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THE UTAH CONTROVERSY: A CASE STUDY OF PUBLIC PARTICIPATION IN POLLUTION CONTROL*

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OBJECTS OF THE CASE STUDY

The controversy surrounding the pollution control permit application by Utah Construction and Mining Co. Ltd. [Utah] has been one of a series of intense public environmental issues that have arisen in British Columbia in the last six years. Most of these major issues have resulted directly or indirectly in changes in the relevant environmental legislation or its administration. The Utah affair now appears to have been no exception. The Utah issue is of particular interest because it arose at a time when several of British Columbia's first militant conservation groups were beginning to attain a significant degree of cohesion and sophistication. The role of these groups as well as other independent public bodies and individuals in the development and operation of British Columbia's system of pollution control forms the central focus of this case study.

In particular, this study attempts to cast some light upon the ability of and opportunities for members of the public to effectively participate in the British Columbia pollution control decision process and the responsiveness of the pollution control administration and the Legislature to articulated public concern about the quality of the natural environment.

Many of the issues faced by the decision-makers in the Utah application involved complex scientific and technical questions. Consequently, a more general objective of this paper will be to assess the ability of the pollution control administration to adequately deal with questions of this kind. To the extent that persons or organizations outside government are able to provide scientific or technical expertise, the question of public participation is also relevant here.

THE PROPOSED MINERAL DEVELOPMENT

In 1965 Utah Construction and Mining Co. acquired control of a group of mineral claims adjacent to the northern shore of Rupert Inlet on Vancouver Island. Subsequent exploratory drilling and excavation revealed an estimated reserve of 280 million tons of low grade copper-molybdenum ore. Development plans were announced in

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June, 1969, which called for an initial investment of 70 million dollars to establish ore concentrating facilities and to clear the mine-site in preparation for an open pit mining operation with a production rate of 33,000 tons per day beginning late in 1971. A major contract for sale of the concentrate was signed with the Mitsui Industrial Group of Japan in October, 1969.¹ The mine would operate over a projected life-span of 21 years.

On October 2, 1969, an application was submitted to the Pollution Control Branch by Utah for a permit to discharge 9.3 million gallons per day of copper mine tailings into Rupert Inlet.² The effluent would contain 32,000 tons per day of finely ground waste rock, and residual quantities of all chemicals involved in the milling process. Some of the reagents involved include sodium cyanide, zinc sulfate, amyl xanthate, fuel oil, lime and various alcohols.³ The effluent would be discharged by means of a submerged pipeline which would transport the waste to a depth of 200 feet in central Rupert Inlet before its introduction into the water. It was hoped that this would eliminate the possibility of visible effects on surface water as have occurred in similar operations when tailings were introduced at the surface.

Rupert Inlet forms the most eastward extension of the inlet system of Quatsino Sound, which extends far into the northern end of Vancouver Island from the Pacific. It is typical of coastal fjords, relatively long and narrow with a deep basin which is cut off from the outer water by a shallow sill. Until the announcement of the Utah development public land around Rupert Inlet was managed as highly productive forest land. Some logging took place near the shore in the 1930's, but regeneration has long since returned the entire area to a semi-wilderness state. The water in Rupert Inlet is clear and cold throughout the year and supports an abundance of marine life including crabs, shrimp, clams, oysters and codfish which contribute considerably to the diet of local residents, particularly the inhabitants of the Quatsino Indian Reserve at the mouth of Quatsino Narrows.

THE POLLUTION CONTROL PROCESS

A. *The Legal Framework*

The Pollution Control Act is the basic legislation establishing British Columbia's system of pollution control.⁴ The Act is admini-

1. North Island Gazette, Oct. 29, 1969, at 1.

2. Application for a Permit under the Pollution Control Act, S.B.C. 1967, ch. 34, *as amended* 1968 ch. 38, 1970 ch. 36 [hereinafter cited as Pollution Control Act], filed with the Pollution Control Branch Oct. 2, 1969, signed by R. O. Wheaton, administrative manager, Utah Construction and Mining Co. North Island Gazette, Oct. 29, 1969, at 15.

3. Brief of Utah Construction and Mining Co. in support of its application for a permit under the Pollution Control Act, Appendix 1.

4. Pollution Control Act.

stered by two agencies—the Pollution Control Branch, and the Pollution Control Board. Both agencies are part of the Water Resources Service, a section of the Department of Lands, Forests and Water Resources under Minister R. B. Williston.

Any person proposing to discharge sewage or other waste materials on, in or under any land or into any water in the province must obtain a permit from the Director of the Pollution Control Branch.⁵ Failure to obtain the necessary permit results in an offense punishable on summary conviction by a fine of up to \$1000.00 or a prison term not exceeding three months or both.⁶ If the offense continues, a fine of up to \$500.00 per day is provided.⁷

The applicant must file an application with the Director setting forth the source of the effluent, the location of and plans for the emission works, the type, characteristics and quantity of the effluent,⁸ and any other information that the Director considers relevant.⁹ A copy of the application must be posted on the grounds,¹⁰ and other copies published in the British Columbia Gazette and in local newspapers as required by the Director.¹¹

Grant of the permit is at the discretion of the Director, and he may attach such conditions as he deems appropriate.¹² He may also issue a provisional permit, and a final permit when the conditions of the provisional permit have been met.¹³

Upon receipt of a permit application the Director must forward a copy within 10 days to the Comptroller of Water Rights and to the Deputy Ministers of Agriculture, Health, and Recreation and Conser-

5. *Id.*, §5. In 1970 when it became apparent that the process of bringing existing dischargers under permit was proceeding too slowly, the permit requirement was amended to allow existing effluent dischargers without permits to obtain exemptions until ordered by the Director to apply for a permit by filing notices with the Director before Jan. 1, 1970 setting out the effluent type, discharge rate, and location of works and discharge area: Pollution Control Act, §5 (1a), added S.B.C. 1970, ch. 36, §3. This privilege was subsequently extended to Mar. 1972: B.C. Bill No. 98, §2 (1971).

6. *Id.* §20A.

7. *Id.*

8. Pollution Control Regulations, B.C. Reg. 96/67, amended 50/68, 7/71, §§2.01, 20.3.

9. Pollution Control Act, §5(2); B.C. Reg. 7/71, §2.07.

10. B.C. Reg. 96/67 §2.02.

11. B.C. Reg. 96/67, §2.04. However, applicants who propose to discharge less than 10,000 gallons per day of domestic sewage or who are discharging effluent from existing works and have filed a notice in accordance with §5(1a) or §5 A (3) (a) of the Pollution Control Act are exempt from the publication requirements unless otherwise directed by the Director: B.C. Reg. 7/71, 2.09. The Director may also exempt special act sewerage districts, municipalities, regional districts and improvement districts from the publication requirement: B.C. Reg. 96/67, amended 7/71, §2.08.

12. Pollution Control Act, §5(3).

13. *Id.* 7.

vation.¹⁴ These Departments may then file recommendations within 30 days which the Director is required to consider.¹⁵

Under §13(2), any person who has an interest in the land affected or who is the holder or an applicant for a water licence or another pollution control permit and who claims that his interest would be affected by the granting of the permit may file an objection with the Director.¹⁶ The Director must decide in his sole discretion whether to grant a hearing on the matter and notify the objector of his decision.¹⁷ A person who has no interest in land may file an objection with the second agency established under the Act—the Pollution Control Board. The Board must then determine whether, “the public interest requires that the Director shall also take such an objection into consideration in making his decision.”¹⁸ The decision of the Board in this regard is “final.”¹⁹

The effect is a review by the policy arm of the pollution control administration of objections from persons without the types of economic interests specified in §13(2). But even where objections are filed by persons with such interests, a hearing is still at the sole discretion of the Director. This discretion and the narrow class of persons entitled to file direct objections clearly limits opportunities for public participation, even at the fact-gathering stage of the permit decision process. However, two judicial decisions, one prior to the Utah application²⁰ and the other during the pendency of the application,²¹ as well as the Utah controversy itself, have partially opened the decision-process to individual and group participation. These cases will be considered in detail below.

What standards or criteria does the Director apply in deciding whether or not to issue a permit? The Act is not too helpful. “Pollution” is defined in general terms.²² Both the Director and the Board²³ are empowered to determine what qualities and properties of water, land or air shall constitute a polluted condition and to prescribe standards as to the quality and character of the effluent, waste materials or contaminants that may be discharged.²⁴

14. *Id.* §5(4); B.C. Reg. 96/67, §4.01.

15. *Id.* §5(5).

16. *Id.* §13(1)(2); B.C. Reg. 7/71, §2.10.

17. *Id.* §13(4).

18. *Id.* §13(6).

19. *Id.* §12(6).

20. *Western Mines Ltd. v. Greater Campbell River Water Dist.*, [1967] 58 W.W.R. (n.s.) 705.

21. *Re Hooker Chemicals (Nanaimo) Ltd.*, [1970] 75 W.W.R. (N.S.) 356.

22. Pollution Control Act, §2.

23. *Id.* §4(a), (b).

24. *Id.* §10 (a), (b).

In fact, no detailed effluent standards have been formally laid down by either the Director or the Board,²⁵ and reference is simply made to standard water quality manuals.²⁶ General water pollution control "requirements" have been established by the Board for only the lower Fraser Valley area of the province.²⁷ However, a water pollution control policy was established in 1969 with following requirements:

That discharge of untreated domestic sewage into enclosed or confined bodies of salt water be prohibited where there is any doubt as to the adequacy of the flushing effect of the tide, excepting infrequent storm flows from an existing combine sanitary and storm sewer system.

That discharge of any untreated domestic sewage into any body of fresh water such as a lake, river, or tributary to a river be prohibited.

25. V. Raudsepp, Deputy Minister Water Resources, Water Resources Service Position Paper 8, Proceedings of Regional District Conference, Department of Municipal Affairs, Victoria, Apr. 16, 1971 (mimeo).

26. E.g., *Water Quality Criteria* (McKee & Wolf 1963).

27. Following a Pollution Control Branch study and public hearings, the following requirements were established in 1967:

1. Not less than primary treatment and chlorination shall be immediately required on all new sewage discharges to the Lower Fraser River and by January 1, 1975, all existing works shall require operative not less than primary treatment and chlorination facilities. All works must have available land for expansion and/or upgrading of treatment facilities.
2. Not less than secondary treatment and effluent chlorination to be effective immediately on all new works discharging into the Middle Arm and North Arm, and by January 1st, 1975, on all existing works discharging to the said waters.
3. Effluent discharge into the Lower Fraser Valley below Hope from industrial plants, shall, when of an organic nature, receive comparable treatment to that required for sewage for the same river reach. Inorganic wastes shall require individual assessment to determine the degree of treatment. The minimum treatment for chemical wastes shall be such that the effluent is non-toxic to fish as determined by a 100% fish survival over 96 hours in a 50-50 effluent/receiving water mixture.
4. For the purpose of pollution control policies, the lower Pitt River may be considered as contiguous with the Fraser River and the same requirements are to be applied to it. These requirements are: not less than primary treatment and chlorination effective January 1st, 1975 on all existing works and immediately on all new works.
5. All other large contributing streams are now essentially clean streams, potentially useful for all purposes, even the most demanding as to quality. All reasonable means shall be used to maintain this quality. All permits on these rivers shall require secondary treatment and chlorination as a minimum requirement.
6. Small creeks and streams, back waters and sloughs in the lower Fraser Valley watershed should be kept free of effluent discharges. Discharges into such waterways may be permitted following secondary treatment, chlorination and such other treatment which may be deemed necessary to safeguard the stream. Consideration will be given to such applications only after the possibility of effluent discharge into other more suitable areas have been exhausted.

That regardless of the flushing action or assimilative capacity of salt-water bodies, the discharge of untreated domestic sewage be prohibited in any area designated by order as a recreational water or beach area.

That insofar as health matters are concerned, the *Public Health Service* of the Department of Health Services and Hospital Insurance is to set quality standards of the receiving waters to protect the public health, and the Pollution Control Branch of the Water Resources Service is to ensure that any permit issued contains prescribed effluent standards to ensure compliance with the health requirements.²⁸

Within these policy guidelines effluent standards are set for each particular outflow through the permit application procedure. The most important considerations are that effluent not be offensive or cause a health hazard after it has been discharged into the water.²⁹ The Branch also considers other factors such as the effect on aquatic life.³⁰ Each permit, with its special terms and conditions, forms a separate set of regulations for each waste discharger. Whether or not informal overall receiving body objectives are kept in view is unclear.

It is obvious that enforcement may be difficult and costly in such a system. As a result, little effort has been made to enforce permit terms and conditions.³¹ The Branch has not diligently prosecuted violators and has even been reluctant to provide information to private prosecutors who bring charges under the Act.³²

After a permit is granted by the Director, an appeal may be taken to the Pollution Control Board, and from the Board either to the Lieutenant-Governor in Council or to the Supreme Court of British Columbia.³³ The appeal seems to contemplate a full hearing *de novo*,³⁴ but does not act as a stay of execution,³⁵ and the decision of

28. British Columbia Water Resources Service, *Water Pollution Control in British Columbia* 5-6 (Apr., 1970).

29. *Id.* at 4.

30. *Id.* at 5.

31. There have been only two prosecutions under the Act since its original enactment in 1956. See Lucas, *Legal Techniques for Pollution Control: The Role of the Public*, 6 U.B.C. L. Rev. 167, 180 nn. 69-72 (1971).

32. In *R.v. Matsqui-Sumas-Abbotsford Joint Sewerage Authority*, Unreported, B.C. Prov. Ct., Mar. 25, 1970, it was necessary to subpoena the Director and the relevant Pollution Control Branch documents. The charge, that the Authority was discharging waste into a stream without a permit, contrary to the Pollution Control Act, was dismissed on a technical objection as to the form of the information.

33. Pollution Control Act, §12(1).

34. *Id.* §12(5).

35. *Id.* §12(7).

the Lieutenant-Governor in Council or the Supreme Court is "final."³⁶

The Director retains broad amendatory powers over existing permits, upon notice to persons whose rights would in his opinion be adversely affected,³⁷ and to impose further conditions.³⁸ He is also empowered to suspend or cancel permits for certain specified grounds.³⁹ For this purpose the Director, Board members and other agency officers are given a free right of ingress and egress over any land and premises.⁴⁰ Subsidiary powers to inspect and to order alteration or improvement are also given to every designated agency engineer.⁴¹

B. The Decision Process

1. The Objectors

Within thirty days of Utah's application, the Pollution Control Branch received some 150 written objections,⁴² under the Pollution Control Act, to the permit application.⁴³ Those objecting included the Pacific Trollers Association, the United Fishermen and Allied Workers Union, various branches of the Society for Pollution and Environmental Control (S.P.E.C.),⁴⁴ the Richmond Anti-pollution Association (R.A.P.A.),⁴⁵ and a large number of private citizens, many of whom were members of the previous groups.

The majority of the objections were subjective in nature and simply served to express the objector's concern for the Branch's general approach to environmental problems. Many mentioned the unprecedented quantity of the proposed discharge and questioned the potential effects on a wild and beautiful area of the province. There were also a number of objections raising specific issues and criticising the project on a more technical basis. Among these was a brief submitted by a group of four biologists and ecologists at the University

36. *Id.* §12(6), and the privative clause, §24.

37. *Id.* §6.

38. *Id.* §10.

39. *Id.* §7; B.C. Reg. 93/69, §§ 5.01-5.03.

40. *Id.* §15.

41. *Id.* §11 (b) (c).

42. The Vancouver Province, Dec. 1, 1970, at 21.

43. Pollution Control Act, §§13(2), 13(6).

44. S.P.E.C. at this time was the largest anti-pollution society in British Columbia, with a central organization and some 30 branches throughout the province (plus several in other provinces) and a membership of approximately 8,000.

45. R.A.P.A. is a relatively small ratepayers association formed by concerned residents of the Municipality of Richmond which occupies an island at the mouth of the Fraser River. Its situation has made Richmond the recipient of the domestic and industrial waste of several dozen upstream communities, including the City of Vancouver.

of British Columbia⁴⁶ and a detailed submission made by the S.P.E.C.⁴⁷

These briefs raised questions concerning the dynamics of water circulation and the possibility of vertical inmixing in Rupert Inlet;⁴⁸ the unpredictable chemical nature of the tailings and the possibility of concentrations of heavy metals appearing in the food chain;⁴⁹ the long term consequences of an increase in turbidity should mixing occur;⁵⁰ synergistic effects if the effluent should mix with pulp mill effluent already entering Quatsino Sound; and possible long term sub-lethal effects altering the aquatic community.

The S.P.E.C. brief suggested that the Pollution Control Branch seek the advice of the many independent biologists, ecologists, engineers, economists, sociologists, and planners whose experience and information is seldom tapped by the decision-makers. It requested the Branch to hold open, public hearings and give full consideration to the various opinions expressed. It also urged that the hearing proceedings and the reasons for any decisions made be published and made widely accessible.

A detailed outline for an ecological survey of Rupert Inlet, to be

46. Brief dated Nov. 28, 1969, filed with the Pollution Control Board as an objection to Utah permit application and signed by: C. S. Holling, Director, Institute of Animal Resource Ecology, University of British Columbia; P. A. Larkin, Acting Head, Department of Zoology, University of British Columbia; Ian E. Efford, Director, Marion Lake Project, Canadian International Biological Programme; and J. P. Kimmins, Assistant Professor of Forest Ecology, University of British Columbia.

47. See Society for Pollution and Environmental Control, *Utah Affair-November, 1969*, Introspect 12-30 (Special Report Edition, Spring 1970). The S.P.E.C. objection was on its face, filed on behalf of 72 fishermen (whose signatures were attached) with an opinion provided by Dr. A. L. Turnbull of the Department of Biological Sciences at Simon Fraser University, appended. The idea of course was to produce an objection by persons more clearly affected in a purely economic sense. However, as a result of this tactic there was later some doubt as to whether the central S.P.E.C. body itself was a properly qualified objector under §13 of the Pollution Control Act. Several S.P.E.C. branches including Port Alice and Malahat-Cowichan did file timely direct objections.

48. See Pickard, *Oceanographic Characteristics of Inlets of Vancouver Island, British Columbia*, 20 J. Fish. Res. Bd. Canada 1109-1144 (1962); Waldichuk, *Physical and Chemical Oceanographic Data From the West Coast of Vancouver Island and the Northern B.C. Coast*, Manuscript Report Series 990, Vol. I, Fish. Res. Bd. Canada 73-124 (1968).

49. See Masaru and Fujiya, *Studies On the Effects of the Tailings of Flotation Process to the Coastal Organisms*, Bull. Japan Society Sci. Fish. 955-959 (1960); Pringle, *Trace Metal Accumulation by Estuarine Molluscs*, 94 J. Sanit. Engng. Division of Am. Soc. Civil Engineers 455-475 (1968); Drinnan, *Observations On the Accumulation of Heavy Metals by Shellfish in the Estuary of the Miramachi River, N.B.*, Manuscript Series, Fish. Res. Bd. Canada (1966); Clendenning and Wheeler, *Effects of Wastes on the Giant Kelp, *Macrocystis pyrifera*, in Waste Disposal in the Marine Environment* 82-91 (E. Pearson ed. 1960).

50. See Pickard and Giovando, *Some Observations of Turbidity in British Columbia Inlets*, 5 Limnol. Ocean. 162-170 (1960); Cairns, *Suspended Solids Standards for the Protection of Aquatic Organisms*, Proc. 22nd Ind. Waste Conf., Purdue Univ. Engng. Extn. Ser. No. 129, 16-27 (1968).

conducted before commencement of any mining operation and continuing throughout its operation, was later submitted by the S.P.E.C. to the Pollution Control Branch and to the Federal Fisheries Department.⁵¹

The Pollution Control Branch faced such widely-based opposition that final consideration of the permit application was postponed indefinitely. On January 16, 1970, Minister R. B. Williston of the Department of Lands, Forests and Water Resources announced that a study had been commissioned by the Water Resources Service of his department on the feasibility of dumping mine and mill wastes into fresh and salt water bodies.⁵² Although the Utah development was not mentioned as the object of the study, it seemed clear that this was its focus. The study was to be conducted by B. C. Research, a non-profit organization specializing in industrial research. No original research would be carried out; the study would only be a survey of existing research on the subject.

Even before the study was completed it was clear that it would not provide an adequate evaluation of the problems involved. A central criticism of the proposed effluent disposal system was its unprecedented size and nature. The literature of existing research contained few references that would be helpful in determining the feasibility of the Utah proposal. A number of local examples which were not reported in the literature but which were relevant to the Utah situation were excluded from consideration by restricting the study to a literature study. The Anaconda Copper mine at Britannia Beach and the Western Mines copper-lead-zinc-silver mine at Buttle Lake are both examples of mines that discharge their effluent into bodies of water, although in smaller quantities than those proposed by Utah. Both of these mines were readily accessible for on-site inspection and could undoubtedly have provided useful field information.

Although the main purpose of the study was to determine an acceptable procedure for waste disposal from an environmental point of view, the author of the report was not chosen with this objective in mind. There was no participation in the project by anyone whose field of study involved consideration of the total impact of large-scale industrial activity on the environment. The sole author of the report was a research scientist whose specialty is the microbiological leaching of sulfide ores. This expertise is hardly representative of the

51. See *Introspect*, *supra* note 47. The role of the Federal Fisheries Department (Now Fisheries Service, Department of the Environment: See Government Organisation Act. S.C. 1970-71, ch. 42, PT. I, proclaimed in force June 11, 1971) in the permit application process is considered in detail at p. 46, *infra*.

52. Vancouver Sun, Jan. 16, 1970, at 1.

many considerations that require evaluation in determining the total environmental effect of the proposed waste disposal system. In addition, the author had been engaged for many years in work, at B.C. Research, conducted for the mining industry. Without in any way impugning the objectivity of the report's author it nevertheless would have been more desirable, from the objectors' point of view, to include someone in the study whose relationship with the mining industry was less direct.

At the same time both Utah and the objectors were making efforts to publicly articulate their positions. The Company pledged to undertake "extensive investigations of its proposals before they are put into operation."⁵³ Meetings were held with various groups including the local Chamber of Commerce, at which Utah officials insisted that their method of disposal was the most desirable possible.⁵⁴ The opposing views were expressed publicly and at meetings of the various objector groups.⁵⁵

During this period the S.P.E.C. was active in negotiating with both officials of the Company, and with top level officials of the Federal Department of Fisheries, Pacific Region. On December 5, 1969, S.P.E.C.'s officers met with Fisheries Department personnel to seek clarification of the Department's position and its potential role in the Utah decision process. They urged that the information used in compiling the Department's evaluation of possible effects of the Utah Development be released. The response was that some formal method of disclosing this information might be developed but that ministerial approval would be required. The S.P.E.C. emphasized the fact that release of this information, if based on sound research, could only serve to raise the public's estimation of the Department.⁵⁶

On December 18, 1969, the S.P.E.C.'s officials met with Utah executive personnel. Upon the S.P.E.C.'s request, the Company provided a complete list of chemical additives to be used in the separation process. The S.P.E.C. urged the Company to voluntarily undertake an ecological survey of the proposed discharge area to determine possible harmful effects. A draft memorandum of agreement prepared by the S.P.E.C.'s counsel, providing for such an ecological survey along with a research program approved by the S.P.E.C. and the Department of Fisheries to be conducted at Utah's expense, was accepted for consideration by the Company.⁵⁷ At a subsequent public meeting attended by the S.P.E.C., Utah representa-

53. Vancouver Sun, Jan. 19, 1970, at 10.

54. North Island Gazette, Dec. 10, 1969, at 9.

55. North Island Gazette, Feb. 25, 1970, at 12.

56. See note 47, at 18.

57. *Id.* at 17-18.

tives and federal and provincial legislators, Utah disclosed plans to have T. W. Beak Consultants conduct an ecological study of Rupert Inlet.⁵⁸ The following day a detailed plan for an ecological survey of the area, prepared for the S.P.E.C. by Dr. John Stimson of the University of British Columbia's Institute of Animal Resource Ecology, was forwarded to Utah.⁵⁹

In the result, the Company neither entered into the proposed research agreement nor specifically followed the S.P.E.C. ecological survey plan.⁶⁰ However, it does appear that the group's efforts were at least partially responsible for the Company's decision to undertake its own study.⁶¹

One incident which occurred during this period illustrates the problem of "best advantage" data interpretation that is common in developer-conservationist controversies. In planning the underwater disposal system it was assumed that the deep water in Rupert Inlet was stable and that there was no mixing of waters between deep and surface layers. On several occasions Company representatives stated that "A sill in Quatsino Narrows only 40 feet below the water surface will stop the tailings from spreading to other parts of the Sound. . . . But there is practically no chance they would ever go so far. Below 70 feet there is no tidal turbulence in Rupert Arm."⁶² The Company also stated that "the water in Rupert Inlet is stratified into layers of differing density with tidal action affecting only the surface layers."⁶³ This implied that the deep water was stagnant and did not intermix with the surface water. When an article in the local newspaper pointed out that available oceanographic data suggested that the waters were vertically mixed and therefore there was an exchange of water between deep and surface layers,⁶⁴ the Company's

58. *Id.* at 21; Vancouver Sun, Jan. 19, 1970, at 10.

59. *Id.* at 21-24.

60. The group was particularly concerned by the fact that it could not discover the details of the proposed studies from either the company or the Department of Fisheries. The Fisheries Department replied only that "it would appear that many of the features described in your survey plan have been included in [the company's] plans and . . . there are several additional features which we regard to be important which will also be included" (Letter to Dr. Robin Harger, S.P.E.C. Vice President from W. R. Hourston, Director of Fisheries, Pacific Region, dated Feb. 5, 1970). S.P.E.C. was also unable to obtain assurance from the Department that the completed study would be made available to the public: *see Introspect, supra* note 47, at 24-26.

61. As noted in the Feb. 5, 1970 letter from W. R. Hourston to R. Harger, *Id.*, the company's survey contained "many of the features of the S.P.E.C. plan." Earlier one of the company officials had referred to the possibility of "courtesy studies" being conducted: *see* letter to M. E. Pratt of Utah from G. F. Culhane, Chairman S.P.E.C. Legal Committee, dated Feb. 10, 1970; *Introspect, supra* note 47, at 26.

62. North Island Gazette, Dec. 10, 1970, at 9.

63. North Island Gazette, Jan. 21, 1970, at 2.

64. *See* Waldichuk, *supra* note 48; Pickard, *supra* note 48; and North Island Gazette, Feb. 25, 1970, at 12.

response was rather interesting. They quickly accepted it as fact, implying that it was known from the beginning. The Company now claimed that "it is important to us that this interchange occur as it will prevent any long-term build up of toxic matter in the inlet."⁶⁵ When a second article⁶⁶ pointed out the contradictory nature of these statements, the Company had no further comment.

2. *The Federal Fisheries Department*

The Pollution Control Act requires the Director to seek the advice of the Comptroller of Water Rights as well as that of the provincial Departments of Agriculture, Health, and Recreation and Conservation before a permit is issued.⁶⁷ A copy of the application is also forwarded as a matter of policy to the Federal Department of Fisheries.⁶⁸ The Federal Department may therefore participate in the decision-making process by recommending, in cases where it feels that the fishery may be adversely affected by the proposed disposal scheme, either that a permit not be granted or that protective conditions be attached to the permit. It is in the interest of both provincial authorities and permit applicants to seek this advice since the Department of Fisheries is authorized under the Fisheries Act⁶⁹ to control the discharge of deleterious substances into waters frequented by fish.⁷⁰

The Department of Fisheries had taken an even more active role than usual in the Utah development. The Department was directly involved in planning the disposal method prior to the permit application on October 2, 1969.⁷¹ Utah engineers had approached fisheries officials early in 1969 to obtain their advice and cooperation. Apparently during these consultations the decision was made to discharge the tailings underwater rather than on the land. Utah favoured underwater disposal from the outset, presumably for economic reasons. The Department of Fisheries also felt that underwater disposal would be the most desirable method. This decision was based on the possibility of biological leaching of tailings if they were left exposed to atmospheric oxygen on land. The facts surrounding this decision throw considerable light on the problem of the quality of information and its interpretation in the decision-making process.

65. North Island Gazette, Mar. 4, 1970, at 5.

66. North Island Gazette, Apr. 15, 1970, at 9.

67. Pollution Control Act, § 5(4).

68. British Columbia Water Resources Service, *Pollution Control in British Columbia* 10, (Apr., 1970) (mimeo).

69. Fisheries Act, R.S.C., 1970, c. F-14 as amended, S.C. 1969-70 c. 63.

70. *Id.* § 33.

71. Personal Communication, from L. Edgeworth, Federal Department of Fisheries, to P. Moore, Dec. 14, 1970.

At many previous mining operations, in particular the coal mines of the Appalachian region, exposed mine waste is subject to oxidation by bacteria, primarily *Thiobacillus spp.*, which convert such insoluble sulfides as copper sulfide into water-soluble sulfates such as copper sulfate.⁷² The products of this bacterial action are extremely toxic to aquatic life, resulting in large fish kills and rendering some 6,000 miles of rivers in the United States alone inhospitable to fish-life.⁷³ It is known, therefore, that toxic acid mine drainage may result from land disposal of mine tailings. The Company and Fisheries Department officials apparently felt that underwater disposal would provide a solution to this problem. Subsequent oceanographic studies, however, tend to cast serious doubt on the correctness of this assumption.

3. *The Deep Water Mixing Problem*

The Company's public statements suggested that the deep water in Rupert Inlet did not mix with the surface water and therefore the tailings would not be brought to the surface. Thus, the deep water would also be very low in dissolved oxygen since it was not replaced periodically by fresh oxygenated water from the surface.

When asked for their reasons regarding the discharge, both the Provincial Department of Recreation and Conservation⁷⁴ and the Federal Department of Fisheries⁷⁵ cited the existence of a stable water body and a low dissolved-oxygen content in deep water as the primary considerations for the decision to employ underwater disposal.

There have been only two studies of Rupert Inlet which involved the collection of basic oceanographic data,⁷⁶ one of which was conducted by the Fisheries Research Board of Canada. In both of these studies, dissolved oxygen values from 50 to 75 per cent saturation at 400 foot depths were reported in Rupert Inlet. Dr. G. L. Pickard also reported high oxygen values in the deep water and stated that this condition could not exist unless there was vertical mixing, with the deep waters being periodically replaced by surface water in the Inlet.⁷⁷ The Department of Fisheries' source of information for

72. See Ehrlich, *Observation on Microbial Association With Some Mineral Sulfides, in Biogeochemistry of Sulfur Isotopes*, (Proc. Natl. Sci. Foundation Symposium, Yale University, Apr. 12-14, 1962).

73. See E. Kinney, *Extent of Acid Mine Pollution in the United States Affecting Fish and Wildlife* (U.S. Department of the Interior, Fish and Wildlife Circular 191 1964).

74. Personal communication, Hon. K. Kiernan, British Columbia Minister of Recreation and Conservation, to Dr. J. Kimmins.

75. Personal communication, K. Jackson, Federal Department of Fisheries, to P. Moore, dated Nov. 9, 1969.

76. See Pickard, *supra* note 48; Waldichuk, *supra* note 48.

77. Personal communication, Dr. G. Pickard, Director, Institute of Oceanography, U. of B.C., to P. Moore, dated Dec. 2, 1969.

the opposite conclusion regarding both oxygen content and water circulation is not clear. The Department's conclusion seems contrary to the results of the research done by the Fisheries Research Board, a main function of which is to provide information for the use of the Department of Fisheries.

The existence of high dissolved-oxygen levels in the deep water was pointed out to the Department of Fisheries in December, 1969.⁷⁸ The decision favoring underwater disposal had apparently become irreversible despite documented technical information which indicated that the original assumptions were inaccurate.

There is another implication of high dissolved-oxygen levels. It was assumed that sulfide oxidizing bacteria would not be capable of operating on the tailings if they were placed underwater, particularly in water with a low oxygen content.⁷⁹ However, it has been shown that there are also marine forms of *Thiobacillus* which are well adapted to underwater conditions.⁸⁰ The high dissolved-oxygen content in Rupert Inlet would almost certainly be sufficient for their growth. The tailings surface could provide a substrate which would support a large population of these organisms resulting in the release of soluble heavy metal ions into the marine environment.

4. Public Participation

On July 3, 1970, the 150 objectors were informed by the Pollution Control Branch that the B.C. Research study on "The Disposal of Mining and Milling Wastes With Particular Reference to Underwater Disposal" had been completed.⁸¹ The report recommended that tailings from ore concentrators should be placed in deep water wherever possible, in effect supporting the Company's position. It is difficult to understand the reasoning behind the conclusions in the study. Not one reference was cited which indicated that the proposed method of disposal had been employed successfully at any other mine. This could have been due to the unprecedented and therefore undocumented nature of the proposed disposal system.

78. Personal communication, K. Jackson, Fed. Dep. of Fisheries, to P. Moore, dated Dec. 8, 1969.

79. See text at 46 *supra*.

80. See Adair & Gundersen, *Chemoautotrophic Sulfur Bacteria in the Marine Environment. I. Isolation, Cultivation, and Distribution*, 15 Can. J. Microbiology 345-353 (1969); Adair & Gundersen, *Chemoautotrophic Sulfur Bacteria from the Marine Environment. II. Characterization of an Obligately Marine Facultative Autotroph*, 15 Can. J. Microbiology 355-359 (1969); Tilton, Cobet, and Jones, *Marine Thiobacilli: I. Isolation and Distribution*, 13 Can. J. Microbiology 1521-1528 (1967); Tilton, Stewart, and Jones, *Marine Thiobacilli: II. Culture and Ultrastructure*, 13 Can. J. Microbiology 1529-1534 (1967).

81. See D. Duncan, *The Disposal of Mining and Milling Wastes With Particular Reference to Underwater Disposal* (Study conducted by B.C. Research for the Department of Lands, Forests and Water Resources, Water Resources Service), 42 pp. (1970).

The form letter to each of the objectors announcing the report's completion also enclosed an abstract of the report and advised that a limited number of copies of the full report were available at Pollution Control Branch offices on a two week loan basis. The letter continued:

*in the event you wish to support your original submission further, documented written briefs based on technical data which supports your position will be received and considered . . . these briefs must be received in this office no later than August 3, 1970.*⁸²

The majority of the objectors felt that their original submission had sufficiently expressed their concern and opposition. Some, like the S.P.E.C., reviewed the report and concluded that since it was merely a literature survey it added nothing that called for further comment. Therefore most objectors decided that they did not wish to submit further material and did not respond to the letter.

On September 4, 1970, all but 4 of the 150 objectors received a form letter from the Director that read in part:

I have noted that you did not respond to our letter of July 3, 1970 in the allotted time and you are advised therefore in accordance with subsection 4 of section 13 of the Pollution Control Act (1967) that your objection (if you intended your original letter to be an objection) does not warrant a hearing.⁸³

It appears that the basis upon which the Director refused to exercise his discretionary right to hold a hearing on objections was that no further material had been filed in response to his July 3 letter, even though there was no indication in that letter that failure to do so would result in an objector being excluded from the decision-process. In fact, at least one objector who did file further material received the same form letter dated September 4, 1970.⁸⁵

In the same letter, the objectors were informed that:

a hearing will be held in Kinsmen Recreation Hall, near Port Hardy Airport at 8:30 a.m. on September 16, 1970 to hear those who replied to our letter of July 3, 1970. The procedure for the

82. Letter from W. Venables, Director Pollution Control Branch to Pacific Salmon Society; also to Dr. J. Kimmins, dated July 3, 1970 (emphasis added).

83. Letter from Pollution Control Branch to Dr. J. Kimmins, dated Sep. 4, 1970. Section 13(4) reads as follows: "The Director shall decide, in his sole discretion, whether or not the objection will be the subject of a hearing, and shall notify the objector of his decision."

84. Pollution Control Act, §13(4).

85. The Malahat-Cowichan Branch of the Society for Pollution and Environmental Control. However, the group had in the meantime changed its name to "Duncan S.P.E.C.", and had filed further material in response to the Director's July 3, 1970 letter under that name. This was disclosed later at the hearing of the S.P.E.C.-R.A.P.A. appeal to the Pollution Control Board heard Dec. 8, 1970, *infra*, text at 60: Vancouver Sun, Dec. 10, 1970, at 2.

hearing will be determined and announced by the Director at the commencement of the hearing.⁸⁶

It was subsequently disclosed that only four objectors had been named to make representations at the hearing; a housewife and a pulp and paper worker from Duncan, B.C., a retired gentleman from North Vancouver and the Pacific Salmon Society, an association primarily representing the interest of sports fishermen and marina operators.⁸⁷ None of these objectors had included technical briefs with their submissions and none had first-hand knowledge of the Quatsino Sound area. The Pacific Salmon Society's reply to the July 3rd letter had merely stated that, "The Pacific Salmon Society is not able to submit a detailed brief, as suggested, within the time limit of August 3rd, 1970."⁸⁸

At this point then, further participation in the permit-decision process had been denied to the most directly concerned and knowledgeable individuals and organizations. In particular, groups likely to be very directly affected by the grant of the permit such as the Pacific Trollers Association and the United Fishermen and Allied Workers Union were not permitted to make public representations. These groups represent the commercial fishermen whose livelihood depends upon salmon runs such as that of the Marble River which flows into Rupert Inlet.

In response to their exclusion from the hearing, the S.P.E.C., the largest and most vocal of the anti-pollution groups, sent an open telegram to the Pollution Control Branch which read in part: "If you wish to hold a public hearing on Utah, please consult a lawyer to find out what that means. If you do not wish to hold a public hearing on Utah you will find yourself in a court of law."⁸⁹

By this time, at least one of the reasons for the agency's decision to hold a public hearing on the Utah application had become clear. In an interview the Director disclosed that he was following the procedure outlined by a B.C. Supreme Court decision handed down in May, 1970, in which Mr. Justice Wootton had criticized him for failing to act "in a judicial manner" on a permit application by Hooker Chemicals Ltd. of Nanaimo.⁹⁰ In both the *Hooker Chemicals case*⁹¹ and the earlier case of *Western Mines Ltd. (NPL) v. Greater*

86. *Supra* note 3.

87. By co-incidence the three individuals were all members of S.P.E.C.

88. Letter, Pacific Salmon Society to W. Venables, Director Pollution Control Branch, dated July 26, 1970.

89. Vancouver Province, Sept. 10, 1970, at 38.

90. Vancouver Sun, Sept. 10, 1970, at 9.

91. *Supra* note 21. Re Application of Hooker Chemicals (Nanaimo) Ltd., [1970] 75 W.W.R. (N.S.) 354 (B.C.S.C.).

Campbell River Water District,⁹² decisions of the Director on permit applications were quashed on the ground of failure to allow objectors to properly substantiate their objections, which was therefore a failure to act in accordance with the principles of natural justice.⁹³ Since these cases have set forth the procedural requirements for dealing with objections under the Act, they must be examined in detail and the Director's procedure on the Utah application considered in their light.

In *Western Mines Ltd. v. Greater Campbell River Water District*,⁹⁴ the Water District, which held an appropriation licence under the Water Act,⁹⁵ filed an objection to the Company's application for a permit to dump mine-mill waste into the fresh-water lake which was the source of the river from which the District drew its water supply. After receipt of the objection by the Pollution Control Board,⁹⁶ the District retained the B.C. Research Council to prepare a report on the possible effect of the Company's proposed discharge on its water supply. There was no further communication between the District and the Board until the Board wrote to the District's solicitors informing them that their objection had been considered and "dismissed," and that permits were being issued to Western Mines Ltd.

The District immediately moved for a writ of *certiorari* to quash the permits. At trial, the application was dismissed on the grounds that the Board exercised an administrative as opposed to a judicial function in determining permit applications;⁹⁷ that a purely administrative body has no duty to provide adequate notice or an opportunity to be heard to a party affected by its decision; and that, in any event, *certiorari* lies only to a tribunal that exercises judicial functions.⁹⁸

On appeal,⁹⁹ this decision was reversed. The majority of the British

92. *Supra* note 20. *Western Mines Ltd. v. Greater Campbell River Water District*, [1967] 58 W.W.R. 705 (B.C.C.A.). (Hereinafter cited as *Western Mines Case*).

93. The principle concerns basic procedural fairness, and is sometimes said generally to involve first, an unbiased decision-maker; and second, adequate notice and a fair opportunity for interested parties to be heard. There is general agreement on the futility of attempts to extract any very precise definitions from the Canadian Cases. See generally, Reid, *Administrative Law and Practice* 209-218 (1971).

94. *Re*, Application of Hooker Chemicals (Nanaimo) Ltd., [1970] 75 W.W.R. (N.S.) 356 (B.C.S.C.).

95. R.S.B.C. 1960, ch. 405.

96. Under the predecessor statute (The Pollution Control Act, R.S.B.C. 1960, Ch. 289) the Board was the sole decision-maker.

97. The trial judgment dated Oct. 14, 1966 is unreported. (Vancouver Registry No. X844/66., Dryer, J.).

98. The authorities are legion. See R. Reid, *Administrative Law and Practice* 159, 167-170 (1971). However, the characterization of the Board's function as administrative was questionable particularly since the recent landmark English case, *Ridge v. Baldwin*, [1963] 2 All E.R. 66, [1963] 2 W.L.R. 935, was not cited to the court.

99. (1967) 58 W.W.R. (N.S.) 705 (B.C.C.A.).

Columbia Court of Appeal held that while the Pollution Control Board is, procedurally, an administrative body, it might at certain stages of its process be required to act judicially.¹⁰⁰ The Court held that the provisions of the Act allowing persons whose rights would be affected by the granting of a permit to file objections show that the Board must proceed in a judicial manner in considering these objections;¹⁰¹ and that although section 17(2) of the Pollution Control Act¹⁰² allows the Board to decide "in its sole discretion whether or not the objection will be the subject of a hearing," this does not mean that the objector can be denied a reasonable opportunity to support his objection informally, by written submissions, for example, if a hearing is denied.

Following this decision and apparently in response to the wave of public concern about the quality of the province's environment generated by the Western Mines controversy, the Pollution-Control Act¹⁰⁴ was repealed and re-enacted as the Pollution Control Act, 1967.¹⁰⁵

Important changes in the objection provisions followed in 1968. The right to object was limited to interest holders, as outlined above. However the present section 13(6) was added, allowing any person without an economic interest to file an objection with the Pollution Control Board.¹⁰⁶

An objection was filed under this subsection in March of 1970 by Lawrence Jones, a commercial fisherman, to an application by Hooker Chemicals Ltd. of Nanaimo to discharge chemical wastes into Georgia Strait. The Director informed Jones that his objection would not be subject of a hearing. A writ of *certiorari* was then sought to quash the Director's denial of a hearing.¹⁰⁷ The action was supported by the Nanaimo Branch of the Society for Pollution and Environmental Control. The S.P.E.C. had also filed an objection,¹⁰⁸ but they felt that the more readily identifiable economic interest of the fisherman made him a better plaintiff.

Wootton, J. held that the Director erred by deciding not to hold a hearing on the objection without first supplying Jones with the

100. *Id.* at 706.

101. *Id.* at 707.

102. R.S.B.C. 1960, ch. 289.

103. Western Mines Case at 708.

104. R.S.B.C. 1960, ch. 289.

105. S.B.C. 1967, ch. 34.

106. S.B.C. 1968, ch. 38, §5.

107. *Supra* note 21. *Re Application of Hooker Chemicals (Nanaimo) Ltd.*, [1970] 75 W.W.R. (N.S.) 354 (B.C.S.C.) (Hereinafter cited as Hooker Chemicals Case).

108. Hooker Chemicals Case, hearing transcript, cross-examination of W. Venables, Director, Pollution Control Branch, 26-29 (questions 44-57).

technical material filed in support of the application and giving him an opportunity to consider this material and reply to it.¹⁰⁹ Before deciding whether or not to grant a hearing the Director would be required to proceed in the manner outlined in the *Western Mines Case*, “[allowing] the objectors to know the essentials of the case they have to meet and a reasonable time in which to support the objections, at least informally, by material and submissions. . . .”¹¹⁰ The Director’s order was therefore quashed, and the matter referred back to the Pollution Control Branch.

The *Hooker Chemicals* case is particularly useful from the public participation standpoint because *viva voce* evidence as to Pollution Control Branch procedure was given by the Director, Mr. Venables. In cross-examination by counsel for Jones, the Director explained how objections by the public were dealt with by the Branch. This became important in the case because Jones had sent his objection to the Director, rather than to the Board as section 13(6) would seem to require.¹¹¹ There was therefore some question whether the objection was properly made under the provisions of the Act. When questioned whether he had accepted a letter by an owner of water-front property located two miles from the Hooker Chemical plant as a properly lodged objection under section 13 of the Pollution Control Act, the Director replied that “[he took] cognizance of all evidence before him whether it is in the form of an objection or otherwise.” Later in the cross-examination he said that:

We take some of these objections that are actually filed or written to the Minister or to the Chairman of the Board; there is quite a lot of confusion about the Board’s position, etc., and they end up on our desk . . . officially accepted and we recognize them.¹¹²

The practice of the Board seems to recognize and consider all objections whether filed by persons having an interest under section 13(2) or by other persons entitled only to object to the Board under section 13(6). Persons in the latter class are accorded status as objectors by the Director without the Board first determining whether the public interest requires that the Director consider their objections. The effect of this practice,¹¹³ coupled with the decision in the

109. *Hooker Chemicals Case* at 359.

110. *Western Mines Ltd. v. Greater Campbell River Water Dist.*, [1967] 58 W.W.R. 705.

111. Hearing transcript, *Hooker Chemicals Case* at 18 (questions 1-3).

112. *Hooker Chemicals Case* at 25-26.

113. This informal modification of the statutory objection procedure was approved by Wootton, J. who stated at 357 *Hooker Chemicals Case*: “I must conclude that the applicant had the right to have his application heard because the Director indicated that he considered the objection of the applicant as a valid one.”

Hooker Chemicals case, was to accord members of the public a wider opportunity to participate in the decision process than might be required on a stricter interpretation of the legislation.¹¹⁴

While acknowledging the Director's sole discretion as to hearings on objections, the tenor of the judgement suggests that hearings would be desirable in many cases.¹¹⁵ Wootton, J. also strongly suggested that the Director should establish a procedure that would ensure that the requirements of notice and opportunity to consider and respond are properly met.¹¹⁶ He also suggested that when the Director denies a hearing on an objection, he should notify the objector of his right to appeal that decision.¹¹⁷

With the Utah controversy going on when the *Hooker Chemicals* judgement was handed down, the Director was quick to heed the judicial advice. Unfortunately, something was lost in his interpretation of Wootton, J.'s suggestions, as the hearing procedure adopted by the Director on the Utah application amply demonstrates.

On its face the Utah hearing appeared to satisfy the legal requirement of holding a hearing, but at the same time it effectively limited both the presentation of relevant technical information and the range of public participation. On September 14 the scheduled hearing was postponed indefinitely when the Director developed a sore throat.¹¹⁸

C. *The Company and the Community*

Opposition to the discharge of effluent into Rupert Inlet had been voiced early in the summer of 1970 by the Board of the Regional District of Mount Waddington, the local government of northern Vancouver Island. On August 3, 1970, the Board resolved that it could not "condone the method of waste disposal proposed by Utah Construction and Mining Co. in their operation at Rupert Inlet."¹¹⁹ The Board also expressed the desire to participate in any public hearing that might be held on the permit application. As a result of its exclusion from the hearing scheduled for September 16, the Board

114. This has since been considerably qualified by the decision in the case that arose from the Utah controversy, *see text at 68 infra*.

115. A Vancouver Sun editorial, (July 18, 1971, at 4), expressed the hope that this suggestion would be acted upon by the agency or by the legislature:

We would like to think this is a fateful judgment for the people of B.C. We would like to think that the government will show proper respect for the court's belief that "There must be some machinery whereby the public having an interest in the matter should have an opportunity of objecting to the granting of permits" [per Wootton, J. at 75 W.W.R. 357].

116. *Hooker Chemicals Case* at 360.

117. *Id.*

118. North Island Gazette, Sep. 30, 1970, at 1.

119. North Island Gazette, Aug. 12, 1970, at 1.

criticized the manner in which the matter was being handled by the Pollution Control Branch. At a meeting of the Board on September 21 the chairman stated, "If it's public and open no one is suspicious, but when they hold private meetings about things like this you can't blame people if they treat it with the suspicion that something underhanded is being done. I think it's noteworthy that nobody from this area, none of the municipalities or anyone else, was asked to appear at the hearing."¹²⁰

On November 6, 1970, the four official objectors were informed that the hearing had been rescheduled for December 2 in Port Hardy.¹²¹ Each objector would be permitted the assistance of one technical advisor who would be included as a participant at the hearing.

While there had been a delay of over one year in the granting of the Pollution Control Permit, there was no such delay by the Company in developing the mine-site. Clearing had begun in January, 1970, three months after it had become apparent that there was considerable opposition to the proposed disposal scheme. By the fall of 1970 the Company had cleared over 1000 acres of timber, begun excavation and removal of over-burden, installed a deep-sea wharf to receive construction materials, and commenced construction of the main mill building as well as many smaller structures.

Approval for these activities had been obtained from a number of Federal and Provincial agencies. Approval under the Federal Navigable Waters Protection Act was required to construct the wharf facilities.¹²² Certificates of work were filed with the provincial Mines Branch as required by the Mineral Act,¹²³ along with a reclamation plan as required by the Mines Regulation Act.¹²⁴ In addition, a permit allowing diversion of water for processing purposes had been obtained from the Comptroller of Water Rights,¹²⁵ and a high voltage power service had been installed by the Crown Corporation B.C. Hydro and Power Authority.¹²⁶ All of these regulatory hurdles had been cleared before any hearing on the pollution control permit application was held. Over 350 men were permanently employed at the mine-site.

Company management was well aware that the operation of the mine could not begin unless a permit was obtained. The Minister of

120. North Island Gazette, Sept. 30, 1970, at 1.

121. Letter, Pollution Control Branch to Pacific Salmon Society, dated Nov. 6, 1970. The excluded objectors received copies of this letter as well.

122. Navigable Waters Protection Act, R.S.C. 1970, C. N-19, §5.

123. Mineral Act, R.S.B.C. 1960, ch. 244 *as amended*, §51.

124. Mines Regulation Act, R.S.B.C. 1960, ch. 242 §11, *as amended* 1967, ch. 25, §11; 1969, ch. 18, §2.

125. Water Act, R.S.B.C. 1960, ch. 405 *as amended*, §§8, 9.

126. See B.C. Hydro and Power Authority Act, S.B.C. 1964, ch. 7.

Municipal Affairs, himself a member of the Pollution Control Board, was asked why Utah was permitted to develop the mine-site before obtaining a permit. He replied that "work that is now going ahead is being done on the company's own responsibility."¹²⁷ Nevertheless, it is hardly conceivable that the company would invest \$30 million in building concentrating facilities if it foresaw any real possibility that it would not obtain a permit. In fact, just prior to the hearing the Director conceded that it was obvious that the development would go ahead and that the only question was what technical disposal requirements would be imposed.¹²⁸ When questioned by Mrs. Elaine Price, one of the recognized objectors, at the hearing, whether it would be "fair to presume that Utah started its operation assuming it would get a permit?", R. O. Wheaton, Utah's administrative manager, replied "Yes, that is fair to assume."¹²⁹

One week before the hearing a petition which protested the "arbitrary action" of the Pollution Control Branch in refusing to allow the S.P.E.C. and other groups to object publicly was signed by 241 of the 350 employees engaged in the construction of the Utah mill site. The chairman of the petition committee stated that "it's a very important social issue, one which could have serious effects on all of us and could be a danger to our children and grand-children. We feel there could be a danger of pollution to Rupert Inlet and the fact that the Board refuses to hear S.P.E.C.'s brief makes us feel this more strongly."¹³⁰ Such an unprecedented show of environmental awareness on the part of union members who depend directly on the mine's construction is indicative of the wide basis of public opposition to the project. It also suggests extreme lack of public confidence in the Pollution Control Branch's ability to work effectively toward the goal of improved environmental quality.

D. The Hearing

The hearing on the Utah application was held as scheduled on December 2, 1970 in Port Hardy. Although the objectors were permitted only one advisor apiece and did not formally have the right to counsel, the Utah representative was supported by three technical advisors, a senior company official from San Francisco and two lawyers including senior counsel.

Through the S.P.E.C. the lay objectors had obtained three advisors: a marine biologist from Simon Fraser University, an oceanographer

127. North Island Gazette, Apr. 15, 1970, at 9.

128. Vancouver Province, Dec. 2, 1970, at 10.

129. Vancouver Sun, Dec. 3, 1970, at 22.

130. North Island Gazette, Dec. 2, 1970.

from the University of British Columbia, and a member of the U.B.C. Law Faculty. The Pacific Salmon Society was represented by a Ph.D. Ecology student acting as his own technical advisor. The Pollution Control Branch had helpfully provided the objectors (on the day of the hearing) with a list of "suggested questions," apparently culled from the rejected objections, intended to aid in cross-examination of Company officials.¹³¹ The S.P.E.C. organized tactics meetings of the recognized objectors and their technical advisors prior to the hearing and assumed travel expenses to Port Hardy for three of the objectors and their advisors.

When the Pollution Control Branch hearing opened, Mr. Venables made a short opening statement in which he outlined the scheme and operation of the Pollution Control Act and indicated the purpose of the hearing that day. He stressed that as far as the Pollution Control Branch was concerned Utah would be required to give adequate assurance that the works contemplated by the application would not cause pollution. Noting that the Act empowered him to determine his own procedure, he then outlined the procedure to be followed at the hearing. The members of the panel consisted of the Director, his counsel and three Pollution Control Branch members, two of whom were engineers and the third a Ph.D. biologist.

The lengthy brief presented by the company in support of its application contained preliminary studies of currents, density profiles, and bottom fauna.¹³² It became apparent through cross-examination by the objectors and the presentation of their briefs¹³³ that the studies which had been done were not conclusive in answering the fundamental ecological problems involved. Sweeping generalizations as to the effluent's harmlessness had been made on very limited observations.

The possibility of biological concentration of heavy metals was not even considered. The fact that accumulation of copper and lead had been found in fish near a similar tailings outflow at Buttle Lake on Vancouver Island suggests that the company was either unaware of basic biological considerations, or simply avoided the subject.¹³⁴

Nor was the bacterial oxidation of heavy metal sulfides in the

131. Material distributed to objectors in Port Hardy, Dec. 2, 1970.

132. Brief of Utah Construction and Mining Co. in support of its application for a permit under the Pollution Control Act.

133. P. Moore, A Criticism of the Proposed Dumping of Mine Tailings into Rupert Inlet by Utah Construction and Mining Co., brief presented on behalf of the Pacific Salmon Society, Dec. 2, 1970.

134. Vancouver Sun, Jan. 20, 1971; see G. R. Peterson, Heavy Metal Content of Some Fresh Water Fish of British Columbia (Department of Recreation and Conservation, Fish and Wildlife Branch, Circular, 1970).

marine environment considered. The implications of this possibility on the eventual levels of soluble heavy metals in the Inlet deserved at least a preliminary investigation.

The only investigation of the effluent's direct toxicity to marine organisms was a 96 hour test involving coho salmon fry in a 100 per cent concentration of simulated tailings water.¹³⁵ The fact that these tests were not carried out by accepted methods adds to the many inherent limitations of 96 hour tests.¹³⁶ No tests were conducted on the organisms most likely to be affected, such as clams, crabs and phytoplankton, nor to determine possible sub-lethal effects of the effluent.

The limited tidal current measurements made by B.C. Research on behalf of the company revealed that "deep water currents do occur" in Rupert Inlet.¹³⁷ This was not favorable to the company as it indicated that bottom scouring and vertical mixing could occur, tending to bring the tailings into surface waters. B.C. Research was not represented at the hearing. Instead, the company engaged an independent consultant to reinterpret the data.¹³⁸ While B.C. Research's conclusion was that "data are insufficient to document reliably any current patterns," the Utah consultant concluded that "current measurements are adequate to indicate the general strength and character of the currents." These conclusions were both made on the basis of the same B.C. Research study.

The biological survey of Rupert Inlet was designed to favor the company's contention that there was no significant marine life in the inlet.¹³⁹ Nearly all the samples taken were of bottom sediments below 100 foot depths. The report stated that "benthic productivity in the deep central basin of Rupert Inlet is not high." No attempt was made to estimate primary productivity in the Inlet, nor were samples taken

135. B.C. Research to Utah Construction and Mining Co. Subject: Bioassay of Tailings Sample (Sept. 24, 1970).

136. It is usual in 96 hour tests to arrive at an estimate of the median lethal concentration (LC50) which is the concentration of the toxic material which results in the death of 50% of the test organisms in a 96 hour period. It is then usual to set the standards for the particular toxic substances many times lower than this value. The tests run for Utah only established that there was 0% mortality of the test organisms at 100% concentration of the simulated effluent. It may be that the LC50 is at only double the concentration of the toxic substances present in the tailings and therefore the tailings would contain more toxic material than would generally be considered acceptable: See Sprague, *Measurement of Pollutant Toxicity to Fish: I. Bioassay Methods for Acute Toxicity*, 3 Water Research, 793-821 (1969).

137. B.C. Research to Utah Construction and Mining Co. Subject: Current Measurement in Rupert Inlet (June 11, 1970).

138. Letter from J. W. Johnson to R. O. Wheaton, Utah Administrative Manager, dated June 12, 1970.

139. T. Beak Consultants Ltd., A Preliminary Assessment of the Biological and Chemical Characteristics of Rupert Inlet and Adjacent Waters, Report prepared for Utah Construction and Mining Co. (1970).

in the more productive intertidal and euphotic zones. The production of commercially valuable species of crab, shrimp and bottom fish was not considered in the brief.

A report on the measurement of density profiles in Rupert Inlet concluded that "density stratification exists through the entire water column within Rupert Inlet."¹⁴⁰ The only actual measurements made were taken on one day, June 17, 1970, and were reported for only two stations in Rupert Inlet. The conclusion cannot be justified given the limitations of the data in both space and time.

From the reaction of Utah's consultants it became apparent that they had not expected that either the limitations of their data base or their lack of consideration for the biological components of the marine system would be seriously questioned. The press reported that the objectors "had the harried Utah experts scurrying to their records for additional data in support of their application. The impression created was that "Utah's proposed system of monitoring the effect on marine life of the tailings would be inadequate, and that Utah had not been convincing in claiming that the discharge would not create excessive turbidity of surface waters."¹⁴¹

It should be noted though that the technical dialogue was carried on almost entirely by the Utah consultants and the scientific advisors of the recognized objectors. The reading by the objectors of their previously submitted briefs was largely a formality as the briefs dealt mainly with the more general question of overall environmental quality standards for the area and the need for pre-development planning. Several of the briefs pointed out that lay objectors could not and should not be expected to produce technical information. Nevertheless, the hearing panel was interested only in technical information, and a number of questions raised by objectors in cross-examination involving policy issues were quickly ruled out of order by the Director.¹⁴²

At the end of the day the hearing was adjourned¹⁴³ pending the outcome of appeals that had been filed by the S.P.E.C. and the R.A.P.A. with the Pollution Control Board under the Pollution Control Act appeal¹⁴⁴ procedure. Both groups felt that they had been unjustly excluded from the December 2 hearing and were determined to be heard in a public forum.

140. Ralf Carter, Measurement of the Water Density Profile in Rupert Inlet, B.C., Report prepared for Utah Construction and Mining Co. (Oakland, California, June 22, 1970.)

141. Vancouver Province, Dec. 4, 1970, at 8.

142. A. Lucas, notes from Hearing, Dec. 2, 1970.

143. Vancouver Sun, Dec. 3, 1970, at 22.

144. Pollution Control Act, §12(1).

E. Pollution Control Board Appeal

Following the letter of November 6, 1970, from the Pollution Control Branch the S.P.E.C. and the R.A.P.A. appealed the Director's decision to exclude them from the Port Hardy hearing to the Pollution Control Board. In his letter the Director had specifically indicated that he considered his decision to hold a hearing and to hear the persons listed as being an appealable order under the Act. In providing this information he appeared to respond directly to the judicial criticism of Wootton, J.¹⁴⁵

Both groups sent notices of appeal to the Director of the Pollution Control Branch with covering letters requesting postponement of the hearing scheduled for December 2, 1970, pending the outcome of the appeal.¹⁴⁶ The notices of appeal were also served on Mr. F. S. McKinnon, Chairman of the Pollution Control Board.¹⁴⁷

The S.P.E.C. and the R.A.P.A. contended that the procedure followed by the Director deprived them of their rights to natural justice and fair treatment under the Pollution Control Act as inadequate notice was given of the consequences of not replying to the Director's letter of July 3, 1970. It was made clear by the Director only afterward that response to the Letter was a pre-requisite to further participation in the decision process.

The two groups also felt that the venue of the hearing was inappropriate. The Pollution Control Branch was aware that many of the objectors were located in the lower mainland region of British Columbia. Transportation to Port Hardy from the Vancouver area is expensive and accommodation in Port Hardy is inadequate for large numbers of objectors.¹⁴⁸ The S.P.E.C. and the R.A.P.A. argued that the public interest required the Director to take these objections into consideration in reaching his decision on the permit application. The Director replied:

145. Hooker Chemicals Case.

146. Letters from Richmond Anti-Pollution Association (Mrs. S. V. Boyce, Secretary) Nov. 17, 1970; and Canadian Scientific Pollution and Environmental Control Society (S.P.E.C.), Nov. 19, 1970, to W. N. Venables, Director Pollution Control Branch.

147. Letters from Richmond Anti-Pollution Association, Nov. 17, 1970; and Canadian Scientific Pollution and Environmental Control Society, Nov. 20, 1970, to F. S. McKinnon, Chairman, Pollution Control Board.

148. S.P.E.C. and R.A.P.A. Notices of Appeal (Nov. 17, 1970).

The suggestion here was really that the Utah application raised issues of concern throughout the province and that interested persons from other parts of the province should be heard in as convenient a manner as possible. Therefore a second hearing in a Lower Mainland location, or in Victoria might be necessary.

The result was a hearing that gave neither Port Hardy area residents, nor concerned individuals and groups elsewhere in the Province a proper and convenient opportunity to be heard. The four outside objectors were heard to the exclusion of local residents.

Your attention . . . is directed to sub-section 7 of section 12 of the Pollution Control Act, 1967, which states: 'No appeal shall act as a stay of execution' and accordingly you are advised that the hearing on the application from Utah Construction and Mining Company will be held as scheduled at Port Hardy on December 2nd, 1970.¹⁴⁹

Following adjournment of the Port Hardy hearing, the appeals were heard by the Pollution Control Board in Victoria on December 8, 1970.¹⁵⁰ A representative of the Richmond Anti-Pollution Association appeared first and stressed the Director's failure to provide proper notice of the consequences of failing to reply to his letter of July 3.¹⁵¹ As new material in support of the application, including the T. W. Beak Consultant's report,¹⁵² had been presented at the hearing, the R.A.P.A. representative argued that failure to allow the R.A.P.A. an adequate opportunity to respond to this material constituted a denial of natural justice within the principles laid down in *Western Mines Limited v. Greater Campbell River Water District*¹⁵³ and *Re Application of Hooker Chemicals (Nanaimo) Ltd.*¹⁵⁴ The representative also emphasized that the R.A.P.A. should not have been excluded from the hearing because as an interested and responsible organization, if given an opportunity to respond to the new information submitted by the company at the hearing, it could provide valuable new insights. In addition, the R.A.P.A. noted that public confidence in the administration of the Pollution Control Act would be undermined if an organization representing a significant segment of the public were excluded from an agency hearing.¹⁵⁵

The S.P.E.C.'s counsel then incorporated by reference the legal argument with respect to notice and hearing that had been submitted

149. Similar letters from W. N. Venables, Director, to J. Marunchak, Communications Director, Canadian Scientific Pollution and Environmental Control Society, and to Mrs. S. V. Boyce, Secretary, Richmond Anti-Pollution Association, Nov. 20, 1970.

150. 6 of the 10 Board members were present: F. S. McKinnon, Chairman (Retired Deputy Minister of Forest Service); The Hon. R. G. Williston, Minister of Lands, Forests, and Water Resources; V. Raudsepp, Deputy Minister of Water Resources; R. G. McMynn, Director, Commercial Fisheries Branch, Department of Recreation and Conservation; J. W. Peck, Chief Inspector of Mines, Inspection Branch, Department of Mines and Petroleum Resources; and Dr. C. J. G. MacKenzie, Associate Professor, Director, Division of Public Health Practice, Department of Health Care and Epidemiology, University of B.C., Vancouver. Other members of the Board were: The Hon. D. R. J. Campbell, Minister of Municipal Affairs; The Hon. R. R. Loffmark, Minister of Health Services and Hospital Insurance; Dr. J. A. Taylor, Deputy Minister of Health, Health Branch; and J. S. Allin, Department of Agriculture.

151. Form letter from Pollution Control Branch to Utah objectors, July 3, 1970, *see* note 82, *supra*.

152. *Supra* note 142.

153. *Western Mines Case*.

154. *Hooker Chemicals Case*.

155. Richmond Anti-Pollution Association, Memorandum of Argument, at 9-10.

by the R.A.P.A. and outlined the S.P.E.C.'s involvement in the permit application process. Noting the range of scientific experts available to the S.P.E.C., he also stated that it had additional technical information to present in an appropriate public forum.

Lands, Forests and Water Resources Minister, Ray Williston, one of the Pollution Control Board members, told the representatives of the S.P.E.C. and the R.A.P.A. that appeals and procedural wrangles were simply time wasted, that formal hearings were not necessary, and any groups could simply send their briefs to the Director and to the press.¹⁵⁶ The following day each group received identical notices from the Board stating that the appeal had been disallowed. The appellants were informed that they could file any new technical information with the Director within 30 days, which would be considered before any decision on the application was made.¹⁵⁷

This decision left the groups in a dilemma. On the one hand, the opportunity to file further material could be construed as a limited victory. However, they felt any response at this point would be accorded little weight and in any event would have a lesser impact than if presented at a public hearing with adequate publicity. There was also reason to believe that the Pollution Control Board, none of whose members had been legally trained, had simply failed to appreciate the weight of the arguments presented. If they filed further technical material as allowed by the Order, the S.P.E.C. and the R.A.P.A. feared that they might be taken to have waived their opportunity to be heard at the hearing. They could further appeal to the Supreme Court (or to the Cabinet) within thirty days following the Board's Order,¹⁵⁸ but many group members felt that since the permit was likely to be granted within the near future it might be more effective to seek a writ of certiorari to quash any decision granting the permit. Since the issues in an appeal to the Supreme Court under §12 of the Act and those in *certiorari* proceedings would be substantially the same, the possibility of waiver again became a real danger if this latter course were adopted.

In the result, the R.A.P.A. filed a further technical brief within the thirty day period,¹⁵⁹ while the S.P.E.C.'s Executive Director simply

156. Vancouver Sun, Dec. 8, 1970, at 20.

157. Letters from F. S. McKinnon to Richmond Anti-Pollution Association, and Canadian Scientific Pollution and Environmental Control Society, Dec. 9, 1970. A Vancouver Sun report of Dec. 10, 1970, at 2, noted that "The Board's decision . . . follows a suggestion made by Resources Minister Ray Williston at the appeal that anyone with technical objections to Pollution Control applications should simply hand them to the Director and to newspapers instead of involving time and money in hearings and appeals."

158. Pollution Control Act, §12(1)(c).

159. Letter (and attached brief) from Robert T. Franson for the Richmond Anti-Pollution Association, to the Director Jan. 6, 1971.

wrote a long letter to the Director of Pollution Control reiterating the group's position on its failure to be heard.¹⁶⁰

RESULTING POLICY AND PROCEDURAL CHANGES

A. *Permit Conditions*

On January 20, 1971, the public hearing was formally closed by the Director.¹⁶¹ The following day the Utah Construction and Mining Co. was issued a permit by the Pollution Control Branch to discharge 9.3 million gallons of copper mine waste per day into Rupert Inlet.¹⁶² Although the disposal system was to be no different from that originally proposed by the company, the permit did contain a number of specific requirements that the Director of Pollution Control termed "stringent anti-pollution safeguards."¹⁶³ Utah was required to:

Secure tenure to land sufficient and suitable for a tailings disposal pond on or before December 31, 1973, or prior to discharge, whichever date is the sooner.

. . . design and construct an emergency tailings pond to acceptable engineering standards [to] be maintained in good repair throughout the life of the permit.

prior to commencement to discharge, . . . post security in an acceptable form in the amount of \$1,500,000.00 for a period of five (5) operating years after discharge commences. The security or a portion thereof will be subject to forfeiture should the Permittee fail to comply with an order of the Director to construct an alternate or modified system of treatment and/or discharge.

engage an independent agent or organization to set up and conduct a two-phase sampling and surveillance program which will be carried on for at least five (5) operating years after discharge commences—all subject to approval by the Director to determine 'the natural conditions in the receiving environment' and 'the effects of effluent discharged into the receiving environment through monitoring of the physical—chemical—biological characteristics of Rupert Inlet, Holberg Inlet, Quatsino Narrows and related waters.'¹⁶⁴

160. Letter from D. Mallard, Executive Director, S.P.E.C. to the Director Jan. 6, 1971.

161. Vancouver Sun, Jan. 21, 1971, at 1.

162. Provisional Permit No. 379-P and Letter of Transmittal, Jan. 20, 1971. See Vancouver Sun, Jan. 21, 1971, at 1. The report of the permit grant appeared on the same day as an account of Throne Speech highlights from the opening of the British Columbia Legislature. One of these highlights was a promise to introduce measures to enhance environmental protection. The result was a very effective page 1 juxtaposition of headlines: "TOP PRIORITY PLEDGED TO B.C.'S ENVIRONMENT" and "UTAH GETS OKAY FOR INLET DUMPING".

163. Vancouver Province, Jan. 21, 1971, at 1.

164. Provisional Permit No. 379-P, Appendix C, and Letter of Transmittal, Jan. 20, 1971.

The first two requirements do not represent any significant change in the original disposal plan. The company already had control of far more land than would be necessary for land disposal of the tailings and the construction of an emergency tailings pond had been included in plans of the mine prepared prior to the public hearing.¹⁶⁵ Presumably, it was considered necessary in the event of a failure in the underwater disposal system. Diversion of the tailings to the emergency pond would allow the mill to continue operating while repairs were made to the system.

The emergency tailings pond will be built on the shore of Rupert Inlet, with an island near the shore as one wall of the dam. It will therefore be useless should problems arise as the emergency pond would drain directly into the Inlet; the pond will merely move the tailings from one part of the Inlet to another.

The company did not anticipate that it would be required to post a bond as security for construction of the tailings pond. However, there is no reason to believe that the Company would not build the tailings pond in any event.

When the permit was issued, it was uncertain whether this security bond would be available as compensation for damage to the Inlet caused by the effluent. At a meeting of the Pacific Salmon Society on February 20, 1971, the question of compensation for damages was put to the Minister of Municipal Affairs, who at the time was also a member of the Pollution Control Board, and he promised to write an answer to it on his return to the Capitol. In his letter, however, he simply restated the terms of the permit.¹⁶⁶ It would therefore appear that the security is not intended as compensation for any damage that results in the Inlet from the effluent discharge.

The fourth provision of the permit is to some degree an advance in pollution control policy. Although the disposal system will be no different from that originally proposed, there is now the possibility that damage to the Inlet will be identified before it becomes serious. There is no guarantee, however, that the monitoring system will be capable of avoiding any of the discharge's undesirable effects. If, for example, copper is found to accumulate in some organisms through food-chain concentration or some other mechanism, it is possible that there will be a considerable delay from the time of introduction of the tailings until significant amounts of copper appear in animal tissue. In this situation, contamination may continue to grow worse even after

165. Brief of Utah Construction and Mining Co. in support of its application for a permit under the Pollution Control Act, Appendix 2.

166. Letter from Dan Campbell, Minister of Municipal Affairs to Lloyd Stewart, President, Pacific Salmon Society, Mar. 30, 1971.

the discharge of tailings has been stopped. Laboratory experimentation aimed at determining the accumulation rates of heavy metals in marine organisms might assist in the understanding of these problems, but at the present time there is no indication that research of this nature will be attempted.

In order to comply with the requirement that an independent agent set up the biological monitoring program, Utah approached the Mineral Engineering Department of the University of British Columbia (U.B.C.). This resulted in an agreement between Utah and U.B.C., for a monitoring program from March 1, 1971 to August 31, 1972, costing \$40,500 for the initial period.¹⁶⁷ The total cost should be substantially more as a large part of the actual data collection and analysis will be carried out by commercial consultants and Utah employees. The main functions of the U.B.C. committee will be to design the program and interpret the data.

The pollution control permit issued to Utah states that: "Prior to and for the first year after commencing to discharge, data collected during each quarter shall be tabulated and submitted quarterly to the Director." The independent agent must also submit to the Director comprehensive annual reports interpreting the tabulated data from the monitoring program with the first report to be submitted prior to any discharge.¹⁶⁸ Although the permit does not specifically require that the data be published and made available to the public, the Branch appears to have committed itself to this policy.¹⁶⁹

An important consideration is the composition of the monitoring program's committee in terms of the academic disciplines represented. At present the fields of geology, mineral engineering and oceanography are represented with four members from each. This composition poses a serious risk of repeating the inadequacies of the report by B.C. Research on the feasibility of discharging mine wastes into water bodies. The task of directing a biological monitoring program appears to have been assigned to a group in which engineers and physical scientists greatly outnumber life scientists.

The two biologists on the committee are both from the Institute of Oceanography, one a specialist in marine phytoplankton, the other in marine zooplankton. Because of the particular structure of the departments at U.B.C., there is no one on the committee whose

167. U.B.C. Gazette, vol. 10, no. 7, at 2 (1971).

168. Letter of transmittal from Director of Pollution Control to Utah Construction and Mining Co., Jan. 20, 1971, attached to Pollution Control Branch Provisional Permit no. 379-P.

169. Personal communication from A. J. Chmelauskas, Chief Engineer, Pollution Control Branch. It is interesting to note that the requirement for the first report to be submitted before commencing to discharge was ignored by Utah and apparently overlooked by the Branch. The mine began to discharge in late Oct., 1971. As of Jan., 1972 the report had not been submitted.

specialty involves either benthic (bottom dwelling) organisms or fish and other members of the nekton (free swimming) organisms. These areas of study are well represented in the Department of Zoology but this department was not involved in the consultations leading to the formation of the committee. This is regrettable as their inclusion would probably have enhanced the committee's ability to interpret the biological data on which recommendations to the Director will be based.

B. The Environment and Land Use Act

The Utah controversy has also resulted in enactment of a statute by the British Columbia Legislature designed to ensure consideration of the environmental impact in the use and development of public land and resources. The Environment and Land Use Act¹⁷⁰ establishes a cabinet committee empowered to formulate and recommend programs to foster increased public environmental concern and awareness; ensure consideration of environmental factors in land use and resource development to minimize consequential environmental damage; and prepare reports and recommendations to the Lieutenant-Governor-in-Council on environmental problems in the development and use of land and other natural resources.¹⁷¹ The committee may also appoint technical committees, engage consultants and hold public inquiries when it deems them necessary to properly determine any matter within its jurisdiction.¹⁷²

This committee appears to be the direct result of a rather surprising policy statement by Lands, Forests and Water Resources Minister Ray Williston following the granting of the Utah permit. He stated in the Legislature that in the future, large extractive resource developments would not be allowed to proceed until pollution control approval had been obtained. This, he said quite candidly, would prevent a repeat of the Utah situation where massive capital investment by the company prior to permit approval had created overwhelming economic imperatives that outweighed the environmental concerns raised during the permit application process.¹⁷³ He emphasized that these approval procedures would include evaluation by technical experts and public hearings. Mr. Williston's original statement suggested that the existing Cabinet Land Use Committee, recently established under the Land Act,¹⁷⁴ would be charged with these duties; however, separate legislation was subsequently introduced.

170. S.B.C. 1971, ch. 17.

171. *Id.* §3.

172. *Id.* §4.

173. Vancouver Sun, Jan. 28, 1971, at 26.

174. *Id.*; see Land Act, S.B.C. 1970, ch. 17, §84; B.C. Reg. 185, 1970.

Environmental groups were generally encouraged by the government's action to deal with this problem. However, they strongly criticized the legislation itself, and were particularly concerned that the Act did not guarantee that public hearings would be held before any major developments were undertaken. The committee is merely given discretion to hold hearings. Environmentalists also pointed out that there is no requirement that notice of proposed developments or information as to their nature be given to the public before committee deliberations commence. Nor is there any machinery by which interested persons can register their concern by filing objections, as in the Pollution Control Act.¹⁷⁵

It is desirable to formalize the kind of decision that must have been taken *de facto* in cabinet concerning the Utah development before application was made for the pollution control permit. However, the Environment and Land Use Act makes it clear that the decision will still be made in cabinet, with no guarantee of public participation or even public notice. Does this amount to an acknowledgement that the Pollution Control Act permit application process is concerned only with the technical means of minimizing environmental damage? If so, the limited avenues for public participation developed under the Pollution Control Act become meaningless, and effective public participation will now depend, in effect, upon cabinet fiat.¹⁷⁶

CHALLENGING THE PERMIT: THE PIATOCKA CASE

Following the grant of the permit the S.P.E.C. and R.A.P.A. officials were disappointed, although not altogether surprised. They felt that their efforts may have resulted in slightly more onerous permit conditions than would otherwise have been the case. But, the issue seemed too fraught with possibilities to be allowed to die; and there remained in the Supreme Court, a route that had previously proven successful in the *Hooker Chemicals Case*.

On May 3, 1971, with the S.P.E.C.'s support, Paul Piatocka brought a *certiorari* action to quash the Utah permit in the Supreme Court of British Columbia. Mr. Piatocka was a commercial fisherman who had fished in the area of Rupert Inlet and Quatsino Sound for some 15 years and one of the 72 fishermen who had signed the S.P.E.C.'s brief in its original objection.

The grounds set out in the notice of motion were substantially the

175. B.C. Environmental Council Press Release, Mar. 26, 1971.

176. The fiat is taken seriously in British Columbia, one of the few remaining Canadian jurisdictions in which the fiat of the Lieutenant-Governor in Council is still a prerequisite to most direct legal action against the Crown in right of the Province: *see* Crown Procedure Act, R.S.B.C. ch. 89 (1960).

same as those argued on the appeal to the Board.¹⁷⁷ An additional ground was that the Director exceeded his jurisdiction in deciding to issue the permit by considering the irrelevant fact that Utah had invested some \$30 million in the property, and that, in effect, this fact had forced pre-judgment of the issue upon the Director.¹⁷⁸

Three preliminary objections were raised by counsel for the Attorney-General and the Director: (1) That the applicant lacked status to file an objection under the Pollution Control Act; (2) That the applicant had failed to exhaust his internal remedies, since he had not taken the statutory appeal to the Pollution Control Board (though the R.A.P.A. and the S.P.E.C. had, but to no avail); and (3) That the material filed in support of the applicant's notice of motion was insufficient.

Following a three day hearing from June 11 to 15, 1971, on the preliminary objections, Aikins, J. dismissed the action, upholding the first preliminary objection that Piatocka lacked standing under the Pollution Control Act, as he had not filed a valid objection to the Utah permit application.¹⁷⁹

Justice Aikins' decision is questionable on legal grounds and is completely unsatisfactory from a broader policy standpoint. This decision significantly reduces the opportunities for effective public participation under the Pollution Control Act from those established by the *Hooker Chemicals Case*.

His Lordship determined that an "effective objection" must be such by statute,¹⁸⁰ and that the Director could not validate an "ineffective objection" by considering it, if the Board had not reviewed it and made a finding under §13(6) that the "public interest required" the Director to consider it.¹⁸¹ This is less than consistent as the reason that the Board had not made a determination under § 13(6) was that the Board and Director had previously established a policy whereby all objections of permit applications were to be forwarded to the Director.¹⁸² This policy was followed in the Utah application.¹⁸³ The Board did not make a formal determination on any of the non- §13(2) objections, including that of Piatocka. Therefore, if Aikins, J. is correct every one of the 150-odd "public

177. *Hooker Chemical Case*. See text at 60 *supra*.

178. See Notice of Motion para. (f) and supporting affidavit of Paul Piatocka, para. 22.

179. *Re Piatocka and Utah Construction and Mining Co.*, [1971] 21 D.L.R. 3d 87 (hereinafter cited as *Piatocka Case*). During the three months between the hearing on June 11, 14, and 15, 1971, and the date of judgment, construction of the Utah site continued unabated.

180. *Piatocka Case*.

181. *Id.*

182. See text at 54 *supra*.

183. Affidavit of A. Chemelauskas, Chief Engineer of the British Columbia Pollution Control Branch, dated June 10, 1971, but not formally filed in the action.

interest objections" was invalid. Since the mine-site was remote Crown land it is unlikely that there were any property owners or license holders who could have validly filed an objection with the Director under § 13(2). The exchange of correspondence with the objectors by P.C.B. officials and the Port Hardy hearing were therefore entirely *ex gracia*, as counsel for the Director so eloquently argued at the Supreme Court hearing.¹⁸⁴

The Court was concerned that to find a duty on the Director to act judicially in respect to Piatocka's objection would be to "validate" the objection; and to validate the objection would be to allow the Pollution Control Authorities to "amend" the objection provisions of the Pollution Control Act by establishing a variant policy.¹⁸⁵ This does not necessarily follow. The duty to act judicially is an element of the more general common law principle of natural justice whenever a matter arises for decision which affects the rights or interests of individuals.¹⁸⁶ These obligations can be excluded by appropriately drafted statutory provisions. Section 13(4) of the Act may have done this, subject to the limitations placed on it by the *Western Mines* and *Hooker Chemicals* Cases, if the Director had relied on it in deciding not to hold a hearing. But there is also authority for the proposition that a decision-maker must act judicially when he accords a hearing, *even if under the governing legislation he is not obliged to do so*.¹⁸⁷ This means that interested parties must be provided with relevant information and given a fair opportunity to be heard. "Fair," it is submitted, means to be heard *orally at a formal hearing* if that privilege has been accorded to other similarly affected persons.

But even if natural justice does not require participation by *all* affected persons when a formal hearing is held, it is still arguable that the exchange of correspondence amounted to an informal hearing within the *Western Mines* principle.¹⁸⁸ If so, the duty to act judicially arose with respect to Piatocka and continued when new materials

184. A. Lucas, notes from Hearing, June 14, 1971.

185. *Supra* note 179, at 95.

186. See *Cooper v. Wandsworth Board of Works*, (1863) 14 C.B.N.S., 143 E.R. 414, *Wiswell v. Winnipeg*, (1964) 45 D.L.R. (2d) 348, (1965) 51 D.L.R. (2d) 754, 763; R. Reid, *Administrative Law and Practice* 21-22 (1st ed. 1971); S. de Smith, *Judicial Review of Administrative Action* 137 (2d ed. 1968).

187. The following statement appears in R. Reid, *Administrative Law and Practice* 21 (1st ed. 1971): "There is authority to the effect that even though a hearing is not required, one who embarks on it must conform to the rules of natural justice, despite an apparently absolute discretion and the exercise of power classified as administrative", R. V. *Minister of Labor*, citing *R. V. Minister of Labor, Ex parte General Supplies Co. Ltd.*, (1964) 47 D.L.R. (2d) 189, 49 W.W.R. (N.S.) 488; *Re Swanson and Minister of Lands and Forests*, (1960) 23 D.L.R. (2d) 65; *Ex parte Kuzych*, [1968] 1 O.R. 577, rev'd on another point, [1968] 2 O.R. 337.

188. *Western Mines Case* at 708 per Davey, J. A. quoted in text at 53 *supra*.

(especially the T. W. Beak Report) were introduced at the formal hearing in Port Hardy on December 2nd.

Justice Aikins also rejected the argument that the Director was estopped from denying that he was without authority to deal with Piatocka's objection:

As to Estoppel, the applicant was not a qualified objector; he did not change his position, nor was his position as such affected in any way by the Director treating him as if he were a qualified objector. There was no prejudice to the applicant. I can see no sound basis for the argument given me based on estoppel.¹⁸⁹

This reasoning allows the Director to shelter behind his own informal procedural modifications. The estoppel argument should therefore at least have received more attention from the Court. There is a well-recognized distinction between a situation in which the effect of the alleged representation is to confer a spurious jurisdiction upon a judicial officer or tribunal, and one in which the representation involves a "mere irregularity of procedure."¹⁹⁰ This case, involving a procedural modification by the Board and the Director, falls into the latter class and should support an estoppel.¹⁹¹ The detriment to Piatocka can be found in his failure to obtain a determination from the Board as a result of being misled into believing that it was unnecessary to do so. The ultimate result was that he was unable to make further representations regarding the protection of his livelihood—the Rupert Inlet fishery.

The case from the environmental groups' point of view is disappointing, but not altogether unfavorable. The decision makes it clear that the Board *must* consider and pass upon § 13(6) objections. However, the Board is not an operational body, but is more akin to an interdepartmental committee with policy and planning responsibilities that meets from time to time. It is likely to be unable to deal with the numerous objections that can be expected on future controversial permit applications. The Court's decision, therefore, may well result in a full re-examination of the objection and hearing procedures under

189. Piatocka Case.

190. See Spencer, Bower and Turner, *Estoppel by Representation* ¶ 142 (2nd ed. 1966).

191. See also *Lever (Finance) Ltd. v. Westminster Corp.*, [1970] 3 W.L.R. 732, [1970] 3 All. E.R. 496 where Lord Denning, M.R. said at 738 (W.L.R.):

There are many matters which public authorities can now delegate to their officers. If an officer, acting within the scope of his ostensible authority, makes a representation on which another act, then a public authority may be bound by it, just as much as a private concern would be. . . . It was a matter within the ostensible authority of the planning officer; and being acted on, it is binding on the planning authority.

In *Re Fertile Belt No. 183 and Peters*, (1915) W.W.R. 103, a Provincial weed inspector who gave notice not in compliance with governing statute was held to be estopped.

the Act and clarification of the right of members of the public to participate in the decision-process.

CONCLUSION

How did the activities of the environmental action groups affect the decision on the Utah application? Can any effects on the Pollution Control decision process as a result of their efforts be identified? Is the B.C. legislative and administrative framework adequate to ensure effective citizen and group participation in pollution control decisions? What is the role of the courts? Obviously, no very clear answers can be given; but after full review of the Utah controversy, some general observations can be made.

Several effects of the environmental action groups' activities on the Utah decision can be identified. The S.P.E.C., by recruiting and briefing independent technical experts, was able to seriously challenge the type and quality of information upon which certain conclusions in the Utah proposal were based as well as to suggest and develop alternatives.

In addition, the activities of the S.P.E.C., the R.A.P.A. and assorted individuals resulted in the Utah application being widely publicized. This massive publicity, featuring strong criticism of the pollution control authorities, appears to have been at least partly responsible for sensitizing the issue and forcing the decision to hold a public hearing.

Perhaps a further indication of the groups' effectiveness is the fact that the Utah permit conditions included several "firsts." The performance bond requirement was the first for an industrial plant. Biological monitoring requirements had been included in previous permits, but none were as detailed and comprehensive as that specified for the Utah project.¹⁹²

The experience of the groups also highlights a number of problems inherent in existing pollution control legislation and policies. The Pollution Control Act and regulations are misleading as to the nature and effect of decisions by the Director to issue permits. The Director does not decide the primary question of whether the development should go ahead at all; he merely makes secondary decisions on the technical acceptability of the proposed effluent disposal systems. He considers that this is the limit of his authority under the Act, and has even gone so far as to suggest that the Act does not permit him to consider the public interest when dealing with permit applications.¹⁹³

The Director's permit does, however, confirm and give legal

192. Interview with A. J. Chemelauskas, Chief Engineer, Pollution Control Branch, June 15, 1971.

193. The Vancouver Province, June 11, 1971, at 8.

authority to decisions taken previously at the higher departmental level, and occasionally in Cabinet. His position may be the unhappy one of buffer between Cabinet and the outraged public on politically sensitive environmental issues. But his decisions on effluent quality and quantity conditions in permits for individual plants in certain areas ultimately constitute overall water quality standards for those areas. The Director therefore does in fact make policy with respect to water quality.

The legislation does, however, appear to give the Director authority to control pollution. In dealings with the Director and proceedings before him the public therefore directs its concern and comment to the question of whether the plant should be built at all (over which the Director has no authority) and to the issue of the receiving water standards that ought to prevail in the area, taking such factors as competing resource uses and the like into consideration (which the Director denies he has authority to consider in permit applications).¹⁹⁴ The public simply cannot understand why the inquiry must be limited essentially to quibbles about the operation and effects of the proposed technology. In any event, without expert assistance, the public is incapable of effectively responding to these issues. It is little wonder that skepticism about the entire process rapidly develops among citizen objectors.

The real decisions are made at higher levels, and it is obvious that such discretionary statutes as the Environment and Land Use Act do not guarantee effective public involvement in these decisions.

The Pollution Control Act makes invocation of the hearing process and formulation of issues the sole preserve of the polluter or potential polluter. The decision-process can be initiated only by an application for a permit. No interested individual, whether he has property likely to be affected or not, can formally raise the matter with the Director until the polluter has prepared its proposal and submitted its application. Before filing, the proposal will have been carefully planned and designed to raise mainly narrow technical issues related to the feasibility of the system proposed and possibly scientific issues related to obvious potential environmental effects.

In addition, the applicant may already have acquired a kind of pre-emptive right to discharge his waste by obtaining approvals under other statutes and investing substantial sums of money. Objectors are always placed in the position of meeting the polluter on its own terms.

194. See text at 59 *supra*. The Director has stated that "[The Act] is essentially a waste control act. That is, it recognizes that there must be some discharge of waster in the air, land and water . . . And if it is too narrow, then there are democratic processes to take care of that". *Id.*

The opportunities for public participation provided by the legislation and the relevant policies of the Branch and Board are still too narrow to allow meaningful public involvement in the decision-process. Since there is no guarantee of oral public hearings, the few hearings on objections that are held appear to be held only in situations where the issue has become too politically sensitive for the Director. Public hearings may in fact be used mainly as a safety valve by the Director when public pressure makes his buffer position untenable.

The internal appeal procedure in the Pollution Control Act will remain largely futile as a means of widening public participation until members of the Pollution Control Board acquire a proper understanding of their responsibilities in conducting these judicial proceedings under the Act.

Better information must be conveyed to objectors and must be done earlier in the process to allow sufficient time for analysis and response. The major Utah technical brief was received by the four recognized objectors only one week before the hearing. By suggesting questions which would clarify the nature and implications of the Utah proposal, the Branch used the hearing itself as a means of conveying information to the objectors—information without which they were unable to adequately support their objections. Clearly this is not good enough.

As noted above, the *Western Mines* and *Hooker Chemicals* cases have had some impact in opening the pollution control decision process to representation of a wider range of interests.

The *Hooker Chemicals* case demonstrated that legal action in challenging pollution control decisions may have a leverage effect beyond the actual legal requirements laid down by the decisions in particular cases. This effect could stem from the administrators' perception of judicial decisions in the light of sensitivities in their decision process and its political underpinning.

There are, however, very serious constraints on the effectiveness of these legal actions. The most important factor is the narrow technical approach of the courts which is reinforced by traditional Canadian judicial conservatism and reluctance in appearing to "legislate." *Piatocka* is an excellent example, clearly illustrating the danger of having to rely entirely on procedural grounds to achieve broader environmental objectives.¹⁹⁵ The earlier *Western Mines* and *Hooker Chemicals* cases were of little precedential value in *Piatocka*; although their result was to recognize the broader issues of public interest in pollution control decisions and the necessity for wide public participation, the two cases really turned on procedural

195. *Piatocka* Case.

matters. Unfortunately, the same procedural points were not directly in issue in the *Piatocka* case even though the same wider social issues were raised.

The *Piatocka* case appears to have narrowed opportunities for public participation in proceedings under the Pollution Control Act. However, the procedure has at least been clarified and the possibility of a heavy burden upon the Board may force a full review of the decision-process under the Act.

At the time of the Utah Application the B.C. Pollution Control Branch was ill-equipped to handle biological and biochemical issues. Its expertise lay in the physical and applied science areas—mainly engineering—resulting in problems in evaluating issues with large biological components. Life scientists have since been added to the Branch staff; in fact, the hearing panel in Port Hardy included one recently-appointed biologist. However, the proportion of engineers on the Branch staff continues to be rather large.¹⁹⁶

The Utah application also illustrates that basic scientific issues relating to environmental effects are often not resolved at all in permit applications. If the objectors and the Branch are well-informed and armed with the necessary expertise, possibilities would be raised and hypotheses advanced—but that is about all. Any opinions ventured would always be carefully qualified.

The result is that these possibilities are left to be tested by the actual construction and operation of the proposed facility. Certainly, serious consideration should be given by the pollution control authorities to requiring further biological studies as a *precondition* of development. The question is who should bear the burden of showing that serious environmental damage is or is not likely? Predevelopment studies or pilot project requirements would place this burden on the developer, where it belongs. Post-development monitoring requirements, on the other hand, place the burden on the interested and affected public, even though the developer may in fact bear the cost of monitoring and data interpretation.

196. At present 33 members of the Branch staff are classified as engineers, 16 as technicians and engineering assistants, and 7 as biologists: Question answered in the Legislature by R. G. Williston, Votes and Proceedings of the Legislative Assembly of British Columbia 10-12, (Feb. 4, 1972).