse interests. The device of regulation -- making rules which apply to specific segments of society with the intended purpose of protecting or serving other segments of society -- particularly suits a public who defines its interest as dynamic, individualistic, descriptive and procedural. In turn, this view of the "public interest" facilitates ever-increasing regulation.

The multi-faceted device of regulation requires considerable diffusion of authority, and much responsibility is delegated to appointed officials. The Parliamentary tradition of ministerial responsibility is compromised in this setting as the numerous administrators respond to professional and career values and personal discretion. The overall approach of governments becomes vague and generalized, while each department or agency of government pursues its own perceived mandate. The result is increased regulation. Where major development decisions are concerned, much discussion and negotiation, sometimes conflict, ensues before a compromise decision is arrived at.

The modern-day desire of the public to be more intimately involved in governmental decision-making which

affects them finds the regulatory process an ideal forum. The political response has been incorporation of participatory mechanisms, particularly the adjudicative public hearing, into the regulatory process, producing the advantages of placating certain elements of society and increasing their political efficacy, as well as the disadvantages of contributing to economic inefficiency, poor planning, and further erosion of the stature of legislatures as definers of the public interest.

With these elements of political and social reality in mind, the following chapters analyse the regulation of energy resources development: coal and electricity, and the regulation of urban land development. The overriding question to be considered is: Given these elements of the environment of regulation, does this manipulation of the free market system achieve a balance of public good -- fairness, equity, safety, or a balance of disadvantages -- economic inefficiency, stifled creativity and innovation, curtailed personal freedom and initiative, erosion of the sense of social responsibility of individuals, artificial surpluses or shortages of supply, and in some cases, artificially high prices, burgeoning bureaucracies and diffused leadership with less accountability to the public? Could a similar or more advantageous balance be achieved by a relaxation of regulatory controls? Can the mechanics of the regulatory process be made less time-consuming and more accountable, if regulation in certain policy areas seems inevitable?

PART TWO

CASE STUDY: ALBERTA REGULATION OF ENERGY RESOURCES DEVELOPMENT: COAL AND THERMAL ELECTRICITY

I. ISSUES, OBJECTIVES, AND DELEGATION OF AUTHORITY

A. Constitutional Jurisdiction

Section 92A of the Constitution Act 1867 - 1982 establishes provincial ownership of natural resources. Supported by "property and civil rights" under Section 92 of this Act, provincial governments have assumed power to collect royalties, to regulate development and operation of resource projects, safety, labor practices, environmental management, and sale and transportation of resource products within the province.

The federal government has jurisdiction for interprovincial and international transportation of products and trade and commerce.

The dual or overlapping jurisdictions provide opportunity for testing how far the federal jurisdiction or that of a particular province may extend. The pipeline issue provides a good example. Alberta, fearing that the federal government might extend its authority to control the natural gas industry to the well-head if a federally funded and controlled pipeline were built, responded with the innovative creation in 1954 of Alberta Gas Trunk Line, which would collect gas within Alberta and deliver it to the border for transfer to the TransCanada Pipelines.[1]

In certain instances, provincial jurisdiction has been assumed or appropriated simply because no federal legislation exists pertaining to the matter. When the

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1. John Richards and Larry Pratt, Prairie Capitalism, (McClelland and Stewart, Toronto, 1979), describes the unique character of this company. pp. 66 - 68.

jurisdiction of the Alberta Energy Resources Conservation Board was challenged concerning authority to consider application by Calgary Power Ltd. (now TransAlta Utilities) to build a high voltage line from near Calgary to Phillips Pass and to interconnect with British Columbia Hydro, the Supreme Court of Canada ruled in 1980 that since no pertinent federal legislation covered this contingency, the Alberta ERCB was within its jurisdiction to hear the Alberta portion of the line. (1 RCS (1981) 153)

Concern in the 1950s for a federal energy policy, the pipeline debate being a precipitatory factor, prompted the passing in 1959 of the National Energy Board Act, and the formation of a board to coordinate policies. The NEB was authorized to deal mainly with oil and gas, although the export of electricity also came under its mandate. The federal government, therefore, leaves regulation of the development of coal and electric power mainly in the hands of the provinces. The federal Department of Energy, Mines and Resources and the federal Department of Environment do issue policy guidelines and regulatory standards, for example the Clean Air Act 1971, Environmental Contaminants Act 1975, with which the provincial regulations are expected to comply. These standards are "designed on an industry to industry basis to apply uniformly across Canada rather than to all the sources of a given pollutant in a particular geographic area".[2] Furthermore, "environmental quality objectives are usually established as ideals, without regard to the costs of controlling emissions".[3] A district office of the federal Environmental Protection Service is maintained in Alberta.

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2. Economic Council of Canada, Reforming Regulation, (Minister of Supply and Services Canada 1981). p. 86.

3. Ibid., p. 87.

In many cases, the federal standards are less stringent than those set by Alberta. In May 1981, however, the federal government announced new standards for control of sulphur dioxide emissions from electric power plants which substantially exceed Alberta's standards. Concern about acid rain is very pertinent in eastern Canada, and preventive controls make sense for western Canada. Alberta Environment is considering acceptance of the federal standards.[4] According to TransAlta Utilities, the cost of this sulphur removal equipment would amount to $125 - $150 per KW added to a plant costing $500 to $600 per KW. In other words, maintaining these standards could increase capital cost of a power plant by as much as twenty percent and operating costs by as much as 50%. These kinds of costs are a big factor in increased consumer rates for electricity in recent years.

In 1981, the Parliament of Canada passed legislation authorizing the National Energy Board (NEB) to expropriate rights of way for interprovincial or international electric transmission lines, as it presently does for oil and gas pipelines. This legislation may affect completion of the British Columbia interconnection with Alberta's system at Phillips Pass, and would facilitate a proposed Western Grid interconnecting Manitoba, Saskatchewan and Alberta. The latter idea is strictly a political venture. It was proposed by the Premier of Manitoba who desired a market for surplus hydro-electricity from proposed expansion projects. A committee of Ministers from the three provinces has studied the feasibility of such a project through use of consultants. In 1982, however, discussions

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4. Serge Dobko, of the Standards and Approvals Division of Alberta Environment, as quoted in Calgary Herald, October 21, 1981. p. B10.

stalled as a new government in Manitoba assesses the matter, and Alberta considers producing its own hydro-electricity if the recently released Report of the Slave River Hydro Project Study and further studies suggest its feasibility.

Recently, pricing and taxation of energy products has become the most contentious element in the federal-provincial tug of war for control over resources. However, coal and electric energy pricing are not a federal concern at this time.

B. Alberta Traditions and Issues

Past and present governments in Alberta have professed strong defence of the free enterprise system. Nationalization of energy resource industry has been frowned upon, and Alberta is the only province in Canada where the major electric power utilities remain in the private sector. However, all governments, including Alberta, have demonstrated a determination to participate in resource development and exercise some control over the economy, both directly and indirectly.

Direct involvement in the resource economy began in 1973 when Alberta created the Alberta Energy Company, owned 50% by government and 50% by private investment. The immediate purpose was to provide a vehicle for direct government involvement in the Syncrude oil sands plant and Suffield gas fields. Enabling legislation precluded competition between Alberta Energy Company and conventional oil and gas ventures. However, in April of 1981, Premier Lougheed provided AEC with a new "letter of understanding"

giving mandate to operate on a fully competitive basis within Alberta and western Canada.[5] By year-end 1981, the Company had $702 million in assets, with interests in forest products, gas and oil, pipelines, utilities, steel, coal, petrochemicals, and heavy oil extraction.[6] A 1982 purchase of 51% of shares in Chieftain Oil indicates an aggressive trend, the first takeover of a private company. However, when new stock was issued in late 1982, the government did not exercise its right to purchase, thereby allowing the government equity in Alberta Energy Company to fall to about 40%. In the past few years, AEC has been sought by investor-owned industries, such as Dupont Canada or Esso Resources, as a partner in large project developments such as petrochemical plants, partly as a source of financing and partly in hope of having an edge in the regulatory process and the competition for project approval.

Indirect participation in the economy, through regulation of energy resources, became an issue in Alberta in the 1930s, shortly after the Turner Valley oil discovery. Since 1938, the Petroleum and Natural Gas Conservation Board, renamed Oil and Gas Conservation Board in 1957, then incorporated within the Energy Resources Conservation Board in 1971, has monitored oil and gas development under regulations meant to promote conservation, equity, efficiency, and safety. With passage of the Energy Resources Conservation Act in 1971, this regulatory jurisdiction was extended to include hydro and electric energy resources and coal. Instigation for the expanded role came from the Cities of Calgary and Edmonton, who suggested to a June 1970 hearing of the Oil and Gas Conservation Board that

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5. "Voracious AEC", Alberta Report, July 5, 1982. p. 14.
6. Ibid.

government should appraise all of Alberta's energy forms and coordinate their development.[7]

Following the oil crisis of 1973, increased concern for conservation and efficient utilization of resources gave impetus to government control by regulation. Alberta began to stress the meeting of Alberta needs before export, the desire to diversify the economy and therefore a desire to maximize processing of resource products before export. A 1973 report entitled "Choices Among Energy Resources for Generation of Electric Energy in Alberta", prepared by the ERCB following hearings on the subject held in June and September 1972, recommended the use of coal rather than gas for generation of electricity for "greater overall benefit to the province".[8] This became government policy complementary to a policy to promote a petrochemical industry using natural gas as a raw material.

In June 1978, the government published a new coal development policy for Alberta:

> The policy classified land in Alberta into four development categories ranging from no exploration or development to a full development in certain areas, subject to environmental control. An applicant is now required to first disclose its development plan to the government, and then, after receiving the government's views, to the public. The policy also requires the developer of a major project to submit to the Board a cost-benefit analysis, social and environmental impact assessments, and a reclamation plan.[9]

In 1981, draft legislation for an Electricity Marketing Board was distributed to utilities for perusal.

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7. ERCB Annual Report, Conservation in Alberta, 1971.
8. ERCB annual Report, 1973. p. 19.
9. ERCB Annual Report, 1979. p. 20.

The Bill establishing such a Board passed the legislature, and it became operational September 1, 1982. Rationale for the legislation was the desire to equalize rates for electricity across the province.

Environmental concerns accompany nearly every resource development. The two basic problems involve land use and disposal of wastes. Coal development and oil sands development involve strip-mining and the attendant problems of waste disposal and land reclamation. Surface and sub-surface water contamination and air pollution from chemical emissions, dusts, and fly-ash accompany oil and gas operations, gas processing, and thermal power plants.

The 1971 Annual Report of the ERCB identified four main areas of government responsibility concerning energy resources:

1. The disposition of crown rights -- involving the granting by the government of rights to explore for and develop the energy resources under the control of the province, including fees, provisions for bonuses and the fixing of royalties. This applies to all of Alberta's energy resources: hydro, oil, gas, oil sands, and coal.
2. The management of the development of energy resources -- involving the regulation of the development of the various energy resources of the province in the interests of safety and efficiency and to ensure that it is carried out without waste and in the public interest.
3. The management of the impact upon the environment of the development of Alberta's energy resources -- involving the control of pollution of land, surface and sub-surface waters and the air, and providing for their preservation.
4. The fixing of prices and tariffs where appropriate and of awards for necessary expropriation -- involving where considered necessary in the public interest the fixing of prices or transmission tariffs of energy resources (or rates of return relating to their supply), and awards to those whose property

is expropriated to permit the production or transportation of energy or energy resources.

Thus, regulation of energy resources strives to serve a variety of public interests -- federal control versus provincial control, efficient development of resources versus preservation of the environment, as well as protection of consumers and landowners.

C. Legislation and Regulatory Mandate

1. Disposition of Crown Rights and Surface Rights:

In Alberta and Saskatchewan prior to 1930, mineral rights were included in land titles when crown lands passed into private ownership. Such mineral rights may be privately transferred or sold. Energy resource companies have sought freehold land, since it is subject only to property taxes and mining income taxes, escaping the royalty system. Such companies as Canadian Pacific Ltd. and Dome Petroleum Ltd. each hold millions of freehold acres in Alberta. Much of the coal-bearing land in Alberta is freeheld.

Since 1930, rights to minerals on crown lands are granted independently from surface rights.

Disposition of mineral right in the case of oil, gas, oilsands, and coal is administered by the Department of Energy and Natural Resources. The auctioning of mineral leases and the royalties assessed upon production have been a major revenue-gathering mechanism for a government with few taxing powers. Although alternative

methods have been considered,[10] Alberta has retained a cash bonus bidding system which provides immediate income and no risk whatever to the public treasury. Although this method led to accelerated exploration of oil and gas in the past, development of all energy resources is now paced by regulation, so this system now meets with few complaints.

Water rights are administered by the Water Resources Division of the Department of the Environment.

Surface rights, since 1972, are administered by the Surface Rights Board, which holds hearings and issues the compensation orders under the Provincial Lands Act, the Surface Rights Act or its predecessor, The Right of Entry Arbitration Act, The Pipeline Act, The Hydro and Electric Energy Act, or the Water, Gas, Electric, and Telephones Companies Act, plus the Expropriation Act. This Board submits its annual report each January to the Minister of Agriculture. Its orders are made in writing and are final, although appeal may be made to Court of Queen's Bench. The appeal takes the form of a new hearing in which the court assumes the jurisdiction of the Board in determining the amount of compensation to be paid or person to whom compensation is to be paid.[11]

As discussed in PART ONE, a review is presently being conducted of surface rights legislation and practice.[12] Industries would prefer to purchase the acreage necessary, or pay a lump sum compensation for use of the necessary four acres or twenty acres while leaving the

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10. Richards and Pratt, supra footnote 1 (PART TWO), pp. 87 - 90.
11. The Surface Rights Act 1972, Section 24.
12. Supra pp. 30 - 31.

ownership of the remainder of the piece of land with the farmer, and where possible, allowing farm use of the purchased piece of land. The owners, however, demand lump sum plus annual compensation payments. A recent Alberta Court of Appeal decision awarded a Brooks, Alberta area farmer an unprecedented initial payment of $11,772.50 plus more than $770.00 per acre ($393.11 per hectare) annual compensation for loss of 4.84 acres (1.9587 hectares) of land used to produce alfalfa for haylage. The annual awards feature a 5.8% increase for inflation over the five-year term of the contract.[13] This annual form of compensation, which must be renegotiated every five years, appears to be the trend of the future. The result could be conflict which never ends and a greater than ever backlog of arbitration hearings.

2. Management of Energy Development:

The function of managing energy resources development is wide in scope and falls mainly within the jurisdiction of the Energy Resources Conservation Board or ERCB. Section 2 of the Energy Resources Conservation Act 1971, reads as follows:

> The purposes of this Act are:
> (a) to provide for the appraisal of the reserves and productive capacity of energy resources and energy in Alberta,
> (b) to provide for the appraisal of the requirements for energy resources and energy in Alberta and of markets outside Alberta for Alberta energy ...
> (c) to effect the conservation of, and to prevent the waste of, the energy resources of Alberta,
> (d) to control pollution and ensure environment conservation in the exploration for, processing,

13. Hubert Johnson, "Brooks Farmer Wins His Point on Compensation", Calgary Herald, March 27, 1981. p. D15.

development and transportation of energy resources,
(e) to secure the observance of safe and efficient practices ...
(f) to provide for the recording and timely and useful dissemination of information regarding the energy resources of Alberta, and
(g) to provide agencies from which the Lieutenant-Governor-in-Council may receive information, advice and recommendations regarding energy resources and energy.

In pursuit of these functions, the ERCB administers the following Acts, among others:

(a) Coal Conservation Act 1973 and the Coal Mines Safety Act 1975 which replace the Coal Mines Regulations Act. Coal policy stresses good environmental management and reclamation of mined lands as well as efficient and safe development.

(b) Hydro and Electric Energy Act 1971. The ERCB reviews all proposals for new generation and transmission facilities or significant additions to existing facilities in Alberta. As stated in the 1971 ERCB Annual Report:

> ... effective resource utilization, efficient generation and the impact on the environment will be the major considerations. In regard to the impact on the environment, the Board and the Department of the Environment will co-operate in deciding what conditions should apply in a certain case.

Further changes to the Hydro and Electric Energy Act, upon the advice of the ERCB principally, are expected to be introduced in the spring 1983 session of the Alberta legislature. These changes are expected to facilitate regulation of hydro development, and perhaps remove the necessity for Ministerial approval of the ERCB's administration of certain licences and permits.

Amendments in 1976 to the Oil and Gas Conservation Act require a permit for industrial or manufacturing industries which use any energy resource or derivative as a feedstock or as a fuel. A similar amendment in 1975 to the Coal Conservation Act requires that a permit be obtained from the ERCB for any industrial operation using coal or a coal product as a raw material.

All applications for an industrial development permit require approval of Lieutenant-Governor-in-Council at this time, as do all large resource development projects and applications to export from the province. Decisions of the ERCB are recommendations only, and may be subject to approval of the Minister of Environment before going to Lieutenant-Governor-in-Council. Although the ERCB assumes responsibility for determining public interest, and its decisions are subject to the required procedures of a quasi-judicial body, in essence the ERCB serves the role of middle management, responsible for technical decisions concerning energy projects and involved with matters of the public interest and the environment, yet holding only indirect power over final decisions. Management of energy development is just one of several objectives in government regulation of resources, including land, and the Energy Resources Conservation Board is just one of the managers hoping to influence final decisions. This predisposes toward competition for influence and assumed expansion of mandate, characteristics of "bureaucratic politics".

3. Management of the Environment:

The environmental functions are carried out jointly by the ERCB and Alberta Environment "to further the Department's goal of balancing environmental quality

and industrial development".[14] According to the ERCB:

> Normally, the Department of the Environment prescibes the criteria that determine whether pollutants from a resource development project are kept within acceptable limits, while the Board requires that the criteria be met.[15]

The Department of Environment Act 1971 states:

> Section 2. For the purposes of this Act, the following are matters pertaining to the environment:
> (a) conservation, management and utilization of natural resources.
> (b) the prevention and control of pollution of natural resources.

Referring back to the Energy Resources Conservation Act, Section 2, subsections (c) and (d), as quoted on page 52 of this thesis, note that both of these agencies have been given essentially the same mandate in these two areas. Considering the self-interest principle of human nature, as well as professional and job survival instincts, neither the Energy Resources Conservation Board nor Alberta Environment has any desire to see its own sphere of jurisdiction and influence eroded. Such overlapping mandates, therefore, make negotiation and competition between appointed officials endemic to the process of rule-making and decision-making. For example, monitoring and enforcement of regulations has been stipulated by the ERCB as its function:

> An example of complementary jurisdictions may be observed in the case of thermal power plants where both air pollution and thermal pollution of waters may be a problem. Here the Department of Environment prescribes the criteria that determine whether pollutants are kept within acceptable limits and the Board in its approval requires that criteria be met, sees

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14. Alberta Environment, Annual Report 1979.

15. ERCB Annual Report 1978, p. 9.

> that the installations are suitable for such purpose, and provides for monitoring the performance of the plant from an environmental viewpoint.[16]

Yet, Alberta Environment states:

> Another key part of the program is the monitoring of the environment -- principally the air and the water, to ensure the standards are being followed and where necessary to enforce compliance with the standards.[17]

Section 12 of the Department of the Environment Act gives the Minister of Environment blanket authority to over-ride power of any Minister of the Crown, any goverment agency or official until:

> ... the Minister of the Environment has first made a report to the Lieutenant-Governor-in-Council as to the advisability of the action, having regard to its effects <u>or possible effects</u> on the environment.[18]

Under a strong Minister, such a blanket mandate could lead to attempts by Alberta Environment to enlarge its sphere of influence. The clause "or possible effects" leaves the door open to rule-making and decision-making based more on suppositions than upon proven data. In the absence of direct financial cost, the public offers little objection to over-stringent regulations or the cost of such to industry, and does not seem aware of the indirect costs to the public. Although the Lieutenant-Governor-in-Council must consent to such power being used, a great deal of industry time and cost, which reflects back upon consumers and the total economy, has elapsed between the initial industry application, the negotiations and drafting of conditions

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16. ERCB Annual Reports 1972 and 1973 under heading "Responsibilities of Board".
17. Alberta Environment Annual Report 1979, p. 16.
18. Department of Environment Act, Section 12 (1)(a). The underlining is added by this writer.

of approval, and the final presentation to Lieutenant-Governor-in-Council. In the meantime, Department staff may attempt to promote adoption of standards they may have formulated on the basis of personal theories or unpublished and unproven reports and data.[19]

The Department of Environment also administers the following Acts which affect development of energy resources: Clean Air Act, Clean Water Act, Groundwater Control Act and Water Resources Act. These Acts contain few, if any, specifics, and leave wide discretionary powers to the Minister of Environment, who may issue, besides the permits and licences, stop orders (to eliminate pollution), control orders, or certificates of variance, which may permit a variance from regulatory standards in a particular case. This Department also administers the Land Surface Conservation and Reclamation Act, which authorizes orders to developers to prepare an environmental impact assessment concerning proposed projects and may require development of alternate plans.

4. Rate-setting and Other Issues in Utility Regulation:

Government responsibilities relating to rate-setting, the fixing of prices, tariffs, and other financial awards are carried out by the Public Utilities Board operating within the jurisdiction of the Public Utilities Board Act. A public utility includes:

> ... any system, works, plant, equipment or service for production, transmission, delivery or furnishing of water, heat, light or power, either directly or indirectly to or for the public.[20]

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19. See Highvale Mine case in PART TWO of this paper.
20. Public Utilities Board Act, Section 2 (j).

"Owner" of a public utility "does not include a municipality that has not voluntarily come under this Act in the manner provided in this Act".[21] Therefore, in Alberta, some utilities have remained outside the jurisdiction of the Public Utilities Board.

Concern for consumer equity of access and rates has accelerated regulation of utilities in the past few decades. The original logic motivating regulation of utilities centered around theories of natural monopoly and market concentration. These concepts, coupled with a pessimistic view of the nature of man, with the assumption that business operates with only self-interest and profit as motives, have led theorists to the conclusion that lack of sufficient competition in the marketplace will affect efficiency and price of the product. Even Milton Friedman, who feels private monopoly is less undesirable than public monopoly or regulation, wrote:

> When technical conditions make a monopoly the natural outcome of competitive market forces, there are only three alternatives that seem available: private monopoly, public monopoly, or public regulation. [22]

However, this reasoning has been questioned. University of Chicago economist Harold Demsetz wondered why the unregulated market outcome must be monopoly price. He wrote:

> The theory of natural monopoly is deficient for it fails to reveal the logical steps that carry it from scale economies in production to monopoly price in the marketplace. ... Why must rivals share the market? Rival sellers can offer to enter into contracts with buyers. In this bidding competition, the rival who offers the buyers the most favorable terms will obtain

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21. Public Utilities Board Act, Section 2 (i)(ii).

22. Milton Friedman, Capitalism and Freedom, (University of Chicago Press, Chicago, 1962). p. 28.

> their patronage; there is no clear or necessary reason for bidding rivals to share in the production of the goods, and therefore, there is no clear reason for competition in bidding to result in an increase in per unit production costs.[23]

The economy of scale argument can also be disputed. The relatively small city of Medicine Hat, Alberta, has found ownership of its own electric generating facilities more advantageous, politically and economically, than inclusion in the large utility company which serves most of southern Alberta. This is not because of any socialistic ideal. The advantages derive from the fact that the City owns its own natural gas supply -- under City property, making generation of electricity less costly than wholesale purchase of electricity from the large company, as Calgary does. Also, as a municipality, the City of Medicine Hat has now been exempted from inclusion in the provisions of the Electricity Marketing Agency. Therefore, ownership has represented freedom from regulation!

After the coming into force of the Hydro and Electric Energy Act, 1971, the existing power companies in Alberta agreed upon boundaries of franchise areas to coincide with the general service areas of each at the time. Since 1972, unallocated areas have been allotted by the ERCB with the purpose of preventing destructive competition. The ERCB holds these unallocated areas of the province open to bidding. Major industrial projects are planned five to ten years in advance of the request for approval, so new service areas can be anticipated by aggressive utilities.

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23. Harold Demsetz, "Why regulate utilities?", Journal of Law and Economics, Volume 11, 1968. pp. 56 - 57.

Competitive companies regularly survey other industries in the effort to guage their electrical needs as a basis for a competent bid for the service area. A bid presented to the ERCB for service area must include notification of other utilities which might be interested, and who may then decide to also place a bid, perhaps based only on the data provided by the first bid.

In Alberta, the opportunity to serve the considerable electric load requirements of the proposed Cold Lake oil sands plant brought forth bids from both Calgary Power Ltd. (TransAlta Utilities) and Alberta Power Ltd., the two major investor-owned electric utilities. Although Esso Resources indicated a preference for the Calgary Power bid, for reasons of greater security of supply and lower rates,[24] the ERCB decided to award the service area to Alberta Power Ltd. Although technically, either company was a good choice, the ERCB based its reasoning upon equity: to give Alberta Power a more equal share of the Alberta market, and to give them a larger industrial load so that their overall rates could be reduced.[25] Especially since the inception of the Electricity Marketing Agency, such a decision does not serve the public interest, since average rates to all consumers in the province will be higher than necessary. Even more importantly, determining equitable rates for the consumers of Alberta is not within the jurisdiction of the Energy Resources Conservation Board, even though Cabinet may agree with the decision. Under such conditions, perhaps the decision could and should have been appealed by the losing bidder, if only to remind the ERCB of its mandate.

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24. ERCB Report 80-C re Electric Service Area: Cold Lake Project. pp. 7, 13, 18.

25. Ibid., pp. 21 - 22.

Less competitive companies would prefer this comfort of protected markets, but whether this encourages efficiency and lower costs is not clear. An element of unfairness can also creep in: in January 1982, the City of Edmonton assumed jurisdiction, through recently approved annexation of a large area of land which had been serviced by TransAlta Utilities. The franchise to provide electric power to this area has been transferred to the City-owned utility, Edmonton Power, even though TransAlta produces reliable electric service at lower cost. In the free market, the industries would prefer the service of the most efficient and competitive bidder, thus keeping power costs down and in turn keeping the price of end products or consumer products down. If the service area is arbitrarily allotted on any other basis than technical efficiency or professional competence, the public interest does not win, since consumer rates will be higher than necessary.

The rationale for cost-plus rate regulation of utilities, administered by the Public Utilities Board (PUB), draws upon the essential commodity nature of the product and upon the principle of equitable access to the service and equity of rates to all consumers in the province. "The burden of proof to show that any such increases, changes or alterations (in rates) are just and reasonable is upon the owner of the public utility" seeking to make them.[26]

In the capital-intensive electrical utility business, rates now reflect the current cost of providing service, but because of the severe inflation of recent years and consumer reaction to rate increases, rates have

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26. Public Utilities Act, RSA 1980, Section 89.

not kept pace with total costs. Yet the cost to the utility includes not only inflation but costs of burgeoning regulation. An industry executive explains:

> In the electric utility business, there is a delay between the general price increases and the adjustment to electricity rates. This occurs because the inflation "is stored" in construction work in progress for a new plant which takes some ten years to plan and some five years to build. The new cost of the plant under construction exceeds the imbedded cost of existing facilities, but the cost of the plant is not built into rates until the facilities are put into service. ... Over 70% of the cost of providing service to a consumer is related to fixed costs which are committed when the capital investment is incurred.[27]

To put these costs into perspective, the capital cost per kilowatt output of the Company's first thermal plant at Wabamun, constructed 1952 - 1967 for 69 million dollars, is $121 per KW, as compared to approximately $628 per KW for Sundance Unit Six, constructed 1975 - 1980 for 221 million dollars, and an average cost of $800 per KW for the first two Keephills units to be completed in 1984 at an estimated cost of over 600 million dollars. The capital costs for environmental controls for Wabamun and Sundance in 1981 alone amount to 156 million dollars. Costs of service have also increased rapidly, "with no added quality of service except for the environmental controls".[28] The increase in environmental service costs for Wabamun and Sundance plants alone has increased from approximately

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27. H.G. Schaeffer, Senior Vice-President Finance, Trans-Alta Utilities, presentation to a seminar on Regulatory Purposes and Policies, Monticello, Quebec, April 1978.

28. Ibid.
Quality of service would include such factors as system reliability, reserve capacity for peak load periods, increased underground distribution of power lines, etc.

twenty million dollars in 1977 to approximately thirty-six million dollars in 1981. Although the public demands certain environmental controls, rate increases to keep pace with these costs are opposed. The public must decide whether their interests lean more toward environmental protection or more toward economic restraint and strike a reasonable balance. Consumers cannot expect both low rates and stringent environmental controls.

A more reasonable approach to rate-setting would include consideration of inflation during plant construction.[29] The basic concern of utilities has always been reliability of service, and if utilities are to maintain adequate reserves of supply to meet peak demands, new facilities are necessary. Required reserves are regulated, as are most elements of power production which determine eventual costs.

Conversion to provincial ownership of electrical utilities, as often demanded by social democrats, would not necessarily improve rates that consumers must pay. A rate-analysis study conducted by National Utility Service Inc. of New York, compared industrial electrical power costs in Canada from December 1977 to March 1979. The results put Hydro Quebec's 1.87¢ per KWHour lowest, followed by Calgary Power Ltd. (TransAlta Utilities) at 1.89¢, Manitoba Hydro at 1.93¢, Ontario Hydro at 1.95¢, British Columbia Hydro at 2.04¢, and so on.[30] A survey of industrial electricity rates, based on 1979, conducted by Manitoba Hydro, placed the City of Medicine Hat's rates lowest, investor-owned TransAlta Utilities and its

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29. Ibid.

30. Canadian Press release, Calgary Herald, May 19, 1979. p. C9.

customer City of Calgary second lowest, Hydro Quebec third lowest, Saskatchewan Power eleventh lowest, and Alberta Power Ltd.(investor-owned) thirteenth lowest. Samplings among Canadian cities over 50,000 population placed Montreal residential rates lowest, followed closely by Calgary and Edmonton, then Toronto and Regina, then rapidly increasing up the scale to the Halifax rate which is almost double the Montreal rate.[31] From these comparisons, one can see that ownership of the utility is not the basic factor in rates, nor in reliability of service. The more important factors affecting costs and rates include the type and availability of the source -- hydro, coal, gas or nuclear, the concentration of service area, and the efficiency of the operation.

Since the Electric Energy Marketing Agency became effective in Alberta September 1, 1982, the cost-plus return to electricity producers, as determined through PUB decisions, remains essentially the same. In essence, although physical operations continue as before, the Marketing Agency began, on September 1, 1982, to buy electricity from the producing utilities at the following rates; from TransAlta at 2.16¢ per KWH, from Edmonton Power at 3.69¢ per KWH, and from Alberta Power Ltd. at 4.79¢ per KWH.[32] The agency then sells electricity back to each utility at an averaged rate, resulting in a subsidy to consumers of high cost producers provided by the consumers of the low-cost producer. Consumer rates are determined by the averaged rate bases for generation and bulk transmission facilities of the participating utilities plus the individual distribution costs.

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31. Manitoba Hydro Rates Department, Survey of Canadian Electricity Bills, 1979.

32. TransAlta Utilities, Fortnight, August 31, 1982.

Although natural gas distribution for residential use is subject to the same regulation of unallocated service areas and rate-setting as electrical utilities, industrial gas rates are not regulated. In a 1978 interview, then Energy Minister Getty stressed that Alberta's gas pricing system does not regulate rates for sales within Alberta. He added that petrochemical industries and their suppliers negotiate contracts in an open market. "Arbitration is available, but the government does not become involved", he told a reporter.[33] Long-term private contracts for the supply of commodities have been satisfactorily concluded, but are fraught with uncertainties. There is little doubt that price regulation of such commodities can cope more easily with positive or negative windfalls. Small gas producers in Alberta experienced the negative windfall in the 1970s when they were tied into long-term private contracts with petrochemical developers Celanese and Sherritt-Gordon. The producers were receiving 11½¢ per thousand cubic feet when natural gas was selling on the open market for about $1.35. In this case, the gas producers asked for government intervention; they asked the Public Utilities Board to help them break the contracts and negotiate a new price. These private sector producers should realize that if they request government intervention to control negative windfall, they cannot complain about control of positive windfall profits.

Rate regulation by an independent Board, whose members are relevant professionals, whose decisions are essentially free from political interference, would appear to be a fair and necessary form of regulation.

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33. Gordon Jaremko, Calgary Herald, November 11, 1978. p. D10.

Summary: Alberta Issues, Objectives and Mandates in the Regulation of Energy Resources Development

The government of Alberta strongly believes that control of resources is within provincial jurisdiction, and views resource rents as a major source of provincial government income. Principles of free enterprise are enunciated, but direct involvement in resource development is increasing and indirect control through regulation has become extensive. Alberta legislation concerning all facets of resource regulation has been reviewed and amended and considerably reorganized in the past decade.

The ERCB has cogently outlined the areas of regulatory responsibility in resources development in Alberta.[34] These correspond with the objectives of government as follows:

(1) Disposition of Crown Rights -- control of exploration areas and generation of revenue.

(2) Disposition of surface rights -- fairness, and the settling of disputes.

(3) Management of energy development -- conservation, and efficient and safe use of depleting resources.

(4) Management of the environment -- prevention of harm to others, and preservation of natural resources such as land, water and wildlife.

(5) Rate-setting and other allocative functions -- protection from destructive competition or exploitation of consumers, and the objective of equity.

However, these are very broad goals which do not indicate how, and to what extent, the public interest is to be served. A great deal of discretion is delegated to

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34. Supra pp. 49 - 50.

appointed officials in both agencies and departments, as legislation remains unspecific as to policy, implementation or extent of jurisdiction. Overlapping mandates, particularly between Alberta Environment and the ERCB, could lead to considerable "bureaucratic politics" and delay in processing resource development applications and to a final decision often based more upon the professional and personal ideals of the various participants than upon an identifiable overall public interest. In contrast, rates are regulated only by the Public Utilities Board, based upon accounting procedures and free from political interference from elected officials.

The following chapter describes and identifies the main characters or actors in the on-going policy process which creates regulatory details, the fleshing out of the particular Acts mentioned in this chapter.

II. THE SIGNIFICANT ACTORS

This chapter identifies the influential participants in regulatory decision-making concerning development of resources, particularly coal and coal-based electricity. These are the Energy Resources Conservation Board, Alberta Environment, Cabinet and the Energy Committee, and the industries plus their lobbies. Cabinet, the final decision-taker, is included, as well as those appointed agencies and officials with broad mandates and much delegated authority, those most likely to participate in bureaucratic politics and to interface with the industries and the public interest groups.

The Public Utilities Board is described as a contrast. Its mandate is specific and rationalized, and the independent Board experiences very limited outside interference in decision-making. Thus, its decisions can meet the objectives of justice and fairness, and equitable rates for all, without sacrificing economic efficiency.

A. Energy Resources Conservation Board

As described in preceding pages, this Board is charged with a broad mandate for management of energy resources development.

The Board consists of five members appointed by Lieutenant-Governor-in-Council for a period of five years, which is renewable. Although scientists and engineers have dominated the Board, additional technical specialists may be appointed by the Board to sit with the

panel hearing a particular matter. Also, since the Minister of Environment has authority to approve or reject many decisions of the ERCB or add conditions to them before they go to Cabinet for final approval, an assistant deputy-minister of the Environment Department often sits as an Acting Board Member at public hearings. The present chairman of the Board is an economist and a career bureaucrat.[35]

Where a division of the Board is delegated to hear a particular application or inquiry, two Board members (including acting Board members) may constitute a quorum and reach a decision binding upon the full Board. Decisions of the Board are recommendations only, and are subject to approval by Cabinet. In many cases, approval of the Minister of Environment must also be given, and any conditions added by the Minister, if not overturned by Cabinet, must be imposed by the ERCB. Excepting questions of law and questions of jurisdiction of the Board, "every action, decision, and order of the Board with respect to such matter or question is final and conclusive and is not open to question or review in any court".[36]

The Board is not required to hold a public hearing unless a specific Act requires one, and when it appears that an application does not adversely affect the rights of any person, such as a low voltage electric transmission line to be built on a road allowance, the

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35. Vernon Millard started working for the Oil and Gas Conservation Board in 1950 and rose through the ranks, was appointed Board member in 1962, Vice-Chairman in 1971, and Chairman in 1978.

36. Energy Resources Conservation Act, Section 28.

Board may approve an order "upon its own motion or initiative, and without the giving of any notice, and without holding any hearing".[37] The Board solicitor "acts as chairman of an Applications Advisory Group which advises the Board on routine applications".[38]

The original Oil and Gas Conservation Board established in 1938 had a staff of 30 by 1948. By 1958, staff increased to over 200, by 1968 to over 300, by 1978 to an approved staff complement of 561 of which 539 positions were actually filled, and by 1980 to over 700. Annual net expenditures of the ERCB have risen from some two and one-half million dollars in 1968 to well over twelve million dollars in 1978, and over sixteen million dollars by 1980. Approximately 85% of these expenditures are for salaries or salary-related items. In 1978, oil and gas related net expenses amounted to eleven million dollars; revenues required were met equally by Government of Alberta and taxes levied on oil and gas properties. Hydro, thermal electric and coal-related expenses were paid by the Government of Alberta.[39] These figures are an indication of the growth of regulatory controls, which requires additional staff, who in turn generate more regulations, and so on.

The ERCB is required by its statute to gather, and have available for the public, a wide variety of energy resource data. Core samples from all energy exploration must be submitted to the ERCB, and after a period of confidentiality, is released to any company or person

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37. Ibid., Section 29(1).

38. Alberta Treasury, Organization of the Government of Alberta, October 1980. p. 103.

39. Figures are taken from ERCB Annual Reports.

seeking high quality technical data, allowing companies both large and small to compete on more equal basis. The ERCB, therefore, also serves a public information function.

B. Alberta Environment

This department of the Alberta government was created in 1971 and by March 31, 1979, included 953 salaried positions with expenditures totalling $66,561,421.00 in the 1978 - 1979 year.[40] By 1982, it seems reasonable to assume that personnel and costs have increased considerably. It is the fastest growing department of Alberta government. The Environmental Protection Services Branch includes the Director of Standards and Approvals, concerned mainly with monitoring of air and water pollution, and the Research Secretariat, whose scientists annually review fifty to sixty research proposals. The Environmental Coordination Services Branch includes an active Land Conservation and Reclamation Division and environmental assessment division.

Staff of the Environmental Assessment Division are also involved in a number of ERCB public hearings, while another section of Alberta Environment sets up citizen participation programs to encourage public involvement in planning of projects and appearances at public hearings.

C. Cabinet and Energy Committee

Under the Energy Resources Conservation Act, an Energy Committee is established to provide liason between

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40. Alberta Environment, Annual Report 1979.

all government departments and to advise Cabinet on policy matters. This Committee consists of the President of the Executive Council (the Premier), who is chairman of the Committee, the Deputy Minister of the Environment, the Deputy Minister of Business Development and Tourism, the Deputy Minister of Recreation, Parks and Wildlife, a Deputy Minister for the Department of Energy and Natural Resources designated by the Minister, the Chairman of ERCB, Chairman of PUB, and a Vice-Chairman of the Committee if the Chairman has appointed someone not otherwise a member of the committee. The Energy Committee is involved in the preliminary applications for industrial project approval-in-principle, and considering the diverse objectives represented, time-consuming bargaining and negotiation are likely.

D. The Industries, individually, and through their Associations:

The two main associations recognized in Alberta as lobbies for the electric and coal industries are the Electric Utility Planning Council (EUPC) and the Coal Association of Canada respectively.

The EUPC was formed in 1972 at the suggestion of the ERCB to coordinate the activities of the various investor-owned companies and major cities of Alberta, to carry out long-range planning studies of generation and transmission for the interconnected electric system of Alberta. The industry readily complied, acknowledging that failure on their part to coordinate planning for total Alberta needs would provoke further government intervention. The 1972 ERCB Annual Report states that the

Electric Utility Planning Council "made a major submission to the ERCB hearing held in September of this year, concerning the appraisal of the requirements for energy and energy resources in Alberta."

This Council also provides expert testimony on Alberta requirements at the public hearings on all major electric energy project applications, and has representation on various bodies such as the Slave River Hydro Project Study.

The Council's advisory role was enhanced when, in March 1981, the EUPC was invited to make a slide presentation and report to the government caucus concerning Alberta electricity needs for the next twenty years and the resource options available. Held at Government House in Edmonton, on a Friday afternoon, some thirty-nine members of caucus were in attendance.

The EUPC members are executives of the constituent utilities, whose time, expertise, and expenses are paid by their respective employers. Observing members include the ERCB and PUB; advisory members include Alberta Utilities and Telephones Department and Alberta Environment. Chairmanship of the Council rotates among the voting members, the senior representatives from the member utilities.

The Coal Association of Canada is primarily concerned with production, uses, and marketing of coal, and is the recognized lobby for the industry. This Association, centered in Calgary, Alberta, employs a full-time administrator, and coal industry executives serve on the Board of Directors and various committees of the Association.

E. The Public Utilities Board

This Board is composed of not more than nine members, who are appointed by Lieutenant-Governor-in-Council for a term of ten years held during good behavior. Currently, there are seven full-time members: Chairman William Horton, who is an engineer; four accountants, one experienced in municipal administration, two in industrial work; a lawyer, and a former teacher -- a well-qualified Board. According to the 1980 Annual Report, the PUB had 53 authorized staff positions, 35 administrative and 18 technical.

The PUB is a quasi-judicial body with independent status. Within its jurisdiction, PUB has the same power, rights, privileges and immunities as Alberta Court of Queen's Bench. Decisions and orders may, with leave, be appealed to Alberta Court of Appeal on questions of law or jurisdiction, but not on question of fact.

The Board also has a limited advisory function in that it will conduct inquiries on matters within its jurisdiction upon request by Cabinet, make monthly internal reports available to Ministers, or make comments upon proposed changes to pertinent legislation. Under the Natural Gas Rebates Act, PUB exercises an administrative function: review of all gas supply contracts and customer rates for gas which are subject to rebate applications.

This Board holds hearings on applications for rate increases for water, power, natural gas, and other utility services in Alberta. As previously mentioned, this was one of the first Boards in Canada to award costs to groups and individuals appearing before it. The Alberta wing of Consumers Association of Canada has criticized costs awards to interveners, and launched appeal to the courts when its own award was reduced after a 1977 hearing.

Alberta Court of Appeal ruled in January, 1979 (Green, Michaels & Associates, City of Edmonton, and Consumers Association of Canada (Alberta Branch) v PUB. 13AR 574) that the PUB must justify its decisions and give reasons for rejecting or reducing awards to interveners. However, it is a duty and a right of the PUB to judge the appropriateness of costs of witnesses and studies.

The idea of a utility consumers' advocate, or public funding of a consumers' lawyer, has been raised in the Alberta legislature, but it received no encouragement from the Utilities Minister, the Consumer Affairs Minister, nor the PUB's director of administration. There is no doubt that a consumers' advocate's first concern would be "rates" or cost of service, and influence could result in inadequate service, for example, electricity brownouts or blackouts because of insufficient reserve electricity, or breakdowns or inadequate expansion of communications facilities, all a direct result of inadequate return to utilities. Utilities are regulated because they are considered essential services, and it is because they are essential services that they must be kept financially viable. Only a neutral board, such as the present PUB, can apply financial and technical criteria to determine that utility rates are adequate to cover operation and maintenance of a desirable level of service and provide for necessary expansion of the services demanded by a growing population with a taste for comfort. At the same time, the PUB can control the cost-plus return or profit to utility companies.

The duties of this Board do not thrust it into the bargaining and negotiations arena of the aforementioned actors, since its decisions affect development of energy resources only to the extent that PUB controls profit and

therefore the amount of capital readily available for further development proposals or expansion of the industry.

The PUB requires of all public utilities annual "detailed reports of finances and operations".[41] Furthermore:

> where any person directly or indirectly controls the business of an owner of a public utility within Alberta, that person and any company controlled by that person shall give the Board or its agent access to any of the books, documents and records that relate to the business of the owner or shall furnish such information in respect thereof as may be required by the Board.[42]

Under this latter Section of the Act, Atco Industries' attempted takeover of Calgary Power Ltd. was thwarted, when the PUB was drawn in by virtue of the fact that Atco had previously purchased controlling interest in Canadian Utilities Limited -- an example of the pervasiveness of regulation.

The Public Utilities Board represents well controlled regulation. The duties of the Board are specific, its decisions are independent of political approval, the Board members are well-qualified for their duties and its decisions are technically supportable. They do not ostensibly cater to clientele or interest groups or make statements about the "public interest", nor make blatant attempts to expand their sphere of influence.

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41. Public Utilities Board Act, Section 80 (d).
42. Ibid., Section 79 (3).

III. THE REGULATORY PROCESS

This chapter describes the regulatory requirements and the interaction between industries, government departments and agencies, as well as the public, in planning for the development of coal and thermal power plants.

Section A describes the schedule of procedures required to obtain a permit to begin construction of a mine or power plant, illustrating the multiplicity of controls and the time-frames involved.

Section B uses the Highvale Mine Case as a good illustration of the processes of setting and enforcing regulation, the conflicts of interests and personalities, the bureaucratic politics, citizen participation, citizen appeal, and the complexity and unpredictability of regulation.

A. Schedule of Procedures: Coal and Electricity

(a) Exploration Permit: In the development of a mine, the first consideration is acquisition of mineral rights. Before bidding for mineral leases on crown lands or negotiating for transfer of freehold rights, an industry will seek assurance of the supply of coal and the economic feasibility of its recovery. Core samples will be taken if none are available for examination at the ERCB Core Lab. If a very shallow sample is taken, no permit is required. However, beyond a certain depth, or on crown lands, a permit is required, and all samples must be registered with the ERCB, who will classify them confidential for up to two years, then make the data available to the public.

Application for an exploration permit is made to the Chairman, ERCB. Copies are distributed by the Board to the Land Surface Conservation and Reclamation Council, who in turn distributes copies to their Exploration Review Committee and the Department of Energy and Natural Resources. After each has reviewed the application, subject to terms of the Coal Conservation Act, Public Lands Act, Land Surface Conservation and Reclamation Act, Water Resources Act, local land use bylaws, and approval for use of public road allowances, and approval of landowner or Surface Rights Board if applicable, results are coordinated by the ERCB, who issues or denies approval of the exploration permit. All of these procedures and time-consuming paperwork are required just to obtain permission to drill a core sample which will become public knowledge.

(b) Surface Rights: Negotiations for surface rights for the area of the proposed site generally occur well in advance of a mine application. If the developer is unable to reach agreement with the rights holder for outright purchase of the land or for transfer of the surface rights, an application is made to the Surface Rights Board for a Right-of-Entry Order. The SRB review, including hearings, may take up to three months before a permit is granted allowing access to the land. The compensation hearings may extend longer than a year.

If the land in question is zoned agricultural or parkland, or any use other than mining, applications must be made for appropriate zoning changes or amendments to land use bylaws or plans. Considering advertising, public input or public hearings and preparations of final decisions, this process may take many months, possibly more than a year, to complete.

(c) Project Approval-in-Principle: This stage involves two steps: preliminary disclosure to the Provincial Government and public disclosure to the affected community.

Once a project has been formulated, preliminary disclosure is made to the Department of Energy and Natural Resources, who distribute copies to the ERCB and Energy Committee. Evaluation of the project is then passed on by ENR and ERCB to the Cabinet Economic and Resource Development Committee, who then pass on their recommendation to Executive Council. Subsequently, the project is either rejected or approved-in-principle.

Under present coal policy in Alberta, after approval-in-principle has been received, the developer must disclose the project in reasonable detail to the general public at least forty-five days before the formal public hearing of the project by the ERCB. A public meeting is held in the affected community, where repre-entatives of the developer will describe the project and answer questions. The purpose is to inform the public, so that any interested party may prepare and present his views during the formal hearing process.

(d) Formal Application for Development Permit: The formal application must comply with the Coal Conservation Act, Land Surface Conservation and Reclamation Act, Clean Air Act, Clean Water Act, and Water Resources Act. It may involve Public Highways Act, Forest and Prairie Protection Act, Groundwater Control Act, Wildlife Act, and must include a cost-benefit analysis, social and environmental impact assessments, and a reclamation plan. At this stage, consultants are usually hired to carry out the various analyses and assessments. According to the pre-face of ERCB-AE Report 77-AA, the ERCB has prime

responsibility for assessing the technical aspects of the project and Alberta Environment has prime responsibility for assessment of social impact and cost-benefit matters. "In addition, various other government departments contribute to the assessment of the environmental, social impact and cost-benefit issues by providing their input to those carrying the prime responsibility", according to this report. The 1979 Alberta Environment Annual Report states that "eighteen departments and agencies participate in the review of Environmental Impact Assessments". Consider the potential here for bureaucratic politics!

The ERCB may, at this time, also request further studies or alternate plans from the developer. Only when the Board is satisfied that the applications are complete, will a public hearing be scheduled.

(e) The Public Hearing before ERCB: This process has been described in detail in PART ONE, Chapter IV.

(f) Subsequent Deliberations upon the application may take several months or more. The Report recommending approval, with or without conditions, or recommending disapproval, is forwarded to the Minister of Environment and to Lieutenant-Governor-in-Council for final approval.

(g) When permits have been granted, the next stage is the obtaining of licences, a separate one for every pit to be mined, generally granted for a five-year term, and subject to conditions of the Department of the Environment. All permits, licences, and approvals are signed by deputy ministers or branch managers. Ministerial approvals are signed by the Deputy Minister of Environment or Deputy Minister of Energy, indicating that at times, there could occur a complete breakdown of ministerial responsibility

beyond the approval-in-principle stage.

Planning for a mine development, following this regulatory schedule, takes about seven years on average. Construction of the project may now commence, but the regulatory procedures do not abate. The Power Plant application will be processed simultaneously with the mine application, subject to all the same procedures. Once approval has been received for the power plant, formal application for transmission and substation facilities begin, and thus the process starts over again.[43]

These procedures, complex, time-consuming, and costly, discourage private initiative in planning new projects and intimidate the small enterpreneur. Construction and safety standards, labor or health standards and the like are not at issue here. The matter of concern is the negative impact upon development initiatives and the effect upon the economy of regulatory delay in bringing forth new development projects. New projects not only provide an increased gross national product, but also an increased opportunity for employment and other social benefits.

B. Highvale Mine Case: The Many Facets of Regulation

A recurring theme in this thesis is that regulation is a product of many interacting and inter-relating elements. While it is difficult to enumerate particular examples of each element outside the context of their inter-relationships, the Highvale Mine case encompasses

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43. Schedule of procedures obtained from TransAlta Utilities Corporation.

all the elements or facets of developing regulations and enforcing them, of the conflicting goals and perceptions of the "public interest", of clashing personalities and "bureaucratic politics", of citizen participation and citizen appeal, and of the problem of ensuring administrative responsibility for decisions made by appointed officials.

The Highvale Mine has been in operation since 1969 under permit #1769 granted by the Department of Energy to Calgary Power Ltd. Under then existing legislation, the Department was not required to hold public hearings on mine applications.

Following establishment of the Energy Resources Conservation Board in 1971, the Board undertook to review and issue new mine permits for all existing mines authorized by the previous authority. The new permit #C77-7 was issued to cover the existing mine boundaries as previously authorized by the Department of Energy. There is no evidence of a thorough reexamination of the project at that time.

In November 1976, Calgary Power Ltd. made application for extension of the Highvale Mine to fuel a proposed South Sundance (Keephills) Power Plant. A public disclosure meeting was held on a Saturday afternoon, January 13, 1977, in Keephills Community Hall. The ERCB hearing was held March 15 through March 22, 1977. The involvement of the community of Keephills has been discussed in PART ONE.[44]

In August 1977, the ERCB and Alberta Environment recommended approval, subject to certain conditions, among

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44. Refer back to pages 23 - 26.

them the following:

> The assumptions made by the applicant to determine the cost of reclamation are adequate to accomplish the reclamation of mined lands to a level of productivity equal to or better than that existing prior to mining. The Department accepts the resulting estimated cost of reclamation as both significant and adequate. However, until the Department receives a final reclamation plan as required under the Regulated Coal Surface Operations Regulations, it is not in a position to determine whether the productivity of the reclaimed land would be as good or better than prior to mining.[45]

The Department's report added:

> The Department is convinced that the cost of power would not significantly increase, nor would the economic feasibility of the project be jeopardized, if the Company replaced one foot of topsoil and three feet of rootzone material on all mined areas.[46]

This requirement did not alarm Calgary Power Ltd. officials, who considered the statement an expression of a desirable maximum which may be required.

On January 24, 1978, final approval by Lieutenant Governor-in-Council was granted, and the Board issued Permit C77-20 covering the extended mine area.

In 1980, application was made by Calgary Power Ltd. to amend Permit C77-20 to allow extension of boundaries which would permit mining of very shallow coal on the Lake Wabamun side of the mine.

The Lake Wabamun cottage owners mounted considerable opposition, stating that extension would bring the mine too close to their properties, lowering property values financially and aesthetically.

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45. ERCB-AE Report 77-AA. p. 12.16.

46. Ibid., p. 12.20. The underlining is added.

Open houses were held by the Company to demonstrate mitigative measures planned, and to explain that the shallow coal in this pit could be completely removed in less than a year and the land would soon be reclaimed to a condition as good or better than before. Disturbance of groundwater systems also concerned the cottage owners, and the Company attempted to assure them that all necessary precautions would be taken to ensure minimal impact.

The cottage owners, meanwhile, were also meeting with Alberta Environment Department staff for advice. The community was not united in one group or association, but each had good leadership. The president of the Wabamun Home Owners Association was a former Calgary Power employee who was assistant deputy minister of Government Services at time of this application. The president of the other local group, the Rosewood Sundance Environmental Society, was an employee of the Department of Energy and Natural Resources. Both brought expertise and pressure upon government colleagues for their cause.

The Edmonton Regional Planning Commission also took up the cause against the mine, arguing against the disturbance of recreational sites within reasonable reach of Edmonton.

At this time, a neighboring farm-owner, Mr. Tanney, discovered that in his absence in 1977, the Highvale Mine boundaries had been extended toward his property. Now, in 1980, he joined the Wabamun Home Owners to oppose further extension.

A public hearing was held by ERCB in Spruce Grove, Alberta, from October 15 - 20, 1980. The hearing panel consisted of Chairman Dr. N. Berkowitz, Mr. N. Strom, and Mr. H. Thiessen, Assistant Deputy Minister of Environment.

At this hearing, a middle-level staff member of Alberta Environment, the Chairman of the Development and Reclamation Review Committee, conducted a four-hour cross-examination of the applicant, characterized by somewhat belligerent questioning, and at times more commentary than questioning. He treated the hearing as an evaluation of a new mine site, not as a slight extension of boundary for a long-time ongoing operation. He also intimated that CPL's Application was not properly complete (also somewhat a criticism of ERCB since the ERCB should not call a hearing until the application contains the necessary and adequate information), and that the applicant, CPL, did not understand its role or the government role. This Environment Department employee stated that the purpose of the hearing was not to decide whether a plan submitted by CPL should be approved or not, but that the applicant company should provide a number of alternate plans so that public agencies can assess the trade-offs and determine what should be done.[47] He also told the applicant's sociological consultant, Dr. J. DiSanto, that his social impact assessment was deficient because he had not examined the impact of denial of the application.[48]

Only twenty minutes into this cross-examination, ERCB Chairman Berkowitz admonished:

> ... the Board has sensed that in part you are going into the area of argument here. ...I think it would be helpful if you confined yourself at this point to cross-examining the panel.[49]

During the following several hours of cross-examination by this Environment Department staff member, the CPL solicitor

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47. Transcript of ERCB hearing, October 16, 1980. pp. 249 - 250.

48. Ibid., p. 299.

49. Ibid., p. 227.

and Dr. Berkowitz reminded him no less than seven times, that this hearing was concerned with an expansion of boundary, not a rehearing of the entire mine approval.[50] Finally, Dr. Berkowitz interjected with a strong statement to the effect that the mine was first approved in 1969, and one could not expect retroactive examination of a minesite authorized by the government of that day. As well, he reminded the cross-examiner that if he wished to understand the social and environmental impact upon the Lake Wabamun cottage owners, he should cross-examine the interveners, not the applicant, and he should confine his questioning to the application at hand.[51]

By events which follow, this hearing only deepened the determination of the Environment Department employee to influence conditions concerning this mine permit.

The March 1981 decision of the ERCB recommended rejection of further extension of boundaries upon the reasoning that environmental and social costs of the extension outweighed the economic benefit to the Alberta electric system. Although the mandate of the ERCB is ostensibly to effect the orderly and efficient development of Alberta's coal resources, this decision put the need and desire for recreational property above the permanent loss of 12.4 million tonnes of shallow coal which could be mined in a year -- if not mined immediately, it will become covered with cottage subdivisions and lost forever -- and a potential net saving to electrical consumers of 6.6 million dollars as calculated by ERCB, based on permanent property devaluation of present cottages. CPL had estimated a net saving of ten million dollars, allowing for temporary

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50. Ibid., pp. 251, 275, 280, 281, 294, 299, 300.
51. Ibid., pp. 300 - 303.

devaluation of present cottages, and enhanced values in a few years after reclamation.[52] This decision was not based on evaluation of the project, but upon "public interest", upon a balancing of the need for efficient energy development with the need for recreational property. Although elected officials may have come to the same conclusion, such policy decisions should not be within the mandate of the ERCB.

Meanwhile, the Land Reclamation Division of Alberta Environment had been drafting new standards for development and reclamation approval for Highvale Mine. The same Chairman of the Development and Review Committee who had participated in the 1980 hearing now played a major role in the development of the reclamation standards. On March 24, 1981, the following cryptic letter from Alberta Environment was sent to Calgary Power Ltd.:

> Re: Highvale Development and Reclamation Draft Approval
>
> Please find enclosed a draft of the above Development and Reclamation Approval.
> Would you please review the document to make sure all conditions are understood.
> We would be pleased to meet with you and your staff to go over each condition if you think this is necessary.

The attached conditions contained a big surprise:

> Any material considered unsuitable for revegetation shall not be placed closer than <u>three meters</u> to the recontoured land surface where in the pre-mining condition such material did not exist within three meters of the land surface.

Previous reclamation sites, now producing bumper crops, have averaged one-half to one meter of root-zone material. The tone of the letter and the draft regulations draw into question the popular conception that regulations are

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52. ERCB Decision on an Application by Calgary Power Ltd. Highvale Mine Extension, March 1981. p. 26.

created in consultation with industry. In spite of objections, the interim D and R Approval #C-2-81 was issued July 28, 1981, including verbatim the above conditions.

The suggestion for three meters of rootzone material was apparently made by the Land Reclamation Advisory Council, based upon an unpublished study done by the Alberta Department of Agriculture. Efforts by CPL (now named TransAlta Utilities) officials to obtain the study proved fruitless for many months. Finally, a telephone call to an Assistant Deputy Minister of Agriculture disclosed that the elusive study had not yet been compiled into final form, but it was determined that a main source of soil science expertise had been the writings of an American certified soil scientist named Dr. Fred Sandoval.

TransAlta officials contacted Dr. Sandoval in Montana to inquire about his studies, and were told that a conclusion requiring three meters of rootzone material could not be derived from his data. Dr. Sandoval was asked by TransAlta to come to Alberta to do an on-site evaluation of the Highvale Reclamation Plan.

Meanwhile, TransAlta contacted the Chairman of the Coal Association of Canada to inquire whether any reclamation studies had been completed recently, and to discuss the draft regulations recently sent to TransAlta. It was suggested that activation of the Coal Association would require time and national red tape. Since time was important, it was decided that an independent grouping of Alberta coal producers would produce quicker results.

Thus, TransAlta contacted the other coal-producing operations in Alberta -- the Coal Companies plus Alberta

Power Ltd. and City of Edmonton Power -- and apprised them of the situation. The Alberta companies agreed to meet regularly under the chairmanship of TransAlta, to work towards compilation of a report for presentation to Alberta Land Reclamation Division, and to share costs, including the engagement of Dr. Sandoval to conduct an on-site evaluation of the Highvale Mine Reclamation Plan.

The action plan of the industry group was to research people experienced in reclamation of solonetzic or saline soils in Canada to determine scientific basis or error in the Alberta Department of Agriculture's interpretation of criteria for reclamation standards. Although different rules for reclamation refill apply for different mine sites, according to acidity of soil base, the industries hoped to establish the minimum depth of soil which would produce maximum results and effectiveness.

In December 1981, Sandoval's critique was received by TransAlta and circulated to other members of the Ad Hoc Industry Committee. Dr. Sandoval wrote:

> I do not subscribe to the concept of separate salvage and replacement of three soil layers to three meters depth. This concept, to my knowledge, is not supported by research findings in Canada or elsewhere. ... Research in North Dakota ... showed that crops responded to increased soil thickness up to a total of about one meter. Further increases in replaced soil thickness had no consistent effect on crop productivity.

In January 1982, the Ad Hoc Committee assigned consultants Hardy Associates (1978) Ltd. the task of contacting known experts in soils and groundwater hydrology in Canada and the preparation of a report on reclamation. The committee also retained four referees, two experts in soils and two in groundwater hydrology -- from University of Calgary, University of Alberta, from University of Saskatchewan, and from a University in North Dakota. Hardy

Associates were advised not to contact these four people.

On March 9, 1982, after reviewing seventy separate sources, Hardy submitted its report, stating that the benefit of three meters of rootzone material is not scientifically supported.

Doug Harrington, Director of Land Conservation and Reclamation Division of Alberta Environment, had indicated to TransAlta officials that the Reclamation Review Committee and the Soils Advisory Committee should be able to stand behind their recommendations for three meters if they wish to continue to press for this condition. Now, Mr. H. Thiessen, chairman of the Land Conservation and Reclamation Council and an Assistant Deputy Minister, hosted a workshop to present and discuss the Soil Criteria Report now available from the Department of Agriculture as prepared on behalf of Alberta Soils Advisory Committee (ASAC). The ASAC chairman agreed to review and incorporate where possible any comments made by the Coal Association of Canada.

On March 31, 1982, the Hardy Report was sent to Mr. Harrington, and on May 11, 1982, a meeting between industry and government officials reviewed this report.

Subsequently, TransAlta submitted a new five year Development and Reclamation Plan for Highvale Mine, seeking approval of conditions to 1985, suggesting 1.2 meters of rootzone material. The matter is still under study and the Amended Approval for Reclamation of Highvale Mine had not yet been issued as of September 1982. Meantime, further interim instructions for the mine stripping and subsoil salvage were issued in July 1982. Sufficient material is required to be salvaged to replace 1.5 meters of subsoil where more than one meter occurred prior to mining, and one-half meter of subsoil where less than one meter

existed prior to disturbance.[53] Topsoil to an overall coverage of .2 meters is understood, making the deepest in-fill of rootzone material to be 1.7 meters. Incidentally, by this time, the aforementioned Chairman of the Land Reclamation Review Committee who had included the "three meter" requirement in the draft regulations in 1981 had left the Department of Environment.

Regulatory officials, without adequate research, had sought to impose excessive standards without consideration of efficiency or cost. Yet, within a year, the industry was able to provide the scientific basis for maximum results, through use of consultants and recognized neutral professional experts. One must wonder how often this occurs. If the regulated citizens are large industries or organizations which have the means and the power to fight back, the final regulatory standards may be fair to both industry and "public interest". However, small businesses would have difficulty financing and expending the time necessary to counteract overzealousness or the correctness of decisions made by public servants.

Meanwhile, the Highvale Mine permit has been tested on another level. When the application for the Mine Extension and Keephills Power Plant was processed in 1977, the resulting decision granted CPL (now TransAlta) an extended boundary which included four square miles of land at the extreme west end of the Highvale Mine near where the Tanney property is located. Mr. Tanney had never questioned the company or the ERCB re the mine. At the time of the 1980 application for further extension, Mr. Tanney began to question the mine boundaries.

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53. Letter from Alberta Environment to TransAlta, July 6, 1982.

He claimed he had been denied a right to appear at the 1977 hearings because he had not been notified. Both ERCB and TransAlta admit that Mr. Tanney was not personally notified, but the required newspaper notices had been published by ERCB,[54] and public disclosure meetings had been held by TransAlta Utilities in the nearby communities.

In 1981, Mr. Tanney sought legal help, and subsequently filed application for writ of certiorari and for declaratory judgement concerning permits C77-7 and C77-20. The case was heard by Justice Cavanagh, Court of Queen's Bench, in Edmonton in June 1982. Witnesses did not appear, but provided affidavits and evidence to the court. The decision re Charles Tanney v ERCB and TransAlta Utilities Corporation (1982 Alta D 59-02) denied certiorari, but granted declaratory judgement, citing "unfairness" to Mr. Tanney in the granting of mine permits C77-7 and C77-20 because he was not heard at the public hearing. The decision states that Mr. Tanney became a member of Wabamun Homeowners Association which did appear at the October 1980 hearing, and suggests that if Mr. Tanney had appeared at the 1977 hearing, the permit C77-20 extending boundaries for the Keephills Plant may not have been granted.

TransAlta has been granted leave to appeal Justice Cavanagh's decision. Although the judgement has declared permit C77-7 and C77-20 null and void, the decision is being appealed, and operations continue as usual, while Company officials continue to negotiate cooperation with Mr. Tanney's advisors and the other groups concerned with the mine's operations.

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54. Under terms of the Energy Resources Conservation Act, newspaper publication of Notice of Hearing is sufficient under Section 35 (2).

In summary, this case[55] demonstrates the difficulty in reconciling public interests with private interests, and in reconciling the differences among the variety of private interests. This case demonstrates bureaucratic politics: competition for jurisdiction and managerial mandate between government agencies and departments, conflicting goals, clashing personalities, and slow decision-making. This case has demonstrated how at least one employee of the Department of Environment felt disdain for ERCB authority and decisions, and appeared determined to add as stringent regulations as possible to the permit granted by the ERCB. Rationale for these stringent standards could not be scientifically supported. The ensuing negotiations and presentation of data supporting the positions of the various government committees and the industry lasted nearly two years, and then only interim instructions were forthcoming.

The Highvale Mine case also demonstrates successful negotiation between developers and communities -- the Keephills people who gave up their hamlet in exchange for new homes, new school and community center in a park-like setting, all at the expense of the Company -- and unsuccessful negotiation between the developer and the opposing factions of the Lake Wabamun community.

Problems of ensuring administrative responsibility are demonstrated in the overzealous actions of the young public servant, which support current trends toward loyalty to professional goals and career advancement as much as to political hierarchy.

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55. The details of this case have been gleaned over the past several years from conversations with industry officials, from public hearing transcripts and decisions, from documents concerning Highvale Mine, and from conversations with community members.

Government agencies court support of public interest groups, perhaps to rationalize their decisions through direct responsiveness to the public, such as the assistance to Wabamun community groups by Environment Department staff, or perhaps in an effort to expand the agency mandate. The latter seems evident in the statement of Vernon Millard, Chairman of the ERCB, to a conference of some three hundred civil servants and resource industry representatives. Mr. Millard stated that the Board believes the public wishes the ERCB to become more involved in planning energy development. He used interest group requests in the case of the Keephills to Ellerslie 500KV Transmission Line as an example.[56]

The breakdown in ministerial responsibility is indicated when the Minister of Environment tells the same symposium that the protection of the environment must be balanced by economic feasibility and warns against over-zealousness on the part of government and environmental officials, while the Environment Department staff zealously put forth proposals for excessive and costly standards for land reclamation.

The regulation of resources development indicates that:

> Regulatory agencies ... exercise a great deal of power merely because they have the authority to give or withhold benefits, and to inflict or refrain from imposing sanctions. The fact that regulatory agencies have such power forces a group subject to their jurisdiction to defer to them even in situations in which their authority may not be altogether clear.[57]

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56. Speech to a Land Reclamation Symposium held in Edmonton April 14 - 15, 1982.

57. Francis Rourke, Bureaucracy and Public Policy, (Little Brown and Company, Boston, 1969). pp. 2 - 3.

to appeal decisions which are questionable, because maintenance of good relations with regulatory officials may be as important in some cases as a set-aside decision which would necessitate rehearing or renegotiation of the matter, and perhaps still result in the same decision, more carefully reasoned.

These sets of circumstances affect all business development proposals, and have particular impact upon the smaller companies. The small businessman does not have the time or financial resources to cope with this system and the uncertainty in planning which it creates. The result is bigger companies and consortiums, less competition, and a predisposition for megaprojects. Small projects go through the same lengthy procedures as large projects -- why go though this maze of regulatory controls two times or five times if one megaproject can produce the same quantity of end product? (Plus a larger concentration of human displacement, of pollution, of problems of financing, of problems of rapid growth, etc.). Does this reflect the public interest?

PART THREE

CASE STUDY: ALBERTA REGULATION OF URBAN LAND DEVELOPMENT

I. ISSUES, OBJECTIVES, AND DELEGATION OF AUTHORITY

A. Constitutional Jurisdiction

Section 92 (8) of the Constitution Act 1867 - 1982 grants provinces jurisdiction over municipal institutions. Section 92(13), concerning property and civil rights, and Section 92(16), concerning local works and undertakings, bolster the provincial mandate.

Urban governments have only those powers given by the Province under such legislation as the Municipal Government Act RSA 1980, the Planning Act 1977, or the City Transportation Act RSA 1980. Policies contained in the Calgary Plan, for example, must conform with the Calgary Regional Plan, which in turn is approved by the Alberta Planning Board and the provincial Department of Municipal Affairs. The Alberta Department of Transportation can also exert considerable influence over location, form, and timing of major routes in Calgary and other cities. The Alberta Environment Department's regulations concerning pollution of air and water will influence certain developments such as location of industries.

Alberta Environment has also intervened directly in urban land use planning in recent years. In 1974, the Alberta Environment Minister recommended -- on the basis of Sections 15 and 17 of the Environment Act -- the establishment of a green belt or restricted development area (RDA) around Edmonton, Calgary, and other major Alberta cities, for the purpose of containing urban sprawl and the pollution of and encroachment upon prime agricultural land. On February 19, 1974, the first section of Edmonton's RDA was established by Order-in-Council, and by 1976,

Calgary's was established. Regulations require that permission of the Environment Minister be obtained before any development can be undertaken by either private landowner or government agency. By late 1977, landowners realized that the RDA was also to be used as a utility corridor and transportation route, and challenged the government's authority, under existing legislation.[1] Subsequently, the Environment Act was amended to permit establishment of utility corridors.

The RDAs are administered by the Environmental Coordination Services Division of Alberta Environment. Research studies are presently underway to assess physical and ecological features in some RDAs, with a view to establishing lists of primary and secondary land uses to guide development within the corridors.[2]

City officials have felt some resentment and confusion concerning this intrusion upon city planning, that is, the provincial government stifling of growth of the city.[3] By year-end 1981, the provincial government had spent some 200 million dollars purchasing land within the corridors around both Calgary and Edmonton, for future development of ring roads.[4]

In 1980, Alberta Environment commissioned a study on water and sewage management. The resulting Calgary Regional Utilities Study recommended in February 1981 that ten to twelve towns surrounding Calgary should tie into the Calgary water treatment and sewage disposal system.

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1. "The dubious RDA deals", Alberta Report, February 1, 1982.
2. Alberta Environment Annual Report 1981. pp. 71 - 72.
3. Alberta Report, supra footnote 1, p. 8.
4. Ibid. Also, Alberta Environment Annual Report 1981.

A similar proposal was recommended for Edmonton. The Regional Municipal Services Act proposes to set up a new system of regional services commissions, which would own and operate regional water and sewage treatment plants. The new authorities would have power to require financial contributions from member municipalities, to borrow money from the province, and to buy or expropriate property, including existing facilities. In future, the jurisdiction of such commissions, almost a form of county government, could be expanded to include other services. Yet, urban governments will have little choice but to comply.

The Alberta Department of Housing and Public Works has various areas of jurisdiction concerning housing alternatives and assistance, which must be considered in urban land development. The Alberta Housing Corporation provides social housing, and the Alberta Home Mortgage Corporation assists lower income people by providing low-interest mortgages and programs for starter homes or residential land development, as for example in Airdrie.

Operating within the Provincial Department of Municipal Affairs, and by authority of the Local Authorities Board Act, the Local Authorities Board (LAB) makes recommendations to Lieutenant-Governor-in-Council on annexation of lands to municipalities, authorizes debenture borrowings in respect of public works, and has the right to examine the financial status of municipalities.

Federal government involvement in urban-related policies has been widely diffused. A Ministry of State for Urban Affairs was established in 1971 to coordinate urban policy formulation, but was not given authority to implement policy. This proved ineffectual and by 1976, the Ministry amalgamated with the Central Mortgage and Housing Corporation (CMHC) to become Canada Mortgage and Housing.

The main federal influence is through financing, especially through such programs as neighborhood improvement programs, which indirectly influence the density policies of cities. The federal government also has the vital power to zone for airports, while the provincial Municipal Affairs Department plans for airport vicinity protection.

In essence, where land development and land-use planning are concerned, urban governments play approximately the same role as a managerial administrative agency such as the Energy Resources Conservation Board. The regulatory jurisdiction of each pertains to details within the broad policy outlines of the provincial government, and must compete with the objectives of a number of other agencies or departments. However, at the local government level, the authority to prepare plans, zoning bylaws, and regulations is vested in elected officials, unless delegated to municipal staff where allowed.

Long-term planning by cities is difficult. Priorities are often dependent upon provincial funding, and many proceed only if the provincial government concurs with the list of priorities. Rapid transit development in both Calgary and Edmonton has been subject to this type of uncertainty. Although urban governments do have authority to borrow for capital expenditures, financial constraints erode urban autonomy. The only general tax base allowed the city is the property tax, and some income is derived from licence fees, business fees and licences, and utilities. Planning policies will often reflect desire for an increased tax base.

Subject to the availability of funds, municipalities are able to borrow from the Alberta Municipal Financing Corporation (AMFC), but the subsidizing of interest rates is expected to discontinue.

B. Alberta Traditions and Issues

Municipal government organization has had a big influence on urban development policy. The Canadian tradition of non-partisanship in civic politics is strictly adhered to in Calgary and is favored in Edmonton. Citizens have appeared to be more concerned about the responsiveness of their alderman generally than they are about policy, unless of course the policy affects them personally.

The non-partisan tradition has included the notion that urban government is a business, a matter of administration or management to be run on principles of efficiency. However, in recent years, the objectives of "efficient provision of necessary services and efficient use of taxpayers' money" or "orderly growth and development" are competing with a "quality of life" philosophy. Growth for growth's sake has been rejected, as evidenced by public rejection of a large annexation proposal in 1974 in Calgary and public scepticism about the large Edmonton annexation proposal in the eighties. General plans adopted by both Calgary and Edmonton in the late seventies reflected a tempering of the growth ideal, as evidenced by the "balanced growth strategy" adopted in the 1977 Calgary General Plan, and by increasing citizen involvement in City planning strategies.

As urban populations grow, space becomes a luxury. Yet people seem unwilling to accept greatly increased densities. Therefore a ceaseless search has ensued for single-family residential lots, wide open suburban schoolyards and recreational grounds, for sprawling shopping centers, broad freeways, and all the amenities of low-density living.

Urbanization does not mean merely growth of cities; urbanization suggests an accelerating rise in proportion of the population living in urban settlements. Urbanization

implies a decrease in agriculture, increased technology, industry and commerce, and an increasingly interdependent lifestyle.

Since the 1960s, the human interaction, the human contact, and complexity of the society have been accelerating at dizzying speeds. Calgary offers one of the most startling examples; the population has doubled in less than twenty years, and recently has been growing at the rate of over two thousand people per month. After the 1981 census, government officials announced that Alberta had gained 440,000 people through migration since 1971.[5] Calgary metropolitan population had experienced a 25% growth -- from 495,267 to 592,743 -- between 1976 and 1981.[6] By the year 2000, Calgary's population could be one million people. The influx comes from a variety of cultural and occupational groups. Many of the newcomers to Calgary and Edmonton come from older, well-established eastern cities where higher densities and the apartment lifestyle have been accepted for many years.

Besides the value and belief systems of citizens, the biggest influence on urban land development policy is the prevailing economic system. Free enterprise and the right to private property have dominated. Alberta cities are considered affluent, and development has proceeded during the 1970s at a frantic pace.

The Alberta government intervened in land development as early as 1913, when the first Town Planning Act was passed to facilitate control of speculative land

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5. "The rush to Alberta", Alberta Report, June 26, 1981. p. 2.
6. Alberta Report, July 26, 1982. p. 12.

purchases around Calgary and Edmonton, and to ensure that sufficient roadways, lighting, sanitation facilities, and open spaces would be provided in new subdivisions.[7]

In 1928, a new Town Planning Act set up the Town and Rural Planning Advisory Board. This Board was to assist in preparation of town plans, and was delegated the authority to make regulations concerning land use along highways.

Zoning was introduced in 1929, allowing for regulation of building heights, floor areas, lot size requirements, densities, and permissible uses for different areas.

In the boom following the second World War and the oil strike at Leduc, the Alberta government again undertook to overhaul Town Planning legislation. Professional planners were hired by Edmonton in 1949 and by Calgary in 1951,[8] and provisions were made for advisory District Planning Commissions. By 1957, the advisory role was deemed an unsatisfactory control over landuse planning, so Commissions containing a municipality of over 50,000 population were authorized to prepare a plan for the entire region, and the plan of each municipality within the region was required to conform.[9]

In urban land planning, conflicting aims have been expressed. In development of the Calgary Plan and Edmonton Plan in the late seventies, there existed some support for each of a variety of objectives, such as:

(1) Provision of quality urban services at reasonable cost. This indicates containment of urban sprawl, and therefore

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7. Alberta Municipal Affairs, Planning in Alberta, (Supply and Services, Edmonton, 1980). p. 1.
8. Ibid.
9. Ibid., p. 2.

less infrastructure is required.
(2) Conservation of agricultural land and energy resources. This indicates containment of sprawl, higher densities, use of public transit rather than cars, therefore less need for expressways. Yet, parks are required to provide an outlet for the stress of dense urban living.
(3) Choice of lifestyles, or balanced growth. This indicates a desire for both inner city and suburban lifestyles, with attendant infrastructure and need for parks and recreational facilities for inner city dwellers. The need for expressways to the suburbs will disturb the people of inner city residential areas.
(4) Economic growth and development. This requires both space and money.

The most pressing concerns associated with these goals, as expressed by both citizens and governments, are:
(1) Encroachment of urban areas onto the highest quality agricultural land. Growth of cities and the popularity of acreage residences for urbanites has taken some seventy thousand acres annually out of agricultural production in Alberta in recent years.[10]
(2) Need for recreational land. It is expected that, before long, about 80% of the population will live in urban settlements.[11] As transportation costs increase and density of living increases, there will be more need for parks, sports facilities, and recreational areas in and around urban areas.
(3) Cost of energy. Higher fuel costs will affect modes of transportation and compactness of cities. People will

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10. Alberta Environment, "Urban Pressures on the Rural Scene", Environment News, (Edmonton), Volume 6(2), 1977.
11. Ibid.

wish to live closer to place of employment and public transportation will be favored.

Obviously, there is no consensus about a public interest where land development is concerned, so planning legislation, and local and regional plans are general, and elected Councils cannot even agree among themselves as to the direction land regulation should take.

C. Legislation and Regulatory Mandate

1. Planning and Subdivision Control:

The Planning Act 1977 is the primary document outlining the land development process in Alberta. The stated purpose of this Act is to effect the "orderly, economical and beneficial use of land and patterns of human settlement",[12] and to maintain and improve the physical environment.

Specifically, the Planning Act establishes the Alberta Planning Board (APB) as the instrument for effecting the purposes of the Act, and provides for the establishment of Regional Planning Commissions and Municipal Planning Commissions. The APB, comprised of senior civil servants, administers the Alberta Planning Fund which finances the Regional Planning Commissions. These Regional Planning Commissions are made up of representatives from the constituent municipalities, are established by Order-in-Council, and have fixed membership numbers.

Regional Planning Commissions are responsible for

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12. Alberta Planning Act 1977, Section 2.

regional plans, and municipal authorities are responsible for Municipal plans, area structure plans, and area redevelopment plans, all of which have statutory status. The Act also requires that all municipalities with a population over one thousand must pass a land use bylaw, and outlines direct control of land by City Councils, permitted and discretionary uses of land, and conforming and non-conforming uses of land.

Subdivision of land is controlled by a City Council, or as in Calgary, by a Municipal Planning Commission. There is right of appeal to the Alberta Planning Board if the application for development of a new subdivision has been rejected by the granting authority. Simple divisions, such as cutting a city lot into two, known as subdivision-by-instrument, are handled by the local Planning Commission, with appeal to a Development Appeal Board.

Requirements for public hearings and citizen participation are set out in the Planning Act, and provision is made for establishment of Development Appeal Boards. Developers can appeal rejection of a project and the public can appeal approval of a project. Since, in most cases, the initiator of land development is a private citizen or company, this Act stipulates the intent to plan for orderly land development "without infringing on the rights of individuals except to the extent that it is necessary for the greater public interest".[13]

Functions concerning acquisition or expropriation of land by municipal authorities are outlined in the Municipal Government Act . Within city boundaries, if purchase cannot be negotiated with an owner, the City may proceed to acquire the land pursuant to the Expropriation

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13. Ibid.

Act.[14] The provincial Land Compensation Board sets the final price in expropriation of land for urban development. If the desired land is located outside the municipal boundaries, where consent of the municipality in which the land is located cannot be obtained, the matter must be referred to the Local Authorities Board for its approval.[15] If approval is not received, the land cannot be purchased.

2. Annexation and Land Banking:

The Local Authorities Board Act is administered by the Department of Municipal Affairs. This Board (LAB) hears all applications for annexation of land to municipalities, and has the authority to fix terms and conditions as necessary. But its orders are only recommendations to Cabinet, who reserves final decision.

In the 1979 application by Edmonton to annex nearly 500 square kilometers of land, including two communities with population totalling nearly 100,000 and a lucrative industrial tax base in Refinery Row in Strathcona County, the LAB recommended in November 1980 granting nearly everything Edmonton asked for. Edmonton argued that one municipal government should have authority for what is essentially one geographic, economic, and social area. However, the Alberta government has favored decentralization of industry and population; it does not wish to see super-cities which might become too powerful politically.

In the June 1981 government decision to allow Edmonton to double in size physically, the annexation of the city of St. Albert and village of Sherwood Park were rejected, and only half of Strathcona County's lucrative

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14. Municipal Government Act, RSA 1980, Section 130.
15. Ibid., Section 127.

industrial assessments were granted. Of the twelve matters listed by the government as considerations in the decision, the recommendations of the Local Authorities Board was listed seventh, and the "considered view of Edmonton and area MLAs was listed eleventh. Clearly, the Cabinet made an independent decision, which had such political overtones as inclusion of a 7000-acre land bank amassed by the Alberta Housing Authority, even though Edmonton had not requested it, and a compromise which united the Edmonton and area MLAs. Only the City of Edmonton, however, was unhappy with the decision.[16]

In the Edmonton Annexation Decision Report, Cabinet included two new policy announcements which would further emasculate the autonomy and power of large cities like Calgary and Edmonton. The first was the creation of a new Edmonton Metropolitan Planning Region which must develop a new Regional Plan ensuring that Edmonton will maintain approximately 75% of the population of the region, while other communities maintain 25% of the population. Yet, Edmonton was awarded only nine of twenty-seven representatives on the Commission. Municipal Affairs Minister Marvin Moore explained that geographical representation takes precedence over people representation.[17] The second proposal was the Regional Municipal Services Act, described on page 98 - 99.

Local planners recommend a twenty to thirty year supply of land should be kept in reserve within city boundaries.[18] Calgary's supply should last ten to fourteen

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16. Geoff White, "Alberta Politics", Calgary Herald, May 22, 1981. p. A3.
17. Calgary Herald, June 18, 1981. p. A6.
18. Calgary Herald, quoting Alderman Bob Hawkesworth, February 15, 1982. p. D1.

years but since annexation processes take about three years before consideration by Cabinet, Calgary city planners have begun preparations for a major annexation proposal.[19]

Complications arise from the reports since mid-1981 that the provincial government has purchased as much as 10,000 acres of land between Calgary and Airdrie.[20] Since the provincial government has already assembled land for a mobile home subdivision in Airdrie, without Airdrie's knowledge until it was a "fait accompli",[21] Calgary wonders if the province plans to create a satellite community, to allow Airdrie to expand, or to allow Calgary to expand. Airdrie officials, meanwhile fear their community may be swallowed up by Calgary.[22] In any case, the Province is stifling local autonomy and pursuing its own goals without consultation of the municipalities, is competing with free enterprise developers, and will no doubt, unilaterally decide what to do with the land bank. At the same time, thousands of acres of agricultural land near the provincial land bank have been purchased by speculators, and land prices have soared out of all proportion.[23] It is difficult to perceive of this as being in the public interest.

In April 1981, new rules were announced to the effect that developers could no longer submit annexation applications directly to the LAB; applications will be accepted only from municipalities or Cabinet.[24] From the point

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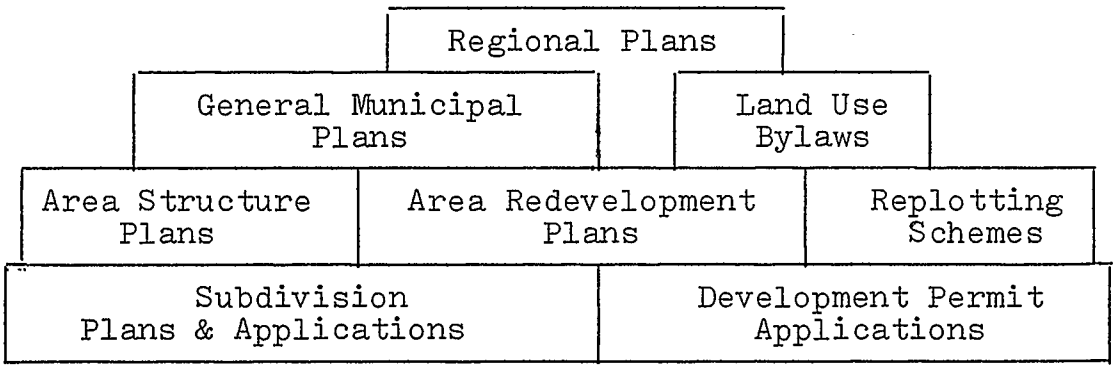
19. Calgary Herald, quoting Ted Brown, Manager of Long-Range Planning, City of Calgary, August 14, 1981. p. A1.
20. Calgary Herald, June 27, 1981. p. A1.
21. Calgary Herald, quoting Mayor Bennett of Airdrie, July 3, 1981. p. B8.
22. Ibid.
23. Alberta Report, December 18, 1981. pp. 12 - 13.
24. Municipal Government Act, Section 20(2).

of view of the Municipal Affairs Minister, this would end piecemeal proposals from all sectors and allow municipalities to prepare comprehensive plans for annexation, taking into consideration the feasibility of extending infrastructure and the desire for a more compact city. From the point of view of developers, the free enterprise nature of their business will be destroyed, and development time will be lengthened since they will first require the support of the City Council, involving increased lobbying, then the waiting for the application to go through the LAB process. They also fear that with municipal or provincial ownership of land banks, developers' applications could be stalled indefinitely. Cabinet used its authority to initiate annexation when the Edmonton area provincial land bank was included in the annexation to Edmonton.

3. Local Plans and Land Use Bylaws:

HIERARCHY OF STATUTORY PLANS [25]



(a) Regional Plans have a bias toward protection of areas around cities, towns, and villages for future urban growth or designation as country residential areas. Although large

25. Adapted from: Alberta Municipal Affairs, Planning in Alberta, (Revised 1980). p. 15.

cities are under-represented -- membership is established by regulations pursuant to Planning Act 1977 -- rural municipalities feel their needs are overlooked. The Calgary Regional Plan has been in preparation for eight years, yet when first adopted in 1980, it was not put into effect because of the dissatisfaction of the rural members and the Alberta Planning Board.[26] Revisions put to public hearing on July 14, 1982, received more opposition, setting the Plan back again.[27] This is typical "bureaucratic politics".

(b) Municipal Plans, such as the Calgary Plan, map out idealistic goals for the city's growth and development. The Planning Act requires participation by citizens as well as Councils and administrators.

In development of the Calgary Plan 1977, planners spent about one year devising six options for Calgary development in the next twenty years. Many public meetings and a public hearing invited citizen input. City Commissioners put forth a flexible option which they called a "balanced growth option", containing elements of various planners' options. Council adopted the "balanced growth strategy" in June 1977. However, administration and City Council both indicate that the Calgary Plan can be interpreted in various ways, so it is not a forceful guide. Again, much time, effort, and money have been expended on a somewhat ineffectual document.

(c) The Calgary Land Use Bylaw took effect April 1, 1980, as required by the Planning Act 1977. It replaced Development Bylaw 8600 which had been Calgary's zoning document. Calgary has used a "development control" bylaw accompanied

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26. Charles Sterling, "Public pans Regional Plan", Calgary Herald, July 14, 1982. p. B7.

27. Ibid.

by a Land Use Classification Guide which categorized zoning in certain areas. The new Land Use Bylaw 1980 set out broader classifications intended to encourage more imaginative design. "Permitted Uses" are for straightforward applications, obviously within the rules, and intended to facilitate quick approval. It means community groups can no longer appeal on the basis that the project does not mix well with existing development. "Discretionary Uses" are for more complex applications which will be considered on merit. A wider range of multi-family densities and building forms is provided for. The new Land Use Bylaw includes a "direct control" mechanism meant to enable Council discretion to impose site-specific rules for special and innovative projects, but it was expected that the more flexible zoning categories would limit need for its use.

If an application for development permit falls under "permitted use", and other standards are complied with, the Development Officer must issue a permit. Conditions may be attached to either "permitted" or "discretionary" use.

By July 1981, the technique of circumventing Planning Department objections to a development proposal by taking the application directly to Council[28] was used successfully by the developers of Bankers Hall, a fifty-three storey twin tower building with a glass dome over part of the Stephen Avenue Mall. Believing Council would

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28. Ron Ghitter, quoted in Calgary Herald, July 23, 1981. p. A1. Alderman Donnelly quoted in same article as supporting this technique because it gives Council more control over development, and Alderman Jack Long, quoted as opposing the circumvention of planning principles.

be easier to convince than a more idealistic Planning Commission,[29] the developer applied for a land use reclassification to direct control zoning (DC) rather than applying for a development permit.

Again in February 1982, Council approved rezoning to DC to permit a Cascade Development sixty-six storeys high with a floor area 25 times the site area, 38% more floor space for site size than any other development which has been approved. Council was very impressed with the design which included a half-acre public park and plaza fronting on 7th Avenue and the 3rd Street Mall linking the downtown with Prince's Island.[30]

The above-mentioned Cascade project had been approved by the Calgary Planning Commission on January 14, 1982, although Planning Director George Steber objected to the density and massiveness of the project. Only one month previously, the CPC had supported a proposed Downtown Area Redevelopment Plan, calling for a maximum of 19 times site coverage.[31] However, even Mr. Steber grudgingly admitted it was a "first class project". It appears that the Planning Commission is no more loyal to planning guidelines than is Council.

Calgary has a system of allowing developers to exceed bylaw limits in return for building plus-15 bridges or other public amenities such as an indoor park or parking facilities. Developers have been innovative in finding new ways to win "bonus points", and at the same time, the City has achieved its aim to have developers internalize external costs.

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29. Ibid.
30. Calgary Herald, February 18, 1982. p. B1.
31. Calgary Herald, January 14, 1982. p. B2.

(d) Under the Planning Act 1977, Area Structure Plans have statutory status once passed by bylaw. The design brief is essentially the same kind of neighborhood plan, but offers more flexibility because it is not legally binding. According to the Planning Act, all subdivision or development applications within a plan area must conform to the plan.[32] However, Calgary City Council regularly disregards these guides. As Council member Pat Donnelly states:

> The overall policies are in place, but Council, all too often, abandons policies when the opposition is hot.[33]

(e) The Area Redevelopment Plan (ARP) is a statutory plan which describes the intent and manner of rehabilitation of an older area. It is, however, an optional exercise: it is not mandatory for Councils to adopt ARPs. Several ARPs have been adopted by bylaw in Calgary and several others are in various stages of preparation.

Community groups have felt that ARPs offer them protection. However, a Bridgeland case demonstrates the pitfall in this thinking. The Bridgeland ARP, passed in September 1980 after a long consultation process, was a document with which city planners, Council, and community were satisfied. The community felt the ARP was binding on the Development Officer, the Calgary Planning Commission, and the Development Appeal Board. When a 92-unit apartment, proposed for a site zoned for a maximum of 57 units under the ARP, was rejected by the Development Officer, then approved on appeal to the Development Appeal Board, the Bridgeland community filed suit in court. When the

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32. Alberta Planning Act 1977, Section 88 (1)(b).

33. Pat Donnelly, speech to Shelter Crisis Conference, Calgary, June 1982, as printed in Calgary Herald, June 24, 1982. p. A7.

community was granted right to appeal in March 1981, the developer withdrew the apartment application. The community spokesman stated that the court decision would still be pursued to determine whether zoning set out under an ARP is legally binding on the DAB.[34]

In May 1982, the Alberta Court of Appeal[35] upheld the DAB ruling, declaring that only a land use bylaw, and not an ARP, specifies building restrictions. However, when Council passes an ARP, it also amends the Land Use Bylaw map of the area concerned so that specifications conform. The Court stated that the quasi-judicial DAB has the power to grant minor relaxations of height and density when they don't unduly interfere with the amenities of the neighborhood. The ruling evokes the conclusion that an ARP is more of a strong policy statement than a miniature land use bylaw. The ARP still offers more protection to communities than a design brief because an ARP can be amended only after public hearing.[36]

The Bridgeland case is also an ideal example of bureaucratic politics, where one agency of government scuttles policy decided by other actors in the policy process. Doubling an allowable density exceeds definition of minor alteration.

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34. Interview with George Swales, Calgary, July 18, 1981.

35. Bridgeland-Riverside Community Association v City of Calgary and Patricia Investments Ltd. 37 AR (1982) 26.

36. Alberta Planning Act 1977, Section 135 (1)(e).

II. SIGNIFICANT ACTORS IN URBAN LAND DEVELOPMENT

The foregoing discussion of planning legislation makes evident the influence of provincial planners on urban government development in general. However, once land is annexed to the city, the principle actors in the day to day decision-making in urban development are the city planners, municipal planning commission, Council, the development industry, and the Development Appeal Board.

The interaction between these actors is the best possible example of bureaucratic politics. In local government, the bureaucratic politics is not only behind the scenes, but erupts before the public. In March 1981, a city planner stood up in a public meeting and stated that she is tired of having elected officials sell out to developers. About a month later, Calgary's Director of Planning George Steber, stated publicly that he doubts Council "has the guts" to approve a controversial downtown plan.

A. City Planners and the City Developement Officer

Planners are professionals, the hired support for an urban Council. They consider themselves best able to decide the most pleasant environment for people, the most technically desirable and enduring patterns of development, and the only group that holds a long-term view and genuine concern for the city as a whole.

The recent trends in public opinion and participatory reform politics offer planners new influence, and an opportunity to work with citizen groups and interest groups other than developers. Through information meetings and hearings, planners have the opportunity to solicit support for their policies through direct interaction

with the public. It is most probable that these mechanisms of "responsiveness to the public" were devised by bureaucrats to increase access to the public and to impart information as much as to gain public input.

The Land Use Bylaw 1980 established the office of Development Officer, and one or more members of the planning department are designated by resolution of Council as Development Officer. With more statutory plans, land use bylaws, ARPs, being put in place, the Development Officer rules on most applications for development permits, unless they are of a complex nature. The Development Officer has little or no discretionary power. If any element of a development proposal exceeds regulations, the DO must refuse the permit. If the project complies with all regulations, he must issue a permit, unless for some other reason he has serious misgivings about a particular development, in which case he would refer the matter to the Planning Commission. If the permit refusal or approval goes to the Development Appeal Board, the Development Officer will present the views of the city planners on the matter.

B. Planning Commission

In large urban centers, for example Calgary, Edmonton or Lethbridge, Council creates a municipal planning commission by bylaw, and delegates to the commission the authority to rule on development permit applications of a complex nature, as well as the subdivision applications. The commission has access to a support staff of professional planners.

The Calgary Planning Commission (CPC) is composed of six planning administrators, two aldermen, the mayor, and three citizens appointed by Council. The citizen

members often have some connection with the development industry.

C. Council

In recent years, urban councils have contained a mix of pro-development and reform aldermen, as well as a few who vote pro-development one time, anti-development the next. Elected in a ward system, non-partisan milieu, City Councillors are often accused of being unable to take the broad city-wide view. Perhaps for these political reasons, or perhaps from a desire to assert their authority over that of planners, the present Calgary Council appears to welcome the opportunity to exercise direct control over development sites and to make decisions at variance with planning documents.[37]

According to a citizen member of the Calgary Planning Commission, architect James McKellar, Council's "practice of not following its own policies is making life difficult for everyone connected with development".[38]

Besides Council as a whole, each alderman in the present system of city government can be considered an actor for purposes of the bureaucratic politics model. Personality clashes, as well as philosophical differences and political loyalties, make conflict and negotiation particularly rampant in urban government.

D. Development Industry

In rapidly growing cities like Calgary and

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37. See footnotes 28 and 33. Also, Alderman Hawkesworth and Husband, quoted in Calgary Herald, April 18, 1981. p. B2.

38. Kathryn Warden, "Council planning moves hit", Calgary Herald, May 6, 1982. p. B9.

Edmonton, developers still have considerable influence on the direction of policies, although that influence is being eroded. The traditional technique for locally-based developers to influence was placement on city boards and committees. Now, the land market and development in large cities is under control of a few large national or multi-national corporations. The representatives have made their way onto city boards and the executive of the Urban Development Institute or the Housing and Urban Development Association of Canada, (HUDAC). HUDAC, especially, is an effective lobby group for the industry and utilizes the media as well.

E. Development Appeal Board

The Planning Act requires that any municipality with population over 1000 must establish a DAB with a minimum of three members. It is stipulated that no Development Officer or member of a Planning Commission may sit on a DAB, but otherwise leaves membership to the discretion of Council. Under the Planning Act 1977, all members may be Councillors, although this was not possible under the Planning Act 1970.

The Calgary DAB has an arbitrarily set membership of ten. Members need no expertise in planning, but are often developers, lawyers, independent planners, or community workers. In Calgary, there are three aldermen on the DAB, although there are a few members of Council who would like to see this number increased.[39]

Anyone directly affected by a development project may appeal its approval or rejection, or conditions attach- by a Development Officer or a Planning Commission.

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39. Alderman Barbara Scott told me she would like to see the DAB composed entirely of Council members.

III. THE REGULATORY PROCESS

An urban residential development "requires over a thousand major decisions from the early interest stages to the actual occupancy by the individual, stretched over a span of several years". About twenty percent of these decisions rest with government.[40] Developers would argue that an even higher percentage of decisions is regulated.

Regulation of land in Alberta has two phases: (1) the development of comprehensive plans, from subdivision plans to design briefs, area structure plans, land use bylaws, to municipal general plans and regional plans, and (2) the permit process that is required before developing or subdividing land.

The development of plans is a study in bureaucratic politics, and demonstrates well the desire of public servants to be as responsible to their professional ideals as to their political masters.

In Section A of this chapter, the preparation of an Area Redevelopment Plan is used as a case study to demonstrate the development of the regulations which affect all our lives.

In Section B, the permit process demonstrates the application of regulations to urban developments.

The appeal process, Section C, gives an added dimension to land development regulations.

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40. Alberta Municipal Affairs, Planning in Alberta, p. 10.

A. Development of a Downtown ARP: Case Study in Struggle for Influence

In March 1981, a city planning team released its draft plan for a downtown area redevelopment plan. This plan had occupied six full-time planners for three years at a cost of over half a million dollars for salaries alone.[41] About three quarters of a million dollars had been invested in the previous policy statement known as Downtown Plan 1979 and the draft ARP.[42]

The ARP was touted as designed to make downtown a more vibrant place in which to work or live. Guidelines were set forth to increase public space in the downtown area: more small parks, arcades, improved pedestrian promenades and access to core, trees planted on roadsides. Increased residential development and strict environmental guidelines, to which developers must adhere, were recommended. The plan called for $32 million to be spent on traffic and pedestrian rights of way and parks. 3rd Street SW from Stephen Avenue to Prince's Island would become a pedestrian mall. Traffic would be limited to major arteries.

The public information meetings were not well attended; at one meeting, fifteen people were present, including five city officials.

The developers, the Urban Development Institute, and the Building Owners and Managers Association picked the plan apart.[43] They echoed Mayor Klein's quip that sunlight

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41. George Steber, Director of Planning, quoted in Calgary Herald, September 19, 1981. p. A7.

42. Alderman Elaine Husband, quoted by Calgary Herald, April 18, 1981. p. B2.
Also, Alberta Report, March 22, 1982. p. 10.

43. Calgary Herald, April 13, 1981. p. D10.

was being put ahead of commerce, and pointed out that residences, especially if density is restricted, would not generate the kind of tax revenue needed to maintain downtown. They also called for more on-site parking downtown.

The Director of Planning, George Steber, countered that the restrictions, in form of "building envelopes", are more flexible than it seems. This would mean the taller, bulkier buildings could be built in the center of the block, allowing sunshine to penetrate the avenues at least around noon in fall and spring.[44] In the commercial core, a bonus system for providing amenities would allow developers to exceed density limits. Planners spoke of possible tradeoffs between City and developers.

The Mayor announced formation of a Downtown Task Force, a form of citizen advisory group, made up of representatives from many of the companies occupying big buildings downtown. They were to advise and provide ideas on matters concerning business downtown.[45]

While these discussions were proceeding, Council continued to grant zoning changes for higher densities amidst protests from city planners and "reform" members of Council. Several office towers were approved for the transitional office-residential area, and these permits were opposed by both development planners and transportation planners.

In late September 1981, a revised draft increased densities allowed in north and south fringes of the downtown core, and reduced the discretionary powers of planners over bonuses. More public meetings and shopping center

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44. Ibid. Also: George Steber, "Herald Forum", Calgary Herald, June 17, 1981. p. A7.

45. Calgary Herald, April 9, 1981. p. B2.

displays were planned to promote public involvement and support.

By December 1981, the Calgary Planning Commission had considered the ARP three times, and still there was controversy. The Mayor's Task Force felt there should be more developer input. The general public seemed uninterested. There consisted no consensus on density south of the tracks, residential densities, and parking issues.

A public hearing was scheduled for January 28, 1982, in Council chambers, but postponed because there was no agreement on a draft to put before the hearing. Just before a second scheduled public hearing on the ARP before City Council on February 23, 1982, Mayor Klein hinted at a shake-up in the Planning Department, and Alderman Brian Lee led a group of aldermen who proposed dropping the controversial ARP and replacing it with a "Core Area Policy Brief", a non-binding set of guidelines to downtown development. After seven hours of debate on February 23, 1982, City Council aborted the planned public hearing and voted 7 to 3 to replace the proposed ARP with a set of policy guidelines or design brief.

An eighteen-member Core Policy Committee was set up, with Alderman Lee and Alderman Scott as co-chairmen. Other members included architects, development lawyers and consultants. At least half of the committee members had some link with the development industry -- a potential conflict of interest, but a balancing force to planners. The planners were essentially shut out. This committee was to prepare options based primarily on the draft ARP for study by Council.

The Committee had shortly devised a more elaborate bonus system, but still favored ceilings on density. As the

Committee delved further, they strayed from the draft ARP, and put forth new proposals such as extension of the downtown to Seventeenth Avenue south (rather than Twelfth Avenue), or a park spanning the downtown railway tracks. They categorized some options as preferred options; this met with particular criticism, even though the options would be reviewed by the CPC, the Mayor's Task Force, and the Board of Commissioners before going to Council.[46]

When Alderman Lee announced a meeting for presentation of the options to the CPC on July 7, 1982, without consulting co-chairman Scott or mentioning her name as co-presenter, Scott refused to attend.[47]

The planners were highly critical of the Committee proposals.[48] Alderman Lee publicly stated that the planners were taking unfair shots at the Committee's proposals because they wished to revive the ARP.[49] Meanwhile, Alderman Scott pointed out that Council had never abandoned the ARP, but had asked for simplified options based on the ARP.[50]

The CPC recommended on July 8, 1982, that Council reconsider a revised ARP setting out the planning objectives for downtown development, to be supplemented with a design brief dealing with land uses, densities, parking, and the like.[51]

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46. Calgary Herald, April 22, 1982. p. B2, and May 1, 1982.
47. Calgary Herald, June 26, 1982. p. B1.
48. Calgary Herald, July 5, 1982. p. B1 and p. A6.
49. Ibid.
50. Ibid.
51. Calgary Herald, July 8, 1982. p. B2.

The following day, the Mayor's Task Force of downtown business people made recommendations. Both CPC and this Task Force revived features of the ARP which had been rejected in February.

On July 23, 1982, Council decided, in just a few minutes, to set up a public hearing on October 5, 1982, to consider a new downtown plan based on the CPC recommendations, as they were a compromise between ARP proposals and the Core Area Committee's proposals.[52]

Although the matter is not fully resolved at this time, the process to date amply demonstrates the conflicts between the significant actors responsible for urban land-planning, the special interests' jockeying for position, the tug-of-war between professional planners (public servants) and the elected officials, the petty jealousies and personality clashes, and the slow, confused policy outcome which is unlikely to be followed even after a sort of agreement is reached -- a model of bureaucratic politics. This makes determination of the public interest very difficult and puts the effectiveness of the regulatory process into question.

B. The Development Permit Process

Any change in appearance or use of land, from a back-yard attached deck to a high-rise building or a factory, requires that application be made to a Development Officer for a permit. If the use is straightforward, complies with all plans and bylaws and building regulations,

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52. Calgary Herald, July 23, 1982. p. B3.

a permit will be issued by the Development Officer. A more complex project will be referred to the Municipal Planning Commission, and Special Project applications will be referred directly to City Councils.

Developers of a project, large or small, must submit a complete set of plans and specifications, land surveys, and applications for reclassification of land, if required. If land reclassification is required, the process, including advertising, could take about three months, or longer if public hearings are required.

The plans and specifications are circulated to over twenty different parties, any or all of whom may add requirements or conditions. Once the planners have given the project approval-in-principle, it goes before the City Planning Commission, who may also add conditions.

At this point, the project is advertised. In Calgary, all development permit applications and approvals are published in the daily newspapers every second Thursday, so that any member of the public may take notice and appeal, if desired. If the project is only approved-in-principle, subject to the consideration of other "public interests", the advertised notice will be for a public hearing concerning this project.

For large, complex projects, such additional studies as traffic flows, conformity with requirements for protection of the environment, and social impact studies may also be required.

Once all the above requirements and regulations have been met, the development permit may be forthcoming. If the application is refused, reasons must be given in writing.

If an application for development permit is

refused, or if conditions are attached which the developer finds unsatisfactory, there exists right to appeal. Also, if the application has been approved, any affected persons must be notified, whether neighbor, Community Association, or other property owners, and may appeal within fourteen days of the written decision. As well, if a developer has not received a decision in writing within forty days of filing the application, he may take the "deemed refusal" option[53] and file for an appeal hearing by the Development Appeal Board. Since almost all applications, except the very straightforward, take longer than forty days to process, developers have attempted to shortcut regulatory procedures by applying to the DAB almost simultaneously with the application to the planners. This final step of the development permit process is somewhat taken for granted as a necessary procedure in the obtaining of the permit.

However, the regulatory requirements continue -- once the developer has obtained the development permit, he must apply for a building permit, and the cycle of regulatory requirements governing construction begin.

C. Appeals

Although public hearings are conducted by Council on large projects or special projects, the public hearings of the development appeal process are held at regular intervals in the larger centers and are a popular forum for citizens, as well as a method for developers to circumvent some regulatory specifications.

Notices for DAB hearings appear every second

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53. Alberta Planning Act 1977, Section 81(2).

Thursday in the Calgary Herald. Other urban centers similarly post notice a full five days before the hearing as required by Section 82(3) of the Planning Act.

The hearings of development appeals are a quasi-judicial function. The DAB judges an appeal on its merits, and is therefore bound by rules of natural justice, and its decisions are subject to orders of certiorari. Natural justice includes the principle that both sides must be heard and the principle that noone may judge his own cause. The duty to act fairly applies to all discretionary powers. DAB decisions are subject to appeal to Supreme Court of Alberta on questions of law and questions of jurisdiction.

At the hearing, the Board may accept oral or written evidence which in its discretion is deemed proper. A DAB is not bound by judicial rules of evidence, as for example rules of relevancy. However, if a decision is made on the basis of irrelevant points, this is an error in law, and the courts may refer the matter back. The DAB, as all statutory tribunals, must make "reasonable" decisions, not based on extraneous or irrelevant evidence.

Decisions must comply with any regional plan or statutory plan in effect, but may approve a development even when it does not conform, if the Board deems the project will not "unduly interfere with the amenities of the neighborhood, or materially interfere with or effect the use, enjoyment or value of neighboring properties".[54] This is by virtue of the fact that a DAB is granted the "same power as a council is permitted to exercise pursuant to this Act or the land use bylaw or land use regulations".[55]

The DAB has awesome power. It has, practically

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54. Alberta Planning Act 1977, Section 83(3)(c).
55. Ibid., Section 83.

speaking, "the final say on the nature and extent of development that occurs in the province. Its decisions may have an immediate impact upon the face of the community".[56]

On April 12, 1979, the Chairman of the Calgary DAB refused to hear appeals on two projects which conformed with permitted land uses and all zoning rules, stating that under the Planning Act 1977 such an appeal was outside the Board's jurisdiction. The ruling was challenged by Board member Alderman Barbara Scott, and the appeals were tabled pending legal advice. Two weeks later, the appeals were heard upon advice that the City's bylaw was not within the scope of the Planning Act until April 1980, but they were promptly rejected.[57]

When the DAB approved, March 26, 1980, a ten-storey apartment building next to Bowness Park, the Bowness Community Association sought leave to appeal to the Courts on the basis DAB had failed to comply with Calgary's land use bylaw. In May 1980, Alberta Court of Appeal Justice Milt Harradence refused leave to appeal on the basis that DAB has discretion concerning application of the land use bylaw. In May 1982, the Alberta Court of Appeal reinforced the power of DABs when it reiterated in the Bridgeland case[58] that DABs have the authority to approve minor alterations to statutory plans. In this case, minor alteration was doubling of the allowed density limits.

Court decisions such as this, as well as some controversial decisions made in project approvals have evoked calls for curbs on the discretionary powers of DABs. Suggestions have been put forward that the Planning Act

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56. Michael Rutter, A Guide to the Development Appeal Board, (Rutter Crash Courses, Edmonton, 1978). p. 36.

57. DAB hearings held April 13 and April 27, 1979.

58. Bridgeland-Riverside v City of Calgary, 37 AR (1982) 26. Case described on pp. 114 - 115.

should be amended to put clearer limits on the DAB or the Council should stipulate in bylaws an allowable relaxation of limits, for example a 10% or 20% increase in density.

In August 1981, Alberta Court of Appeal released another significant decision concerning appeals to the DAB. The Court ruled that an individual "affected" by a project does not include someone who lives in the suburbs and may occasionally walk down the 8th Avenue Mall. The ruling stated that a single citizen does not have right to appeal through the planning process the erection of a building which might keep sun from the mall. No existing right had been abridged. It was intimated, however, that a group or association may have had more success in this case than an individual.[59]

The controversy over a coliseum site in Calgary elicited new tactics for circumventing the planning process. Lack of sufficient technical planning prior to application for the development permit necessitated search for a new site as time for the Calgary Olympic bid approached. Since the coliseum committee was anxious to have the plan underway before fall, adequate study of alternatives was abandonned, and the rezoning of a Stampede grounds site was hurried through Council. While the Victoria Park Property Owners Association apparently supported the Stampede site,[60] four residents representing a Help the Coliseum committee composed of those who wished to preserve Victoria Park as a residential area, appealed to

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59. Pension Fund Properties Ltd. v DAB of Calgary., 1981 Alta D 2958-03.

60. Mrs. Irene Bruzga, Vice-president, Victoria Park Property Owners Association, letter to the editor, Calgary Herald, April 4, 1981. p. A8.

Court of Queen's Bench on the basis of improper procedure by the City in the rezoning of the site. It was argued that the City had not provided documents for public perusal the required twenty-one days prior to the public hearing on the rezoning. In May 1981, the Court ruled the hearing invalid, and quashed the rezoning bylaw which Council had approved on March 3, 1981.[61] Council immediately set up a new hearing on June 30 to consider the rezoning, and when Council failed to address the Victoria Park citizens' concerns about the coliseum's impact upon traffic through the community, the community spokesman again threatened court action to nullify the rezoning bylaw and launched appeal to the DAB, who scheduled a hearing for July 30, 1981. At this point, upon request from City Council, the provincial Cabinet intervened to exempt the coliseum site from planning regulations, thereby eliminating the DAB process. There was some public wonder at this breach of participatory democracy, but the general support for the olympic bid and general support for the end to the coliseum-site bungling and squabbling, dissipated objections. In this case, when the individualistic and procedural process of determining public interest was not working, a prescriptive element was injected into definition of the public interest.

Generally, based upon criteria of fairness and natural justice, Calgary Development Appeal Board decisions and procedures seem to provide an effective common-sense balance to planning regulations. In attendance at every hearing over a period of six months, this writer, who had no conflict of interest or biases about any of the cases

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61. Search at both U of C Law Library and Courthouse failed to locate a written decision. These facts were gleaned from Calgary Herald issues, May 16, 1981 to July 29, 1981, page 1 news stories, editorials, and columns.

heard, almost never disagreed with the majority decision. During 1979, 277 appeals were heard. Of the 156 refusals by the Development Officer, which were overturned by the DAB, 30% had been refused on technical grounds and the remainder upon planning principles. Yet, at the DAB hearings, the planning authorities supported 120 of the projects, opposed 32 of the projects, and had taken no position on the remainder. Forty-five appeals were initiated by a third party, that is a party other than the City or the developer, and of these forty-five, only six were successful. These third-party appeals are the cases which arouse media attention and cause the controversies concerning DAB powers.[62]

In land planning regulation, Development Appeal Boards are an example of an effective tribunal for balancing public interests with private interests. The DAB is a quasi-judicial Board, with final decision-making power excepting appeal to the courts upon matters of procedure or jurisdiction, with a certain degree of independence from political interference, and controlled by a particular mandate to hear only those cases brought before it.

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62. Internal unpublished statistical report supplied to the writer by Grace Meadows, DAB secretary, with consent of Brand Inlow, solicitor, and Dennis Cole, Chief Commissioner of Calgary, in 1979.

Summary: Regulation of Urban Land Development

There is no consensus on "public interest" where development of urban land is concerned. Desires for single-family dwellings, suburban shopping centers and schools, must compete with desires for the compact city and the attendant lower infrastructure costs such as utilities, roads, and public transportation. Need to accommodate urban growth and desires for acreage living must compete with the need and desire to preserve good agricultural land as well as clean air and water. Attempts by provincial and local governments to pursue their own objectives by creating regulations for urban land use often only arouse counter-interests, resulting in conflict, dissatisfaction, and rules which are constantly being revised to the point where everyone is confused about their responsibilities and rights, as well as the future of their city.

Administrative responsibility to the elected representatives of the public appears to be granted only grudgingly. City planners feel more accountable to their profession, and are unabashedly vocal about their belief that they are best qualified to define the public interest where land use planning is concerned. In turn, in a non-partisan type of government, where individual aldermen feel some insecurity about their own influence, City Council appears to welcome the chance to counteract or overturn planning policies. This is demonstrated in Calgary Council's decisions in such "direct control" cases as the approval of the Cascade Developments project which exceeded density and massiveness standards by as much as 38%, or the approval of the controversial Bankers Hall project.

The dynamics of the bureaucratic politics model have been demonstrated in the attempts to develop a "down

town redevelopment plan", where the process entailed distinct conflicts of objectives among the significant actors responsible for urban land planning, the petty jealousies and personality clashes among significant actors, and a slow, confused policy outcome which did not have enough support to be accorded statutory status, and is unlikely to be followed in subsequent adjudication of specific projects. The Bridgeland case, where one agency, the Development Appeal Board, scuttled the policy of another actor in regulation of urban land by overturning the rejection by the Development Officer of a project which almost doubled allowable density for the site, demonstrates another facet of the bureaucratic politics model.

The attempts to cater to public participation in urban land planning decision-making and policy development have made the public more aware, and more vocal, about city planning issues, but have also encouraged slow decision-making and uncertain definitions of policy, such as Light Rail Transit route selection or statutory plans. This has no doubt been a factor in recently more frequent involvement of the provincial government in urban problems, although this does not necessarily justify provincial intervention.

Guidelines for development are a necessity in rapidly growing urban areas, but regulations should not cause more uncertainty and dissatisfaction (as well as expense) than private initiative and creativity might. Long-range goals for a community should be sought through a balancing of public wishes, and should be given statutory status subject to periodic review. In the meantime, Councils and planning authorities should abide, within reason, with these guides to policy when adjudicating specific projects. Both developers and the public would

enjoy freedom to operate within known rules. As development lawyer Ron Ghitter has pointed out, even developers "might find themselves better off with the devil they knew than the devil they didn't know".[63]

In land development regulation, an efficiently managed and non-political development appeal system can dispense common-sense justice to persons affected by either government regulations or private initiatives: a Development Appeal Board can work at balancing private interests with public interests.

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63. As quoted in Calgary Herald, May 1, 1982. p. A7.

SUMMARY AND CONCLUSIONS

This thesis is concerned with a process of governing, with relationships between citizens and the institutions of government as well as relationships among officials of the various institutions of government. The emphasis of the analysis is government regulation of private sector industries engaged in economic development of natural resources and land.

Six basic relationships can be identified:[1]

(1) Liberal Model (including Brokerage, Pluralist, and Elite Accommodation Models)

Members of society demand → [government] → outputs

(2) Authority Model

Government demands → [members of society] → outputs

(3) Leadership Model

Executive of Government demands → [bureaucracy] ——→ outputs

(4) Grand Vizier Model

Bureaucracy of Government demands → [executive of government] ——→ outputs

(5) Social Autonomy Model

Members of Society demand ——→ [social institutions] ——→ outputs

(6) Social Control Model

Social Institutions demand ——→ [members of society] ——→ outputs

Such policies as welfare payments would fit the Liberal Model, while taxation would fit the Authority Model.

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1. Richard Rose, "Models of Governing", Comparative Politics, Volume 5(4), July 1973. p. 467.

Models 3 and 4 involve internal politics of government, including the administrative process and the "bureaucratic politics" model. Models 5 and 6 indicate the attainment of societal goals without state intervention, such as the attainment of improved working conditions through negotiation between industry and labor unions, or consumer satisfaction through the supply and demand of the free market system. In our complex society, all of these relationships will be in evidence.

Governing, therefore, is a two-way process, with demands and responses flowing in both directions. Actions and responses are greatly influenced by environmental factors such as depression, recession, the formation of OPEC, technological advances, or urbanization, as well as the personal and ideological values and socialization which determine our definitions of "public interest", of administrative responsibility or accountability, or our desires to participate in the decision-making and policy development process.

Theodore Lowi sees at least four types of political policy process which are engaged in simultaneously by governments. Four distinct policy types -- distributive, redistributive, constituent, and regulative -- determine distinct ways in which governmental processes function. The distinguishing characteristic is the use of government coercion. Distributive policies are individualized, such as subsidies, involve remote or indirect coercion, and do not take effect until a problem arises. Redistributive policies, such as progressive income tax, social welfare or medicare, do not react to particular behavior or individual conduct, but to the environment of behavior, yet they involve direct coercion such as tax collection.

Constituent policies, such as a redefining of electoral boundaries or establishment of a new agency, also work through the environment of behavior, but they involve no sanctions and very indirect coercion (through use of general revenue funds). The fourth type, regulative policies, such as protection of the environment or safety standards, involve direct coercion, and apply to individual behavior. Although there may be a general rule covering, for example, sulphur emissions into the air, it is applicable to those whose operations involve sulphur emission. A deliberate choice is made by government as to the allocation of costs and benefits in society. Regulation, then, is coerced upon certain members of society for the benefit of other segments of society or the "public interest".

Although none of these functions operate in isolation, and a certain amount of overlapping occurs, this thesis concentrates upon the regulative process and its effectiveness in the attainment of governmental goals which are rhetorically referred to as "the public interest".

The case studies have demonstrated the difficulty in defining the public interest. The attitudes toward development of natural resources are as diverse as the concerns and aims for use of urban land. Alberta's energy resources legislation and Alberta's land planning legislation are both up to date and among the more rationalized examples of development control in Canada, yet this legislation is written in vague terms with no specified policy direction. The scale of government in Alberta, as compared for example with the government of Canada, is relatively small and simple, and Alberta has a strong, stable government. The predominating socio-political-economic ethic favors free enterprise and freedom of the individual, right to private property, and a conservative outlook. Yet,

regulatory control dominates every development initiative with the supposed aim of protecting the public interest from the excesses of free markets. Government and citizen acceptance of the view that public interest continually changes, is descriptive and procedural, and involves a compromise between individual interests, promotes the regulatory system of governing. Because we are not a simple society with straightforward objectives, adjudication of specific interests, through the mechanism of the public hearings of the regulatory process, has proliferated as the favored answer to modern problems of legitimacy and of complex and rapid changes in society. Concurrently, the role of legislatures and parties as policy-makers has declined; Cabinets have centralized government control and delegated extensive discretionary powers to bureaucrats and administrative agencies. Agencies and departments organized to coincide with areas of interest each develop regulations according to their own perceived mandate. New regulations may necessitate more personnel, who in turn generate more rules and regulations.

The growth of bureaucracy is demonstrated by the increases in personnel and budgets which are summarized in each annual report of the ERCB and the Department of Environment. The extent and pervasiveness of regulation is well demonstrated by the list of procedures facing a resource developer even before a licence is obtained to commence construction. The regulations imposed upon the construction and operation of a project are equally extensive.

The regulatory process is by nature not only self-propogating, but also self-interested. The merit system and professionally aligned departments and agencies promote client and interest group identification. The case studies have demonstrated at least as much or more dedication to

personal values and job achievement than to ministerial accountability -- contrast the zeal of Environment Department staff in the Highvale Mine case with Environment Minister Cookson's words to a reclamation conference, or consider the conflict between Calgary city planners and Calgary City Council decisions. Competition for expanded mandates between agencies with overlapping jurisdictions can occasion a change of focus -- the ERCB, which was created to oversee the development of depleting resources in an efficient and safe manner now enunciates the more popular catchwords in defining its mandate as being matters of the public interest and environmental concern, and the Board's chairman has expressed interest in planning energy development in Alberta, presently in the capable hands of the private sector industries.

The unclear guidelines under which public officials operate offer little guidance in terms of administrative responsibility. If a bureaucrat follows the wishes of his Minister, he may alienate the interest groups to which he is expected to be directly responsive, and if he identifies too closely with public groups, he may counter the policy direction desires of his Minister. Striving for technical legitimacy, professionally-based decisions, or decisions based upon personal ideals may please neither. Career survival or advancement may be more important than a just decision. Much discretion is involved.

Since the approaches to administrative responsibility are ambiguous, and the concept of public interest is nebulous, decision-making and policy development are more incremental than rational. A model of "bureaucratic politics" tends to characterize the manner in which public officials pursue their perceived mandates. Time-consuming negotiation and cometition for influence between the

various agencies and departments can result in slow decisions, compromised policies, or stalemate. This has been demonstrated by both the Highvale Mine case in resource development and the Downtown Calgary Area Redevelopment Plan case in urban land development. The Bridgeland case in land development demonstrated another facet of "bureaucratic politics" -- the scuttling by one agency of a policy decided by another actor within the same government.

The process of decision-making and policy development is further complicated by ever-increasing demands for citizen or interest group participation. As regulations multiply, as life becomes more interdependent, as the economy weakens, citizens become more intolerant and critical. Vocal interest groups cause creation of countering groups; participation generates more participation. Although it may be argued that this rationalizes decision-making by adding more alternatives to be considered, it may also be stated that this causes decision-making to be less rational by widening the set of criteria for the decision to the extent that some criteria are directly opposed to other criteria. This is particularly true in land development cases, where for example, one faction may favor low-density residential zoning while another faction will support the project because they favor high-density zoning for generation of higher property values. The presentation of 248 interventions in the Langdon to Phillips Pass power line hearing is an extreme example of citizen participation and obstruction which manifested itself not only in the hearing process, but also in physical acts such as the toppling of a $10,000 transmission tower and depositing it on the Oldman River bottom. However, other recent ERCB hearings and land development hearings are receiving more and more input from disgruntled citizens and advocacy groups which may be either

pro or con development. Although public hearings are considered a democratic forum for adjudication between the various interests, and for communication of concerns and positions among the various interests, unduly lengthy public hearings do contribute to greatly increased costs, as in the above power line case where costs escalated from 43 million dollars to 75 million dollars in two years of delay which only resulted in confirmation of the original ERCB recommendation. These costs must be borne by all consumers.

Public hearings on development projects have outgrown their original purpose and have become, in some cases, an obstructionist mechanism as in the above power line case, and in other cases, a political platform for certain groups and individuals such as environmental advocates, political candidates, or political idealists. Examples include the environmental group "professional witness" from Toronto at the Genessee power plant and coal mine hearings or the representative of the Edmonton Voters Association (which has elected only one alderman) at the Federal Environmental Assessment Review Agency public meetings hearing environmental concerns re the Slave River Hydro development, both of whom advocated public ownership of all utilities. Certain environmental groups, such as the Sierra Club, routinely intervene in each project hearing scheduled, admittedly not to oppose the project, but merely to put forth a particular view of environmentalism.

In an environment where the meaning of "public interest" is unclear and considered individualistic and procedural, where the approach to administrative responsibility balances political accountability with subjective discretion and direct responsiveness to the public, where the multiplicity of government departments and agencies

must develop policy through a process of negotiation and competition for influence among the diverse interests represented, where participation by the public in regulatory decisions is seen as a right, the regulatory process is no longer an automatic protection of the public interest. It may be considered merely as an enlarged circle of private interests competing for influence.

Given all these political and social realities within which the regulatory process takes place, does this extensive manipulation of the free market system achieve a balance of public good, such as fairness, equity, safety and efficiency, or a balance of disadvantages, including economic inefficiency, stifled innovation, curtailed personal freedom and initiative, the erosion of a sense of social responsibility in individuals, and diffused leadership with less accountability to the public?

There can be no argument against the fact that our economy is unhealthy. Inefficiencies caused by excessive regulation have been at least part of the problem, as planning is rendered uncertain, initiative and creativity are stifled, and delays in regulatory approvals cause costs to escalate to a point where it must be reflected in prices of consumer products. In extreme cases, projects must be abandonned altogether because the increased costs make the project no longer financially feasible; enormous amounts of money already spent must be written off, and perhaps hundreds of personnel, already assembled, must be released, as with some proposed oil sands projects in Alberta. Production or supply management may benefit a particular interest group for a time, but this is usually reflected in considerably higher prices for all consumers than would

occur on the free market.

The generally expressed goals of Albertan citizens include personal freedom, procedural fairness, efficiency, and a certain degree of equality of opportunity and equality of condition. In marketplace competition, industries must be efficient, innovative, and responsive to the needs of consumers or face elimination. Regulation cannot force efficiency, creativity, or professional competence on any individual or any company. However, competition can. Personal freedom and initiative are enhanced by the free play of market forces, which should be curtailed only when harm to others is threatened. Regulation of clean air or water, land reclamation rules, and safety regulations are examples of prevention of harm to the general public. The orderly development of scarce natural resources, which can be argued to belong to all citizens, and the orderly development of urban land to provide a quality living environment are usually recognized as general areas to be regulated to some degree. Rate-setting regulations for commodities provide enhanced equality of access. The right-of-entry regulations or allocation of service areas to utilities prevents destructive competition, but decisions in these cases should be based solely on technical and professional efficiency of the industries involved as well as financial efficiency, even if this tends toward a regulated natural monopoly. Public officials should not have the right to arbitrarily decide which company should grow or which should not, except upon the grounds of economic and technical efficiency which would prevail in the free market.

Although recently there have been calls from a number of quarters for deregulation and regulatory reform, it appears obvious that the clock cannot be completely turned back. Also, knowledge of reasons for inefficiency

in a complex self-perpetuating bureaucratic system, which has become inextricably interwoven in the political processes of creating regulatory legislation, does not mean that solutions can readily be obtained. Too many people now look toward government for guidance, help, protection, and security, and therefore, any large-scale deregulation would be political suicide for the government which attempts it. The nature of the regulatory process, as described in this thesis, makes effective reform extremely elusive, but the system must be streamlined. In certain areas, deregulation may be in order, and in others, incentives could guide the free market toward government objectives.

However, in those areas mentioned on the previous page, where regulation seems inevitable or desirable, reforms of the regulatory process must strive to shorten the process for individual development applications, and to make the rules more predictable and justifiable. Since rational planning and politics are not compatible, and there is no evidence that bureaucrats have more expertise than private enterprise, planning the individual projects of economic development should be left to the private sector, with conditions attached as necessary by the regulatory officials. The goals of economic and technical efficiency in the development of depleting natural resources, including land, need not be sacrificed when striving for effective responsiveness to the public interest.

Provision for effective public participation in the development of regulations could lead to enhanced natural justice and administrative responsibility to the public interest, as well as to public confidence and support for public policy. Efficiency, however, would suggest a new policy for accommodating public input. Increased use of policy development inquiries could hear representations

from broadly-based interests such as environmental groups, consumer groups, industry associations, and professional experts from both government and private sectors in a consultative process rather than an adversarial process. Such a panel or legislative committee, with some accountability and credibility, could resolve the broader issues such as requirements for recreational land and most likely locations for preservation as such, urban area redevelopment plans, main utility corridors, or scientifically supportable environmental standards. Such policy decisions, if given statutory status subject to periodic review, or passed on to adjudicatory agencies as binding directives, could make regulatory decisions more predictable and planning more certain.

The adjudicative public hearings on individual development applications could then be rightfully limited to only those persons directly affected by the development of a project in their community. Responsibility for determining the public interest and the direction of policy would be somewhat shifted back to the elected representatives, and at the same time, regulatory procedures for individual development proposals would be shortened.

All hearings, whether policy development inquiries or adjudication of specific projects, would benefit from the kind of chairmanship which would discourage use of hearings for grandstanding or for playing to the media. Strong chairmanship need not mean lack of compassion or responsiveness to the public, and most interveners at hearings will realize that certain rules and responsibilities should accompany their rights to be heard. Since all interveners are required to make written submissions (which may be very lengthy) to the hearing panel, a universally-imposed time limit for oral summation at the hearing (for example, a

limit of fifteen minutes) would help control repetition of details which are usually of little interest to other interveners, would help control rambling and irrelevant grandstanding, and would control the length of hearings and their attendant costs.

Consolidation of agencies and departments with overlapping mandates would greatly simplify the regulatory process. If, for example, an energy resource developer did not have to deal simultaneously with ERCB, Department of Environment, and Department of Energy, certainly conditions for development could be more quickly resolved. There is duplication of bureaucratic organization; for example, an Assistant Manager, Environmental Protection, is "responsible for development and administration of environmental regulations and policies ..."[2] at the ERCB, while the Environment Department is responsible for this as well. One regulatory body could decide whether a project proceeds or not and what criteria must be met, particularly if a more specific mandate has been legislated and more specific guidelines and policy directives have been set forth previously. Such a decision could be made as soon as need or desirability of a project is established, with the requirement environmental and socio-economic problems be solved within the bounds of the pre-set criteria. Such administrative reorganization could improve the effectiveness of the regulatory process by increasing economic efficiency while allowing for a more rational, less ad hoc, determination of public interests and public policy.

In conclusion, the regulatory process strives for a "public interest" which defies definition as to content

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2. Alberta Treasury, Organization of the Government of Alberta, October 1980.

or direction of policy, guided by politicians and administrators pursuing diverse, sometimes conflicting goals, in an atmosphere of "bureaucratic politics", and administered by public servants with a confusing set of responsibilities and loyalties, compounded by the "culture of participation". There is no certainty such a device of governing will make a just allocation of costs and benefits in society. Therefore, use of this device should be carefully controlled. Where governmental objectives can be met in no other way, some procedural and administrative changes could produce enhanced efficiency, fairness, and accountability to the public.

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