Dalhousie Law Journal

Volume 7 | Issue 3 Article 6

10-1-1983

Regulatory Reform and the National Energy Board

J. M. Hendry

Recommended Citation

J. M. Hendry, "Regulatory Reform and the National Energy Board" (1982-1983) 7:3 DLJ 235.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

J. M. Hendry*

Regulatory Reform and the National Energy Board

I. *The Need for Regulation*

Government regulation has been increasing rapidly for the past five decades. At present, boards, commissions, and other variously named administrative agencies pervade nearly every phrase of the nation's economic and social activity. At the federal level, these groups are involved in formulating economic policy; they control the construction and operation of pipelines and other means of transport; they supervise most facets of the telecommunications and broadcasting industries; they regulate, in many ways, the exploration for and manufacturing and marketing of raw materials. At the provincial level, they are concerned with labour relations, education, and the use of property. In addition, an assortment of fire marshalls, engineers, inspectors, and registrars are among those who operate under municipal ordinances to maintain property according to certain guidelines, to regulate how and where structures will be built and maintained and, in many circumstances, to control how, when, and where individuals may operate businesses.

The reasons offered for government regulation are many and may be classified as economic, social, and political. The economic reasons are probably foremost. The doctrine of laissez faire economics, as enunciated by Adam Smith,[1] was implemented in the early part of the nineteenth century in the form of predatory individualism, unrestrained private initiative in business, calculating and relentless competition, and above all, the absence of government interference in these matters. The period of rapid transport development, spreading settlement, and increased exploitation of natural resources that occurred in the United States during this era probably witnessed the peak of this form of laissez faire economics. Along with the growth of business enterprise, which was aided by the industrial development that was essential to the

*Formerly of the National Energy Board, Ottawa.

1. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (4 Volumes, C. Knight, ed., 1843).

wars during that period, the growth of monopolies was attracting attention. Monopolies, particularly in the railways, levied excessive and discriminatory charges on their customers and placed the industries and individuals in the monopolized territory under the complete control of one or more individuals or corporations. Privately owned municipal services, such as water supply, local transportation, and gas and electric services, also came under scrutiny as these are fields of natural monopolies and, therefore, were subject to abuse. In general, as cut-throat competition, rigged markets, cooperative arrangements, and other unfair practices increased, government regulation became more pronounced.

Consequently, unrestrained laissez faire economics have been curtailed for some time. "Even before Confederation, the Province of Canada had resorted to a type of non-departmental regulatory body when it enacted a Railway Act in 1851, under which regulatory functions, principally the approval of rates, were assigned to a Board of Railway Commissioners. . . ."[2] This regulatory body was a prime example of administrative authority exercised on behalf of the common good and in restriction of the persistent, increasing powers and selfish, pecuniary interests of big business. Since this time, government regulation has increased and, since the latter part of the nineteenth century, government has not hesitated to interfere where it was necessary. In some cases, public knowledge of significant facts and the resulting pressure of public opinion are sufficient to attain the desire results. But in some cases, control must be achieved by issuing orders, licences, and certificates. Although Adam Smith assumed that free competition in production and marketing works as an automatic regulator of prices (an assumption that may have been true in the era in which he wrote), in practice there have always been circumstances which interfere with free competition and the desired equilibrium of demand and supply. There is no perfect state of competition and, even if there was, questions could be raised as to whether social goals would be best attained in that way. The control of prices and rates, then, are the main economic concerns of regulation, and this, for the most part, means preventing discrimination, monopolies, the restraint of trade, and other forms of unfair business practices. As mentioned previously, although the elimination of such practices

2. See Independent Administrative Agencies, Working Paper No. 25 (Law Reform Commission of Canada, 1980) at 21.

generally requires direct regulatory action, other methods of regulation may be used. For example, boards of arbitration and conciliation are existing modes of attaining industrial peace. Their success in Canada is due, to a great extent, to the effective utilization of these regulatory processes by the groups concerned and the fact that participation in them is voluntary.

Regulation in the realm of social affairs has become particularly prevalent since the end of World War II and, especially, since 1965. It has resulted from a combination of prosperity, the consequent enthusiasm for social causes and concern for the plight of those in our society who are less fortunate, the ability of the government to combat and overcome these problems, and, perhaps above all, a pervading concern for the environment. These factors led to the creation of a number of agencies to deal with safety conditions and remuneration in the work place, products standards, discrimination, and pollution. Environmental assessment boards, workmen's compensation boards, human rights commissions, and many other such agencies are now commonplace. In addition, the government uses many forms of regulation to attain its regulatory goals. It may grant subventions, afford favourable tax treatment, or allow the operations of a group to be exempt from generally applicable laws. It may empower an individual, or group of individuals, to ascertain the facts of a given situation and, in the light of those facts and in conformity with certain standards, may grant or withhold economic favours. The government may confer on individuals or groups of individuals only those powers sufficient to perform defined advisory roles, but no effective enforcing powers, such as those held by boards of inquiry. Some agencies may be empowered to adjudicate claims by individuals against the state or against employers, as exemplified by the work of the Unemployment Insurance Commission and the Workmen's Compensation Board.

Regulatory reform is a phrase that has many meanings. First, it may be used to mean deregulation. Two authors of a recent study use the phrase "to refer to (i) outright deregulation of industry-specific controls over price and/or entry output; or (ii) substantial liberalization of regime of direct regulation resulting in significantly greater reliance on competition."[3] The proponents of deregulation

3. Stanbury, W.T. and Thompson, Fred, *Regulatory Reform in Canada* (Montreal: The Institute for Research on Public Policy, 1982). See also W. T. Stanbury, ed., *Government Regulation, Scope, Growth and Process,* (Ottawa: 1980), *passim.*

cite the costs of regulation as the main reason for curtailing it. They point to the large quantity of economic resources that are regulated by the government with no reference to the market. They refer to the American efforts to deregulate, which began with the Ford administration, were continued under President Carter, and which constituted a major part of Ronald Reagan's presidential campaign platform. They gleefully call attention to the large number of regulations and can easily find absurd examples of conflicting, needlessly rigid, and hopelessly antiquated regulations which, because they have not been removed from the official records, still technically exist. The proponents of deregulation also complain about the numerous forms that are required by government regulators to be filled out and the time and expense necessary to comply with them. Although the status of deregulation is unclear in the United States, the situation in Canada is clearer. Professors Stanbury and Thompson write:

> While the studies, official and otherwise, on regulation and proposals for reform have been piling up, and while governments have expressed their concern about the overlap and economic burden of regulation, they have been also moving in the opposite direction. Indeed, the penchant of Canadian governments for intervention seems inexhaustible . . . The petroleum industry has become another directly regulated industry in a country in which 29 per cent of the GDP at factor cost is already subject to a form of price and/or entry controls by government.[4]

It is submitted that deregulation, in its pure form, is wishful thinking; it is a dream for the days (if such days ever existed) when commercial activity and social welfare were completely uncontrolled. Although deregulation might be profitably undertaken in particular economic areas, modern society demands some controls. Most of us will agree that the model society is one that is based on individualism, ownership of private property, and freedom of contract, and which allows government intervention only to the extent necessary to curb excesses and attain objectives for the common good. But what are excesses? What is the common good? These are political questions and, in western societies, their answers are determined by political processes.

Political action usually results from the interaction of two competing groups, those that advocate change and those that advocate the maintenance of the status quo. During the past two

4. *Ibid*, note 3, *Regulatory Reform in Canada*, at 115.

centuries, advocates of change have generally been seen as a force that is necessary in order to curb the excessive powers that arise in society from time to time. In the early part of the nineteenth century, a group called for economic liberty from the then predominant constraints of mercantilism and advocated laissez-faire policies. But by the latter part of that century, the same group was demanding government intervention to curb excesses, particularly those of the corporations, which manifested themselves in rigged markets, labour strife, unfair business practices, and what was at that time considered to be generally anti-social behaviour. (By the time of the economic depression of the thirties, this group, which was called, among other epithets, liberal, liberal-democrat, and socialist, stood for liberty, equality of opportunity, and social justice for all. Its members advocated change and, of course, were in conflict with those who advocated the status quo.) Satisfaction of their demands, then, would have entailed a return to the status quo. It is clear that complete deregulation may have a place in specific areas where competition — that is, true competition — meets the criterion of socially acceptable conduct. In such circumstances, the market is the proper device with which to allocate goods and services. However, although evidence of situations where regulation has throttled competition and pushed up prices is easily produced, regulation is not only desirable, but necessary when free competition, for some reason, does not operate. Then it becomes clear that, although the market has a place in the scheme of our social order, so has economic planning. The solution, of course, is to find some acceptable compromise between these conflicting forces.

Government regulation is a prime method of attaining social goals. At present, it appears that the philosophy of unrestricted economic growth must give way, to some degree, to the welfare ideal. In other words, the market economy must, to some extent, be subordinated to the planned, democratic state. Since the end of World War II, the evidence that the transition is well under way has been impressive. At the very least, the concept that the nation-state has broad responsibilities is now generally accepted, and the profit motive and the marketplace are seen to be rational only in light of the common good. In a society where the bulk of the denizens live below the poverty line, some concept of need must be considered in the distribution of goods and services. As a result, the welfare state, the philosophy of which rests on satisfying the needs of many and

the common good of all, is emerging. Planning and regulation are necessary in the attainment of these goals. In the light of these remarks it is evident that deregulation, in the sense used by Professors Stanbury and Thompson, is a political matter; that is, it is the result of the goals and aims of the collective group.

A consensus of the people will, no doubt, favour the elimination of unnecessary costs, burdensome paperwork, and archaic and outdated regulations that fulfill no function. It will generally favour efficient management within a framework of free competition. But the consensus will also favour control and regulation in monopolistic and other discriminatory situations, and will support reasonable social goals and regulations to effect these controls. It is fair to say that the same consensus will not favour inefficient government which manifests itself in the form of bad legislative drafting, prolix or archaic rules, unnecessarily long and obscure administrative procedures, or bad applications of the law. These are the basic parameters of regulatory reform. Regulatory reform, then, has one major purpose, namely, efficient government or administration. First, this requires careful, knowledgeable planning and drafting of the enabling legislation. The principles upon which the legislation is based must emerge clearly and in a precise form from parliamentary discussion and committee investigation, and must be afforded the time and means necessary to make good policy. These principles will comprise the political framework within which it will be determined whether or not the regulation is necessary and what form it will take. Also included in the political process will be the careful drafting of the legislation by legal experts, giving direction, in as much detail as possible, to the regulators or the regulating agency. Second, regulatory reform requires a continuing review of the management of the affairs being regulated; this is regulatory reform in its broadest sense. To ensure good management, regulators and staff of the regulating agencies must be carefully appointed. The enabling legislation must be accurately interpreted by the regulators so that it serves the purpose Parliament intended it to, and available techniques must be used to attain those objectives. Good management also requires an outline both of the practices which the regulators can utilize to arrive at administrative, advisory, and regulatory decisions, and of how they are to perform their legislative, administrative, and quasi-judicial functions.

We now turn to a study of the National Energy Board and to a discussion of how regulatory reform is carried out in this agency.

II. *The Statutory Framework for Regulation by the National Energy Board*

The National Energy Board Act was passed by Parliament in 1959 after a long and acrimonious debate relating to the building of a pipeline for the disposal of Alberta natural gas.[5] The act resulted from the recommendations of two royal commissions. In 1957, the Gordon Commission recommended the development of a comprehensive energy policy and the formation of a national energy authority to advise the government on its long-term energy requirements. And in 1958, the Borden Commission reported to Parliament on the structure and control of pipelines and on the regulation of prices and rates, all of which were relevant to ensuring that the operation of interprovincial and international pipelines would be efficient, economical, and in the national interest. The resultant act was mainly based on two acts that it repealed. These were the Pipelines Act of 1949,[6] which dealt with the construction of international and interprovincial pipelines, and the Exportation of Powers and Fluids and Importation of Gas Act,[7] which was concerned with the exportation of power and fluids, the importation of gas, and the construction of facilities for the exportation of power. Prior to the passing of the National Energy Board Act, lip service was given, in debates in the House of Commons, to an overall energy policy and to the consolidation of all governmental functions in the energy field. However, the act contains no mention of coal, atomic energy, or even electrical energy, other than a reference to the construction of international power lines and the export of electrical power.

To develop and implement the regulatory policy, the act created a board consisting of seven members, since increased to eleven, each of whom holds office for a term of seven years.[8] The board is presided over by a chairman who directs the activities of the board and its staff, which is comprised of three hundred and fifty federal public servants. Section 10 states that the board is a court of record. As such, it has all of the powers, rights, and privileges that are vested in a superior court of record with respect to the attendance of witnesses, the swearing in and examination of witnesses, the

5. 1959 S.C. c. 46; R.S.C. 1970, c. N-6, (hereinafter "the act").
6. R.S.C. 1952, c. 21.
7. 1955 S.C., c. 14.
8. 1980-81-82, S.C., c. 116.

production and inspection of documents, the enforcement of its orders, the entry upon and inspection of property, and other matters deemed necessary or proper for the due exercise of its functions. By issuing certificates, the National Energy Board regulates the construction and operation of international and interprovincial oil and gas pipelines.[9] It is also empowered to certify international power lines, that is, lines that have a connection with those across international borders. The standards or principles which the board must apply in determining whether or not a certificate will be issued are set forth in section 44 of the act.[10] They are extremely general, but are the only policy guides available. The section also provides that, before issuing a certificate, the board must be satisfied that the power line is and will be required in light of present and future public convenience and necessity and with regard to all relevant circumstances. Under Part VI of the act, the board, by means of the licencing system, regulates the exportation of gas, oil, electricity, and certain oil products, as well as the importation of gas. The board is guided in these activities by the general criteria in section 83 of the act, which require it to consider all relevant circumstances and, in particular, to satisfy itself that enough energy sources will remain in Canada for use in the reasonably foreseeable future and that the price to be charged for the gas, oil, or power that is exported is just and reasonable in relation to the public interest.

Part II of the act pertains to the advisory functions of the board. It bestows wide powers on the board to prepare studies and reports and to make recommendations on all aspects of energy under federal jurisdiction, either on its own initiative or at the request of the minister. For the purposes set forth in Part II, the board is given all the powers under the Inquiries Act.[11] Under section 50 of the act, the board is empowered to make orders with respect to all matters relating to traffic, tolls, and tariffs. Regulatory policy in this regard is constrained by the statutory guidelines that the tolls be just and reasonable, that they be charged equally under similar circumstances and conditions, and that they not be unjustly discriminatory.

9. See definitions in Hendry, *Some Observations on the Canadian Regulatory Agency* (1976) 1 Dal. L. J. 3, 7.

10. Section 44, inter alia, requires the board to take into account all such matters that it deems relevant, including the availability of gas, oil, or electricity as the case may be, the existence of markets, the economic feasibility of the pipeline, the applicant's financial responsibility and structure, Canadian participation in the project, and any public interest.

11. R. S. C. 1970, c. 1-13.

Finally, the act provides for a broad regulatory power over such matters as the supervision of the safety of pipeline operation, the approval of contracts limiting liability, and the crossing of pipelines by other utilities. The regulatory power of the board also extends to the granting of orders for the exportation and importation of gas, oil, and electricity, where circumstances demand expeditious handling and where the more formal procedures required for the granting of licences are not considered necessary.

In summary, the regulatory policy, as expressed in the act, is quite general. It sets up an administrative agency, to which it gives general powers and only a few standards and guidelines as to how that policy should be developed and implemented. The general nature of the mandate is not surprising when one recalls the reasons for the existence of such agencies, namely, the quantity of work involved, the expertise required, the need for intensive investigation, and, perhaps foremost, the need to develop policies in particular areas where the government, for some reason, has not. As Professor Willis, an acknowledged authority in the field, has said:

> (They), at first sight, look like courts in that they hold hearings and apply statutory standards — such as 'fit and proper person', 'public convenience and necessity', 'just and reasonable rates', 'in the public interest' and so on, to the facts of individual cases coming before them but are in reality minor legislative bodies pricking out a policy.[12]

(a) *The Regulation of Oil*

In 1966, the Canadian government announced its National Oil Policy.[13] The aim of this policy was to create a favourable climate within which Canada's large, indigenous oil reserves were to be developed. The objective was to be achieved by encouraging the increased use of Canadian oil in domestic markets west of the Ottawa Valley, and by expanding exports with as little disruption of normal trade patterns as possible. The government stated that participation in the program would occur on a voluntary basis, and instructed the National Energy Board to evaluate any activity and to report periodically on any progress. In the early years, industry was quite successful at meeting the policy's objectives. However, since 1964, oil companies, particularly those that produced gasoline, moved from the area east of the Ottawa Valley into the area west of

12. Administrative Law in Canada (1962) 39 Can. B. R. 251, 260.
13. See, for example, *Canadian National Energy Board Report* (1962) at 13ff.

the valley in increasing numbers. These moves and the risk of similar action by companies which had been complying with the policy, but which had become increasingly concerned about the apparent inequities in the situation, led to the proclamation on May 7, 1970, under section 87 of the National Energy Board Act, to facilitate enforcement of the National Oil Policy.[14]

This proclamation had the effect of extending the licencing provisions of the National Energy Board to the importation and exportation of oil and oil products. However, amendments to the National Energy Board Part VI Regulations, which were made by the governor-in-council at the same time, restricted this effect.[15] The amendments provided for the licencing, by the board, of imports of gasoline into those areas designated Regions I and II (the Maritime provinces and Quebec, respectively, although Region II included a small portion of Ontario) and Region III (which included the greatest proportion of Ontario). They also made the licences subject to the condition that transfer of gasoline from Regions I and II to Region III be allowed only with the written consent of the board. Early in 1970, Caloil Inc. of Montreal instituted an action in the Exchequer Court of Canada for these regulations to be declared unconstitutional and invalid. The president of the Exchequer Court, Mr. Justice Jackett, agreed, and held that the regulations were invalid because they purported to regulate the marketing of oil and oil products within a province and were not confined to the regulation of imported oil and oil products.[16] Immediately after this decision, the board amended the regulations to remove those features held, in Mr. Justice Jackett's judgment, to be objectionable.[17] Shortly thereafter, the newly amended regulations were contested by the same company, Caloil Inc., in the Exchequer Court. Mr. Justice Dumoulin of that court upheld the validity of the new regulations, stating that, as the federal authority has the power to prohibit the entry of certain products into the country, so it also has the power to specify the quantity, time, and area of consumption of the imported products, which include oil and oil products, from the point of purchase to the point of consumption.[18]

14. *Canadian Gazette*, Part II, 2215-70, at 558.
15. C. R. C. (1978) Vol. XI, c. 1056.
16. *Caloil Inc.* v. *Attorney General of Canada* (1970) Ex. C. R. 512.
17. These regulations have since been repealed.
18. *Caloil Inc.* v. *Attorney General of Canada* (1970) Ex. C. R. 534. An appeal to the Supreme Court of Canada was dismissed; S.C.R. (1971), 543.

When international oil prices rose to unprecedented heights in 1973, it was quickly decided that Canadians should not pay the world market price for domestic oil consumed in Canada. However, in order to obtain the world price for oil on the export market, the federal government instituted an oil export tax. The authority for this tax was originally found in a House of Commons ways and means motion, but was eventually incorporated into Part I of the Energy Administration Act.[19] This part of the act, inter alia, provides for the imposition of a tariff applicable to various kinds and qualities of oil and oil products. Every month, the board makes a report to the minister, who considers the relevant circumstances and makes his recommendation to the governor-in-council in the form of a tariff of charges for that month. In practice, the board determines the reasonable price for domestic consumption and, by using various criteria, arrives at the export charge. These tariffs are published regularly in the Canada Gazette.

Although Canadian consumers of oil have been sheltered from the world price, it is still economical to import into eastern Canada some three million barrels of oil per day at the world price, which, at the time of this writing, is thirty-four dollars a barrel. In order to compensate Canadian refiners for the difference between the world price and the Canadian price, a compensation program was devised and put into place under Part IV of the Energy Administration Act. Briefly, a board, originally called the Petroleum Administration Board, pays importers the difference between the average domestic price, including transportation charges, and the world price.[20] The foreign price is calculated on the basis of a three-month moving average of the cost of the oil, its source, and its type.

(b) *The Regulation of Gas*

Pursuant to section 83 of the act, before granting licences for the exportation of gas, the board is required, inter alia, to consider the amount of gas that will remain after the export authorizations have been given. Because the quantities of gas to be exported must be deemed by the board to be surplus and because projections of future gas needs must be based on estimates, the board has considerable discretion in the matter. During the 1960s and early 1970s, surplus was calculated by comparing available reserves with the amount

19. Originally passed as the Petroleum Administration Act, A.C. (1975), c. 47, and now called the Energy Administration Act, S.C. (1980-81-82), c. 114.
20. *Ibid*, (1980-81-82), c. 114, s. 80.

that was twenty-five times greater than the Canadian demand projected for the fourth year of the forecast plus the quantity proposed for export. This was known as the 25A4 formula. In the Report on Natural Gas Supply, released in February 1979, the board noted that the rate at which reserves would be produced (that is, their deliverability) had become the limiting factor in estimating requirements. The board provided three tests, the Current Reserves Test, the Current Deliverability Test, and the Future Deliverability Test, all of which had to be met before authorization would be granted. In its report following the Gas Export Omnibus Hearing of 1982, the board further modified its surplus determination procedure. As a result, the surplus calculation was nearly doubled and the export of almost twelve trillion cubic feet of natural gas to the United States and, for the first time, a small amount to Japan was authorized.

Prior to the recent amendments, section 83 of the act provided that the board should satisfy itself that the price to be charged was just and reasonable in relation to the public interest.[21] In the late 1950s and in the 1960s, much concern was generated about the export price of gas sold to customers in the United States. This price was predominantly set by the market price that United States' domestic gas received on interstate markets. These sales were made near the end of an era during which the United States, because it was basically self-sufficient in energy, was pursuing energy pricing policies that were largely independent of world energy prices. At that time, Canada had to accept what was later termed a "distress price" for the gas exports in order to make the construction of a major gas pipeline viable.[22] Because the reasonableness of this price was questionable, the government, notwithstanding the express words of section 83 of the act, amended the National Energy Board Part VI Regulations.[23] This new amendment provides that all licences shall be subject to the condition that the prices to be charged for gas are to be continually reviewed by the board, and, on reporting an increase in the price to the governor-in-council, that price may, by order, be made a condition of the licence, such that the gas cannot be exported at a lower price.

---

21. This test is now deleted from section 83 of the act in respect of oil and gas. See note 11, *supra.*

22. See, for example, *Reasons for Decision in the Matter of the Application by Westcoast Transmission Company, Limited* (1968).

23. See note 15, *supra,* s. 14.

An integral part of the price charged for gas is the rates or tolls that are charged for its transportation. Under Part IV of the act, companies are prohibited from charging tolls, except those that are specified in a tariff that has been filed with the board and which is in effect. In addition, all tolls must be just and reasonable and must be charged without unjust discrimination. The determination of these costs comprises a major portion of the work of the board, as the proceedings to determine just and reasonable rates or tolls usually require lengthy hearings, during which details of the applicant's total service costs, rate structure, rate design, and rate of return must be heard. Where the product being transported is owned by some third party, as it is in the case of most oil pipeline companies, the determination of the costs is relatively straightforward. However, where the product is owned by the company transporting the gas, as it is in the case of most gas pipeline companies, the situation is more complex. For these circumstances, the toll is defined in section 61 of the act as "the differential between the cost to the company of the gas at the point where it enters its pipeline and the amount for which the gas is sold by the company". The powers of the board over the setting of prices and tolls were recently defined by the Supreme Court of Canada.[24] In this case, the TransCanada Pipeline Company had applied to the board for orders to fix a just and reasonable rate that the company could charge for the transportation of gas that it sold, under contract, to the Saskatchewan Power Corporation. The company sought disallowance, by the board, of the contract sale price, and sought the substitution of a zone rate which the board had promulgated under the Energy Administration Act. [25] The court held that the board was empowered to deal with the price only incidentally to the fixing of transportation tolls. Thus, the powers granted in Part IV do not encompass the setting of prices and do not permit the board to act outside the prescription of that part of the act. However, in Part III of the Energy Administration Act, the price of natural gas that is traded interprovincially or internationally is regulated. Section 51 provides that, if an agreement is entered into between the federal government and a producer-province, the governor-in-council may prescribe prices at which such gas can be sold in any area or zone in

24. *Saskatchewan Power Corporation* v. *TransCanada Pipeline Limited* (1982), 1-0 D. L. R. 3rd. 1.
25. See note 19, *supra*.

Canada or at any point on Canada's international boundary. By an agreement with the Province of Alberta in 1977, a price to be paid for gas at the Alberta border, called the Imputed Alberta Border Price, was struck. Thus, when the National Energy Board determines the reasonable rates between the Alberta border and some point either in Canada or on the international border, this rate, when added to the Alberta Border Price, is the prescribed price which takes the form of a formal board order and is published in the Canada Gazette. The board continually reviews the tolls and prices it sets and orders are regularly amended.

For sometime now, Canadian sales of natural gas to the United States have been declining, due to the recession, competition from low-cost alternative fuels, and American legislation which closely controls gas prices. In addition, the Canadian price of natural gas, which, at the time of this writing, is $4.94 per million cubic feet and which was set in 1980 by an agreement between the American and Canadian governments, is undeniably a factor. At present, the matter is being discussed by the two governments.

(c) *The Regulation of Electricity*

Pursuant to section 83 of the act, exportations of electricity must meet the statutory requirements for surplus and price. The requirements, set out in section 6 of the National Energy Board Part VI Regulations, list the criteria which the board may take into account in making this determination, but, as a matter of practice, only particular information about the application is usually considered.[26] In determining the reasonableness of the price, the board covers three general areas of questioning: does the export recover its appropriate share of the costs incurred by the Canadian transmission company? Is the export price not less than the price charged to Canadian customers by the transmission company in the general area of the proposed export? And does the export price result in prices in the United States market that are close to those of the cheapest energy alternative from indigenous sources?[27] Answering these questions has been relatively easy for the board until lately, when the social costs and environmental effects of the proposed exports of energy and power have caused considerable discussion. This is well-illustrated in the recent application by

26. See note 15, *supra*.
27. This test was first used in the *Westcoast* decision, see note 21, *supra*.

Ontario Hydro for the export of electricity generated by the nuclear station on the Bruce Peninsula, in the Province of Ontario.[28] Environmentalists, led by the Department of the Environment, made strong representations against the export, mainly on the ground that Canada would then be generating nuclear energy for the benefit of another country. However, despite representations made in cabinet to defeat the export licence, approval was granted.

The export of electric power has been the subject of federal regulation since 1907, and the board is empowered to issue certificates for international power lines. However, until recently there was no provision which expressly allowed for land to be expropriated for the construction of international power lines, although such a provision existed in the case of pipelines. As a consequence of representations made by a utility in Alberta and by the government of Newfoundland, an amendment was made to section 43 of the act, such that the provisions regarding the expropriation of lands for the construction of pipelines now apply to the construction of international power lines.[29]

(d) *Some Development Since 1980*

The National Energy Program, announced in October 1980, undeniably constitutes considerable government interference in the Canadian economy. The avowed purposes of the program are to achieve energy security; to provide the federal government with sufficient revenue from petroleum sources, such that an effective national energy policy can be developed; to permit, through private and public sector corporations, greater involvement of Canadians in energy programs; and to put into place an acceptable pricing regime. To accomplish these ends, the program set out a new pricing schedule for well-head blended crude oil, as well as a price for natural gas, which would be linked to oil prices but which would remain below them. These prices were finalized in an agreement between the federal government and the Province of Alberta in September 1981. In this agreement, some new taxes and charges were proposed, along with the alteration of a number of old ones. These proposals have since been reflected in the Energy Administration Act of 1982.[30] The program proposed the

28. In the *Matter of an Application* under Parts I, III, and VI of the National Energy Board Act by Ontario Hydro, *Reasons for Decision* (March, 1982).
29. See note 11, *supra*.
30. See note 19, *supra*.

establishment of some additional crown corporations, such as Petro-Canada International, which would explore for petroleum in developing countries. In addition, a series of direct expenditures and grants were envisaged which would provide incentives for oil and gas discoveries and for household conversions to gas and electricity, as well as funding for energy research.

At present, the program is in difficulty, due mainly to the fact that oil prices have not continued to rise as was assumed at the start of the program and in the subsequent Alberta Federal Agreement. Although revisions are certainly in order, there is little question that they will not lead to much deregulation in the industry. Nor would it appear that the acts and various functions of the National Energy Board would be greatly affected by any proposed revisions. However, the recent economic recession has had its effect on the megaprojects which were announced as an integral part of federal economic policy. In particular, the following three with which the National Energy Board was closely concerned have been affected. The Northern Pipeline Act, passed in April 1978, provided the authority for the construction of the first of these projects, a natural gas pipeline in Canada along the Alaska Highway, as well as for the creation of a Northern Pipeline Agency to oversee the construction project.[31] Certain terms and conditions in the legislation require that the company constructing the pipeline seek the approval of both the board and the minister responsible for the Northern Pipeline Act. The board's responsibilities relate primarily to the rate of return schemes, to financing and tariffs, to approval of pipeline specifications, and to the granting of leave to open orders. At the time of writing, the construction of the pipeline has been postponed, due to difficulties with the financing. Another megaproject, the TransQuebec & Maritime (TQM) pipeline, has also been stalled.[32] The TQM pipeline is unlikely to be extended any further than Quebec City for some time, although it was originally intended to extend to Halifax and to supply many areas in New Brunswick and Nova Scotia with western natural gas. But, while faced with escalating costs and uncertainty about the marketing of Sable Island gas, there is no guarantee that the pipeline will ever reach these two Maritime provinces. The third megaproject is the so-called Arctic

31. S. C. (1978), c. 20.
32. In *The Matter of an Application* under Part III of the National Energy Board Act by TransQuebec and Maritime Pipeline Inc., *Reasons for Decision* (July, 1981).

Pilot Project, which consists of a scheme to transport liquified natural gas from the Arctic by tanker and to inject the gas into the TQM line at certain points in Nova Scotia. The hearing on this application was recently stopped because the project's sponsors may export the gas to Europe, rather than to the United States. The postponement served as notice that the board would not approve projects when important evidence, such as the source of financing, firm contracts of the sale of the gas, or adequate environmental data, was not forthcoming.

III. *Regulation by the National Energy Board*

The National Energy Board performs its statutory mandate through its three main functions, the administrative function, the legislative function, and the quasi-judicial function.[33] In the use of each of these functions, some form of hearing may be held. Section 20 of the act reads:

> Subject to subsection (2), hearings before the Board with regard to the issue, revocation or suspension of certificates or licences for the exportation of gas or power or the importation of gas or for leave to abandon the operation of a pipeline or international power line shall be public.

Although the board has held hearings on certificate, licence, and rate applications since its inception in 1959, the precise meaning of this section has not been authoritatively determined. With respect to form, Mr. Justice Cattanach, in *Re A. G. of Manitoba and National Energy Board,* concluded that "because the statute and the regulations contemplate a panoply of a full adversary hearing it follows that the word hearing in section 20 of the Act must have attributed to it the same meaning as it has in a court of law."[34] However, the precise ambit of the section is still not clear.

Applications for orders for the exportation of oil do not require hearings. However, even if a hearing is not required by statute or by regulation, it would seem that fundamental law might require an oral hearing.[35] In practice, the board usually holds hearings on

33. See note 8, *supra,* at 9ff.

34. (1974), 48 D. L. R. (3rd) 73, 91.

35. Mr. Justice Cattanach said in the *Manitoba* case, note 32, *ibid,* at 89:

> I fully appreciate that in many instances a hearing need not be an oral one but may be on written representations. If a tribunal is left by the legislation creating it with unfettered discretion as to how to proceed then the tribunal can work out an acceptable procedure that does not include an oral hearing, but even then there may be cases where fairness may dictate an oral hearing.

applications for certificates to construct pipelines that exceed twenty-five miles in length.[36] Applications for export licences are also the subject of hearings, but the board has wide powers to create regulations that authorize orders for specific types of exports. For example, emergency imports, exports of gas, and exports of propane and ethylene that occur at certain times and do not exceed specified amounts may be authorized by order. The issue of licences for the export and import of oil does not require a hearing, due to the fact that section 20 of the act, when originally passed in 1959, did not include the word "oil". When the act was proclaimed in 1970 and its provisions were extended to include oil, the word "oil" was still not included in section 20.

(a) *The Administrative Function*

The regulatory acts of the board are usually performed by the administrative function, that is, without hearings. A list of many of these acts can be found in section 2 of the National Energy Board's Rules of Practice and Procedure.[37] They include applications for exemption orders; orders for the export of gas, oil, and electricity; orders relating to traffic, tolls, and tariffs; and various crossing orders under sections 76 and 77. Most of these applications are handled expeditiously at regular weekly meetings which are presided over by board members who are selected for their expertise in particular areas and arranged in panels for the quick dispatch of the matters at hand. Although hearings are usually not held to dispose of these applications, they may be held in particular circumstances. For example, a hearing was held on an application, under section 72, regarding compensation payable to the owner of a mine as a result of its severance by the pipeline. Several public hearings have also been held on applications for the approval of plans, specifications, and books of reference, pursuant to section 28 of the act. These hearings came about as a result of strong complaints that were voiced by landowners in the vicinity of the proposed pipeline and which were made with regard to its location and its effect on agricultural lands.

These hearings now have a degree of statutory sanction. Recent amendments to the act have modernized the procedure used by pipeline companies, under federal jurisdiction, to acquire lands for

36. See note 5, *supra*, s. 49.
37. C. R. C. (1978), vol. XI, c. 1057.

their pipelines. It is expected that the provisions will greatly expand the recognition of the rights of landowners who are adversely affected, not only so far as the compensation they receive is concerned, but also by providing them the right to a public hearing during which an inquiry will be made into the appropriateness of the route selected by the company in question.[38] Section 29 of the act requires, in part, that the company prepare and submit a plan, a profile, and a book of reference to the board after the certificate has been issued. The amendments require that notice of these documents be served on all owners affected by the proposal and that the documents be published. If the detailed route is opposed by any party that would be adversely affected, a public hearing is to be held in the area. The amendments provide for compensation, inspection, negotiation, and arbitration to be carried out as required, and even specify the form that the land acquisition agreement between the company and the owner of the lands is to take. They also allow for the board to create additional regulations to cover its various operations. There is little doubt that these amendments will increase considerably the number of hearings that come before the board.

To date, the board has not made extensive use of inspectors or examiners to report on matters relating to the safety of pipelines or the use of land. If the inspectors or examiners merely report facts to the board, then the board would be performing an administrative function and no further action on its part would be required. However, if the reports of the inspectors or examiners reveal that the rights of individuals are being affected in any way, the dictates of fair play may indicate that some further action to apprise affected parties of the proceedings is necessary.[39]

(b) *The Legislative Function*

An important part of the exercise of the legislative function is subsidiary law-making, that is, the making of rules and regulations under the enabling statute. Certain rules which delimit the lawful exercise of this function are prescribed by the judiciary. For example, the subsidiary law-making must be reasonable in relation to the purpose that it is intended to achieve, it must be made in good faith, and it must comply with all conditions, both subsequent and

38. S. C. (1980-81), c. 80.
39. Board members sometime act analogously to examiners when appointed under section 14 of the act.

precedent, that are contained in the enabling act.[40] The laws are also governed by statutory requirements, contained in the Statutory Instruments Act.[41] This act requires that most rules, regulations, and orders be enacted subject to the approval, by the legal officers of the Privy Council Office, of their form and compliance with legal standards. In addition, there is a Standing Joint Committee on Regulations and Other Statutory Instruments. It is a parliamentary body and its function is to maintain close control over the subordinate legislation enacted by those to whom Parliament has delegated such a power.

Since the inception of the board, it has been its practice to publicize all of its important proposed subordinate legislation and to request comments on it. When new regulations, such as the gas and oil accounting regulations or the pipeline safety regulations, are proposed, or when information is required for, say, an order to set tolls or tariffs, the board will mail copies of the proposed changes to all parties concerned, requesting replies and information. When the replies are received, they are carefully read and analyzed and, if it is deemed necessary, an informal hearing may be held to further explain the situation and to obtain additional information. Although the board decides whether or not to send the proposed regulations to the Privy Council for approval, it will not do so until the regulations are felt to be basically sound and have the support of a large proportion of the parties involved. Once approved, the rules, regulations, and orders are continually reviewed and, where necessary, are amended to reflect current conditions. This has been the practice until recently, when, along with several other departments and agencies, the board introduced the practice of publishing a document, called the "Regulatory Agenda", three times a year. This document not only lists proposed legislative changes, but also provides information on all significant developments during the four-month period it covers. Perhaps of greatest importance, the Regulatory Agenda lists the details of amendments to its rules and regulations. For example, the third issue covered the activities at the board from September through November, 1982, including recent decisions issued by the board, information regarding pending decisions, descriptions of hearings in progress, a list of hearing applications that had been filed, and references to

40. See, for example, Driedger, Subordinate Legislation (1960), 38 Can. B. R. 1.
41. S. C. (1970-71-72), c. 38.

nonhearing applications (those which do not require hearings). In particular, this issue served notice that information that had been required for some specific situations was "in various stages of preparation" and advised that, in most cases, "when ready, it will be issued for comments by interested parties." Among the amendments mentioned were those made to the Oil Pipeline Regulations.[42]

(c) *The Quasi-Judicial Function*

The exercise of the quasi-judicial function demands most of the time and energy of the board. The major concern in this area is to expedite procedures, while giving adequate time and attention to the representations made by all interested parties. This must be done in a formal, public hearing, the procedures of which must be analogous to those of a trial conducted by the regular law courts.[43] The following comments will briefly set out the procedures followed by the board before, during, and after a hearing. Although these procedures are usually complied with, they can be modified as required for particular circumstances.

From the time that an application arrives, it is important that the board not only be impartial, but appear impartial. Most importantly, it cannot consult with one party to the exclusion of the other party or parties. Some latitude may be allowed in this area for the benefit of a party that is unfamiliar with board practice or procedure, but in general, the receipt of the application commences the hearing and subsequent consultations must take the form of formal preliminary meetings or pre-hearing conferences. Such meetings are encouraged not only because they give some familiarity with the board's procedures, but because they can do much to expedite and simplify the proceedings. For example, oral argument may be deemed superfluous in a particular situation and, thus, be dispensed with. Similarly, discovery procedure may be recommended in specific areas or lines of questioning may, in various ways, be modified. In addition, the board has the power to modify its precedural rules prior to the hearing in order to facilitate more effective and expeditious proceedings.

Because the board (among other agencies which are required to conduct public hearings) is now constrained by the trial procedure,

42. See note 33, *supra*.
43. See note 8, *supra*, at 32ff.

it must take care to follow its Rules of Practice and Procedure and to consider carefully the common law rules of natural justice so far as they are applicable. Thus, notices of hearings are published and sent to all interested parties, including companies, government departments, associations, and individuals, the names and addresses of whom are kept on extensive mailing lists that are continually updated. In general, the contents of board files are available on an ad hoc basis. If applied for at a hearing, information may be granted where the matter is not delicate or where no prejudice will be suffered by any party. However, studies and reports that were carried out by members of the board's staff are usually considered confidential. To date, the board has not had to defend this position in an open hearing, due mainly to the fact that, wherever possible, the board has accommodated requests.

During the hearings, the use of "canned", or written, testimony that is defended by its authors is encouraged. Such testimony is expeditious and usually allows more time for effective cross-examination. It is now used extensively by the board, particularly in hearings regarding rate changes. Testimony provided by panels of witnesses is also used by the board to expedite proceedings. A panel, composed of two or more witnesses, can give a more effective presentation than an individual can, as its members can assist each other with the reporting of facts, can support the others' opinions, and can lend credence to specific positions. Although hearsay evidence has always been permitted within limits, the board is careful to rely on facts and evidence that it receives at the hearings. Section 45 of the act prescribes that the board "shall consider the objections of any interested party" and states that the board has the power to determine conclusively whether or not a person is interested. Although concern about the unmanageable number of hearings and the other extensive proceedings is frequently present, the board has consistently given a wide interpretation to the phrase "interested persons".

The board's post-hearing procedure is designed to ensure that the final decision is that favoured by the panel members. All collaboration between the board's staff and the panel members is done through a staff coordinator, who arranges for the confirmation of facts and evidence, as required. Also ensuring the impartiality of the final decision is the requirement that the individuals who participate in it hear all of the evidence presented. An apparent exception to this rule is the provision in section 14, which may be

adopted by the board and which enables just one authorized member of the board to be apprised of evidence contained in a report.

There is, of course, a paradox imbedded in the requirement of impartiality. As has been described previously, the National Energy Board Act clearly states that administrative agencies should not be unduly influenced and that they should not be dictated to by anybody, particularly by the government of the day. Although legal cases indicate that, when rendering decisions, a strict detachment from outside influences is called for, it would hardly be reasonable to expect the agency to be oblivious to the policy of the current government. In fact, the National Energy Board Act, in section 44, requires the board to make its decisions with "regard to all relevant considerations". Surely government policy is a relevant consideration.[44]

IV. *Conclusion*

As the result of recent developments, in particular the decreasing price of oil on world markets, some modifications in Canada's National Energy Program and the relaxation of some controls may be expected in the near future. However, there is little likelihood that extensive deregulation, in the sense of the entire energy sector or even a large portion of it being regulated only by market forces, will occur. It can only be expected that the National Energy Board and other agencies in the field will allow more efficient government by removing unnecessary, costly, inefficient, and repetitious regulations and procedures.

The government sets energy policy and formulates the statutory framework. Policy is expressed in broad terms, as it was intended by the legislature to apply to many different circumstances. Even if the policy is expressed concisely, much remains to be given meaning and substance by the officials who administer it. However, if good administration is to be achieved, statutory functions and powers, while being broad enough to allow flexibility, must be specific enough to make them meaningful for application to everyday affairs. If the board is to have the powers of a court of record, then its powers should be listed with some precision and the statutory provisions for enforcement should be adequate to accomplish the task that Parliament has delegated to it. Adequate

44. See, *supra*, at 20.

powers should be given to inspectors to oversee and supervise projects, if such activities are considered to be necessary for attaining the goals of the enactment. These powers should also be expressed in such a manner that they will be consistent with the powers of other agencies. Although different goals will necessitate different powers, the powers to perform similar administrative, advisory, and regulatory functions should be expressed in a similar manner in all statutes, in order to ensure their consistent application. Furthermore, special attention should be given to making regulations that are compatible with set policy and the realization of specific goals. The National Energy Board would appear to be appropriately organized to accommodate these alterations. For example, its regulatory power enabled the governor-in-council to control the pricing of natural gas[45] and, similarly, the governor-in-council was given a more specific method of control over the date on which a licence becomes effective.[46]

Recently, much concern has been expressed about the political and functional relationships between administrative agencies, and about the amount of control over these agencies that it is appropriate for the executive branch of government to exercise. A detailed examination of this important subject is beyond the scope of this article, but some concluding remarks will be made on the position of the National Energy Board in this regard. First, Parliament controls the appointment of the members of the board. Although these appointments are made by the governor-in-council, they are subject to careful screening by the Privy Council Office. Indeed, members of the board have, in the past, proved themselves to be experienced, capable, and dedicated people. Second, Parliament is also in complete control of enabling legislation and amendments thereto. The recent amendments, most of which were of a "housekeeping" nature, confirm that the act is a careful and appropriate method of dealing with important aspects of the energy situation.[47] Third, although no provision has been made for policy directives, the legislation is broad enough to permit them. Together with the board's practice of dealing with rules, orders, and regulations in a public forum, it can be expected that policy directives and changes will be published before they are adopted.

45. See note 15, *supra*, s. 8.
46. See note 11, *supra*.
47. See, *supra*, at 40.

Finally, the government also exerts control through the requirements, found in section 90 of the act, for the tabling in Parliament of annual reports of the board. In all, the degree of control that is, at present, exercised by the government over the activities of this important administrative agency would appear to be adequate.