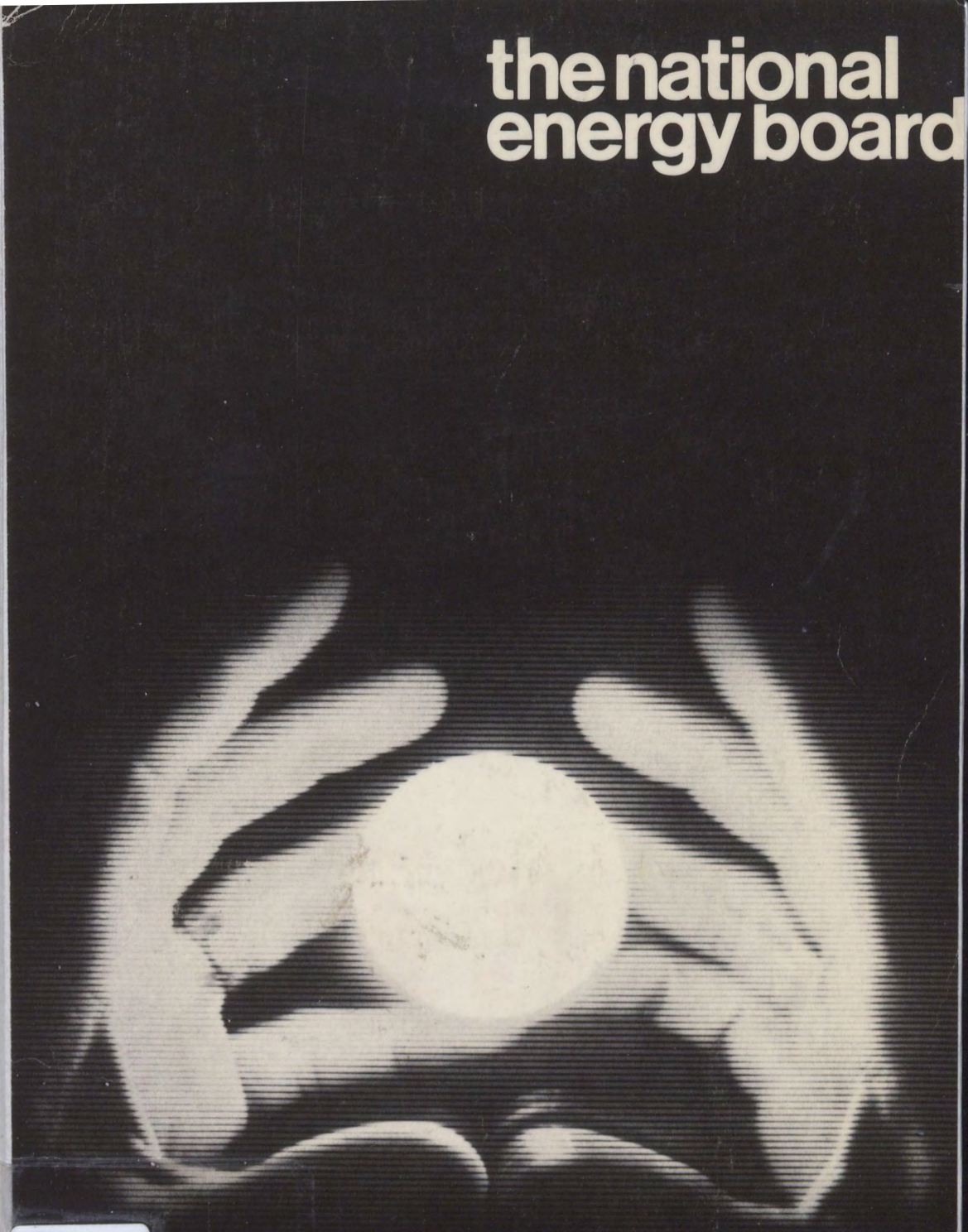
the national energy board



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THE NATIONAL ENERGY BOARD

Policy, Procedure and Practice

THE NATIONAL ENERGY BOARD

Policy, Procedure and Practice

Prepared for the
Law Reform Commission of Canada

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Notice

This study describes an important part of the federal administrative process. It is concerned with how an important federal agency — The National Energy Board — functions. Based on six case studies, the research for this study began in mid-1974 and ended in early 1975. References to legislation, regulations and Board practices were brought up-to-date in November 1976 with the assistance of the Board's counsel. In this study, the authors identify a number of problems and suggest solutions for them. These suggestions may be useful for legislators and administrators currently considering reforms in this area. They are, however, solely those of the authors, and should not be considered as recommendations by the Law Reform Commission of Canada.

The concerns of the Law Reform Commission are more general and embrace the relationships between law and discretion, administrative justice and effective decision-making by administrative agencies, boards, commissions and tribunals. This study, and its companions in the Commission's series on federal agencies, will obviously play a role in shaping the Commission's views and eventual proposals for reform of administrative law and procedure.

Comments on these studies are welcome and should be sent to:

Secretary,
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130 Albert Street,
Ottawa, Ontario.
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Contents

Preface

Some experience with the actual operations of an administrative agency[1] obviously adds considerable insight to a description or assessment of its procedures and practices. This study of the National Energy Board is based on such experience, thanks to the assistance and cooperation of the Board. Its principal author, Professor Alastair Lucas, spent nearly four months with the Board during 1974 preparing six case studies that serve as examples of the kinds of decisions it makes and of its procedures and practices. These case studies, which are included as part of this publication, formed much of the basis for Professor Lucas' consideration of the agency's administrative, adjudicative and legislative functions. The authors' research ended in early 1975. Their references to legislation, regulations and Board practices were updated in November of 1976 with the assistance of the agency's counsel. Because, however, of the changing nature of the legal context in which the NEB operates, and the study's focus on how the agency functions, readers seeking an up-to-date statement of the law in this area must go beyond the pages of this study.

The study constitutes a background study in fulfillment of the Commission's mandate, spelled out in its first research program, to study "the broader problems associated with procedures before administrative tribunals". The study raises a number of interesting and crucial factors that affect how the NEB functions and what procedures it uses. Among these are the agency's dual roles of adjudicating and advising and its heavy involvement in formulating government energy policy. It is right to add that many of the insights in the study naturally reflect the author's concern with environmental issues and the capacity of an agency to respond to changing perceptions of the public interest.

As with its companion studies in the Law Reform Commission's series on federal administrative agencies,[2] we hope this study will prove useful to people in the NEB and others concerned with improving this important area of our legal system.

Law Reform Commission of Canada

The Project

This study is intended to provide a review of National Energy Board procedures, policies and practice. It was conducted in two phases. The first involved a survey of legislation, Board reports, decisions, cases and other literature relevant to the National Energy Board.

The second phase occurred in the agency's offices and hearing rooms as we observed the NEB's day-to-day operations and practice in carrying out its statutory responsibilities. With the permission and cooperation of the Board, a temporary office was established at NEB headquarters in Ottawa where we were granted access to the files and staff members relevant to five "case study" applications.[3] These applications were chosen to provide a representative sample of all the main types of applications handled by the Board. During our stay at the NEB, they were at various stages in the agency's application procedures.

We spent some three and a half months at the Board reviewing documents, sitting in on meetings relevant to the case study applications and interviewing Board members and staff[4]. In order to acquire a feeling for the nature and types of routine matters handled by the Board, regular weekly Board meetings were monitored from July 7 to November 1, 1974. In addition, we followed two related Federal Court proceedings[5] and interviewed selected representatives of various interests touched by the agency's activities.

The organization of this study reflects the two phases of research. Part I is descriptive of the formal elements of the NEB's mandate and practice. Parts II and III, on the other hand, contain most of our findings from the second and empirical research phase. Each of these parts emphasizes a set of issues that appear to be particularly important for the National Energy Board at this stage in its development. The first[6] concerns the degree to which the agency has established policy guidelines or criteria[7] to guide its regulatory

decision-making and how these policies have developed. Here we consider the effect on NEB policies of a number of institutions and interests such as the federal Cabinet, the Minister of Energy, Mines and Resources, federal government departments, the energy industry, the media, public interest groups and the courts.

The second[7] set of issues centres on the extent to which the Board can effectively accommodate newly emerging interest groups in its processes. Consequently, NEB practices and procedures are assessed from the point of view of the various participating interests.

PART ONE

Background

I. THE BOARD[8]

The idea of a National Energy Board emerged from the recommendations of two Royal Commissions that reported following the Pipeline Debate of 1956. The pipeline controversy arose at a time when the bulk of Canadian oil and gas production was concentrated in the southern reaches of the Western Canadian sedimentary basin. Since these reserves were economically distant from major Canadian markets, the Province of Alberta sought oil and gas markets in the United States. However, the eastern Canadian energy market was growing, as too was federal government concern that adequate gas and oil pipeline links be established with the western producing areas.

Two competing proposals to serve eastern Canadian markets emerged. Western Pipe Lines proposed to build a facility east to Winnipeg and from there south to join the U.S. pipeline systems. TransCanada PipeLines Limited proposed an all-Canadian pipeline as far east as Montreal. In 1954 Western Pipe Lines and TransCanada merged and agreement was reached on an all-Canadian system.

The federal government strongly supported the principle of an all-Canadian pipeline. When financing problems threatened to abort the project in its early stages, the Ontario and federal governments

agreed to salvage it through a Crown corporation that would construct the difficult and expensive northern Ontario section of the system, then lease and ultimately sell the line to TransCanada.

Since time was critical to the project and its financing, the government attempted to force the legislation creating the Crown corporation through the House of Commons amidst confusion about the nature of the plan and charges that private parties would profit from government assistance in the financing. The situation was worsened by the use of parliamentary closure to end the protracted debate the project had provoked. The controversy contributed to the subsequent defeat of the Liberal Government.

In 1957, the Gordon Royal Commission[9] on Canada's economic prospects commented at length on the extent and importance of Canada's energy resources. After pointing to the inadequacy of information on these resources and the weak bargaining position of Canadian producers, the Commission recommended the development of a comprehensive energy policy and the formation of a national energy authority to advise the government "on all matters connected with the long-term requirements for energy in its various forms and in different parts of Canada". This agency, the Commission suggested, should have the authority to approve all contracts for the export of gas, oil and power.[10]

As a preliminary to implementing these recommendations, and in response to alleged profiteering in the TransCanada project, the new Conservative Government appointed the Borden Royal Commission in 1957 to recommend the policies that would best serve the national interest in relation to the export of energy and energy resources. The Commission was asked to report on the regulation of prices or rates, the financial structure and control of pipeline companies, and all other matters necessary to ensure the efficient and economical operation of interprovincial and international pipelines in the national interest. The government also specifically directed the Commission to make recommendations concerning

> (c) [t]he extent of authority that might best be conferred on a national energy board to administer, subject to the control and authority of Parliament, such aspects of energy policy coming within the jurisdiction of Parliament as it may be desirable to entrust to such a board, together with the character of administration and procedure that might best be established for such a board...[11]

The Borden Commission submitted its first report in the autumn of 1958.[12] Although considering only two energy resources — oil and

gas — the report contained extensive recommendations concerning the formation of a "national energy board". Legislation followed with a government bill introduced in May, 1959, being enacted as the *National Energy Board Act*[13] in July.

One of the major purposes of the *National Energy Board Act* was to consolidate governmental functions in the energy field. As the then Minister of Trade and Commerce emphasized when introducing the legislation:

> We believe there is a great need for an over-all energy policy. Let us get away from dealing with the problem piecemeal with different departments concerned. It is not an efficient way to deal with these important matters. For example, we suggest that consideration be given to setting up what might be called a national energy board under which could be gathered a professional staff to deal with those questions which would have the necessary information and the necessary training and which could recommend policy to the government. Then once policy had been decided by the government, the board could implement that policy.[14]

The Act itself was based largely on the legislation it repealed — the *Pipe Lines Act* and the *Exportation of Power and Fluids and Importation of Gas Act*. As the Minister remarked: "What is new is important but not extensive".[15] Unfortunately, the "cut-and-paste-technique" quite obviously used in adding older provisions to the *NEB Act* created new ambiguities as well as a new agency.[16]

Despite the averred objectives of the government, the new statute did not authorize the NEB to regulate coal, atomic energy or matters related to electrical energy other than the export of electrical power. Nor did the legislation affect the arrangements under which negotiations for the development of the Columbia River basin were being conducted. While the NEB was empowered to study any aspect of energy, disrupting the existing agencies involved in those related fields was not considered to be "profitable".[17]

This led the Liberal opposition, despite their approval in principle of the legislation, to offer the following criticism:

> ...we do not want another board which will more or less duplicate what has already been done by other existing government agencies, and thus create further administrative delays and confusion. From this point of view, we feel that the functions of the board have not been clearly defined in relation to the responsibilities of existing agencies.[18]

Later during the debate, the Leader of the Opposition, in discussing the regulatory functions to be performed by the Board, raised a more fundamental concern:

> Before issuing a certificate in respect of a pipeline or an international power line, the proposed board is required to ensure, primarily, that the project is economically feasible. I recognize that the main test to be applied by the Board will be — if I read the Bill correctly — the protection of existing facilities and the control of competition. Moreover, the Bill provides that the tolls to be determined by the Board shall be just and reasonable . . . Finally, before issuing an export licence, the Board must be satisfied that the energy to be exported is in surplus and that the price to be charged is just and reasonable having regard to the public interest.
>
> Those, Mr. Speaker, are the only policy principles contained in this Bill and the only guides which are given to the Board in carrying out the functions allocated to the Board by this Bill. Those policies are so vague that they will be of little use to the Board in carrying out and discharging its responsibilities. Indeed, the Bill does not provide any policy on energy and the Board will have to develop such a policy if it wishes to use its powers consistently, according to specific principles.[19]

This concern was well founded — as Parts II and III of this Study will demonstrate.

Interestingly, both government and opposition members seemed to regard oil and natural gas simply as trade products, at least during parliamentary debates on the Bill. In the words of the Minister of Trade and Commerce:

> The past decade of development in the petroleum industries, remarkable as it has been, is only a beginning. We can look forward with confidence to continuing growth in reserves, in production, in employment, in export and in the necessary investment. The prospects, of course, involve the sound utilization of energy resources, perhaps the most important material resources a nation can possess. It is to protect the national interest in the wise use of these resources, and to apply to these complicated, sensitive and vital matters the careful and consistent scrutiny they require, that we have prepared the measure contemplated in this resolution.[20]

And later that:

> As in the case of other important products moving in trade, our interest and the interest of the industry is to sell oil where we can, either within or outside of Canada.[21]

The Minister had, of course, previously contrasted gas and power with oil because the former moved under long-term contracts. He had urged caution in permitting exports of any power or gas that would be required to meet Canadian needs. However, such caution should be seen against the government's interests in exploitation and development. Perhaps most revealing of this short-run commercial orientation was the Minister's justification of the provisions in the

Act that gave Cabinet the unilateral power to impose, by licensing, requirements on oil imports and exports:

> It is the threat that the present world-wide conditions of surplus supply which exist in the oil industry will result in so great a decline in world prices, and such great pressure of supplies of oil offered at distress prices, that normal marketing arrangements may be overwhelmed. If this were to happen, very serious injury could be caused to the oil producing and processing industries in this country.
>
> It is against this contingency that we consider it necessary to take the power under discussion.[22]

The Liberal opposition seemed to have a similar short-term perspective, as remarks by Liberal members revealed:

> . . . it is vital to the national interests that greater utilization of western Canada's surplus of gas reserves should not be delayed . . .
>
> We hope the government will not shackle the development of Canada's energy resources by imposing too many regulations and restrictions.[23]

It is ironic that the situation fifteen years later was not at all what our legislators contemplated in 1959.

> The continuing decline in Alberta's proved crude oil resources — representing the bulk of available Canadian supplies — has assumed alarming proportions, according to the annual report (1973) of the Alberta Energy Resources Conservation Board.[24]

Only the C.C.F. party called for conservation measures and use of domestic energy resources to safeguard long-term Canadian requirements. As one member of that party put it:

> What should then be the objectives of a national energy board? We think the first objective should be to increase the use of fuel and power production as part of a national development plan, a related national development plan through co-operation between the national energy board and suitable agencies in the provinces. Second, it should aim to conserve and direct the use of energy resources to the advantage of present and future generations. Third, it should ensure that, so far as is practicable, fuel and power resources are equally distributed to all sections of the populated areas of Canada, to develop what we have frequently spoken about, ... a national standard of living in Canada.[25]

These attitudes aid analysis of the National Energy Board's statutory mandate, indicating the influences underlying the provisions of the *NEB Act* and suggesting the nature of the functions that Parliament intended the agency to perform. It becomes clearer why, for example, the criteria set out in section 44 affecting the issuance of certificates for pipelines and international power lines were specific for some matters (supplies, markets, economic feasibility, financial

responsibility and structure of applicants) but vague and general for others (public interest considerations).

(a) Its Powers

With this brief background, we now turn to the National Energy Board's statutory powers and describe the operational system and staff organization for their exercise.

The agency's powers and duties may be divided into two main categories: advisory and regulatory.[26]

(i) Advisory

Under Part II of the Act, the NEB is charged with the responsibility of continuously monitoring and reporting to the Minister of Energy, Mines and Resources on virtually all federal aspects[27] of energy. The agency is directed to make such recommendations as it considers necessary or advisable in the public interest.[28] The Board is also required, at the request of the responsible Minister, to prepare studies and reports on any matter related to energy or energy sources and to make recommendations on appropriate national and international co-operative arrangements.[29] For these purposes, the Board is given the formal investigative powers of commissioners under Part I of the *Inquiries Act*.[30] It may also be required to resort to other federal agencies for information, when appropriate.[31] The Minister is given explicit control of all studies and reports produced under these powers.[32]

(ii) Regulatory

The remaining six parts of the *NEB Act* are concerned mostly[33] with the agency's major regulatory functions, namely, granting certificates of public convenience and necessity for construction of pipelines and international power lines; issuing licences for the export and import of power, natural gas, and oil; and approving utility rates, tariffs and tolls.

Granting Certificates

An interprovincial or international pipeline may be constructed only by a company that obtains a certificate of public convenience and necessity from the National Energy Board.[34] To grant a certificate, the Board must be "satisfied that the line is and will be

required by the present and future public convenience and necessity ...."[35]

Before pipeline construction can commence, a further application must be made for approval of plans, profiles and books of reference that specify the route of the proposed pipeline.[36] Following completion, a pipeline cannot be used until a "leave to open" order has been granted by the Board.[37]

Generally, similar requirements are specified for applicants proposing to construct international power lines.[38] However, it is not necessary for utilities to obtain leave to open prior to commencing operation, provided a certificate is in effect and its terms and conditions are observed.

The Board has a discretion to incorporate terms or conditions in certificates.[39] But all certificates and amendments are subject to the approval of Cabinet.[40] The Board, with the Cabinet's approval, may suspend or revoke a certificate for non-compliance with any term or condition provided that the holder is given an opportunity to be heard.[41]

There is also an important power to make orders exempting pipelines less than twenty-five miles in length, and certain ancillary facilities and international power lines of less than 5,000 kilowatts transfer capacity from the main certificate requirements.[42] An important and usual consequence of an exemption order is the lack of a public hearing. How this power has been exercised by the NEB is outlined in Part III below.

Issuing Export and Import Licences

Part VI of the Act prohibits the exportation of oil, gas or power or the importation of oil or gas except under the authority of a licence issued by the Board.[43] Under the Part VI Regulations, all licences are subject to Cabinet approval.[44] The regulations also contain specific requirements concerning the term of licences and other conditions to be included.[45]

Applicants must submit the information specified in sections 4, 5, and 6 of the regulations as well as any additional information demanded by the Board.[46] The Board must then satisfy itself that the quantity of oil, gas or power is surplus to reasonably foreseeable Canadian needs and that the price to be charged is "just and reasonable in relation to the public interest".[47]

As in the case of certificates, the Board is empowered after hearing the holder to suspend or revoke any licence, subject to Cabinet approval.[48] Any export without a valid licence is also an offence punishable on summary conviction.[49]

Approving Rates, Tariffs and Tolls

The Board is empowered under section 50 of the Act to make orders with respect to all matters relating to traffic, tolls, or tariffs. Companies are required to charge only tolls specified in a tariff that has been filed with the Board and is in effect.[50] In the case of a company such as TransCanada PipeLines Limited that is transporting gas purchased from producers, its tariff is specified to include copies of all gas sales contracts.[51] The basic guidelines are that all tolls must be "just and reasonable", charged equally under substantially similar circumstances and conditions,[52] and not unjustly discriminatory.[53]

Companies are not specifically required by the Act to make formal rate applications that would be the subject of notice to interested parties and probably of formal hearings.[54] However, tariffs must be filed and approved by the Board.[55] If a tariff item filed informally under section 51 raises important general issues, the Board may decline approval and request a full rate application that will then be set down for hearing.[56]

Although detailed accounting regulations for gas and oil pipeline companies were developed during the 1960's,[57] no general regulations containing information requirements have yet been developed for rate applications. An information format that is satisfactory to the company, the Board and generally to major intervenors has been developed, based on the first TransCanada rate application.

The Board may disallow and alter or suspend tariffs.[58] Under certain circumstances, it may order pipeline companies to transport oil[59] or to extend oil[60] or gas pipeline facilities.[61]

General

The Act also gives the Board additional supervisory powers over pipeline companies including the approval of contracts limiting liability,[62] contracts for the purchase or sale of pipelines[63] and amalgamation agreements.[64] The Board also has various powers and duties related to the powers of expropriation and rights to use public lands conferred upon pipeline companies by Part II of the *National Energy Board Act*.[65]

To assist the Board in obtaining information, the Act gives it various powers to inquire into, hear and determine matters under the Act.[66]

An appeal lies to the Federal Court of Appeal, with leave of the Court, from any decision or order of the Board upon questions of law or jurisdiction only.[67] There has been only one appeal from a Board decision. Leave to appeal has been granted by the court in one case, but denied in three others.[68]

(b) Board and Staff Organization

The Board consists of nine members appointed by the Cabinet for seven years.[69] In organizational terms, the Board members constitute the executive committee of the agency. The Chairman is chief executive officer. There is also a Vice-Chairman and two Associate Vice-Chairmen to whom the Chairman's powers and duties may be delegated.[70] A quorum is three members.[71]

The current Board members all have extensive professional training in relevant fields as well as considerable industry or related experience.[72] They appeared to us to be able to work closely with staff on complex technical matters relevant to energy issues within the Board's jurisdiction.

Board staff[73] during our research was organized into seven separate branches. These were: administration, economics, electrical, engineering, financial, law, and oil policy.[74] Each branch was under a director who reported to the Board. Usually such reporting was to designated Board members who had special expertise in particular areas.[75] Inter-branch task force projects or special projects requiring extensive consultation between branches are coordinated by the Director-General Special Projects.[76] Thus, the basic staff organization was hierarchical, very much like that of most public service departments. In fact, while it is arguable that NEB staff are not strictly public servants,[77] organizational structures appeared to follow public service practices.

Activity of the various branches related to regulatory matters of all types is co-ordinated through the Director, General Operations, who was also, until very recently, Secretary to the Board.[78] Because he schedules Board meetings, organizes agendas, co-ordinates various public notices, disseminates reports and studies, drafts

summaries for ministerial and Cabinet submissions, oversees the Secretariat which handles routing and filing and because he is the formal contact for regulatory correspondence, the Secretary has occupied a powerful position in the regulatory, and to a lesser degree, in the advisory activities of the Board.

The Law Branch consists of three lawyers who handle counsel work at hearings and advise on issues arising in the course of the agency's activities. The Branch also reviews and supervises preparation of regulations and procedural rules.[79] A member of the Law Branch attends all regular Board meetings. The Branch is consulted extensively on legal aspects of most issues but apparently there is now somewhat less informal involvement with the Board's advisory role than previously.[80]

At the staff level, there is relatively little permanent functional organization that cuts across branch lines. Where necessary, the cross-branch task force technique has been used under co-ordination by the Directors-General, Special Projects, and Planning. However, the recent establishment of a special inter-branch gas policy group to report through a designated Board member may be an indication of future similar developments in other areas.[81]

Board members have, however, formed a number of committees to deal with general issues such as the pricing of Canadian gas in U.S. markets, pipeline safety and environment, northern pipelines and legislation. Members are also assigned to semi-permanent panels on crude oil, oil products and propane and butane.[82] Staff are called upon to advise these committees and panels as required.

It is important to note that NEB members, unlike members of many regulatory agencies in the United States, do not have personal staffs. But because of their assignment to specialized tasks and committees and their designated responsibility for particular branches, certain staff members do spend considerable time working with particular Board members. Perhaps the closest regular working relationships occur between the oil policy branch, certain members of the economics branch and the Board members on the oil, oil products and propane-butane panels. The Directors-General also work very closely with Board members, as do two senior advisers. But on the whole, there is little evidence of intense staff loyalty to individual members and their personal concerns.

The Board meets weekly on a regular basis. At these meetings, presentations are made by senior staff members on most agenda

items. Some matters, including applications issues, are raised directly by Board members. Discussion then takes place on each item, and a consensus among Board members sought. The average length of these regular meetings during our three and a half month observation period was approximately forty-five minutes. A number of additional "quorum meetings", at which formal Board decisions are made, are usually held during any given week.

(c) Regulatory Operations

(i) Procedures for Applications

Procedures for certificate applications,[83] export licence applications and "contested"[84] rate applications are essentially similar. They are outlined schematically in the chart reproduced as Figure 1.[85] Our comments will be brief at this point since we will consider both practices and procedures (as well as relevant policy guidelines) more fully in Parts II and III of this study.

Attention must be drawn to the existence of pre-application consultation with the applicant (step 1), and to post application consultation that occurs through the deficiency process (steps 4 to 10). It should also be noted that two staff members play key roles in processing applications. The staff co-ordinator is responsible for obtaining and co-ordinating staff review, and generally "keeping on top" of the application. The Board's Secretary formally receives the application as well as all relevant correspondence, and directs all formal and most informal communications to applicants. After establishing a timetable for each application, the Secretary oversees the appointment of the staff co-ordinator[86] from the branch that appears most involved, following consultation with the Branch Director.

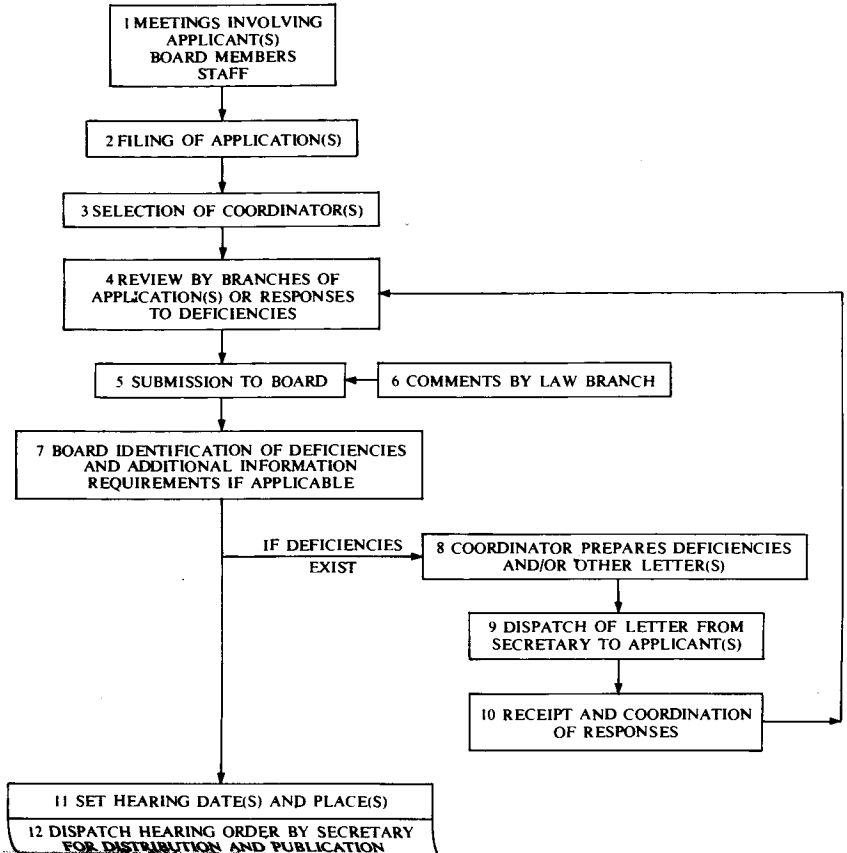
For most major applications, three-man hearing panels are usually established at a Board meeting following approval of the hearing order. For minor or apparently non-contentious applications (which includes a large percentage of electrical applications), a single member normally presides.[87]

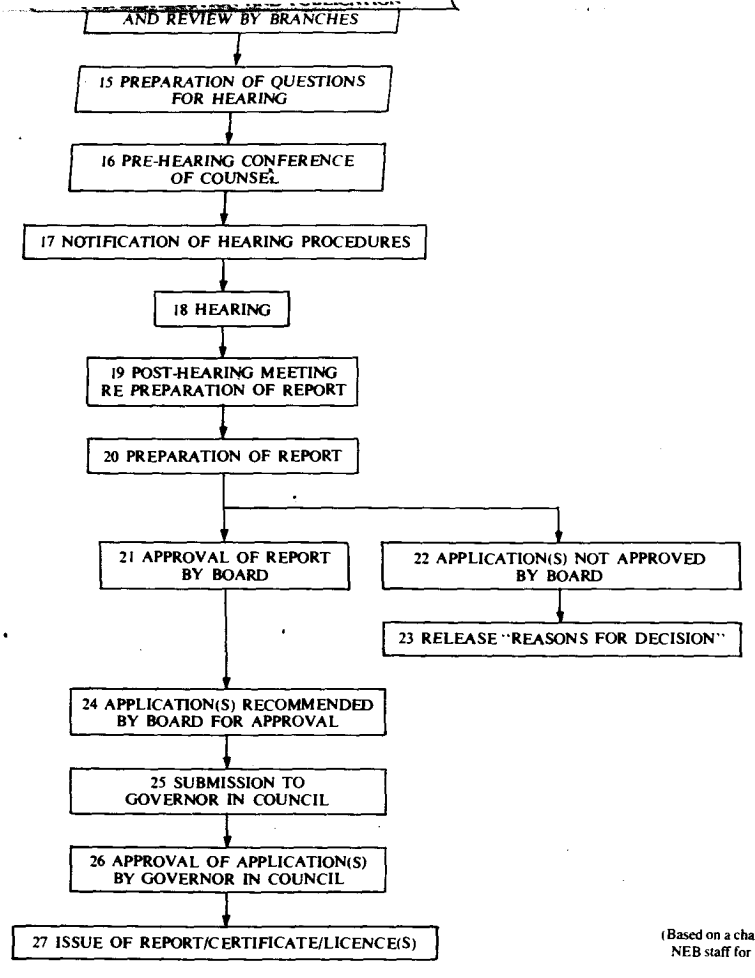
Relatively straightforward contested applications normally require three to five months from the application to release of the decision.[88] But it is important to note that when expedition was considered important, certain techniques were available to speed the

Figure 1

NEB CURRENT APPLICATIONS PROCEDURES
COMBINED CERTIFICATE & LICENCE APPLICATIONS

Applications Procedure
Chart





(Based on a chart prepared by NEB staff for internal use)

process. For example, our research indicates that the formal deficiency letter process may not be used. Instead, informal requests for information (avoiding the word deficiency) will be sent[89] to the applicant. Sometimes the applicant will simply be advised that it will be expected to produce certain information at the hearing.[90] Also, minor deficiencies or ambiguities may be resolved by informal staff contact without formal Board approval of a deficiency statement or informal request.[91] Finally, special procedural rules have been developed to expedite certain proceedings — particularly rate applications.[92]

The number of applications has increased rapidly in recent years. Total numbers of certificates, licences, orders and permits issued by the Board increased 10 per cent in 1972 and 70 per cent in 1973. In 1972 and 1973, totals were 1,311 and 2,485 respectively.[93] The complexity and variety of applications also continued to increase. With the Board's increased oil export regulation responsibilities, totals are bound to show further substantial increases.[94]

The Law Branch member who acts as counsel at the hearing usually plays an active role throughout,[95] beginning with preliminary advice during the staff review and deficiency process. He works with staff in the application review and preparation of questions for cross-examination, and attends the important Board-staff planning and review meeting usually held one week prior to commencement of the hearing. As counsel to the Boards, he calls no evidence during the hearing,[96] but cross-examines largely to clarify issues or to obtain undertakings as to additional information or other activities associated with the proposal in the application. He also advises the Board during the hearing and attends the post-hearing meeting of Board panel and staff as well as certain other deliberations by the panel.[97] The role of the NEB's counsel in the application process is most accurately seen as that of house lawyer advising the hearing panel and staff rather than as "counsel" presenting the staff "case" to the panel of presiding Board members.

Post-hearing meetings are usually held immediately following the close of the hearings.[98] Key issues are discussed with staff and individuals are assigned responsibility for preparation of sections of the report. Sometimes even the argument is written by staff, but the actual "decision" section is nearly always written by the panel members.

Following Board approval, formal review and "noting" at a Board meeting, the report is submitted directly to the Minister of

Energy, Mines and Resources by the Chairman.[99] At the same time, the Secretary sends a copy to the Privy Council Office. If the Chairman judges that policy matters are involved, then prior contact may be made with the Minister. In the latter case, the matter will go to a Cabinet committee and a formal Cabinet Memorandum and précis must be drafted along with briefing notes for the Minister. Occasionally, the Minister may unexpectedly direct a report to a Cabinet committee.

If the Board declines to approve an application, "Reasons for Decision" are released immediately. No Cabinet approval is required.[100]

(ii) Complaints

There is no formal procedure for handling complaints made to the NEB. Proceedings on complaints are referred to in the Rules of Practice and Procedure,[101] but only for the purpose of bringing formal applications for orders arising out of complaints under the basic applications procedure.

A relatively small but increasing number of informal citizen complaints are received by the Board.[102] All complaints that cannot be resolved by staff are passed to the Secretary. He also receives complaints concerning the Board made to Board members, to any Cabinet Minister and to any Member of Parliament.

Response is co-ordinated by the Secretary by passing the matter to the Branch most directly concerned. The matter is then investigated and a recommendation made to the Board. The affected company may be informed and asked to comment. If action by the company is recommended and approved by the Board, an informal written "requirement" will usually be imposed.[103]

It was emphasized by the NEB's Secretary that most complaints are resolved without coming before the Board. Our observation of how the Board considered one citizen's complaint suggests that the attention given is likely to be proportional to the potential for embarrassment should the Board fail to act and the complaint turn out to be justified. This view is supported by the fact that on two occasions well-publicized complaints by farmers, agricultural organizations, municipalities and elected officials led to hearings on applications by pipeline companies for the approval of the route following the grant of certificates.[104]

To conclude this Part, it should be emphasized that the National Energy Board's powers that we have described give it substantial control over the multi-billion dollar petroleum and natural gas industry in Canada.[105] Its specific powers are confined to the regulation of interprovincial and international pipeline construction, rates, exports and imports of oil and natural gas. Direct regulation of exploration and production, as well as marketing, is outside its control. But in practice its authority over transportation and export provide substantial indirect control over the other areas of the industry. The Board, of course, also controls the smaller but also very important exports of the electrical power industry.

In addition, the NEB's advisory function requiring a continuing review of all energy matters within federal jurisdiction has allowed it to play an important policy advisory role in virtually all federal energy activities.

To carry out these functions the Board has a substantial, rapidly growing staff of engineering, economic, financial and legal professionals. Members of the Board are fully qualified, experienced professionals in their own right. Directly responsible to the Board, the staff is organized to provide efficient advice to Board members on matters arising out of applications or relevant to policy advice for the government.

The recent world-wide energy supply problems, coupled with the increasing importance of petroleum and natural gas as Canadian fuel sources is likely to enhance the importance of the NEB's functions in the near future. Its decisions and advice will materially affect the availability and price of petroleum, natural gas and electrical power for Canadian consumers. The Board's advice to government regarding energy policy alternatives is likely to have a significant impact on future Canadian life-styles and quality of life. It is an important tribunal whose decisions directly or indirectly touch the lives of every Canadian.

All of this indicates how very important is the manner in which the National Energy Board develops and implements policy. We examine this in the next part of this study, identifying and assessing major sources of influence on Board policy, procedure, and practice.

PART TWO

Policy Development and Implementation

I. POLICY GUIDELINES FOR REGULATION DECISIONS

The *National Energy Board Act* provides only the most general set of criteria or guidelines for the Board in its consideration of facilities applications under Part III, export licence applications under Part VI and rate applications under Part IV. Criteria are lacking for other types of decision-making authority conferred upon the Board.[106]

On facilities applications, section 44 of the Act enjoins the Board to satisfy itself that the pipeline or power line "is and will be required by the present and future public convenience and necessity...." It must take into account "all such matters as to it appear to be relevant," such as

(*a*) the availability of oil or gas to the power line or power to the international power line as the case may be;

(*b*) the existence of markets, actual or potential;

(*c*) the economic feasibility of the pipeline or international power line;

(*d*) the financial responsibility and financial structure of the applicant, methods of financing the line and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the line;

(*e*) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

Apart from the classification of applications in order to streamline the handling of minor facilities' applications as outlined below,[107] the Board has not laid down more specific guidelines for its decisions. It does, however, rely on generally accepted engineering and financial manuals and practices. It also uses certain technical standards developed by industry or governmental associations.[108] Decisions in previous applications of a similar nature are taken into consideration.[109] But in general decisions continue to be made on the basis of the evidence in the particular application.

Clearly the items listed in section 44 are important. Applicants tend to use the headings in preparing applications and calling evidence. So too does the Board in drafting its reports to Cabinet. Evidence has sometimes been excluded as irrelevant largely on the ground that it could not be said to relate to any of the items enumerated in section 44.[110] Additional matters considered to be relevant, such as environmental impact, are considered under clause (*e*), "any (other) public interest".

Oddly, the matter of public convenience and necessity tends to be treated by the Board and applicants as a separate rather than a comprehensive matter.[111] Applicants usually introduce specific "policy evidence" in order to demonstrate that this criteria is met. This evidence normally concerns such things as the need to satisfy projected increased demand for the relevant energy resource[112] or the economic multiplier that the project will generate in particular areas.[113]

Section 83 of the Act authorizes the Board to grant licences for the export of gas, oil or electrical power provided that it "satisfied itself" that:

(*a*) the quantity . . . to be exported does not exceed the surplus remaining after due allowance has been made for the reasonably foreseeable requirements for use in Canada having regard, in the case of an application to export gas, to the trends in the discovery of gas in Canada; and

(*b*) the price to be charged by an applicant . . . is just and reasonable in relation to the public interest.

In calculating surplus, the Board has always taken the position that any surplus gas or power is *prima facie* exportable. In the case of gas, this was associated with the objective of obtaining a share of U.S. markets for Canadian producers, against cheaper U.S. gas and the Federal Power Commission's (the NEB's regulatory counterpart in the U.S.) resistance to "dependence" on foreign suppliers.[114] Gas surplus determination involves simple deduction of Canadian requirements from total supply to yield "current surplus".[115] The Board's present formula for protection of reasonably foreseeable Canadian needs involves estimating the level of demand expected in four years time and multiplying this figure by a factor of twenty-five.[116]

To the layman these calculations have the appearance of simplicity and precision. This makes it easier to presume that the experts know best. And public concern and possible criticism is probably reduced as a result.

But when a number of questions about underlying information are asked, it becomes clear that these calculations are not entirely technical and mechanical, but involve significant elements of judgment. For example, consider the answers that can be given to questions like what reserve estimates and discovery and deliverability assumptions were used to calculate supply? What is the reliability of supply data; and upon what assumptions should projections of Canadian requirements be made? They are at best "mere estimates or probabilities".[117] This is perhaps best shown by the substantial variations in surplus/deficiency figures for the same periods submitted to the Board by a number of obviously sophisticated companies.[118]

One factor in the determination of total supply that has become critical in recent years is whether or not frontier reserves, especially those in the Mackenzie Delta and Arctic Islands regions should be given some weight. To date, the Board's judgment is that these potential reserves should not be included.[119] This was one of the most important issues under consideration in the Board's gas supply and deliverability hearings.

In assessing the acceptability of export prices, the Board has applied three "tests" that were first stated in the Westcoast Transmission Limited application of 1967.[120] These require that, first, the export price must recover its appropriate share of the costs incurred; second, the export price should under normal conditions

not be less than the price to Canadians for similar deliveries in the same area; and, third, the export price should not result in a cost in the U.S. market materially less than the cost of alternative energy from indigenous sources.

More recently, as a result of rapidly changing United States market conditions, growing Canadian requirements and uncertainties in reserve and discovery, application of these "tests" has become increasingly difficult. The Board has adopted such expedients as authorization of licences for shorter terms[121] and promulgation of a new regulation to permit Board review of export contract prices and establishment of new prices by the Cabinet.[122]

Several other guiding factors can be extracted from the decisions of the Board on gas exports. One is a concern that accessible Canadian reserves could become committed to export so that future domestic demand would have to be met from less accessible higher cost sources.[123] A more general concern is sovereignty — an unavoidable issue when the regulation and control of exports through international pipelines are involved.[124] Another issue — settled for now — has been the suitability of a policy allocating export markets, proposed to the Board but firmly rejected by it. Systems of price regulation at the well-head have also been rejected, but for apparent lack of statutory authority.[125]

These policy guidelines for determination of natural gas export applications were obviously developed by the Board on a case-by-case basis. In the same way, relevant regulations and procedural rules were also adopted *ad hoc* as the occasion demanded. But while these guidelines appear to be very clear and perhaps even quantitatively precise, closer examination shows again that they too are based on a number of underlying matters of opinion about present and future supply and demand conditions.

By 1970, it became apparent that the Board's calculations (using its twenty-five A-4 formula[126] and estimates of reserves and discovery trends) would not in future result in any exportable surplus, unless large new frontier reserves were taken into consideration or Western Canadian development substantially accelerated. And, indeed, no major export applications have been approved since that year. Several applications were denied following major joint hearings in 1971.[127] More recent applications have either been withdrawn,[128] or remain in abeyance.[129]

During this period, industry pressure for additional export approvals mounted, as did producer and producer/province pressures for price increases. A safety valve technique used by the Board to deal with these pressures was the holding of inquiry-type hearings, first on gas export prices in the spring of 1974,[130] and then on supply and deliverability in November of the same year.[131] The price hearings resulted in a report to the Cabinet recommending that the export price be increased to $1 per mcf.[132] This increase was subsequently approved by Cabinet and implemented through licence alterations.[133] The hearings on supply and deliverability permitted the agency to assess its existing policies on surplus calculation, particularly by reassessing the treatment of frontier reserves and the potential rate of development of Western Canadian conventional reserves.

(a) Rule-Making Hearings

Prior to 1970, rule-making hearings[134] on these issues would probably not have been considered necessary by the NEB. The application of criteria and policy that had been developed on a case-by-case basis would then have indicated that exportable surplus existed. And the Board's concern was to ensure that this gas was available to export markets so that the greatest public interest was served. With the industry "booming", few questioned the agency's approach to exports.

However, as supply became tight, the NEB's primary concern shifted to the rapidly growing domestic requirements. The Board found itself between industry pressure for further exports and the interests of the Canadian public in being assured that domestic requirements were protected. The inquiry-type hearings helped to relieve this pressure, by allowing those interested to help evolve within a public forum new policies that could meet the changed conditions. The hearings permitted the industry to make extensive formal submissions outlining its own interests and perspectives. At the same time, the public nature of the hearings allowed industry concerns to be communicated to the public at large. Other interested parties also had an opportunity to place their views before the Board and the public. The NEB was as a result able to say that all interests and views had been fully, fairly and openly heard and considered.

A more fundamental purpose underlay the inquiry-type hearings on oil exports. The Board's regulatory jursdiction over oil began in 1970.[135] Until then, since oil (unlike gas or electrical energy) had been exported under short term, small-quantity contracts, it was thought that an attempt to regulate particular exports would be administratively difficult and unduly disruptive.[136] However, unstable market conditions had by 1970 led to extension of the Board's regulatory power to oil, although no mechanism for crude oil export control was established at that time.[137] The Board had fortunately already developed a sophisticated system for obtaining and analyzing the information necessary for making reliable projections of oil supply and demand in various industrial sectors and regions.

The eventual imposition of export controls on crude oil was not, however, a major disruption for Canada's energy regulators. In 1961, the Government's "national oil policy" established the Ottawa valley as the eastern boundary for the supply of western Canadian crude oil.[138] Quebec and eastern Canada were to continue to rely on imported crude. The development and construction of the interprovincial pipeline system for oil had been completed in conformity with this policy. Later, the NEB developed an informal "nomination" system to promote market stability, with the co-operation of the Canadian industry and the few U.S. refiners dependent on Canadian crude oil.

When attractive export market conditions in 1972-73 (caused by removal of the U.S. import quota) and uncertainty in foreign imports led to export controls on crude oil, this action involved little more than formalizing an existing informal system. And a little later, when these controls were extended to oil products, the NEB's existing information system allowed it to assume the task with an established competence.

The introduction of these regulations was smoothed by extensive consultation involving government and departmental officials, Board members and staff, and representatives of the Canadian and U.S. industries. The vehicle for much of this consultation was the Technical Advisory Committee on Petroleum Supply and Demand.[139] This Committee, composed of representatives of government and industry but chaired by a member of the National Energy Board, performed important advisory functions for the government and the Board during the critical transitional period following implementation of the petroleum export regulations.[140]

The Board was as a result well informed of industry views when the new export regulations were introduced. Its knowledge of public views on the subject was, however, much less. As might be expected the NEB also lacked established and generally acceptable formulae for calculating surpluses like those that had been developed in the Board's decision on natural gas export applications. General hearings on oil export were considered desirable then to hear views on policy issues and to obtain "relevant and trustworthy facts and opinions" to assist in the development of an export formula.[141]

The hearings were announced by the Minister when he tabled the amendments to the Part VI Regulations that implemented formal oil export licence requirements. Consequently, the hearings were considered by the NEB to be at the Minister's request, as provided for by section 22(2) of the *NEB Act*. As a result, the Board's report was not released before submission to the Minister and consideration by Cabinet, the hearings being part of the agency's advisory function.[142]

The hearings themselves involved oral submissions by parties to supplement previously filed written briefs[143] and in reply to briefs filed by other parties. Participants were requested to limit the scope of their submissions to nine matters set out in the hearing order, although in fact considerable leeway was given. Each party was also allowed to submit one written statement in rebuttal.

Witnesses were sworn in the usual way, but following their oral submission were cross-examined only by NEB counsel on both the oral submission and the previously filed written brief. Members of the Board panel then questioned the presentor. In the absence of full cross-examination, members of the Board panel considered it appropriate that they question extensively and take strong positions on certain issues in framing questions.

A wide range of interests were represented, including oil and pipeline companies, petroleum associations, allied industries, provinces and "public interest" groups. In all, the NEB received 56 submissions.[144]

The present policy on oil export applications involves the same basic guidelines as those for natural gas. However, the technique is different. Licences are for shorter periods, initially one month. Surplus calculations are made each month and licences are approved for the quantity calculated to be surplus to Canadian needs, again, provided

the Board is satisfied that the prices are "just and reasonable". These determinations are made by semi-permanent three-man Board panels, comprised of members with special expertise in the petroleum area. There are now three such panels, one dealing with propane and butane, and two with oil, one with crude oil and the other with petroleum products. Panel decisions are decisions of the Board, each panel formally reporting monthly to the full Board. These reports are "noted" and any issues of general policy arising discussed.[145]

Decisions by one of these panels to deny export applications in October of 1973, led to the *Export Tax Act*[146] that imposed an export tax (the difference between the domestic price and the export price). This led in turn to the proposed *Petroleum Administration Act*[147] with its permanent export charge provisions. Through the series of developments that led to the export tax, the NEB in its advisory capacity worked very closely with the Minister of Energy, Mines and Resources and other interested federal departments and agencies.

In the course of debate on another government measure to deal with the oil supply situation in late 1973, the *Energy Supplies Emergency Act*, the Prime Minister reiterated a previously announced government decision to extend the existing oil pipeline system to Montreal.[148] The effect was to declare in advance that the pipeline proposed in the subsequent application by Interprovincial Pipe Line Limited to extend the line from Sarnia to Montreal was required because of "present and future public convenience and necessity".[149] The problem this approach guideline created for the NEB's regulatory process is considered more fully below.[150]

In summary, it is fair to say that the concept of rule-making hearings on policy issues of a general nature to assist in the establishment of guidelines for NEB decisions has gained considerable popularity with Board members. Stimulating factors have been market conditions and potential shortages in supply for domestic requirements that have awakened the Canadian "public interest" from its peaceful slumber through the golden age of export in the late 1950s and early 1960s. During that period, the only problem for the NEB was to ensure that reasonable benefits accrued to the public from energy exports. Since domestic prices were low and supply no problem, there were few complaints. Recently, however, changing situations have exposed the agency more and more often to the glare of publicity and many of its decisions of the 1960s have returned to haunt it.

One solution adopted by the NEB to cope with resultant pressures has been to place issues on the public record and in public view through rule-making or inquiry-type hearings. Industry is given a forum to publicize its concerns, and so too are "public interest" groups. The method has proven so satisfactory that a special "rule-making hearing" was initially suggested for a TransCanada PipeLines Limited rate application requesting an advisory ruling on inclusion in its rate base of costs incurred in research on a major coal gasification project.[151] The Board considered that this was a matter of general policy about which views of interested parties might be sought. But in this case it was ultimately decided, because of the rarity of applications of this type, to hear the rate application alone. Nevertheless, we think the Board will very likely continue to make considerable use of rule-making hearings to inquire into various general subjects within its regulatory jurisdiction.[152]

(b) New Decision Criteria: Environmental Impact

Rule-making hearings are an example of the NEB's response to rapidly changing supply and requirements considerations for particular energy resources. The agency has also been forced to respond to changing social conditions and attitudes.

One example is the development of environmental impact criteria. During the 1960s there was little concern among the Canadian public about environmental disturbance caused by energy-related activities like pipeline and international power line construction and operation. There was even less concern about energy conservation.

However, by 1970, both conservation and environmental issues had gained considerable public attention. Interest groups concerned with these issues had by then achieved a fair measure of public influence. At the federal level, a Department of the Environment was created in 1971,[153] and an apparently impressive list of environmental protection legislation passed[154] or proposed.[155] Inevitably, environmentalists began to look at the National Energy Board and its activities.

The result was, beginning in 1971, modest numbers of interventions by various conservation and environmental groups in NEB regulatory proceedings.[156] At first, these groups were merely

tolerated and their evidence largely disregarded.[157] Later, however two factors became apparent. First, these environmental groups had the potential capacity to delay or disrupt Board regulatory proceedings, yet their exclusion would probably result in damaging public criticism of the Board.[158] Second, the public had increasingly become concerned that attention be given to mitigation of environmental damage caused by energy-related activities. The government had recognized this concern by creating a Department of the Environment.[159] There was danger that this Department's environmental protection jurisdiction would seriously impinge on the Board's regulatory mandate. These concerns and conflicts came to a head in the proposals for massive northern oil and gas pipelines that were under development by industry in the early 1970s.[160]

Northern oil development raised many policy issues of major importance. Several senior-level inter-departmental committees and task forces were involved in considering these issues. One of the sub-committees of the main task force was concerned with related environmental and social issues.[161] It was this group that drafted the Northern Pipeline Guidelines of 1970 and the revised guidelines of 1972.[162] These specified that the National Energy Board would ensure that any applicant seeking a certificate for a proposed northern pipeline must document the research conducted and submit a comprehensive report assessing anticipated effects of the project on the environment.[163] In addition, any certificate issued would contain strict conditions concerning specified aspects of environmental protection.[164]

Subsequently, in 1972, with the NEB's competence to consider and assess environmental issues under attack by environmental interests,[165] the Board declared in a considered power export application[166] that environmental considerations were within its jurisdiction. The panel stated that:

> The Board considers that its environmental responsibilities in relation to the present application are two-fold. Firstly, it should satisfy itself that the production of any power that it may licence for export would not cause pollution in excess of the limits set by those agencies with primary responsibility. Secondly, it should examine the anticipated benefits from the export of the power in relation to any likely adverse environmental impact on the community to satisfy itself that the export would result in a net advantage, not merely to [the applicant], but also to Canada.[167]

In the Lorneville application, environmental advice was provided to the Board outside the hearing by an interdepartmental task force with a heavy input from the Department of the Environment.[168] Later, an

environmental advisor was seconded to the Board from the Department.

In 1973, following study by a staff task force, the Board established a new Environmental Group within its Engineering Branch to be led by an assistant director. There were at the time of writing three staff members in this group and it was intended that it should grow. The group was given responsibility for reviewing and commenting on environmental evidence filed by applicants as well as providing more general advice to the Board and to the Minister on environmental issues. No "in-house" environmental review division including all relevant disciplines and skills was to be developed at the Board. Rather, the group was intended to use the staff of other federal departments and agencies with environmental responsibilities to obtain expert opinions and information. Nor was the group directly to be engaged or assist in the enforcement of environmental legislation administered by other federal departments and agencies.

This latter limitation apparently arises because of the NEB's Law Branch view of the Board's statutory jurisdiction. Further, the NEB's lawyers have also advised that while the Board has jurisdiction to take environmental matters into consideration in facilities and export applications, and in imposing conditions on these, the limit of its jurisdiction is reached if it purports to deny an application solely on environmental grounds. In the Law Branch's view, this would amount to failure to take other relevant matters into consideration and therefore would be a decision based on a "wrong principle".[169]

The Environmental Group was also advised that there is adequate authority under the Part VI Regulations[170] and the NEB's Rules of Practice and Procedure[171] to demand environmental impact information from applicants. However, for greater certainty and to inform prospective applicants clearly, a specific environmental information requirement has been added to the Part VI Regulations.[172] More recently, similar requirements were also approved by the Board for Parts I and II of the Schedule to the Rules of Practice and Procedure.[173] In addition, the Environmental Group has developed draft guidelines for environmental information. These will not take the form of rules or regulations but are intended to provide applicants with informal working guidelines for submission of information. These draft guidelines were extensively discussed with industry representatives and groups, and with interested departments and agencies before their initial trial in the application by

Interprovincial Pipe Line to extend its pipeline from Sarnia to Montreal.[174]

Applicants did not adjust quickly to the new environmental requirements. Quality of information was initially poor, causing, for example, a lengthy adjournment in the Interprovincial Pipe Line Limited Case.[175] In other cases, the Board has required supplementary environmental information to be provided following the close of the hearing and has included reporting conditions in certificates.[176] Environmental information also has been a major component of most of the deficiency letters sent by the NEB recently to applicants for the facilities.

There was, at the time of writing, concern within the NEB that these requirements were not being taken seriously by applicants. The approach still seemed to be to design the facility first, then to assemble evidence later that attempted to establish environmental acceptability.

II. ADVISORY/REGULATORY CONFLICT

The NEB's advisory duties under Part II of the Act[177] are recognized as a source of problems by Board members, staff and virtually all representatives of the participating interests we interviewed. In fact, this is the one aspect of the agency's activities on which anything approaching a clear consensus emerged. All agreed that the advisory function raises serious potential for partiality or political influence, or the appearance of these in the handling of particular applications by the NEB.

The original reason for combining the direct advisory function with adjudicatory regulatory duties was understandable. Why not tap the rich source of information that would inevitably be developed in the course of regulation for its potential in providing policy advice to Government.[178] Nevertheless, this was apparently a difficult concept to sell to the Department of Justice in the drafting stage. That there was no other government department generally responsible for energy matters at the time that could provide policy advice seems to have been the prevailing factor.

When the Department of Energy, Mines and Resources was eventually established,[179] its advisory functions substantially over-

lapped the NEB's. Inevitably, some competition for the Minister's ear seems to have resulted. In the event of conflicting advice, the matter is normally sorted out by the Deputy Minister of the Department of Energy, Mines and Resources and the Chairman of the NEB.

The range of activities that fall under the NEB's advisory function is wide. The agency has been closely involved in the development of major government policies such as the national oil and power policies, as well as the more recent oil export tax and natural gas export price increases.[180] In the latter, the Board undertook an inquiry including public hearings, and then compiled a report for submission to the Minister and consideration by Cabinet.

More often, however, the advisory function seems to be exercised through senior Board members, sometimes supported by NEB staff, simply meeting with the Minister and his staff, just as senior officials of departments do in similar circumstances. Sometimes important staff studies such as the Long Term Energy Forecast of 1969 or the Report on Potential Limitations of Canada's Petroleum Supply of 1973 form the basis for these meetings. The agency even reviews drafts of ministerial press releases on matters arising out of NEB activity. A regular briefing memorandum is also prepared by the agency's staff and communicated to the Minister through Board members. This is in addition to considerable two-way informal communication on issues as they arise. Finally, Board studies and reports of a more routine nature are sent directly to relevant departments, including Energy, Mines and Resources, for their internal use.

Another sphere of advisory activity involves participation in a wide range of interdepartmental committees and task forces by Board and staff.[181] As already indicated, some of these activities relate directly or indirectly to specific applications either anticipated or already before the Board. The extensive pre-application advisory activity by the Board in Interprovincial Pipe Line Limited application for the Sarnia - Montreal oil pipeline extension is discussed in Case Study No. 2.[182]

Some of these advisory activities are international in nature, such as participation on NATO and OECD energy committees. Liaison is also maintained with the energy attaché in the Canadian embassy in Washington, as well as with major U.S. regulatory agencies like the Federal Power Commission.

As the range of energy-related issues has expanded in recent years, so have the NEB's activities on interdepartmental committees and task forces. Thus, in the early 1960s the direct advice functions of the Board related to matters within its regulatory jurisdiction which also covered much of what was then regarded as national energy policy. This is no longer so, given the increasing importance of atomic and other energy resources, off-shore exploration, tar sands development, government participation in energy exploration and development, federal-provincial tax and revenue sharing considerations, international relations' problems and a host of other issues. Quite apart from any conflict with Energy, Mines and Resources, arising from similar advisory functions, it is apparent that many current issues require specialized information and advice from many departments and agencies. So it is that the Board often finds itself as part of a policy advice committee or task force rather than the sole or principal advisor.

Advisory functions absorb a substantial part of the time of some Board members. It appears that most of these duties are handled by an "élite" group consisting of the Chairman and senior members, as well as other members possessing relevant specialized knowledge. A considerable amount of status within the agency appears to flow from participating in advising ministers and shaping interdepartmental policy. A good deal of apparent power is also associated with personal success in these advisory roles.

Within federal government departments this policy advice function would cause no particular problems. Senior public servants provide policy advice directly to ministers and keep themselves informed of relevant political considerations at the same time. The more direct and prolonged the ministerial access, the greater the prestige and presumably the power of the public servant. Good advice is politically viable advice. Successful advisors have understandably developed acute political sensitivity and the ability to screen out elements of their advice that may be affected by partisan or "positional" considerations or be out of tune with a Minister's personal preferences given past statements and performance.

However, success in mastering the advisory role may, in a National Energy Board member, profoundly affect the member's ability to carry out adjudicative regulatory functions in a completely impartial manner. His instinct could well be for the "politically viable" decision, if more general policy considerations were involved. In any event, he would probably already have played a role in providing advice to

government on these more general policy issues. Sometimes, as in the case of the Sarnia - Montreal pipeline extension, the subject of the application is itself a previously decided element in general government policy.[183]

It is not surprising that concern has been expressed by representatives of many of the interests participating in Board proceedings about the very nature of adjudication that allows it to be influenced by the advisory activities of Board members. It has been suggested that the NEB is likely to make decisions based on members "political insights" even when there is no suggestion of direct or indirect consultation with the Minister on a particular application. Furthermore, some observers believe that Board members probably see nothing wrong with this situation because of a tendency to judge their behaviour in terms of public service policy advisors rather than "quasi-judicial" decision-makers. All agree that wide-spread suspicions generated by the combination of functions, whether well-founded or not, are extremely damaging to the NEB's credibility as an adjudicator.[184] This in turn can reduce public as well as industry confidence in the Board and impair its ability to exercise its statutory mandate effectively.

III. INFLUENCES ON POLICY AND REGULATION

(a) Minister and Cabinet

Few NEB members admit that the Board in any way makes policy. That, it is said, is the sole prerogative of the Minister and his Cabinet colleagues. The Board merely advises and administers previously established policies.

But what are these previously established policies? The answer given is that they include guidelines laid down in the Act such as "present and future public convenience and necessity" under section 44, surplus to Canadian needs and "just and reasonable" export price under section 83, as well as general government policy statements such as the national oil policy and the northern pipeline guidelines.

It is clear that the extremely general nature of these guiding government policies leaves considerable scope for policy formulation by the Board through decisions in particular applications and through

interpretation in the establishment of procedures and standard conditions. There can be no doubt that the Board makes policy, for example, when it decides in the context of an export application whether or not to consider frontier discoveries in making its reserve calculation,[185] or whether to require a twenty or twenty-five year protection factor.[186] Similarly, it makes policy when it approves guidelines that require applicants to submit certain kinds of environmental impact information in specified form.[187]

It is equally clear, as has been described, that the Board plays a substantial role in the initial development of major general policies such as the national oil policy. In this regard, it functions in precisely the same way as a highly competent and influential federal government department. In the shaping of major government energy policies, the Board often does considerably more than merely provide advice. An important source of its strength is industry-derived information and expertise, which for petroleum and natural gas, exists nowhere else in government.

Generally, then, Board and Cabinet appear to work as a policy-making team. While not co-equal, the Board may be likened to a very capable, experienced and highly informed senior aide whose advice can be regarded as highly reliable. Often, as indicated above, the Board works as part of a team of such "aides" when issues with wide ramifications are under discussion. But it remains supreme within its own area of expertise.

Still, the question remains — are there circumstances in which the Minister or the Cabinet exercises the privilege of ignoring NEB advice or simply making decisions without advance consultation? In particular, does the Minister or Cabinet ever take initiatives on regulatory matters before the Board?

Occasionally, the Board has complained about a lack of consultation on matters affecting its mandate. A recent example concerns revisions to the *Petroleum Administration Act* that were rushed by the Department of Justice through the stage at which comments are normally made. Although a tight legislative schedule was the cause, this prompted complaints by several Board members. Normally, however, the strong inter-personal abilities of chairmen and senior Board members,[188] as well as a proven record of policy advice have ensured full consultation and usually extensive reliance by Cabinet in deciding issues that touch the Board's jurisdiction.[189]

Nevertheless, it seems that Cabinet would and has pre-empted NEB regulatory decisions in certain circumstances. This has occurred when a policy has been enunciated by Cabinet that requires for its realization the construction or modification of specific facilities within the Board's jurisdiction. Perhaps the best examples are the Montreal oil pipeline extension[190] and the Mackenzie Valley gas pipeline.[191] Other lesser known examples include the first application considered by the NEB — the original Trans-Canada PipeLines Limited application.[192] The Government had already concluded an agreement with the company that the costly northern Ontario section of the line would be built by a federal Crown corporation but then leased back to TransCanada with provision for early purchase. Similarly, the application by Interprovincial Pipe Line Limited for an additional line to Buffalo, New York in 1961[193] was considered following a statement by the Government proposing increased export of oil to the United States. More recently, there were strong indications that government policies favoured the expansion of Alberta petrochemical industries and a pipeline to eastern Canada prior to the Dow Chemical ethylene export application.[194]

In the 1966 Great Lakes extension application[195] by TransCanada PipeLines Limited, the NEB initially approved the proposed main line extension through the United States despite strong public sentiment against a U.S. line, a competing "displacement" proposal and opposition from Northern Ontario communities which favoured a route through their area. However, the Board specifically recognized in its report to Cabinet that there were other "political considerations" that Cabinet might wish to take into account. Cabinet did, and at first denied approval. Later, following extensive direct consultation by Cabinet officials with industry, provincial government officials and the NEB in its advisory capacity, approval was granted on condition that at least 50 per cent of gas destined for eastern Canadian markets would be carried by the existing northern line.[196]

Obviously, then, the power of approval retained by the Cabinet in certificate and licence applications is no mere formality, but part of a joint Cabinet-NEB policy-making process. This has been particularly evident in "pioneering" applications. Where the consequence of any particular application, whether for facilities or export is the opening up of major new energy markets, domestic or foreign, or major new sources of energy supply, the basic "go" or "no go" decision becomes a matter of government policy. In these situations, a policy decision is normally made by Cabinet following consideration of NEB advice prior to resolution of the initiating application by

the Board. In hearing and determining such an application, the Board then concentrates on the details of technical, financial and economic feasibility.

This is not to suggest that Cabinet actually dictates the details of decisions on applications. The recent Interprovincial Pipe Line case[197] shows plainly that applications may be delayed or even rejected on technical, financial or economic grounds. However, assuming financial and engineering details are in order, the fundamental question of whether the proposed project is in the public interest will have already been determined by Cabinet. Once a "pioneering" application is approved and implemented, later applications relying on the same market or supply area will, barring special circumstances, be determined by the NEB without specific Cabinet consideration.

Given the working relationship between Cabinet and NEB, it might be expected that Cabinet ministers would confer directly with members of Board panels while applications were pending. But we found no evidence of this practice. Nevertheless, many persons associated with both industry and public interest groups stated when interviewed that they suspected that such consultation does in fact take place. They pointed to the convenient avenue of contact provided by the Board's advisory function; to the Interprovincial Pipe Line Sarnia-Montreal extension and Canadian Arctic Gas pipeline applications; as well as to the practice of releasing NEB reports to Cabinet on applications, only following final Cabinet approval.[198]

(b) Other Federal Departments and Agencies

We have already suggested that the NEB, in its advisory capacity, functions very much like a federal department. In doing so, it often acts as a member of an advisory team consisting of representatives of various federal departments and agencies. At risk is the possibility that Cabinet might act on advice from elsewhere that affects the NEB's statutory mandate or advisory role. A possible example was the Government's decision to allocate prime responsibility for regulation of northern petroleum and natural gas exploration and production to the Departments of Indian and Northern Affairs, Energy, Mines and Resources.[199] In many areas, the Board may find itself actively competing for the ear of the Minister with the Department of Energy, Mines and Resources. Yet there is no

evidence that the Board has lost much of its original pre-eminence in petroleum, natural gas and electrical power matters. For some matters peripheral to the Board's basic regulatory duties, such as OECD activities, other departments have assumed responsibility.

Most contact between the NEB and departments occurs at the staff level to secure specific information or expert opinion. This is then fed into the making of NEB regulatory decisions through the staff advisory process outlined in Part I. As a rule, other departments and agencies do not formally intervene in Board proceedings.[200]

Formal departmental intervention is, however, quite possible and has been actively considered by several departments.[201] Where wider policy issues emerge from particular applications, the views of interested departments are often expressed through inter-departmental task forces reporting directly to Cabinet.[202]

Generally, the Board is insulated from policy intervention by federal departments and agencies for matters that fall within the NEB's statutory mandate. Occasionally, however, an issue involving the Board and a federal department must be resolved by Cabinet. An example is the recently approved federal policy on environmental impact assessment initiated by the Department of the Environment.[203] The NEB declined to be bound by the Department of the Environment's proposed screening and review process. As a result, the Cabinet directive approving the process merely stated that Crown agencies such as the NEB should be invited but not required to participate in it. As already noted, the Board has decided to develop its own procedures for environmental impact assessment.[204]

(c) Industry

The NEB's contact and consultation with the energy industry in general, and with regulated companies in particular is extensive and continuous. This relationship is described in more detail in Part III. As a result, it has been suggested by some commentators that the Board has become the "captive" of the industry that it is intended to regulate.[205]

There is no doubt that the Board is in close contact with the industry. But this relationship requires explanation. First, it is clear that the industry cannot dictate NEB decisions on particular applications. The Board attempts to maintain a judicial posture on

applications, and is sensitive to allegations of bias or influence. And this approach appears not to be affected by movements of Board members to and from industry which in fact are rare. Most members have industry experience. This reflects the intention of our legislators to appoint members who are experts in various aspects of the energy industry.[206] Furthermore, is there any better source of expert knowledge about the petroleum, natural gas and electrical power industries than within the industries themselves?

Much of the NEB's regulatory information comes from the industry. But it is not a case of complete Board reliance on information prepared and interpreted by industry.[207] Both use the same source — basic drilling and production data that producers are required to compile by federal and provincial law.[208] Information about the industry is obtained through NEB-designed questionnaires and circulars.

There seems to be little doubt, however, that Board members' perspectives, perhaps shaped by experience and training, largely coincide with those of industry officials. All tend to view the rules of the game in very much the same way. There are no Board members with overriding radical views of the public interest or humanist approaches to energy issues. The same unstated assumptions concerning energy development and use seem to be in the minds of both groups. Issues tend to be framed in technical terms with which both sides are comfortable. To a significant degree, and perhaps of necessity, all speak the same industry dialect.

But there is one critically important perspective in Board members that is not matched on the industry side. That is the previous experience as public servants of most members. Apart from industry experience, their outstanding career characteristic has been their employment in various government departments and agencies. Four were formerly senior staff members of the NEB, another sat on the provincial regulatory agency, the Chairman served with the Canada Development Corporation and the Privy Council Office, and the Vice Chairman was associated with several federal departments before commencing his long career with the Board.

When this experience is seen against the regular contact that Board members have with the Minister and senior officials of various departments through the advisory function, its relevance becomes apparent. Such experience may also explain why within the NEB participation by Board members in the "ministerial aide" role is important for enhancement of personal status and prestige.

The point is that it is not particularly meaningful, except perhaps in terms of "attitudes", to discuss direct industry influence on the Board and its members. Industry influence must be understood in the context of the Board's relations with the Cabinet and its senior departmental advisors. In its relations with industry, the Board is guided by what it conceives to be the views of the political decision-makers. For example, since Cabinet had given approval in principle, it participated directly in discussions with Interprovincial Pipe Line Limited on the proposed oil pipeline extension to Montreal.[209] On a routine facility or export application, the Board is likely to adopt a more "judicial" posture, but always in accordance with perceived political sensitivities and concerns.

For Board members, however, an industry perspective is but one factor in their policy making roles. Rather than speculate about industry capture, it is probably more significant to observe that the Board more often views the world through the eyes of the executive branch of government than of industry.[210]

(d) The Media

There is little doubt that the NEB is both interested by and sensitive to media exposure. This was particularly obvious during the Dow Chemical and Union Gas cases when the agency received extensive coverage. Each critical article or comment found its mark at the Board. And with good reason. Editorials criticized the "cosiness" and unseemly haste of the hearing arrangements made for Dow Chemical,[211] and speculated that the NEB had acquiesced in a politically motivated government decision.[212] Columnists happily observed that the Board was being taken to court "for the third time this year".[213] Between July 16 and 31, 1974, alone, the Toronto *Globe & Mail* carried six items on the agency and the Dow Chemical case, including one highly critical editorial. Between August 14 and August 16 of the same year, the *Globe & Mail* contained seven items about the NEB including two full columns by Ronald Anderson, and one editorial — all critical. This exposure seems to have weighed heavily in the Board's decision not to join Dow Chemical in its appeal against Mr. Justice Cattanach's ruling.[214]

Despite the fact that internal NEB documents have occasionally found their way to journalists' desks,[215] the agency's relations with the press have generally been good. Part of the reason for this appears to be the respect that most members and staff hold for some reporters

covering energy matters, particularly those associated with the Toronto *Globe & Mail*. The NEB's addition of an information officer in April, 1974, may also be a factor.

Generally, though, like all good senior ministerial aides, most members prefer to maintain a low profile in the media. And if there is to be exposure, it is best if managed. An example is the report of Energy, Mines and Resources Minister Donald Macdonald's statement on October 21, 1974,[216] that oil exports to the U.S. might have to be reduced to protect future domestic supplies. This was viewed as a "good" report since it softened the blow of the forthcoming oil export report for industry and the U.S. government.[217] Considerable care is taken at times even by Board members themselves in drafting or reviewing press releases both for major regulatory decisions and for policy statements to be released by the Minister.

(e) Public Interest Groups

It is difficult to point to examples of influence by public interest groups on the Board's practice, procedures and policies. Establishment of the Board's environmental group may have been in part a response to pressure by environmental interests.[218] However, it was also a response to expanding environmental activities of the Departments of the Environment and Indian and Northern Affairs. The Board's view that its scope of inquiry on applications must extend to environmental effects was developed through a series of decisions on applications that involved little or no participation by public interest groups.

The real contribution of these groups appears to have been in forcing Board members seriously to consider the wider public interest implications of NEB activities. One result has been that considerable internal discussion has focused on strategies for "dealing with" public interest advocacy. But there has also been serious reconsideration of procedures and policies with a view to ensuring that public interest parties can participate fully and effectively in Board processes. The concern about the effect of the peripatetic nature of the natural gas supply hearings on modestly funded public interest groups is one recent example. Another is informal discussion concerning the possibility of funding or materially assisting certain public interest participants in Board hearings. It is possible that this discussion and self-appraisal may eventually produce attitudes and procedures more favourable to such significant but largely unorganized interests as consumers and conservationists.

(f) Judicial Review

Until recently, the Board has been remarkably free of judicial intervention. Prior to 1974, there were a small number of court actions resulting from NEB proceedings, but the agency either prevailed in the result or the issues did not involve its regulatory powers. A review of the cases suggests that the influence of judicial review on NEB policy, procedure and practice was not significant until the August, 1974, decision of Mr. Justice Cattanach, in *A.G. of Manitoba v. National Energy Board (Dow Chemical)*[219].

In the first case involving the NEB, the Supreme Court of Canada reversed an order by the agency declaring that it had sole jurisdiction to determine compensation payable in respect of any mines and minerals affected by a pipeline.[220] The Court held that section 72 and related provisions of the *National Energy Board Act* authorized the NEB to award compensation to owners, occupyers or lessees of mines and minerals payable by a pipeline company only in respect of those mines and minerals lying under the pipeline and related facilities or within 40 yards of the line. This first judicial test of the *NEB Act* concerned powers that are not at all critical to the agency's regulatory functions.

The next three cases involved constitutional issues. In *Caloil Inc. v. Attorney General of Canada (No. 1)*,[221] the applicant was an importer of motor gasoline intended for consumption on both sides of a north-south line in Ontario and Quebec established by regulation under Part VI of the Act.[222] The regulation limited the definition of "oil" for the purposes of the Act to motor gasoline.[223] The NEB was authorized to issue licences for importation of motor gasoline only east of the line and to make such licences subject to the condition that such gasoline could not be transported or delivered for sale west of the line without its consent.

A declaration was sought that Part VI of the Act and the regulations were *ultra vires* in so far as they affect the importation of motor gasoline without restriction as to market. The Exchequer Court held that Part VI was valid federal legislation as regulation of international trade. However, the regulation authorizing the NEB to prohibit licensees from transporting motor gasoline from east of the line westward into Ontario did not purport to regulate importation into Canada. Nor could it be regarded as an integral part of the law regulating international trade as such. And so the Court granted the declaration.

Following the decision in *Caloil (No. 1)*, Cabinet on the Board's recommendation, amended the Part VI regulations. A new regulation was added authorizing the NEB to issue licences to import oil for consumption "in the area of Canada specified therein, in such quantities, at such times, and at such points of entry in Canada as it may consider appropriate".[224] Under this regulation, the agency refused certain applications to import motor gasoline into parts of Ontario, and required importers to declare that gasoline would be imported into the area specified, as a condition of licences to import into other parts of Ontario.

Caloil again challenged these regulations in the Exchequer Court. But the action was dismissed,[225] as too was an appeal to the Supreme Court of Canada.[226] Since the objective of the regulation was import control of the particular commodity in order to encourage development and use of Canadian energy resources, the Supreme Court held that it was a necessary administrative aspect of an extra-provincial marketing scheme.

Constitutional grounds also formed the basis for an attack on the agency's rate-making authority by intervenors in the first TransCanada PipeLines Limited rate application.[227] The plaintiffs were Ontario utilities — customers of TransCanada — whose pre-existing contracts with TransCanada would be affected by any rate determination by the NEB.

A declaration was sought that sections 50, 51, 52, 53, 54, 61 and 97(1) of the *NEB Act* were *ultra vires* in that they purported in part to regulate the price of gas sold and delivered wholly within a province. It was further alleged that the Board had no jurisdiction to affect prices fixed by the contracts between Ontario utilities and TransCanada.

Satisfied that the *NEB Act* is valid federal legislation within sections 91(2) and (29) and section 92(10)(*a*) of the *British North America Act*, the Exchequer Court dismissed the action.[228] The Court held that the NEB's power to regulate charges by carriers even for transactions fully within a province is an integral part of the overall regulatory scheme as established by its enabling Act. Also sustained was the agency's power to affect existing contracts prospectively by establishing higher selling prices than those originally agreed to by buyers and sellers.

Since the Board proceeded with the hearings on TransCanada's rates pending the outcome of the court proceedings,[229] and given its

result, this litigation did not cause delay. The case clearly confirmed the Board's authority to establish "just and reasonable tariffs and tolls" for Canada's major natural gas transporter, TransCanada PipeLines Limited.

There has never been a successful appeal from a decision of the NEB on a certificate or export licence application or a rate application. In *Soo Line Railway Company v. Matador Pipe Line Company*,[230] the Supreme Court of Canada dismissed without reasons an appeal by Soo Line (a CPR subsidiary) against the granting of a certificate of public convenience and necessity to Matador.[231]

More recently, following amendment of the *NEB Act* to provide an appeal on questions of law or jurisdiction to the Federal Court of Appeal upon its leave,[232] three applications for leave to appeal have been heard. All were denied.

Saskatchewan Power Corporation was denied leave to appeal the NEB's decision on Phase II of the 1973 TransCanada PipeLines Limited rate application.[233] This decision approved tariffs and tolls calculated by using the rate base, rate of return, and cost of service fixed by the NEB in its Phase I Reasons for Decision. The agency rejected TransCanada's proposed separation of its facilities into an "eastern system" and a "western system" for purposes of allocating transmission costs and directed that rates be set for a single integrated pipeline system.[234] The result was disadvantageous to Western gas users, including Saskatchewan Power Corporation.

The Federal Court of Appeal found no arguable question of law in the notice of appeal. Nor were there any questions of jurisdiction or an absence of evidence raised by the pleadings. The court could not see any error of law in the decision to determine rates based on an integrated system on the facts found by the NEB. The decision of the agency did not result in different charges for traffic "carried over the same route" in harmony with section 52 of the *NEB Act*.

In *Consumers' Association of Canada and Pollution Probe v. National Energy Board*,[235] the applicants sought leave to appeal alleging that the NEB had declined jurisdiction by failing to take a relevant matter into consideration. Here, the Board had rejected the applicant's evidence on the social costs imposed on Canadians by a proposed Ontario Hydro power export.[236] It was argued that this means there was then no evidence about social costs on which the Board could base its assessment that Hydro's proposal was "just and reasonable in relation to the public interest".[237]

Again, the Federal Court decided that no fairly arguable question of law or jurisdiction was raised. Since the court heard extended argument, this decision could be viewed as an indication of what the Court would have decided, if leave had been granted.

A similar result occurred in an application for leave to appeal by the Minister of Energy for Ontario from the NEB decision in the TransCanada PipeLines additional facilities application of May 1974.[238] During extensive argument by the applicant, the Chief Justice of the Federal Court of Appeal again and again stated that he failed to see any question of law raised by the NEB ruling on the scope of cross-examination. It became obvious that an appeal on the grounds raised would not likely succeed. And so, leave to appeal was denied.[239] On the same grounds, leave to extend the time for review under section 28 of the *Federal Court Act* was also denied,[240] and a motion by Gaz Metropolitan Inc. and Pan Alberta Gas Limited to quash an appeal by Ontario from the judgment of Mr. Justice Mahoney in *Union Gas Limited v. National Energy Board*,[241] was granted.[242]

It was not until the summer of 1974 that judicial intervention became a more important factor for NEB policy and procedural decisions. Although that summer produced only two instances of judicial review,[243] it seemed to some members that the agency was constantly before the courts, and as a result too often in the editorial pages of newspapers.

In *Dow Chemical*[244] Mr. Justice Cattanach held that section 20(2) of the *NEB Act* requires the agency to hold public hearings on export applications. The word "hearing" in that section imports a full adversary proceeding analogous to a trial before a court of law. This decision has and will obviously influence NEB procedures. Following Mr. Justice Cattanach's ruling, the agency announced that it would only consider such an application following full public hearing.[245] It is possible that the NEB could avoid a full hearing by entertaining an application for an order, as opposed to a licence, under regulation 16.1.[246] However, in his judgment Mr. Justice Cattanach expressed just enough doubt about the validity of this regulation to leave the Board little real choice.

Dow Chemical, along with *Union Gas*, an application for review filed the following month, had effects on the NEB that extend beyond procedural issues and touch the agency's involvement in the formation of government policy.

Acting in its advisory capacity, the agency had participated in government-industry discussions on the expansion of the Canadian petro-chemical industry through construction of one or more world-scale ethylene plants. At this stage, it had been assumed that the NEB's regulatory jurisdiction did not extend to ethylene. In addition, a certificate of public convenience and necessity had already been granted by the agency for a pipeline to move the ethylene that Dow contemplated producing in Alberta to Ontario. The federal Government had plainly given its blessing to Dow's proposal.

However, it was decided by the agency, with support from some government departments, that to lay a basis for determination of future proposals concerning ethylene, the substance should be brought under the jurisdiction of the NEB.[247] The method used to accomplish this was the exceptionally swift approval of an amendment adding section 16A to the Part VI regulations.

There were undoubtedly pressures to speed approval of the project, which has already received approval in principle. In addition, the NEB felt that Dow should be given special consideration because of the sudden "ground rule" change. Dow had laid its plans and made commitments presuming that ethylene export was not subject to NEB regulation. Furthermore, many of the issues involved had already been canvassed in earlier hearings on the ethylene pipeline application by Dome Petroleum Limited.[248] Now, and suddenly, ethylene export required a licence, and with two major competitors as well as interested provinces and other industry groups involved, a long and difficult public hearing seemed likely.

The NEB decided to avoid the delays inherent in a full hearing procedure by hearing only the applicant and by limiting intervenors to written submissions. These procedures were apparently adopted in spite of reservations in the NEB's Law Branch.

At the "hearing", the Attorney General for Manitoba and other intervenors moved for an order permitting them to lead evidence and to cross-examine the applicant's witnesses. When this was denied, the decision was attacked in the Federal Court.

The resulting litigation focused public attention on the close policy-making relationship between the NEB and the Government on "pioneering" applications.[249] Questions were inevitably raised about "political pressures" on the Board and the lack of a comprehensive national energy policy to guide its decisions.[250] The case

demonstrated to industry and provincial interests that it is possible to take the NEB to court on procedural issues quickly and successfully. This was also noted with great interest by various public interest groups. So too was the decision in the case which indicated that the NEB's discretion to abridge public hearings on major applications was limited.

Other legal actions, until then merely contemplated, now appeared more likely to succeed and in a short time Union Gas challenged NEB procedures in the Federal Court.[251] The company argued that the Board had declined jurisdiction by not allowing intervenors to cross-examine the proponent's witnesses on Western Canadian and total gas supply available to the TransCanada PipeLine system.[252] The Province of Ontario and its major gas utilities argued that contract carriage of natural gas by TransCanada for Winnipeg and Montreal utilities could affect supplies available to them through TransCanada's system.

The real issue was price. Alberta, through its vehicle Pan Alberta Gas Limited,[253] had been attempting to push gas prices up by contracting directly with utilities, who in turn entered into transportation contracts with TransCanada. The objective was to bid up the price for TransCanada field purchases of gas scheduled to be carried east for re-sale to customers like Union Gas Limited. Union Gas, in going to the Federal Court, gave Ontario additional leverage in its dealings with the federal Government and the NEB, and in its negotiations with Alberta.

Union Gas and *Dow Chemical* in fact indicate that Federal Court judicial review actions can be used to strengthen inter-corporate and inter-governmental negotiating positions, quite apart from the specific procedural issues raised by these cases. This result may explain Ontario's attempts at further review and appeal[254] following dismissal of the original application for prohibition by Mr. Justice Mahoney.

These actions had as well an effect on subsequent NEB decisions and actions. *Dow Chemical* sensitized NEB counsel and Board members to the situations requiring full formal public hearings. No doubt with Mr. Justice Cattanach's judgment in mind, full cross-examination was permitted during the hearings on natural gas supply and deliverability following strong representations to the agency and to the Minister of Energy, Mines and Resources. The *Dow* case was mentioned in Board deliberations on a request that certain material be

submitted on a confidential basis in TransCanada's rate application in August, 1974. The effect of the Cattanach judgment was also considered in discussions on the desirability of scheduling the natural gas supply and deliverability hearings in six different cities given the difficulties faced by public interest groups in maintaining legal representation throughout.[255]

Dow Chemical also caused the NEB to consider its public image because of the light shed on the political aspects of Dow's application. A result was that the NEB disassociated itself from the appeal taken by Dow to underline that the agency was not "in bed with Dow".[256]

One aspect of Mr. Justice Mahoney's judgment in *Union Gas* seems particularly important as a guide for future Board procedures and policies. He interpreted section 44 of the *NEB Act* as conferring a discretion on the agency limited only by the requirement to act in good faith.[257] This may mean that (barring unusual circumstances) decisions on facilities applications under section 44 will be virtually unchallengeable. The tendency shown by the Federal Court of Appeal to protect tribunals acting within their general mandate by its practice of hearing extended argument on applications for leave to appeal is an additional factor that may limit future judicial review. It will normally not be sufficient merely to show that the Board considered irrelevant matters or failed to consider certain apparently relevant matters in particular decisions.

IV. ENFORCEMENT

The NEB policies on regulating project implementation and monitoring construction stipulations have not yet crystallized. In fact, the general question of inspection and enforcement in relation to all aspects of the agency's work has been given relatively little consideration.

Informal Board recommendations[258] and self-monitoring by industry have been the core of enforcement activities to date. Spot checks are occasionally made by NEB staff, but usually only after receiving a complaint or information that some problem has developed.[259] In the case of the construction of facilities such as pipelines, a field representative consultant is retained as deemed necessary to ensure minimization of agricultural damage.[260]

Establishment of an inspection division within the Engineering Branch was approved in 1974, with five engineers, at least one with environmental training, on staff. The NEB recognizes that these inspectors obviously should have authority to inspect facilities and premises[261] and to give informal "directions" regarding construction methods and remedial action in the field without first obtaining specific approval from superiors in Ottawa. These would be backed by the NEB's statutory authority to suspend or revoke licences or certificates.[262]

The recent emergence of environmental protection as a factor in making decisions has resulted in pressure on the NEB to ensure effective enforcement of environmental conditions and stipulations. In fact, because surveys are not made and specific pipeline alignment not identified until after certificates are granted, assessment of environmental effects usually cannot be completed until construction has begun.[263] Consequently environmental protection depends to a considerable degree on effective monitoring and enforcement during construction.

The NEB has so far shown an aversion to extensive and detailed conditioning of certificates and licences regarding construction procedures and specific environment protection measures. Informal, non-binding letters are preferred because of the greater flexibility permitted to deal with changing circumstances without the necessity for further formal proceedings.[264] There is some doubt that conditions can be enforced by mandatory order without formal proceedings for revocation or suspension of certificates under section 47.[265] The NEB's Law Branch has expressed the view that mandatory orders can only deal under section 12 of the Act with the time in which something is to be done.[265A]

The NEB Act contains no authority for the agency to issue "stop" orders in emergency situations. Although a few specific offences are established,[266] there have been no prosecutions. Several certificates and licences have been revoked, but never without at least the tacit consent of the holder.[267]

V. CONCLUSIONS

That the NEB has developed only general and sometimes rather nebulous criteria to guide its various regulatory decisions is an

obvious conclusion. The agency decides most applications on the facts of the particular case and, so it would appear, with due regard for what the NEB perceives to be the concerns and preferences of the Minister of Energy, Mines and Resources and the Cabinet.

Other influences on the NEB include the energy industry, other government departments, the media and to a very limited extent, public interest groups and the courts. But these influences are relatively insignificant when compared with that of the Minister and Cabinet. Board members through the advisory function serve as Cabinet "aides" in the same way as senior officials of public service departments. This occurs even when the policy issues involved correspond to the issues raised by applications before the agency.

In Part III, we examine the NEB's procedures and practice against the background of these relationships. The adequacy of these procedures and practices is assessed from the perspectives of the various participating interests.

PART THREE

Interest Accommodation

A primary function of economic regulatory agencies like the NEB is to allocate certain economic opportunities among competing private interests with primary regard for the public interest. It consequently seems appropriate to examine the agency's practices and procedures from the standpoints of the interests that are touched by its activities. How effectively can various interests be represented and advanced in NEB proceedings under its current practice, procedure and policy rules, policies and guidelines? Are certain interests favoured? And most important, how is the public interest promoted by affected parties and by the NEB itself?

I. OPENNESS VERSUS EXPEDITION

(a) Hearings

Section 20(1) of the *National Energy Board Act* states that:

> 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*.[268]

Subsection (2) allows revocation or suspension of certificates or licences with the consent of the holder, provided the facility has not been brought into commercial operation. Subsection (3) permits the Board to hold a public hearing "in respect of any other matter if it considers it advisable to do so".

Is the Board required to hold public hearings? If so in what circumstances? These are essentially legal questions.

(i) Hearings in Law

When is the NEB required by law to hold public hearings on applications? The statement of the Minister of Trade and Commerce in the House of Commons upon introduction of the NEB's enabling regulations makes it clear that a public hearing requirement on applications was intended.[269] But the relevant sections of the Act are not clear; and until the recent decision of Mr. Justice Cattanach in *Dow Chemical*[270] there was no judicial guidance on this point.

In *Dow Chemical*, it was held that the word "hearing" in section 20(1) of the Act must be given the same meaning as it has in a court of law. Mr. Justice Cattanach stated that:

> [The word "hearing" in s. 20] is to be construed as analogous to and importing a "trial" before a court of law....[271]

Nevertheless he specifically declined to direct that a full public hearing be held[272] because the recent amendment to the NEB Part VI Regulations empowers the agency to authorize ethylene exports by order without a hearing.[273]

Dow Chemical may be regarded as establishing the requirement of a public hearing under section 20 on major certificate and export licence applications. However, the NEB's authority to dispense with hearings on "minor" applications in accordance with the practices outlined below is not clear. Also, it is still possible to argue (notwithstanding *Dow Chemical*) that the terms of section 20 do not require the Board to hold hearings even on major applications.[274] But, if it does decide to conduct a hearing, then in accordance with *Dow Chemical* it must be a full adversary hearing analogous to that held by a court.

(ii) Hearings in Practice

Certificate Applications

The NEB holds public hearings on all "major" applications. In the case of applications for certificates under Part III involving

pipeline construction, the agency has developed three classes of applications. This is because the Act defines "pipeline" broadly to include all extensions, tanks, compressors, pumps and other pipeline-related facilities.[275]

Class A is a new pipeline, extension or looping in excess of twenty-five miles, or other pipeline construction that, "because of public interest or other reason, the Board is not prepared to consider for exemption pursuant to section 49".[276] A Class A application will always be set down for public hearing. Information must be filed as required by the Schedules to the Rules of Practice and Procedure unless an exemption is granted under section 5(1)(b) of the Rules.

Class B applications include extensions or looping not exceeding twenty-five miles of a main or gathering line, with the exception of intra-field lines for the sole purpose of facilitating delivery from that field and as well new or additional compressors, pumps, measuring or metering equipment, gas treatment or products extraction plants and storage facilities. The guidelines specify the type of facilities and costs.[277] Pipelines or related facilities of this type are considered appropriate for exercise of the Board's discretion under section 49 to grant exemptions from the certificate provisions.[278] A public hearing may or may not be held on this type of application, "depending on [the Board's] view of the importance of the public interest or other factors involved."[279] Information required in support of a Class B application is normally less than for a Class A application. To simplify the procedure, the NEB has developed a special streamlined application form with the information requirements for the type of facility proposed.[280]

Apparently only two hearings have been held on this type of application. In one case there was an objection by another major utility.[281] In the other case, the hearing was part of an inquiry into leakage in TransCanada PipeLines Limited facilities that resulted in an explosion and fire.[282] It appears that a hearing may be held when there are significant objections, or when in the NEB's opinion the proposed facility could pose a threat to persons dwelling nearby.[283]

A Class C application involves miscellaneous construction of a routine type not coming within either Class A or Class B. The Board may in its discretion under section 49 grant annual blanket exemptions to companies for this type of construction.[284] The memorandum of guidance indicates that the minor nature of the construction involved in this class of application will not normally require public hearing.[285] In fact, such a hearing has never been held.

No similar classes have been developed for applications for power line certificates. Here the NEB's jurisdiction is limited to international power lines[286] and most transmission systems are aligned to keep international lines as short as possible. There have also been relatively few power export applications. Exemptions under section 49 may be granted in applications that involve construction of border facilities of less than 5,000 kilowatts transfer capacity.[287]

Export Licences

In the case of export applications under Part VI of the *NEB Act*, the technique used to classify applications has been formal. Regulations have been promulgated to permit approval by order of emergency export of gas or electricity.[288] In addition, gas and electricity exports may be authorized by order within specified quantities and terms, in the absence of emergency conditions.[289] Similar provision is made for export of propane by order through an oil pipeline[290] and for the exportation of ethylene without limit.[291] For all of these, licences may be granted without a hearing and without notice to the public. Regulation 16.1, concerning ethylene, appears to be an example of a rapid regulation-making response to a procedural problem in the course of a particular application. An order-in-council was rushed through in very short order to create the possibility of being able to authorize an export by order without a hearing. The problem then at hand was the challenge by intervenors of the NEB's expedited hearing on the Dow Chemical application.[292]

Rate Applications

Expedited proceedings and limited hearings were developed by the NEB to abridge and simplify the hearing of rate cases. They flowed from the lengthy duration — two and a half years — of the first phase of TransCanada PipeLines Limited's first rate application, filed in 1969.[293] TransCanada had proposed that the Board make an interim decision pending final resolution of its case. But this was rejected by the agency in favour of the "expedited proceedings" technique as outlined in its decision on Phase II of TransCanada's original rate application, issued in May, 1973. The idea of "limited hearings" grew out of the decision to break the first application into phases involving separate issues for convenience and orderly hearing.

Expedited proceedings[294] involve no hearing as such but provide an opportunity for interested parties to file written submissions for the consideration of the Board. The alternative, the limited hearing, is

a full formal hearing encompassing cross-examination. However, the subject of the hearing and consequently the evidence considered relevant is limited to a small number of issues that normally concern the cost of service. Applications to adjust tariffs and tolls to pass on sharp and unexpected increases in the field price of natural gas have been handled in this way.[295]

A potential does exist, however, for abuse of these techniques. The agency's original intention was to limit the use of expedited proceedings to certain special circumstances. But section 5.2 of the Rules of Practice and Procedure contains no such limitation. So it is possible, at least in theory, for the NEB to approve expedited proceedings for any type of rate application. In the Phase I of the 1973 rate application by TransCanada PipeLines Limited,[296] expedited proceedings were used even though no special circumstances were evident. The amendment to that application concerning adjustments as a result of sharp increases in the cost of purchased gas was a matter that appeared appropriate for expedited proceedings. However, a limited hearing was used to deal with that issue.[297]

A more recent rate application before the agency[298] suggests that concerns regarding abuse of expedited proceedings and limited hearings may not be justified and that the NEB is now strongly resisting undue procedural streamlining for the benefit of TransCanada PipeLines Limited.[299] In rejecting TransCanada's bid for approval of a "normalization of purchased gas clause" in its tariff, the NEB seemed to be concerned that approval of a procedure that would automatically adjust rates to reflect increases in the cost of purchased gas would establish a principle capable of easy extension to other cost of service items.

Inquiries

The NEB has held public hearings of an inquiry nature on three occasions. These hearings are in the sole discretion of the Board under sections 14(2) and 20(3) or upon the direction of the Minister of Energy, Mines and Resources under section 22(2).[300] In the first two hearings dealing with oil exports and natural gas export prices, an informal procedure not unlike that of English public inquiries[301] or some forms of American notice and comment rule-making[302] was used. Participants filed written briefs in advance, then orally supplemented these and replied to precirculated written submissions of other parties. Further written rebuttal was also permitted. Cross-examination was conducted only by NEB counsel and by members of the Board panel.[303]

This procedure was adopted because the object of the inquiries was to obtain opinions on policy issues specified in the hearing notices. They were not regarded as important sources of factual information. Prohibiting cross-examination by parties was seen as a way to limit the length of hearings. This restriction was considered to be consistent with the nature of the inquiries since it was not expected that detailed factual information requiring testing by cross-examination would be presented.[304]

Board members felt that the gas price and oil export hearings were very successful.[305] The hearings permitted extensive formal consultation with industry interests, and also brought in a significant but manageable number of other interests, including public interest groups and individual citizens. There were some complaints by both industry and public interest groups concerning lack of cross-examination. But these were not pressed. Generally, all types of participants appear to have been satisfied with the procedures used.

A different procedure was adopted for the recent inquiry hearing on natural gas supply and deliverability. Full adversary rules governed the hearing, with cross-examination unrestricted.[306] Obviously, this has meant that the hearing — held in six different cities — will take some time. Once a procedure of this type is adopted, it is difficult to control the length of the proceeding. Complaints have been voiced by public interest groups about the high cost of retaining counsel and expert advisors over such lengthy proceedings. These problems have caused concern among Board and staff.

Routine Orders

In its first year of operation, the Board considered all applications at its regular meetings. These included various crossing orders under sections 76 and 77, leave to open orders under section 38, orders approving deposit of plans, profiles, and books of reference under section 28, orders for additional plans and drawings under section 35, deviation orders under section 36, purchase, conveyance or abandonment orders under section 63 and various minor amending orders under section 17.[307] It soon became apparent that discussion of these routine matters by the full Board was often causing meetings to drag on interminably. As a result, in 1961, two "General Orders" under sections 76 and 77 were approved that incorporated standard conditions for crossings involving pipelines.[308]

During the mid-1960's, the practice also developed of giving the Engineering Branch virtually sole responsibility for reviewing

applications for routine orders. The majority of these orders are not discussed at all now at Board meetings. They constitute a single agenda item, the numbers of each type simply being noted by the Secretary. Occasionally, the Secretary may single out a particular routine application for comment, where for example, the facility concerned is in close proximity to residential development, or where the application arose out of a matter that had previously come before the agency for decision.[309] If a routine application presents difficulties, this is likely to be noted either during review by the Engineering Branch or possibly by the Secretariat and then placed on the agenda separately for discussion and resolution by Board members.

In 1973, the procedure for dealing with overhead crossings of pipelines by telephone, telegraph and electrical power lines was further streamlined. Under the Pipeline Overhead Crossing Order,[310] overhead lines may be constructed across pipelines without leave of the NEB provided that specific conditions set out in the Order are met.

The procedure for routine orders appears to have worked well. On one occasion, when a junior Board member remarked that it might be interesting to know more about some of the routine orders, he was quickly reminded by a senior member of the inordinate amount of time that was once spent on such matters.

Other Applications

Several other types of hearings have been held at the discretion of the Board. One hearing was held[311] and another proposed[312] on applications under section 72, that requires the NEB to fix compensation for severance of a mineral property by a pipeline. In the most recent application, NEB counsel rendered an opinion that a public hearing must be held.[313]

Several public hearings have also been held following grant of a certificate of public convenience and necessity for a pipeline on applications for approval of plans, specifications and books of reference under section 28 of the Act. There is no specific provision for a hearing on section 28 applications. These hearings followed vigorous complaints by individual land owners and agricultural organizations concerning the specific location of the proposed pipeline.[314]

(iii) Standing to Participate in Board Hearings

Section 45 of the *NEB Act* requires the agency to "consider the objections of any interested persons" on application for certification. However, the section also makes the NEB's decision on who is an interested person for the purpose of the section "final and conclusive". No similar provision exists for export licence applications under Part VI.

Board members have never refused to hear objectors in public hearings although, on one occasion, evidence of two individual objectors was excluded as irrelevant.[315] However, concern is growing in the NEB about the possibility of unmanageable numbers of objectors appearing in a particular application. The intervention of a few public interest groups in recent applications is considered by some Board members to foreshadow this problem, especially since some of these groups have asked and been granted full intervenor status, including the right to cross-examine.[316]

Partly for these reasons, the NEB's Law Branch has pressed Board members to make section 45 determinations for intervenors in the recent TransCanada PipeLines Limited application for additional facilities.[317] The NEB's lawyers were also concerned that standing to initiate judicial review under the *Federal Court Act* may be conferred by participation in NEB proceedings. This was confirmed by the preliminary rulings in *Dow Chemical*[318] and then in *Union Gas*.[319]

The Law Branch proposed a rather narrow "direct affectation" test for standing under section 45, apparently based on common law *locus standi* principles[320] and on several utility cases involving other agencies.[321] In the TransCanada application, this could have the effect of excluding intervenors such as the Industrial Gas Users Association,[322] and possibly even the Province of Ontario, since these parties were arguably not directly affected by the facilities proposed in the application. The Board decided to defer this issue and declined to make determinations about interested parties. In the subsequent *Dow Chemical* judgment, Mr. Justice Cattanach's definition of "public" in section 20(1) in terms of "demonstrable interest in the subject matter before the Board"[323] suggests that his view on standing before the NEB may be very close to the Law Branch's. However neither view is consistent with recent cases that appear to establish more liberal criteria for *locus standi* in judicial review proceedings.[324]

(iv) Formality

The NEB procedures at public hearings on applications is very formal, closely approximating those in a court of law.[325] All rise when

panel members enter and leave the hearing room. There are designated counsel tables and witness tables.[326] At the commencement of each hearing, formal appearances are entered by counsel and copies of application documents, interventions and affidavits of service are formally filed as exhibits. Preliminary motions are made, argued and ruled upon much as they would be in a court of law.[327] Daily transcripts are produced.

Several techniques have, however, been used to expedite proceedings. First, while witnesses are sworn, they normally appear in "panels" of up to five witnesses at one time.[328]. Second, direct evidence is often "canned" and distributed in advance, although it is in fact usually read at the hearing.[329] Considerable leeway is given to witnesses and it is clear that some of the legal rules of evidence, particularly those concerning admissibility, are not applied to the "testimony" of "policy witnesses". The latter are usually corporate executives who testify on such matters as methods of financing, effects of proposals on corporate viability and generally how the proposed activity will serve the public interest. In cross-examination, all members of the witness panel are available for questioning. Often, questions will be referred by one witness to a more appropriate witness so that several witnesses may contribute to answering different aspects of a single question.

The NEB's procedure has not seemed to cause problems for parties as long as all parties are represented by counsel and the majority have some familiarity with the agency and its proceedings. Difficulties have arisen only when unrepresented intervenors have appeared and attempted to participate fully. Lacking the procedural savvy of experienced lawyers, they have often over-stepped the bounds of "propriety" by editorializing when questioning witnesses and venturing argumentative opinions in the course of tendering evidence.[330] Their objective is simply to voice particular concerns and they lack even the slightest interest in distinctions between objections, evidence and argument.

In dealing with problems of this kind, the NEB has attempted to maintain its procedural formality intact. The result has sometimes been rather absurd. In the Interprovincial Sarnia - Montreal extension application, for example, Mr. Peter Lewington, a farmer, was permitted to present his argument along with his evidence after he showed no particular inclination to do anything else. Counsel for IPL was then permitted to include argument with his objections because Lewington had already done so.[331]

The result of insistence on procedural formality is likely to be confusion and frustration on the part of individuals and other intervenors not represented by counsel or experienced laymen.[332] What is surprising about this aspect of agency practice is that none of its Board members are legally trained. It suggests the perceptiveness of the observation that the non-legal mind is likely to be less liberal in matters of interpretation and procedure than the legal one. The administrator's instinct seems to be to avoid straying into legal uncertainty by permitting procedural relaxation or improvisation.[333]

(b) Access to Information

Hearing notices are published in area newspapers and sent to all companies, government departments, associations and individuals on extensive mailing lists maintained by the agency.[334] As a matter of practice, applicants are required to supply copies of applications and supporting documents to all persons and organizations that file interventions within the time stipulated in the notice. Since it is in the applicant's interest to distribute this information fully and promptly, there have been few complaints by intervenors about access to information in support of applications.

The NEB publishes extensive reasons for decision on applications,[335] in addition to formal orders. Copies of reasons for decision are sent to all parties to the proceedings and to everyone on the Board's mailing lists. Single copies of these documents are available from the agency on request without charge. Copies of certain formal documents such as certificates of public convenience and necessity and export licences may also be obtained upon request. Other documents such as plans, profiles and books of reference that are extremely bulky and technical may be made available for inspection at the NEB's offices or at some other convenient place, such as the offices of the company concerned.

Board files are treated differently. These are regarded as "privileged" and are not normally available to persons other than Board members or staff. The agency, through the Minister of Energy, Mines and Resources, has successfully resisted an attempt by a parliamentary committee to obtain files containing advice provided by the Board to the Minister during a specified period.[336] Certain files may be classified as "restricted" or "confidential" for internal purposes. Examples would include files concerning formal international negotiations in which the Board is involved,[337] and files containing information such as details of export approvals pending

Cabinet decision likely to affect the prices of securities in a material way. The agency is extremely careful about the latter. Press releases announcing decisions are normally issued after the close of North American Market trading at six p.m. Eastern Standard Time.

The most difficult problem of access to information concerns studies and reports prepared by NEB staff. These may be intended for internal use and concern general policy matters or a particular application. Detailed reports are normally prepared by staff members on particular applications after the hearing. However, some briefing material is usually prepared and sent to panel members in the course of staff review of the application.[338] All of this material, including studies and reports, is regarded as confidential unless specifically authorized for release by Board decision[339] or tabled by the Minister.

Many lawyers with NEB experience referred to the problem of undisclosed staff studies bearing on particular applications. Oddly, however, the agency has not received a formal written demand with notice to other parties for production and placing in evidence of internal NEB studies or reports. The reason appears to be that many requests for such documents have been satisfied informally, usually before the hearing. When production is refused, industry parties that must deal with the NEB on a continuing basis are probably not likely to press the matter.

Similarly, material prepared as part of the NEB's advisory function under Part II of the Act is presumed to be for internal use only, unless release is directed by the Minister or another authorized agency.[340] This would include all types of material prepared for the purpose of briefing the Minister and for communication with government departments or presentation to inter-departmental committees and task forces in which the NEB is involved. The normal public service presumption against disclosure created by the *Official Secrets Act* and the *Public Service Employment Act* and oath is assumed to apply.

There is some evidence that prolonged exposure to the heady world of high level inter-departmental committees and ministerial advice has caused the NEB to adopt more of the usual public service caution and concern for the sanctity of Cabinet confidentiality than is strictly necessary.[341] It is interesting to note that while the *NEB Act* does not specifically make NEB subject to the constraints of the *Public Service Employment Act*, the uniform practice is to administer the oath.

(c) *Ex Parte* Consultation

The Board maintains a considerable degree of contact with regulated companies, producers, and provincial government departments and agencies. Much of this contact is personal to particular Board or staff members, many of whom have had extensive industry experience. In fact, all of the current Board members have had previous industry or related experience. All have backgrounds in engineering or "applied" economics.[342]

Much of this consultative activity is related to the agency's need to inform itself about vital questions of present and future supply, demand and deliverability of particular energy resources. The basic information for analysis comes from producers' well logs, core samples and other records.[343] But projections prepared by industry sources are also important for purposes of comparison. In view of these common sources of information, the close relations of the NEB with industry is not surprising.

On another level, there is substantial contact through professional and industry associations. This is particularly useful for staff members. It is largely through these organizations that personal international contacts are established, particularly with people in industry and regulatory agencies in the United States.

There is also a pattern of visits for "information exchange" purposes by a variety of industry delegations to the NEB. These serve to keep the agency informed of industry plans and concerns. Often these meetings have involved rather extensive discussion of proposed major projects before any formal application. The series of meetings with various groups interested in the Mackenzie Valley Gas and Oil Pipelines was an example of this.[344] Most discussions have concerned undramatic topics such as the proposed construction of additional facilities and technical problems of construction, facility maintenance and operation.

On occasion, these meetings have been more focused, and amounted to planning sessions for particular applications. Of this nature were the meetings involving the Minister of Energy, Mines and Resources, and his staff, Interprovincial Pipe Line Limited officials and Board members that occurred before IPL's application for the Sarnia - Montreal oil pipeline extension.[345]

In a number of applications, the NEB has been asked by parties to accept certain material on a confidential basis. As a rule, such

requests have been denied. But some concessions have been made.[346] Purchase contracts have, for example, been filed with price clauses deleted.[347] Also, the Board has sometimes directed with the consent of all parties that sensitive information be filed with the agency after the hearing for its use only. Since this problem is common to participating industry interests, it is rarely mentioned in NEB proceedings.

There is also extensive consultation with federal government departments, particularly the Department of Energy, Mines and Resources. In the regulatory context, most contact is informal and at the staff level. The objectives are in most instances simply to draw on expertise that may not exist within the NEB. However, consultation may occasionally occur at a higher level through formal *ad hoc* task forces of inter-departmental committees. The task force on the IPL Sarnia - Montreal pipeline extension was an example of the former;[348] the National Advisory Committee on Northern Pipeline Financing is an example of the latter. Much of these activities involving government departments fall within the NEB's advisory function.[349] And it is obvious that conflicts can and do arise between these and the agency's adjudicatory functions. For example, it was the possibility of this kind of conflict that caused the NEB to terminate its participation on the National Advisory Committee on Northern Pipeline Financing following formal filing of an application by Canadian Arctic Gas Pipeline Limited.[350] But potential for this kind of conflict remains in other areas.[351]

II. WHO PARTICIPATES?

(a) Industry

There is little doubt that the regulated industries are fully and fairly served by the NEB's practices and procedures for adjudication and rule-making. Applicants receive benefits from extensive pre-application consultation with agency staff that help to clarify issues and often to expedite proceedings.[352] Internal review procedures can sometimes be speeded[353] or abridged[354] to further assist the applicant when time constraints are imposed by external or supervening factors.

Most industry interests likely to be affected by any application are directly informed of impending proceedings by the NEB's

Secretary.[355] These companies nonetheless retain staff to monitor industry developments and the media for relevant events and notices. In addition, corporate ties and well-developed industry "grapevines" often make it possible for oil, gas or electricity producers, transporters or distributors to be aware of proposed applications even before formal filing with the NEB. Applicants may meet extensively with other interests likely to be affected by their proposals in order to shorten and simplify proceedings.[356]

If a new procedure is to be adopted by the NEB, affected interests are consulted informally in advance. This occurred, for example, in the development of "expedited proceedings" for rate applications by TransCanada PipeLine Limited[357] and also when an inquiry type procedure without full cross-examination was proposed for hearings on oil export.[358]

Occasionally, a problem has arisen when the NEB has attempted to expedite a proceeding by structuring the procedure in ways that appear to limit or abridge participation by other regulated companies and public interest groups. When this has happened, industry objections have been vigorous. The recent Dow Chemical ethylene export application was a good example.[359] Affected interests first sought a full public hearing but when this was refused successfully attacked the procedure characterized by the NEB as an "*ex parte* public" hearing in the Federal Court.[360]

Confrontations like this, however, have been relatively rare since the NEB has carefully nurtured relations with the industry. These have been maintained, as we have mentioned, by informal exchanges of information both directly between agency and company and indirectly through professional and industry associations.

(b) Provinces

Provinces have also received the NEB's attention through informal consultation, information exchanges and notice of applications. The motivation here may be slightly different. Slighted provinces or provincial agencies have not hesitated to go directly to the Minister of Energy, Mines and Resources or to other Cabinet members with their complaints.[361] The NEB as a result appears anxious to avoid situations that may reflect unfavourably on the agency and cause political pressure for changes in its practices and procedures. A recent example is the NEB's favourable response to the complaints by the British Columbia Energy Commission and the

Province of Ontario that cross-examination was not to be permitted at the gas supply and deliverability hearings.[362] In general, provincial attempts to force NEB and government policy changes through procedural attacks[363] have been stoutly resisted by the agency.

(c) Non-conventional Interests

Other classes of interests have not fared so well in NEB proceedings. Individuals, such as farmers with land affected by proposed pipelines, have been tolerated so long as they speak at the proper time and do not carry on at length.[364] On several occasions the NEB has stated that individual interests must give way to clearly established public convenience and necessity.[365]

Agricultural associations fare better now that some of them such as the Ontario Federation of Agriculture have been before the Board on a number of occasions and have an established role and credibility.[366] However, other groups representing the interests of certain residential consumers,[367] conservationists[368] and economic nationalists[369] have met little encouragement. They must be vigilant to see newspaper hearing notices of matters that affect them, then prepare without the benefit of an existing information base such as those maintained by regulated companies and governments. Nor do they have the benefit of prior informal information exchange and consultation with members of the Board and agency staff. All of these groups have limited resources yet the range of activities to which these resources may be committed is usually wide. It is difficult for them to match the sophistication of industry and government.

Members of these public interest groups have tended to suspect most Board members, because of experience and attitudes, are unlikely to attach much importance to the interests represented or to give much weight to the actual evidence presented.[370] This may have caused consumer groups to pass up NEB rate hearings for provincial agency proceedings in which detailed residential and institutional tariffs of immediate concern to consumer interests are under consideration.

Environmental groups have experienced similar frustrations. An example was the treatment accorded the evidence on calculation of social cost of a proposed Ontario Hydro power export tendered by Pollution Probe and the Consumers Association of Canada in a joint NEB intervention.[371] The Board simply rejected the method and the calculation as unreliable, even though this evidence was consistent

with the method suggested by the Board itself in an earlier hearing, and was not seriously shaken in cross-examination.[372]

The high cost of participation in the NEB's formal proceedings is another problem for parties and intervenors with non-conventional interests.[373] They have found that legal representation is a virtual necessity in this agency's adjudicatory proceedings as well as in its rule-making procedures, such as those used in its gas supply and deliverability hearings. Technical and scientific expertise is required to review applications and other relevant documentation, prepare direct testimony, draft questions and advise on cross-examination. Even a charge of sixty cents per page for the NEB's daily transcript, that often runs to thousands of pages over the course of a hearing, can become onerous.[374]

Information, both theoretical and factual, is especially important for effective participation in inquiry-type hearings, such as the oil export hearings, where views on policy issues are sought by the agency. But the NEB has so far decided not to provide financial assistance to public interest intervenors even though this could improve the quality and usefulness of their participation.[375]

The result of all of these problems is that before the MacKenzie Valley pipeline hearings, relatively few public interest intervenors came before the NEB. The few that have appeared were permitted to participate. And the NEB is very much aware of the potential problems involved in accommodating these parties. The possible proliferation of individuals and public interest parties,[376] and the possible undue formality of procedures,[377] have been discussed within the agency. But specific techniques to accommodate public interest intervenors in an effective and fair manner have not yet been developed or fully considered.[378]

PART FOUR

Summary of Principal Conclusions

(1) Because the NEB's statutory powers give it substantial control over the Canadian petroleum and natural gas industry, and because its advisory function allows the agency to play an important policy and advisory role in virtually all federal energy-related activities, the National Energy Board is an important tribunal that affects the lives of every Canadian.

(2) The NEB's regulatory and advisory workload has increased dramatically over the past three years. The total of certificates, licences, orders and permits issued by the agency in 1973 was nearly double the total in 1972. This increase is largely because of the extension of the NEB's regulatory authority to export of oil and oil products. The further expansion of oil-related activities, as well as work on issues related to projected energy supply shortfalls, is likely to result in increased NEB activity and growth.

(3) The NEB is heavily influenced in its full range of activities by the Minister of Energy, Mines and Resources and other members of the federal Cabinet. Under the *NEB Act* and regulations, the granting of export licences and certificates of public convenience and necessity is subject to Cabinet approval. In addition, there is extensive continuing contact between Board members and staff and Cabinet ministers (particularly the Minister of Energy, Mines and Resources), because

of the agency's statutory duty to monitor all aspects of energy within federal jurisdiction and to advise the Minister on request. There is evidence that through this consultative process, NEB actions likely to affect the minister or other Cabinet members in any way are first discussed with the relevant officials. The ethylene export application by Dow Chemical of Canada Limited and Interprovincial Pipe line Limited's Sarnia-to-Montreal oil pipeline extension application suggest that prior Board-Cabinet consultation takes place on specific applications of a "pioneering" nature. These are applications involving either the opening of major new energy markets (domestic or export) or the developing of major new sources of energy.

(4) All of the present Board members are skilled professionals trained in either engineering, economics or finance. All have extensive industry or related experience. This experience and training allows Board members to understand quite easily the perspectives of the industry they regulate. The same assumptions concerning energy development and use seems to be in the minds of both groups. However, because most Board members also have considerable experience in government and because of the NEB's close contacts with Cabinet through its advisory function, we would argue that Board members' political and bureaucratic perspectives are more important in understanding NEB decision-making than speculation about direct industry influence or "capture".

(5) Guidelines for decision-making found in the *NEB Act* and regulations and government policy statements are vague and not very helpful in analyzing NEB decisions. The agency has failed to develop clear and comprehensive criteria for export and rate regulation decisions. Even for decisions approving facilities, no guidelines have been formulated, although detailed information requirements have been established for both facilities and export applications. Decisions are made on the facts of each case with due regard for what Board members perceive to be the concerns and preferences of the Cabinet in general, and the Minister of Energy, Mines and Resources in particular. Previous Board decisions and decisions of other energy agencies (particularly the U.S. Federal Power Commission) are also relied upon.

(6) Public interest advocates, including consumer and conservation interests, have had relatively little impact on the NEB's policies, practices and procedure. However, the efforts of these groups, along with changing Canadian economic and social conditions and perceptions have fostered internal Board debate that may ultimately

make the agency more responsive to the needs of groups in society that are indirectly but significantly affected by its decisions.

(7) Before the *Dow Chemical* case in August, 1974, judicial review had little impact on NEB policy, practice and procedure. But *Dow Chemical* and, subsequently, *Union Gas*, have demonstrated that quick and effective judicial review of NEB proceedings (even in progress) can be obtained under the *Federal Court Act*. These cases also tend to demonstrate that even unsuccessful judicial review proceedings can provide additional leverage in energy negotiations at the political level. More certain and visible is the impact of judicial review on NEB procedures in subsequent regulatory proceedings.

(8) It is still not clear whether the Board is required by law to hold public hearings on facilities, export and rate applications. *Dow Chemical* can be interpreted as requiring that public hearings be held on export applications. However, in view of the absence of mandatory language in the Act, the decision may only establish a requirement for a full and fair hearing in the event that the NEB decides to hold a public hearing in the first instance.

(9) The procedure for public hearings on applications that has been adopted by the Board is formal and based largely on court models. While sophisticated industry and government interests have generally found this procedure satisfactory, a number of complaints have been voiced by public interest representatives and other non-conventional intervenors. In particular, these parties have objected to:

(i) the inadequacy of newspaper hearing notices, and the incomprehensibility of technically-phrased hearing orders;

(ii) The excessive formality of hearings that requires representation by counsel for full and effective participation;

(iii) extensive *ex parte* consultation by NEB staff (and sometimes Board members) with applicants and with other industry and government interests, but not with public interest representatives;

(iv) the apparent industry-orientation of Board members and staff;

(v) the excessive cost of effective participation in hearings and the lack of machinery for funding public interest interventions; and

(vi) the NEB's practice of regarding all internal staff studies and certain other material relevant to particular applications as confidential.

(10) Since the NEB has never refused to hear submissions relevant to applications before it, standing to participate in NEB proceedings has not been an issue. However, there are indications that concern about manageable numbers of intervenors in particular applications may cause the NEB at some future time to exercise its discretion to decide who is an interested party for the purpose of a facilities application. If this is done on the basis of a narrow "interested party" test, participation by public interest and other non-conventional intervenors could be drastically limited. In view of the discretionary language of section 45, such a limitation would be extremely difficult to challenge.

(11) Techniques developed to avoid undue delay in processing applications have generally proven satisfactory to the NEB and to participating interests. However, the expedited proceedings and limited hearing techniques developed for rate applications, and the order and exemption techniques used for licence and certificate applications, contain potential for procedural abuse. Use of these techniques has been based on the tacit consent of the industry and government interests involved. Due to very limited participation by public interest parties to date, the general appropriateness of these techniques has not yet been determined. In addition, the *Dow Chemical* decision may limit possibilities for expediting major facilities and export licence applications.

(12) Inquiry-type hearings have proven to be a satisfactory technique for formal participation by government and industry, as well as public interest parties, in the development by the NEB of policy guidelines for particular areas of regulatory decision-making. These inquiries have also permitted the government to air general policy issues before deciding among a number of alternative approaches. But public interest groups and individual participants have often been without sufficient resources to permit effective participation in these proceedings.

(13) There are strong indications that the NEB's enforcement policy based on informal "recommendations" and self-monitoring by industry has not been effective. In the case of facilities construction, there is little assurance that statutory requirements and certificate stipulations governing construction practices (that are intended to minimize environmental and community impact) will be properly implemented in the absence of continuous field inspection and clear authority for inspectors to issue corrective orders in emergency situations.

CASE STUDY NO. 1

St. Lawrence Power Company Export Application

I. THE APPLICATION

On June 1, 1974, the St. Lawrence Power Company applied to the National Energy Board for a licence to export to the United States a maximum of 150 GWh of interruptable energy per year.[379] The application arose because of another power company, the Cedars Rapids Transmission Company, had allowed its export licence to expire at the end of 1973.

Cedars held a long-term contract with Hydro Quebec for the purchase of 56 megawatts at a low price until 1999. The Cedars transmission line extends from the Quebec Hydro Cedars Generating Station to Cornwall, Ontario and then into the United States. At Cornwall, the line is tapped to supply the St. Lawrence Power Company, the distributor utility in the Cornwall area. Cedars had been exporting power through this line under various approvals since 1912. However, as Cornwall demand grew, less and less energy remained available for export. In 1973, Cedars concluded that obtaining export licences for the small remaining amount of off-peak residual energy was no longer worthwhile and allowed its export licence to expire.

St. Lawrence Power's contract with Cedars allowed the purchase of 55 megawatts at up to a 100 per cent load factor. However, since the load factor in the Cornwall area is approximately 70 per cent there remained a residual quantity of interruptable off-peak energy. The St. Lawrence application concerned this residual energy. The recipient of the exported energy was to be Niagara Mohawk Power Corporation, a major utility in New York and the parent company of St. Lawrence Power Company.

This was a very routine application. That St. Lawrence Power Company had never before applied for an export licence was perhaps the only unusual feature. The Board's staff had little knowledge of the company, and felt compelled as a result to scrutinize the application more carefully than usual.[380]

A careful review by the staff failed to disclose any deficiencies in the application but noted that the company had not yet received an indication of Ontario Hydro's interest in the energy St. Lawrence proposed to export. The Board's Financial Branch questioned St. Lawrence's entitlement to energy in excess of its domestic requirements in view of the terms of its contract with Cedars. These matters were issues that went to the merits of the application, and consequently matters that should be resolved at a hearing.[381] Cornwall[382] was selected as an appropriate place, and a hearing was scheduled for August 20, 1974.

II. THE HEARING

The hearing was also routine. No unexpected issues were raised at the internal pre-hearing meeting held August 13, 1974. The Board member hearing the application had already reviewed a list of questions for cross-examination with staff members. He suggested several additions to this list at the meeting. A short hearing was anticipated since no interventions had been filed, nor were any important ones anticipated.[383]

The hearing was short — only half a day. Three witnesses were called by the applicant and cross-examined by NEB counsel. Each of the three witnesses was called in turn by counsel for the applicant, rather than in a panel, the usual Board practice. This seemed to be more in aid of spinning out the hearing than anything else.

There were no intervenors. However, at least one written submission was filed with the Board[384] and letters from counsel for

the Ontario and Quebec Ministers of Energy were introduced as evidence that they would not be intervening. Also introduced was a letter from the counsel for Ontario Hydro stating that Ontario Hydro had no need for the residual energy that St. Lawrence wished to export and did not object to the application provided that certain conditions contained in Cedars' expired export licence were included in any new licence.[385] And so only the Board and the applicant participated in the hearing.

III. THE DECISION

Following what was apparently the usual practice, a post-hearing meeting of the presiding Board member and staff was held on the day following the hearing in order to discuss guidelines for the preparation of the report to the Board and to assign responsibility for various sections of it to staff members. In this case, the Electrical Engineering Branch Staff Co-ordinator had already prepared a draft report recommending that an export licence be issued and specifying the terms and conditions to be incorporated in it. The presiding Board member indicated he was prepared to recommend the issuance of a licence. All that remained then was to review and edit the draft report. This was discussed and a time limit set for receipt of further comments by the Staff Co-ordinator.

The draft report was considered by the Board at its regular meeting on August 26, 1974 and adopted[386] with the addition of the following:

> The Board, having received and considered the report of the presiding member made pursuant to section 14 of the Act, and on the basis of that report having satisfied itself with regard to all considerations that appeared to be relevant, hereby adopts that report as the statement of its findings and its decision on the application.[387]

There was, however, no discussion of the substance of the report beyond questions by several members of the Board about the meaning of certain technical terms.

IV. PROCEDURAL ISSUE

(a) Board-Staff Relations

This case illustrates the operation of the Board's procedure for fairly routine applications. Pre-hearing consultation took place

between staff, Board counsel and the Board member named to preside at the hearing. In this case, the Board member played a very active role in pre-hearing discussions, reviewing proposed questions for the applicant's witness and suggesting additional ones.

To what extent ought the presiding Board member, as a judicial officer, engage in prior consultation with staff and Board counsel on the merits of the application? Does he fetter his discretion or raise the possibility of impartiality or pre-decision through these discussions, and particularly through actually participating in the orchestration of Board counsel's questions for cross-examination? As other case studies indicate, the views of Board members differ on this issue. Somewhat more consistent was the opinion expressed by various members of the Board's Law Branch that the presiding Board members should not take an active role in pre-hearing staff conferences.

(b) The Authority of a Single Board Member

The *National Energy Board Act* specifies that three members constitute a quorum of the Board.[388] However, section 14(1) provides that:

> The Board or the Chairman may authorize anyone of the members to report to the Board upon any question or matter arising in connection with the business of the Board, and the person so authorized has all the powers of the Board for the purpose of taking evidence or acquiring the necessary information for the purpose of such report, and upon such a report being made to the Board, it may be adopted as the order of the Board or otherwise dealt with as the Board considers advisable.

It was under this authority that a single Board member conducted the hearing of the St. Lawrence application.

In this case, as in similar cases in the past, it appears that the presiding member's report was more or less "rubber stamped" by a quorum of the Board. Does this mean that the Board has really made a decision on the matter? If the presiding member's report is merely "accepted" without discussion, could it not be argued that the Board had declined jurisdiction by purporting to delegate its decision-making power to a single Board member?[389]

The Agency's Law Branch is well aware of this problem. It was raised at the post-hearing meeting on the St. Lawrence application

during a discussion about whether the presiding member should either submit his own "final" report to the full Board or merely submit a "draft" that the Board could use as a basis for its own final report. Board counsel noted that the NEB should establish a policy governing this procedure. In any event, the final report must state that it is the report of the Board and be signed by at least three Board members to satisfy the quorum requirement.

CASE STUDY NO. 2

An Application to Extend a Pipeline by Interprovincial Pipe Line Limited

I. BACKGROUND[390]

Significant changes in supply and price in the Canadian petroleum market began to occur in early 1973. A strong demand for export affected supply for Canadian refineries. The government response was export controls on crude oil in March, 1973,[391] and an export tax in October, 1974.[392]

On the products side, rising prices and supply uncertainties caused a situation in which imported petroleum products could no longer be sold profitably at prevailing market prices. At the same time increasingly attractive export opportunities in the United States threatened Canadian supplies. A strong possibility arose of shortfalls in winter supplies of heating oil in Ontario and Eastern Canada.

The NEB reacted in a number of ways. Refiners were encouraged to maximize heating oil production through increased capacity and product shifts. Ultimately, export controls were extended to motor gasoline and middle distillates,[393] and later to heavy fuel oils,[394] propane and butane.[395]

Renewed fighting in the Middle East and subsequent cutbacks in oil production and embargos imposed by Arab oil-producing states exacerbated these problems. Supplies of petroleum for regions east of the Ottawa Valley imported under the existing national oil policy, were threatened.

Policy decisions were taken by the federal government included facilitating movement of western crude oil to eastern refineries, through the Panama Canal and to Quebec by the St. Lawrence Seaway. An Energy Supplies Allocation Board was established with extensive powers to allocate supplies in emergency situations.[396] The national oil policy was reassessed and modified to secure supplies for Eastern Canada by moving western crude oil to Montreal refineries. And this meant extending the existing pipeline system.

There were other considerations as well. As the Prime Minister stated in the Commons on December 6, 1973:

> ...without a pipeline the government is unable to guarantee a market in Canada for Canadian oil at a level sufficient to ensure the development of the oil sands and other Canadian sources of supply. The federal government is taking all necessary measures to ensure that construction begins at the earliest possible moment in 1974. The government has directed the Canadian Commercial Corporation to determine whether the project could be expedited in any way if it were to place orders for steel or for pipe immediately. If such action would help, the government will direct that it be taken at once. Any steel or pipe so ordered would be re-sold at cost to those undertaking construction of the pipeline. Of course, before construction can begin the National Energy Board must, under the law, hold hearings and be satisfied that the proposed rates will best serve the public interest and that adequate compensation will be paid for the rights-of-way. The government has asked the Board to carry out all proceedings in a manner as expeditious as the law will permit.[397]

Discussions were commenced with provincial officials[398] and officers of Interprovincial Pipe Line Limited, operators of the crude oil trunk pipeline system from Western Canada.[399]

II. PRE-APPLICATION CONSULTATION

In early December of 1973, a meeting took place in the office of the Minister of Energy, Mines and Resources.[400] Those present included the Minister, the president and secretary-treasurer of Interprovincial Pipe Line Limited, a representative of Wood Gundy Limited (financial consultants), the Deputy Minister of Energy, Mines and Resources, the Minister's two executive assistants and

two members of the National Energy Board. The purpose of the meeting was to discuss with Interprovincial Pipe Line Limited the government's intention to extend the crude oil pipeline system to Montreal.

The Minister and government officials present outlined current thinking on the pipeline. They believed the line would have to be thirty inches in diameter with an initial capacity of 200 to 250 Mb/d and potential for increase in an emergency. The oil would almost certainly have to come from present exports given the rather bleak outlook for additional production of crude oil in Western Canada. Discussion also covered the respective merits of alternative routes and the thorny question of finance.

Interprovincial concerns were specific. The company wanted the government to guarantee its bond issue and agree to a tariff differential between Sarnia and Montreal. Company officials considered agreement on these points essential to the financial viability of the proposed pipeline extension. The Minister was unwilling to make specific commitments at that time.

A few days later, three members of the National Energy Board met with the Deputy Minister of National Defence[401] who had been designated government co-ordinator responsible for expediting the pipeline's construction. As head of a task force of representatives of several government departments, including Environment and Finance he wished to establish a "liaison" with the National Energy Board. The objective was to facilitate presentation of the application to the Board at the earliest possible time so that the pipeline could be completed by the end of 1975. The Board members assured him that the NEB would cooperate to the extent possible.

In early January, 1974, the Board appointed a staff co-ordinator for the anticipated application and staff representatives from the relevant branches were named. Studies began on various ways of building the pipeline over possible alternative routes. The studies included a review of the crown corporation mechanism used in 1956 to construct the Northern Ontario section of the original Trans-Canada Pipeline and its possible application in financing a Northern Ontario oil pipeline from Gretna, Manitoba to Montreal.

The first staff meeting to discuss preparation for receiving and analyzing the expected application was held on January 22, 1974. On February 11, NEB staff and two Board members met the president,

secretary-treasurer, and general counsel of Interprovincial to discuss a draft application.[402] Company officials expressed concern about the position environmentalists might adopt during the hearing. They feared that the company would be criticized for past practices that had not in their view caused significant environmental damage. Interprovincial's officials hoped that the Board would deal with these matters reasonably and expeditiously. They suggested that further discussions with the agency's staff might be useful in resolving specific problems.

The company also sought assurance that questions about its choice of route would not be asked at the hearing. The Board members present indicated that the NEB would not require Interprovincial to substantiate its choice of route as part of the application. They suggested, however, that the company should be prepared to speak to it at the hearing since the subject was almost certain to be raised by intervenors. The usefulness of a company press release giving reasons for preferring the Sarnia route was discussed.

In giving preliminary advice to Interprovincial, Board members clearly stated that the agency would not depart from normal practices in considering this application. The company was cautioned not to presume that the NEB would accept less evidence on this application merely because the government had already told IPL what was expected of it. Concern was expressed by Board staff that on such a sensitive application the NEB should exercise great care with material that might be introduced on a "confidential" or "informal" basis.

In subsequent months a number of meetings between IPL staff and Board staff members occurred. Environmental implications of the proposed pipeline were major concerns at these meetings. A probable reason for this emphasis with the NEB's recent establishing of an Environment Group in its Engineering Branch. This followed the agency's earlier decision to take environmental matters into consideration in carrying out its regulatory and advisory functions.[403]

The Environment Group had prepared draft environmental guidelines but no specific requirements for environmental information had been added to either the NEB's Regulations or Rules of Practice and Procedure. The Engineering Branch noted that a detailed environmental report had been required of Cochin Pipelines Limited in its 1973 Sarnia pipeline application.[404] Westcoast Transmission had

also been asked to supply additional environmental information in a recent application.[405] Also noted by the Branch were the environmental discussions in the press of the effect of the proposed IPL pipeline and alternative routes.

The Branch recommended to the Board that an environmental report, using the draft environmental guidelines, be filed by the applicant. The Board agreed and Interprovincial was asked to provide such a report.

On March 22, 1974, the first three parts of the Interprovincial Pipe Line Limited application were filed with the NEB. The letter of transmittal indicated that the fourth part dealing with environmental implications would be filed in the first week of April.

III. APPLICATION AND HEARINGS

(a) Application Review

The application was reviewed by National Energy Board staff with amazing speed. The documents were received on a Friday. On the following Tuesday, March 26, the Board's Secretary asked that staff comments on the application be submitted by noon Wednesday, March 27. This deadline was met but because of the limited time for review, most of the comments submitted were described as preliminary.

Staff review suggested several deficiencies. But when the Board considered the application at a meeting on March 28, it was noted there were no deficiencies and so a hearing was scheduled for May 7, 1974. The deficiencies identified were to be dealt with by letter in order to expedite the matter rather than through the normal more formal deficiency statement process. In fact, this was done in the same letter that asked Interprovincial to provide an environmental report. The deficiencies involved such information as the identity and capacity of the Montreal refineries to be served by the proposed pipeline.

The agency's usual hearing preparation procedure was then put into motion. Panel members and staff met on April 22 to review the application and again on May 3 to review the draft questions prepared by staff.[406] In the meantime, on April 16, Interprovincial filed the fourth part of the application on environmental effects.

(b) Comments by other Government Departments

Informal comments on Interprovincial's environmental report were prepared by the Departments of Agriculture and Environment. Agriculture Canada submitted its comments to NEB staff. The Minister of Agriculture did not intend to make a formal presentation and believed that the Board could only consider information submitted at its formal hearings.

Environment Canada's report was sent to the Board informally. The internal committee that produced the report suggested that the Department should not intervene in the hearings, nor should the Minister of Environment raise the matter in Cabinet because there were not likely to be any significant environmental effects. The committee did, however, propose that the Department support the formation of a multi-disciplinary environmental inspection team to monitor construction of the pipeline.

By the time the hearing began in Ottawa on May 14, 1974, fifteen interventions had been received. These included submissions by the Provinces of Ontario and Quebec, various oil and gas interests, the Ontario Federation of Agriculture, the Committee for an Independent Canada, and Mr. Peter Lewington.

(c) The Hearing

At the outset, the panel of Board members[407] selected to preside at the hearing established an order of appearance for intervenors as follows:

1. Provincial governments
2. Municipalities
3. Federations such as The Ontario Federation of Agriculture
4. Associations and companies
5. Individuals

Mr. Peter Lewington, a farmer whose land lay on the route of the proposed pipeline, complained about the order of appearance. He noted that an individual intervenor like himself, appears before the Board on his own behalf and at his own expense. It was unreasonable, in his view, to ask individuals to appear last and force them to wait,

possibly for days. Counsel for the other intervenors when asked had no objection to allowing Mr. Lewington to appear immediately after the applicant.

This problem, a significant one for intervenors with limited funds, was resolved to everyone's satisfaction. However, the stage was set for subsequent clashes with Mr. Lewington when NEB counsel stated

> Frankly I have difficulty with my learned friend's submission here. This submission is nothing but a lot of vague, unsupported and, in my opinion, apparently unfounded charges. I don't frankly quite see what we can do about it, but I feel that Mr. Lewington will have to be kept within strong confines when he does make his submission.

Mr. Lewington responded that he did not like the term "strong confines".[408]

In his opening submission, R. H. Sheasby, counsel for Interprovincial, carefully stated and circumscribed the issues that would be addressed by the applicant. He used the government's policy on the pipeline extension as a means to limit consideration of public convenience and necessity to what were essentially technical matters. Sheasby stated that:

> We are dealing with an application to extend an existing pipeline system to serve a new market which extension the Government of Canada has already declared to be in the national interest, to provide a measure of security of oil supplied to Eastern Canada. The national interest having been established, the evidence to be introduced will be directed primarily to matters of design, location, proposed methods of construction and economic feasibility.[409]

The same method was tried again in an attempt to foreclose the critical issue of the route chosen and its environmental consequences. Sheasby noted that:

> The federal government has publicly announced its concurrence that the Montreal extension follow the Sarnia to Montreal route. The Province of Ontario has officially stated that it does not oppose that decision. At this hearing the applicant will, of course, lead evidence as to the matters considered in determining the general location of the proposed extension along this route. However, I wish to state at this time, before the presentation of evidence, that no environmental study has been made by the applicant of any other route than the one proposed.[410]

Interprovincial's counsel then pointed out that the Board had never before considered an applicant's response to the Board's draft environmental guidelines. The thrust of the evidence to be introduced by Interprovincial would in Mr. Sheasby's words "record the

company's intention to minimize the environmental impact to the extent possible (having regard to the completion date desired by the government)". He went on to say that the applicant also intended to show its concern for the environment and its willingness to accept all reasonable recommendations for environment protection. In fact, most of the practices and safeguards suggested by intervenors were already policies of the company and, where appropriate, had been incorporated into the design of the proposed pipeline facility.[411]

Further, it was mentioned that because the Province of Ontario had intervened and expressed concern about the proposed route through the North Pickering project, representatives of the company had met with Ontario government officials. A result of these discussions was an alternate route for the pipeline through the North Pickering project area acceptable to both Ontario and Interprovincial.[412]

Prior to testimony by the first panel of witnesses called by Interprovincial, a motion was brought by counsel for the Attorney General of Quebec. The motion sought to have declared irrelevant the applicant's proposals and submissions on tariffs and tolls and to prohibit introduction of evidence on this subject.[413] The Board decided that the first two panels of witnesses would not deal with these matters and that argument on the motion could be heard and a ruling made later.

When argument was heard on the motion the following day, the Board granted the portion of the Quebec motion intended to prohibit the applicant and intervenors from adducing evidence on the subject of justness and reasonableness of any tolls or tariffs associated with the proposed pipeline facility. The Board acknowledged that some evidence of this nature was relevant to the issue of economic feasibility of the facility under section 10(5) of Part II of the Schedule to the Rules of Practice and Procedure and section 44 of the *National Energy Board Act*. However, the ruling declared that the decision on the facility application would in no way settle any toll or tariff for the proposed pipeline.

In presenting the first panel of witnesses for the applicant, Interprovincial's counsel asked that normal Board practice be modified so that all witnesses in the panel could testify before any cross-examination to "expedite the proceedings". The Board agreed.[414] This panel presented evidence on such technical aspects of the application as planning, engineering design, markets and oil

reserve considerations. The witnesses were Messrs. A. B. Jones and C. H. Bucklee, Interprovincial's Managers of Planning and Economics, and of Engineering, respectively.

A second panel presented evidence on environmental aspects of the proposed project. Witnesses were Mr. O. Linton, Project Manager for the extension who outlined the company's policies, practices, and procedures to minimize environmental impact; Mr. R. Dunsmore, who responded to concerns expressed by the Federations of Agriculture; Mr. D. Duncan, Project Director for F. F. Slaney Environmental Consultants, who directed the environmental studies on the Ontario portion of the route; and Dr. André Marsan, the environmental consultant for the Quebec portion of the route.

The first two IPL panels were cross-examined extensively. Most questions were directed to potential environmental impacts of the proposed pipeline facility. Peter Lewington questioned Buckley and Jones about noise levels at an existing IPL pumping station located near his farm. Sheasby immediately objected since in putting his first question, Lewington had stated that there had been complaints by residents about the level of noise. He was asked by the Board to re-phrase the question.

Ronald White for the Ontario Federation of Agriculture directed questions to the reasons for rejection of the Northern route from Sault Ste. Marie, Ontario. White, also a non-lawyer, brought out very effectively the fact that no environmental impact study had been done on the Northern route prior to the route decision.[415] White's questions were at times rambling or argumentative but he was well prepared, careful and persistent. Throughout the hearing, he uncovered a number of facts about the impact of the proposed pipeline facility on agricultural activities.

Lewington had more difficulty in asking proper questions. He was cautioned a number of times by the Board, following objections by Sheasby about editorializing and presenting evidence. Despite his lack of barrister's skills, his tendency to wander, and Sheasby's rattling objections, Lewington's cross-examination was fairly effective, bringing to light such matters as Interprovincial's lack of knowledge of the effects of pipelines on soil drainage patterns and casting doubt on the company's past record in predicting and avoiding environmental damage.[416]

As cross-examination of the environmental witnesses continued, a number of serious weaknesses were established in this part of the

applicant's case. Cross-examination by counsel for Ontario, for example, established that the F. F. Slaney environmental report was completed in less than one month. The witness Duncan, however, explained that the report was merely a first-phase overview and inventory and as such a month's preparation time was adequate. The same counsel was also able to extract an undertaking from Duncan for further studies to identify areas of special interest and unique historical and ecological areas along the route of the proposed pipeline. The witness Dunsmore agreed[417] that independent inspectors were desirable to ensure that work on the pipeline would be done in a satisfactory way.

Cross-examination by counsel for the Attorney General for Quebec of the witness Marsan confirmed that the consultant's terms of reference did not include the study of the environmental impact of alternative routes.[418] The witness Linton admitted that the choice of route on the Quebec side was based on cost factors and technical considerations and that at the time the choice was made, an environmental assessment had not yet been completed. Linton stated in response to a question by counsel for the Province of Quebec that Interprovincial had never experienced a major pipeline leak. The implication was that major oil pipeline breaks are rare. Counsel's next question was: "Are you aware that yesterday 10,000 gallons of crude oil leaked from Westcoast's pipeline into the Fraser River?" Linton also admitted that the possibility of crossing the Ottawa River downstream from the Carillon Dam (the route ultimately adopted) had not been studied, and that the applicant was not aware that there were 21 municipal water in-takes downstream from the proposed crossing at the Lake of Two Mountains.

Interprovincial's president, D. G. Waldon, called along with the company's secretary-treasurer as policy witnesses, referred to a call from the Deputy Minister of Environment Canada, Robert Shaw. According to Waldon, Shaw stated his department had been asked to "get on this project" and work with Interprovincial's staff to develop a proposed route. Waldon stated that:

> We had consultations with the Ontario Environment people, and frankly I'm a bit stunned that with the emphasis on the environment, if a line is to be constructed we are going to have to cross certain rivers and streams to get there and there are methods to disrupt things as little as possible; but to cross the streams, they must be crossed, and I would think that the emphasis should be on how we are going to go about it and get on with it.[419]

The province of Quebec then called three witnesses to testify about the environmental impact of the proposed pipeline. Their

testimony stressed the proper selection of river crossing sites and the considerations and safeguards involved. Their evidence established that a large number of communities drew their water supplies downstream from the applicant's proposed crossing and that a pipeline break could seriously affect these supplies. It had already been brought out that the company had not seriously considered this possibility in choosing the crossing site.

One interesting line of cross-examination that foreshadowed later events was developed by counsel for the Committee for an Independent Canada, George Hunter. The CIC wished to place on record details of the extensive consultations between Interprovincial and federal government officials before the formal filing of the applications with the National Energy Board.

Waldon's responses to Hunter's questions confirmed a substantial degree of government-industry consultation during the winter of 1973-1974, involving both members and staff of the National Energy Board. These questions appeared to cause some discomfort. At one point, for example, Waldon insisted that the proper term was "discussions" with government and NEB officials, not "negotiations".[420] NEB counsel, objecting to a Hunter question, asked: "Are you implying that there was any collaboration between the Board and the applicant...?" An exchange followed on the proprieties of pre-application consultation and the duties of the Board.[421] Waldon stated that the only "out of the ordinary" concern was expressed by the Department of Energy, Mines and Resources about how quickly Interprovincial could file its application with the National Energy Board.

At this point, the Board decided to adjourn the hearing *sine die* to permit the applicant to prepare and file additional material on the environmental impacts of the proposed pipeline.

(d) The Hearing Resumed

Following receipt of the additional environmental material and further communication with Interprovincial, the Board ordered that the hearing be resumed on October 9, 1974. The Board was not satisfied with the information filed. But again, for reasons of expediency, it decided to bypass the deficiency letter procedure normally used to request further information. Rather, the Board Secretary sent an informal letter to Interprovincial that did not

mention any "deficiency" but requested additional information, particularly about any agreement between the company and provincial resource or environmental agencies. There was some concern that Interprovincial might have "compromised the Board's authority" on environmental matters through agreements with provincial agencies. The letter pointed out that the hearing would be resumed on October 9 if the additional information was provided.

Prior to formal resumption of the hearing, there was speculation that changing supply and market circumstances might cause Interprovincial to delay or drop the project. Two important factors were rising costs generally and the availability of steel pipe.[422] When the hearing resumed on October 9, this speculation was quickly confirmed when Sheasby, counsel for Interprovincial, asked for an adjournment following introduction of the company's new environmental evidence.

Sheasby confirmed, in response to the Board's letter of September 6, 1974, that the company had received no written approvals and had entered into no written agreements with provincial resource or environmental agencies. He called as his first panel of witnesses Messrs. Buckley, Linton, Duncan and Marsan. Linton outlined route changes that Interprovincial had made following adjournment of the hearing. The new route would cross the Ottawa River below the Carillon Dam then cut across part of the federally expropriated land for the new Mirabel International Airport to Terrebonne and thence to the Island of Montreal. He indicated that extensive discussions had been held with environmental officials of the provinces of Ontario and Quebec and that the new route was "acceptable" to both as likely to cause minimal environmental damage.[423]

Environmental studies of the new route had been conducted in Quebec by Marsan and in Ontario by the F. F. Slaney Group. The environmental consultants outlined their terms of reference and the tasks that had been carried out, then summarized their conclusions. Both studies concluded that in general the new proposed route was satisfactory from an environmental point of view and that government agencies in both provinces found it to be acceptable.

Cross-examination by the intervenors on environmental issues was largely perfunctory.[424] It was clear that prior agreement in principle had been reached with environmental agencies in both provinces. In addition, Interprovincial had specifically undertaken to

provide additional environmental information before beginning construction.

Cross-examination by Rogers, counsel for Ontario's Ministry of Energy, did, however, establish the importance of the construction phase in effective environment protection. The environmental report completed before the hearing was phase I — an environmental overview of the proposed route. Only in phase II could a review become specific about the actual site of the pipeline and include consideration of particular problems of environmental impact and possible solutions. Surveys are never completed until after the granting of the certificate of public convenience and necessity. And not until these surveys have been done can the precise location and alignment of the pipeline be known. Supervision of the implementing of environmental stipulations required by Board orders, perhaps through monitoring performance of contractors, appeared then to be critical in achieving effective environmental protection.

Cross-examination by counsel for Ontario established that Interprovincial had not developed construction guidelines for a number of river crossings beyond references to "sound engineering practice".[425] Company witnesses explained that no examples of construction guidelines could be provided since these would be included in the specifications for contracts put out to tender. This was part of the information that Interprovincial had already undertaken to provide later.

Questions by Rogers resulted in what could be described as waffling by company witnesses about the implementation of environmental consultants' recommendations on construction timing.[426] The witness Linton considered impossible the juggling of five spreads involving "tens of millions of dollars of equipment" to meet all of the consultant's timing recommendations. Questions by Rogers about the preparation of construction schedules failed to elicit information about the timing of construction schedule preparation — how far in advance of construction were such schedules prepared, and how soon after the granting of the certificate of public convenience and necessity?[427]

NEB counsel J. M. Hendry's cross-examination concerned residual environmental matters not raised by other parties and seemed to indicate a careful review of Interprovincial's environmental material by agency staff. Involved were such things as the proposed route crossing a particular geological fault not once but

twice, explanation of the dredging technique to be used to dispose of mercury contaminated spoil at certain river crossings, and measures planned by the company to minimize noise and dust during construction.

Interprovincial again called a panel of policy witnesses consisting of its president, vice-president and treasurer. Its president, D. G. Waldon, explained that the situation had changed considerably since the original pipeline proposal was made in the fall of 1973. In particular, it was no longer clear that there was sufficient western crude oil remaining after meeting the needs of western Canada and Ontario to supply the proposed 250,000 barrels per day to the Montreal market. A great deal, he said, would depend on the NEB's assessment of the reserve situation and its decision regarding the level of exports in its forthcoming oil export report. He suggested that if the situation was correctly assessed by the company then it would not be able to proceed solely on the basis of a statement of government policy. Specifically, it would need some type of guarantee of $25 million in annual revenue to cover the cost of the proposed extension. Waldon's testimony was in essence a request to the federal government for assistance and an indication that Interprovincial would drop the application in the absence of a guarantee.

(e) Adjournment and Continued Industry Government Consultation

Following cross-examination of Blight and Waldon, Interprovincial's counsel moved to adjourn as part of his closing argument.[428] The motion requested that the Board either adjourn the proceedings or defer a decision on the application or issue of the certificate until formal release of the NEB's oil export report[429] and such further time as might be necessary for the company to review and consider the report. As Waldon's testimony indicated, the economic viability of the proposed extension was dependent on maintenance of government policy that 250,000 barrels per day of western crude oil be reserved for the Montreal market. It was possible that the Board's conclusions in its report on reserves and any export formula that it might develop could have the effect of modifying existing policy. Sheasby conceded that by the terms of the hearing order the oil export hearings dealt essentially with the subject of exports. But he asserted that the determinations by the Board on the subject of exports necessarily involved a determination of total reserves

available and calculation of Canadian needs. It was these latter determinations that could conceivably affect the viability of the Montreal pipeline proposal.

Apparently, Interprovincial's concern was to reserve an opportunity for further representations regarding the implications of oil reserves determinations and any oil export formula proposed by the Board. This would allow the company to make additional arguments without totally abandoning the application and perhaps having to repeat part of the regulatory proceedings. The company would not be satisfied simply to have the certificate granted, then decide whether to act on it or not. In any event, no intervenor opposed the motion for adjournment.

When the hearing resumed the following morning, Thursday, October 10, the Board adjourned the hearing *sine die*, granting the first part of the IPL motion. The Board's order made no specific reference to the oil export report.[430] Its concern was no doubt to avoid establishing a precedent for delay of regulatory proceedings pending the results of rule-making activities such as oil export inquiry and the forthcoming hearings on natural gas supply and deliverability.[431]

As later events revealed, the government listened seriously to the concerns expressed by Interprovincial.[432] Reports at the end of October, 1974, suggested that the issue was whether the line should be built and operated under public ownership, or whether IPL should be given some form of government guarantee.[433] Meanwhile, production of steel pipe for the line had already commenced.[434] Interprovincial pushed its case for government support even harder following release of the Board's Oil Export Report by the Minister of Energy, Mines and Resources.[435] Company officials met Mr. Macdonald and other government officials on several occasions before the matter went to Cabinet for the decision that met Interprovincial's concern.

IV. ISSUES ARISING OUT OF THE CASE STUDY

(a) Pre-Application Consultation

This application involved a significant degree of pre-application consultation between officials and staff of Interprovincial, not only

with NEB staff, but with Board members themselves. There were two main reasons for this. First, the Cabinet had already as a matter of policy approved the Montreal extension in principle and authorized "facilitation" of the application to ensure completion by the end of 1975. To implement this Cabinet decision, a high-level inter-departmental task force was appointed to study various aspects of the problem, and to work with both Interprovincial and the NEB. The Board was inevitably drawn into this network of "facilitation" activity.

Second was the Board's decision to inaugurate its draft environmental guidelines in this application. Since this was the first time that Interprovincial was obliged to submit detailed environmental information in support of an application, company staff were inexperienced and required assistance and explanation in order to respond to the guidelines. Even then, information submitted with the application was considered to be inadequate by the NEB's Environmental Group, and this necessitated further staff consultation.

(b) Government Policy Influence

The influence of specific government policy on this application was clear. There was direct influence through the initial Cabinet decision and subsequent public statements by the Prime Minister and the Minister of Energy, Mines and Resources. The Minister actually arranged and "chaired" meetings that included representatives of Interprovincial and members of the Board, where details of the proposed application, its route, financing, and environmental concerns were discussed. The result was at least a *prima facie* predetermination that the application was in the public interest. The only responsibilities remaining for the NEB were "checking" engineering, financial, and environmental details of the proposal.[436] This was the context in which Interprovincial presented its evidence at the hearing as Mr. Sheasby's opening statement indicated. The applicant began by noting that the Government had already declared the project to be in the national interest and had concurred in the Sarnia - Montreal route. The Board panel members presiding at the hearing did not contradict this statement.

There was also indirect government influence on the application through the activities of the interdepartmental task force and direct contacts with the agency by officials of interested departments. The

task force looked in some detail at such things as alternative methods of financing, route selection, effects on agricultural activities, and other environmental impacts — the very things that the Board could consider in hearing the application. The Board was treated as simply "another participating department" by the task force. It was apparently difficult for departmental officials, including Ministers, to understand or remember the adjudicative function of the Board.[437]

(c) Non-conventional Intervenors

The application also provides an example of effective intervention by nonconventional intervenors. These were the Committee for an Independent Canada, the Ontario Federation of Agriculture, and Mr. Peter Lewington, an individual farmer.

None of these intervenors called evidence except Mr. Lewington who testified personally, and whose evidence was characterized by the panel of Board members hearing the application as "evidence and argument". However, the transcript of the hearing shows that all intervenors, including Peter Lewington, acquitted themselves surprisingly well in cross-examination. All were able to raise important gaps or inconsistencies in Interprovincial's information on the environmental effects of the proposed pipeline. In addition, Hunter's cross-examination for CIC placed on record the reasons for favouring the Sarnia route and the questionable process by which the decision was made. His cross-examination of IPL President Waldon clarified the type and degree of government policy influence in the preparation of the application and its consideration by the NEB.

But the Board's procedure and practice imposed constraints on these intervenors. One problem was resources. Hunter acted *pro bono* for the impecunious CIC. The Committee was not represented at the resumed hearing because financial and staff time priorities would not permit. Moreover, CIC had concluded, correctly, that the new proposed route was already a matter of agreement among Interprovincial, Quebec and Ontario.

Lewington raised most graphically what limited resources mean to an intervenor in his complaint about being scheduled at the bottom of the list with the possibility of a long and expensive wait. The Board and counsel for other parties wisely consented to hearing him first.

Another problem was the difficulty posed to non-lawyer individual intervenors like Lewington by the formal court-like

procedures followed by the Board. His cross-examination was continually interrupted by lawyerly objections to his habit of editorializing when framing questions. "If he wants to lead evidence, let him be sworn", said Sheasby, counsel for Interprovincial. Yet the transcript discloses on analysis substantial editorializing by Sheasby himself, admittedly interwoven in the proceedings in a more tactful, better timed and less obvious fashion.

In order to carry through the formal judicial procedure, the presiding Board members were forced to such absurdities as characterizing Lewington's representations as half evidence - half argument; then denying Lewington's objection to Sheasby's editorializing on the latter's objections by concluding that this was appropriate in view of the fact that Lewington was also presenting argument as well as evidence!

(d) Environmental Considerations

Interprovincial's application was used as a testing ground for the Board's environmental guidelines. Some of the difficulties of introducing a new criterion for decision requiring a new type of information are illustrated by the application. The need to instruct Interprovincial's staff, and the poor quality of the environmental information initially received have already been noted. The reason suggested by some NEB staff members was that the applicant simply was not prepared to take this aspect of the application seriously. Environmental studies were not conducted as part of standard engineering feasibility studies. Rather, the objective was to draw together sufficient information to "satisfy" the Board and potential environmental intervenors.

The environmental evidence at the hearing showed that under the Board's existing procedure on facilities applications, the critical stage for environment protection appeared to be in implementing environmental stipulations and monitoring compliance during construction. The evidence raised doubts, first, that the Board has the capability to monitor effectively and enforce conditions during construction and secondly, that self-enforcement by the applicant would suffice.[438]

Perhaps the most startling aspect of the environmental issues raised in the Interprovincial application was the poor performance of Environment Canada. This Department's review team, functioning as part of an interdepartmental task force reporting to the Minister of

Energy, Mines and Resources, concluded that no significant environmental impact was likely. Consequently, there was no mention of environmental problems in the memorandum to Cabinet that was based on the task force report. Yet the Interprovincial hearing was adjourned because the NEB concluded there were significant unresolved environmental issues involved.

(e) Rule-Making Adjudication Interface

A final important issue raised by this application is the relationship between adjudicative and more general inquiry or rule-making functions. The Interprovincial adjournment motion was based, at least for the purposes of argument, on the need to review information and conclusions in the Board's forthcoming oil export report. This report was a product of the Board's hearings on the general subject of oil export held earlier in the year.[439] The possibility is raised of adjudications being delayed by or made conditional upon[440] reports generated by rule-making proceedings such as the oil export inquiry and the hearings on natural gas supply and deliverability.[441]

The problem can be put in another way. In considering the Interprovincial motion for adjournment, some of the Board members involved knew quite clearly what was in the most recent draft of the oil export report since two of them also presided at the oil export hearings. It would be difficult not to presume, then, that evidence and undisclosed determinations in such general rule-making proceedings would help to determine issues in adjudications on particular applications.[442]

CASE STUDY NO. 3

An Application to Export Ethylene by Dow Chemical of Canada Ltd.

I. BACKGROUND

In 1971, Dome Petroleum Limited (Dome) contracted to sell ethane, propane and condensates to a company in Ohio. Dome considered this agreement would make supplying ethane originating in Alberta by pipeline economically feasible. Accordingly, the company applied to the National Energy Board for amendments to existing licences to increase the volume authorized for export over a ten year term. At the same time, Cochine Pipe Lines Limited (Cochin) applied for a certificate of public convenience and necessity for the construction of a pipeline. Due to the rapidly changing energy situation in Canada in 1971 and 1972, the NEB limited its considerations to propane. This matter was heard in January, 1972.

In May, 1973,[443] the NEB authorized the export of an additional volume of propane but restricted the term to five years rather than the requested ten years. At that time the Board directed Dome and other parties who had taken part in the hearing in January, 1972, to file additional and more current evidence. A further hearing took place in July, August and September, 1973.

From the additional evidence, it was apparent to the NEB that the nature of the overall project had changed. Dow Chemical of Canada Limited had proposed construction of a large ethylene manufacturing plant at Fort Saskatchewan, Alberta. It had become the equal co-shareholder in Cochin with Dome. Cochin now sought authorization from the Board to construct twin pipelines, one as originally contemplated to carry light hydrocarbons to Sarnia, Ontario and the other to carry ethylene.

During these hearings, argument was presented on the question of whether ethylene fell within the jurisdiction of the NEB as gas or oil within the meaning of Part VI of the *National Energy Board Act*. Since the evidence showed that ethylene would not be transported by the pipeline system until 1977, the Board found it unnecessary to decide the issue at that time. Furthermore, Dow limited its evidence concerning ethylene. The other parties involved did not cross-examine fully on ethylene-related issues because it was generally assumed that the NEB had no jurisdiction over ethylene.

The NEB was, however, aware of the importance of ethylene. (In January, 1974,[444] it took into account the amount of ethane required to produce ethylene in determining the amount of natural gas and ethylene that would be surplus to Canadian domestic needs.) While approving the requested export of ethane, the NEB restricted the term of the licence to six years to coincide with amendments to Dome's licences to export propane. The NEB also approved construction of the twin pipeline system.

In April, 1974, the Board concluded that it had jurisdiction over the export of ethylene under Part VI of the Act and communicated this conclusion to interested parties. Dow thereupon applied for a licence to export ten billion pounds of ethylene annually.

II. THE DOW CHEMICAL APPLICATION

(a) The "*Ex Parte* Public" Hearing Procedure

The NEB decided that it would "publicly" hear the Dow application "*ex parte*" and would "consider only written representations" from interested parties. Such representations had to establish that the party was "directly interested in" or "affected by" the application and be served on the applicant and the NEB on or before June 21, 1974 — only ten days after notice of the *ex parte* proceeding

was given. A Telex message was sent only to those parties previously involved in the Dome-Cochin hearings, although the Board also issued a press release. The effect of this procedure was that only the applicant would be permitted to present oral evidence and to make oral argument (although written argument was later allowed) and that intervenors were limited to written representations and would not be afforded the right to cross-examine.

Why did the National Energy Board depart from its usual procedure in this way? Having assumed jurisdiction over ethylene, the Board did not have sufficient information to make a decision on the export application since ethylene and related matters had not been fully considered at the Dome-Cochin hearings. At the same time, at least some NEB members took the position that the project had already been approved, at least in principle, by the federal government.[445]

A conference was held with Dow officials to determine how the application could best be handled in order to avoid controversy and reach an expeditious decision. Given advice from NEB staff that no interventions were likely, the agency's counsel prepared an opinion suggesting that the agency could safely proceed *ex parte* under Rule 6(1) of the NEB Rules of Practice and Procedure. When it became evident that there would be interventions opposing the application, counsel then advised the NEB that a full public hearing should be held. In order to restrict the size of the hearing, the NEB then decided to give notice by issuing a press release and sending a Telex message to all parties who had been involved in the Dome-Cochin hearings. It was believed that such notice would suffice legally.

Dow officials discovered what had happened and apparently brought pressure through several NEB members to dispense with a public hearing. It appears that several Cabinet ministers were also contacted at this stage.

NEB counsel, aware of the absurdity of the "*ex parte* public" terminology that had been adopted, advised that the agency should either proceed *ex parte* in the true sense of the term, or hold a full public hearing. It was pointed out that a hybrid procedure might invite difficulty. The agency, on the other hand, was concerned about its lack of information on the issues raised by the application and viewed written submissions as a means of supplementing its knowledge. NEB members failed to grasp the serious legal implications involved in receiving written submissions by intervenors

while excluding their oral evidence and prohibiting cross-examination.

The agency faced yet another legal problem when Alberta Gas Trunk Line Company Limited (AGTL) announced that it would move when the Board convened on June 25, 1974, for an order under section 17 of the *NEB Act* to amend the hearing order to require a full public hearing. This would include an opportunity for all interested parties to cross-examine the witnesses called by the applicant in support of its application, to introduce oral evidence and to present oral argument. The NEB then had to decide whether to deal with AGTL's application separately, thereby keeping the so-called *ex parte* procedure more or less intact, or to permit AGTL to present and argue its motion. With Dow's concurrence, the agency adopted the latter course. All of the intervenors that had filed written submissions, as well as AGTL and Dow, were permitted to argue the motion.

Meanwhile, the Dow application was beginning to receive extensive coverage in the press. On June 18, an article appeared in the Toronto *Globe and Mail* discussing the *ex parte* procedure to be followed by the Board as well as the major substantive issues in the application. R. A. Stead, NEB Secretary, was quoted as saying he did not know whether the Board would allow interventions by parties other than the twenty-eight parties specifically invited, but that he was advising other interested parties to submit written representations by the June 21 deadline. Stead also justified the Board's procedure on the grounds that many of the issues had already been covered in the Dome-Cochin pipeline hearings, and that several million dollars had already been invested in the Dow project. He specifically denied that there were any political decisions involved in the timing of the hearing.[446]

On the day before the hearing was scheduled to begin, an editorial criticizing the *ex parte* hearing appeared in the *Globe and Mail*. The real issue was said to be that other companies with an interest in building world-scale ethylene plants did not want the export market taken over by Dow because they could not be sure that their proposed plants would sustain themselves on domestic markets alone. Mr. Stead's argument in defence of the unusual procedure, that a speedy decision was necessary and that much of the subject matter had been covered at earlier hearings, was rejected:

> Yet the very matters that other companies wish to examine at the hearing — the amount of exports to be allowed Dow and the prices to be

> charged — are, Mr. Stead agrees, of importance to the Board, and were obviously not fully explored at earlier hearings. Otherwise, why this hearing?[447]

On the same day, a *Globe and Mail* article noted that more than a half-dozen intervenors were requesting an adjournment and a full public hearing of the application. Several of the interventions and issues were discussed including the Government of Saskatchewan's suggestion that Dow had modified its ethylene plant proposal markedly since the Dome-Cochin hearings. The article stated that:

> What was originally portrayed as an imaginative project for Canada . . . has been reduced to the prevailing common denominator of exporting valuable petrochemical feedstocks with the attendant direct loss of benefits (to Canada) from further upgrading in Canada.[448]

The article also quoted sources that suggested the NEB was ordered by the government to speed up the ethylene export hearing.

(b) The Hearings

The Dow hearing convened before the NEB on June 25, 1974, AGTL immediately moved to adjourn the proceedings so that the agency might review and alter its decision to deal with the Dow application *ex parte*. The Board members presiding refused the application to adjourn but were prepared to hear argument immediately on the application to review.

AGTL argued that the agency's decision to advise a select group of persons[449] of its decision to proceed *ex parte* with the Dow application was contrary to the provisions of the *NEB Act*, in particular, section 20,[450] and to its intent and philosophy. Presumably the decision was based on Rule 6(1)[451] of the agency's Rules of Practice and Procedure. These Rules were made under the general rule-making power conferred by section 7 of the Act[452] and, so AGTL argued, could not override other provisions in the same statute, such as section 20. AGTL claimed that the NEB recognized the applicability of section 20 by deciding to deal with the application in public. However, it was urged, "public hearing" meant more than merely opening a hearing to the public. Section 20 required broader participation in a public hearing than the NEB's *ex parte* procedure allowed.

AGTL also argued that the procedure adopted by the Board prevented AGTL from knowing the case it had to meet and thus amounted to a denial of natural justice. The NEB had assumed

jurisdiction over the export of ethylene but had not, to the knowledge of AGTL, clearly defined what parts of the *NEB Act* applied to such exports or defined the criteria that would be used by the agency to determine whether an export licence should be granted.

Another reason for a full public hearing raised by AGTL was the far-reaching implications of the NEB's first decision on an ethylene export application for the development of the Canadian petrochemical industry.

Dow supported the NEB's decision, arguing that the agency had jurisdiction to proceed in the manner chosen; that the procedure in the special circumstances was entirely appropriate, and that the requirements of natural justice were met by the opportunities for participation available in previous hearings as well as the *ex parte* public hearing now proposed. On the first point, Dow argued that the Board may hear and determine an application *ex parte* pursuant to Rule 6(1) rather than set the matter down for hearing. Hence, the proceeding involved was not strictly speaking a hearing and so section 20 of the *NEB Act* did not apply.

Dow also noted that the Board had recently been empowered to authorize the exportation of ethylene by way of Board Order[453] and suggested that as an alternative to granting the licences, the Board should consider authorizing the export by order.

NEB counsel argued that ten days' notice was sufficient for a Board hearing. Counsel also emphasized the difference between the position of an applicant for a licence, and that of the public at large, to distinguish several authorities relied on by the applicants in arguing that the Board was obliged to give interested members of the public adequate notice and an opportunity to make representations. It was also suggested section 20(1) of the *NEB Act* could be interpreted as requiring no hearing at all.

In reply, AGTL stressed that the *NEB Act* had been enacted in the public interest. In interpreting the statute, the agency had an obligation to give maximum protection to the public. To resort to an *ex parte* public hearing procedure on no other basis than an interpretation of section 20(1) as not requiring a hearing was fundamentally wrong.

At the conclusion of argument, the three NEB members presiding adjourned, and promised a decision the following day. The

next morning, articles in the *Globe and Mail*[454] shed additional light on AGTL's application. In it, NEB lawyers were quoted as admitting that the agency had not yet decided whether for regulatory purposes ethylene was to be treated as natural gas or oil in the price and surplus determinations on which export approval depended. They were also said to have recognized that the wording of the *NEB Act* did not cover ethylene adequately, suggesting that Parliament would eventually have to modify the Act to clarify the jurisdiction over ethylene and define more clearly how ethylene export decisions should be made. One NEB lawyer apparently suggested that even if the ethylene involved in Dow's export application was treated as natural gas under the *NEB Act,* this would not necessarily mean that it would be subject to the same surplus test as natural gas. Similarly, ethylene export applications might not be subject to the same requirements to hold full public hearings as natural gas export proposals. "How ethylene is to be dealt with will be dealt with at this hearing", the lawyer said, agreeing that ". . . the Dow ethylene export application hearing would therefore serve as a precedent and have significant impact on any future exports of ethylene from Canada."

On reconvening, the presiding NEB members ruled that AGTL's application was denied since the procedure adopted by the agency was in their view consistent with the requirements of the *NEB Act* and natural justice. However, given the serious concern of a number of parties over the time allowed for submission of written representations and an "alleged" lack of knowledge of the case to be met, the intervenors were given a further opportunity to make written representations while Dow received a corresponding right of reply. The NEB members presiding also indicated that the Dow application would be assessed within the framework of the surplus calculations relied on by the agency in its decision of January, 1974, on the Dome and Dome-Cochin applications.

III. JUCIDIAL REVIEW IN THE FEDERAL COURT

(a) An "Extraordinary" Hearing in the Trial Division

Some intervenors were not content with this ruling. On July 7, 1974, the Attorney General of Manitoba sought judicial review of the decision by filing a notice of motion on behalf of the province in the

Winnipeg Federal Court Registry. The Trial Division of the Federal Court in Ottawa, although recessed for the summer, agreed to hold an extraordinary hearing on July 18, 1974.

At the commencement of the hearing, the presiding judge, Mr. Justice Cattanach, allowed six additional parties to be joined as applicants. These were: Alberta Gas Ethylene Co. Ltd. (AGE), Alberta Gas Trunk Line Co. Ltd. (AGTL), the Government of the Province of Saskatchewan (Saskatchewan), Alberta and Southern Gas Co. Ltd. (Alberta and Southern), Greater Winnipeg Gas Co. (Greater Winnipeg) and the Attorney General of British Columbia (British Columbia). Standing was refused to Mr. Gerald Hector, president of Radial Oil Limited of Winnipeg, on the ground that he was not a party at the hearing before the NEB. Hector had informally contacted Mr. J. G. Stabback, chairman of the panel of presiding NEB members, about the right to participate fully at the NEB hearing and had been refused. Greater Winnipeg had not been a party before the NEB in the Dow hearing but had participated in the earlier Dome and Dome-Cochin hearings. The Attorney General of British Columbia had not participated in any of the relevant hearings but was permitted to intervene since he represented the public of British Columbia.

Permission was granted to Dow Chemical of Canada, Ltd. (Dow), Dome Petroleum Ltd. (Dome) and Cochin Pipe Lines Ltd. (Cochin) to be joined as respondents along with the NEB.

During the course of argument, two amendments were made to the notice of motion. The amended version requested an order of *certiorari* to quash the NEB's decision to hold an *ex parte* hearing, an order of prohibition to prevent the NEB from making any decision on the Dow application without first having a public hearing, and finally, an order of *mandamus* to require the Board to hold a full public hearing on the application.

Argument by applicants centred on three main issues: first, the requirements of section 20(1) of the *NEB Act*; second, the general requirements of the *NEB Act* and the NEB's Rules of Practice and Procedure, and third, the requirements of natural justice.[455]

On the first issue — the meaning of section 20(1) — a statement by Board member Stabback during the NEB hearing was used to support the view that the agency treated ethylene as natural gas, as defined in section 80.1 of the Act. Since natural gas applications must

satisfy the requirements of section 20(1), so too then must ethylene applications. Other arguments concerning section 20(1) followed AGTL's earlier arguments before the NEB.

On the second issue, the applicants argued that the procedure followed by NEB did not meet the requirements of its enabling statute and regulations. As the transcript of the *ex parte* hearing showed, the application by Dow had been set down for hearing. Thus, it was argued, under Rule 6(1) the requirements of Rule 6(2) applied, and these were not satisfied. In other words, on receiving the application, the NEB had to decide what procedure to follow. Rule 6(1) gave the agency two choices: it could either proceed *ex parte*, or in the usual way by setting the matter down for hearing and satisfying the requirements of Rule 6(2). However, before deciding how to proceed under Rule 6(1), the Board had to decide whether sections 20(1) or 20(3) applied. If section 20(3) applied, the agency could have validly proceeded *ex parte*. But instead, so the applicants argued, the NEB adopted a hybrid procedure based on section 20(1) and Rule 6(1) that was unauthorized and consequently void. The applicants admitted that the agency could have legitimized the procedure it adopted by promulgating new rules. But it had not done so, and could not cure the procedural defects by modifications or rulings announced by members of the presiding panel during the hearing.

On the third issue, natural justice, the applicants submitted that the circumstances and magnitude of the Dow application distinguished it from those in which an oral hearing might not be required. Here, it was argued, an opportunity to submit written representations was not enough. While conceding that relevant information had been tendered by Dow at earlier hearings, the applicants argued that this did not give the intervenors sufficient knowledge of the current Dow application. Different considerations had been involved in the earlier hearings and significant changes had occurred since then that made additional information necessary. No previous application for the export of ethylene had been made to the NEB because it was thought that ethylene was not subject to the agency's jurisdiction. Therefore, the applicants suggested, interested parties could not reasonably have been expected to address themselves to the issue of ethylene export at previous hearings.

The respondents' arguments were presented in three parts by lawyers representing the NEB and Dow. NEB counsel attempted to distinguish the NEB's decisions to proceed *ex parte* and to deny AGTL's application to vary that procedure from its ultimate

disposition of the Dow application. The former decisions, it was argued, were administrative not judicial, and therefore were not required to be made "judicially". Thus, the applicants could only complain of a denial of natural justice when this resulted from the ultimate decision on the Dow application. Counsel also noted that *mandamus* could not issue because there was no provision in the *NEB Act* requiring the agency to set the Dow application down for hearing.

Dow had initially applied for a licence to export ethylene and the NEB set the application down for hearing on that basis. Between the date of application and the hearing, a new regulation[456] allowed the NEB to authorize exports of ethylene by Order. At the NEB hearing Dow, in its application, had asked the agency to consider the application as one for an Order. But, as NEB counsel indicated, the NEB had as yet made no decision on this request. Since the application could be considered in the alternative as one for a licence or for an order, and since the subject matter of a section 20(1) hearing is an application for a licence, any assessment that the Board had failed to satisfy the requirements of section 20(1) was thus premature.

Board counsel also attempted to limit the meaning of "hearing" in section 20 by arguing that the section 20(1) requirement for certain hearings to be public was simply a requirement that the hearing be open to the public rather than *in camera*. Reference to sections 28, 45, 47 and 74 of the *NEB Act*, that each guarantee certain rights, was used as support for the argument that Parliament would have expressly guaranteed interested parties the right to notice and an opportunity to participate in the hearing if that had been its intention.

As asserted by its counsel, the NEB need only recognize those parties whose rights are directly affected by an application. In this case, this meant Dow. But in any event, the rules of natural justice require only that parties be given an opportunity to meet the case against them, an opportunity that had in fact been provided to the intervenors in the Dow application.

NEB counsel noted that the agency has sole discretion to make rules of practice and procedure to carry section 20(1) into effect. The NEB did not purport to act under Rule 6(1) but pursuant to a new rule made under section 7(*b*) of the Act, consistent with Rule 3(2). This new rule, so counsel asserted, was the procedure outlined in the agency's Telex communication to the parties prior to the hearing. Mr. Justice Cattanach commented that the Telex message could only have

been the result of a rule and not the rule itself. He concluded that the rule was only in the mind of the agency since it had never been reduced to writing.

Reference was made by NEB counsel to section 45 of the *NEB Act* that gives the agency absolute discretion to determine whether or not a person is an "interested person" for the purposes of a certificate application under Part III of the Act. It was argued that since there is no similar provision for export licence applications, the requirement in section 20(1) that a hearing "shall be public" means only that it be open to the public. In other words, the NEB has complete discretion to hear or refuse to hear any person. Furthermore, it is competent to decide whether or not the changed circumstances are such that a full public hearing is required.

Counsel for Dow suggested that the company's application must be regarded as an integral part of a mammoth project to manufacture and transport ethylene to supply the needs of the Canadian market and to export the surplus. The NEB had directed itself to the real issue — the public interest of Canada. Mr. Justice Cattanach commented that the applicants also claimed to represent the public interest, so that the issue was whether the failure to permit them to participate was in derogation of the NEB's duty.

Dow's counsel distinguished situations in which the property or liberty of an individual was affected and situations in which there was no dispute in the nature of a *lis inter partes*. It was argued that the less the functions of the NEB resemble those of a court, the less closely the agency must adhere to strict adversary procedures. The NEB, it was submitted, is an administrative agency whose function is not to adjudicate disputes between parties but rather to determine certain important economic and social issues for the common good. These functions, Dow's counsel argued, are administrative and are not analogous to those of a court of law. Despite the use of the words *ex parte*, the NEB did not actually proceed *ex parte* in the sense that intervenors were totally barred from participating. It merely expedited its proceedings in accordance with the discretion conferred by section 7 of the *NEB Act*.

(b) The Decision

On Friday, August 9, the Federal Court released its decision.[457] Mr. Justice Cattanach held that the manner in which the NEB

conducted the Dow hearing did not conform to the requirements of section 20 of its enabling statute. In his words:

> Because the *National Energy Board Act* has bestowed upon the Board the attributes of a court and because the statute and the regulations contemplate the 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. In that sense, a "hearing" before the Board is analogous to and imports a "trial" before a court of law. That being so, the applicant for a licence and the opponents thereto must be treated on an equal footing with no discriminatory advantage being bestowed on one side or the other.
>
> Accordingly, if one side is permitted to give oral evidence the same faculty must be afforded to the opponents with the right by both sides to cross-examine the witnesses giving the oral testimony adverse to their respective positions. That is what is done in a court of law, and because I have concluded for the reasons given above that the word "hearing" in section 20 of the *National Energy Board Act* is to be construed as analogous to and importing a "trial" before a court of law, it follows that the Board must do the same thing in such a hearing.
>
> This the Board has failed to do . . . [458]

But Mr. Justice Cattanach did not see fit to more than grant an order prohibiting the NEB from rendering any decision on the Dow application consequent upon the hearing held June 25-27, 1974. He expressly declined to grant an order in the nature of *certiorari* because he considered prohibition to be more appropriate. He also declined to grant an order for prohibition of the nature requested by the applicants that would have included a direction or reference to a full public hearing.

The request for a *mandamus* directing the NEB to hold such a hearing was also refused. The validity of the new Regulation empowering the agency to authorize ethylene exports by order without a public hearing had not been argued. And so, Mr. Justice Cattanach considered that an order requesting the NEB to hold a full public hearing would not be appropriate.

(c) Agency Response

The NEB decided not to forward its report on the Dow application to Cabinet for final approval while Mr. Justice Cattanach's decision was pending. An NEB source was quoted as stating that it would not be proper — "ethical if you like" — for the agency to disclose its decision while the matter was under review by the Federal Court. The same source admitted that an early decision

would complicate matters and could prove embarrassing if the Court held against the NEB.[459]

Following the release of the Cattanach decision, Dow filed an appeal almost immediately.[460] This was apparently considered by the company to be the "fastest solution".[461] Immediate re-application was rejected because the NEB had made it clear that as a result of the Federal Court ruling it would not dispose of the Dow application without full public hearings.[462] Although NEB counsel had participated in arguing the respondent's position in the Trial Division, the agency announced it would not join actively in the Dow appeal.[463] Apparently, there was concern in the NEB that the agency had received adverse publicity because of the Dow case. Involvement in an appeal could be interpreted as further proof that the NEB was "in bed with Dow".

Press reports at the time suggested the possibility of Dow joining Alberta Gas Ethylene Ltd. in the construction of a world-scale ethylene plant,[464] and noted that, since this would not involve exports, the NEB would be "off the hook".[465]

IV. ISSUES ARISING FROM THE CASE STUDY

(a) Judicial Review of Hearing Procedure

We now examine a number of legal issues raised in the Dow hearing before the NEB and the subsequent motion before the Federal Court.

(i) Standing

There was no discussion in Mr. Justice Cattanach's judgment of the standing of the intervenors in the Dome application before the Federal Court. The Federal Court Rules make no provision for intervening parties. But two conclusions can be drawn from Mr. Justice Cattanach's preliminary rulings in the Dow case. First, any party participating in NEB proceedings that become the subject of a Federal Court action will have standing to appear in the action. In the Dow case, this was the basis for granting standing to all intervenors except British Columbia. The principle was followed in a more recent challenge of the NEB procedures by Union Gas Ltd.[466] Second, it would appear that provinces will be granted standing because they

represent the public if the paramount consideration of the agency involved is the public interest. In the Dow case, the Attorney-General of British Columbia was allowed to participate in the judicial review of an NEB decision because he represented the public of British Columbia.

The interpretation given to section 20(1) of the *NEB Act*, particularly the requirement that hearing "shall be public", was critical to the decision in the Dow case. In his judgment, Mr. Justice Cattanach interpreted the words "public" and "hearing" separately.

> . . . The word "public" in the context, in my opinion, means that every member of the public, subject to the qualification that such person has a demonstrable interest in the subject matter before the Board over and above the public generally, shall have the right to participate in the hearing.[467]

This raises the question of what standard is involved in the phrase "demonstrable interest . . . over and above the public generally". Before the Federal Court, NEB counsel contended that the agency must listen only to those persons whose interests would be directly affected by its decisions. But in an interview following the Federal Court's decision, an NEB lawyer was uncertain if this position had been changed. The question is crucial to individuals and "public interest" groups who may represent some individuals with similar interests. They are not "directly affected" by the NEB's determinations in the same way as other regulated companies. Accordingly, they cannot rely on the same legal bases for claiming standing before the Board.

(ii) Section 20(1) of the *NEB Act*

Mr. Justice Cattanach's decision rested on his interpretation of section 20(1). He concluded that the word "public" means "any member of the general public who has a demonstrable interest over and above the public generally", and that the word "hearing" must have the same meaning and consequences attributed to it as a hearing has in a court of law.

The decision may be questioned on two grounds, as NEB counsel have suggested to us. First, Mr. Justice Cattanach held, considering section 20 as a whole, the words "hearings" and "public" must be interpreted to mean "public hearing" even though the two words are not in juxtaposition in section 20(1). But section 20, as originally enacted, did not include subsections (2) and (3). Then, the only relevant language in section 20 was the "hearings shall be public"

phrase now found in section 20(1). However, the Parliamentary Debates leave no doubt that section 20 was intended to impose a public hearing requirement. As the then Minister of Trade and Commerce stated:

> . . . export and import licences will in future be issues only after public hearing. It has long been a just cause of public complaint that the existing procedure provided no means by which interested parties could appear, be heard, and examine applicants for an export licence, and that the Minister of Trade and Commerce has been under no obligation to state what considerations he had before him in approving or denying a licence. The public hearing process, which in the bill is provided for in that part which deals with the organization of the board, will at once afford better protection to the public interest in these important decisions, and a more satisfactory way of dealing with applications from the point of view of the government and of various parties concerned.[468]

Second, a comparison of the *NEB Act* provisions dealing with "certificates" and those relating to "licences" supports the view that the Act contemplated full oral hearings with all the attributes of a court of law for certificate applications, but not for licence applications. Section 45, in particular, gives the agency absolute discretion to determine whether or not any person is an "interested person" for the purpose of the provisions dealing with applications for certificates. But there is no counterpart to section 45 for licence applications. Similarly, a review of the different considerations relevant and interests affected in the two types of applications leads to the conclusion that the Act has intentionally differentiated between them. In the case of certificate applications, questions arise concerning such things as rights-of-way, property damage and environmental effects. These are issues directly affecting individuals and communities. In licence applications, the impact on individual members of the public is of a secondary order. Such an interpretation, however, is unsatisfactory, especially in view of the expressed intention of our legislators. But even without the aid of the Parliamentary Debates, the language of section 20(1) does not distinguish between certificates and licences. It merely states that "hearings . . . shall be public".

Mr. Justice Cattanach's assessment of the requirements of section 20(1) in the *Dow case*, raises a further question. Could an intervenor before the NEB object to pre-hearing consultations between agency staff and an applicant as a breach of the requirements of section 20(1)? Such communications are common practice, an example being relations between the NEB and Dow before the Dow hearings. One lawyer,[469] who has represented "public interest" intervenors before the NEB, strongly criticizes these practices

because they are inconsistent with the "quasi-judicial process" claimed to be followed by the NEB, and make it impossible for intervenors to acquire all of the information necessary to meet the applicant's case.

(iii) NEB's Jurisdiction over Ethylene

The question of the NEB's jurisdiction over ethylene raises the issue of the validity of Regulation 16.1 that empowered the agency to authorize exports of ethylene by order.

A strong argument can be made that Regulation 16.1 is invalid. Should the NEB be able to by-pass the whole of Part VI of the Act by purporting to authorize exports by Order? If the authority for Regulation 16.1 is the phrase "subject to the regulations" in section 82, a better interpretation is that licences may be subject to terms and conditions set out in the regulations. This would be consistent with Part VI as a whole and particularly section 85 which gives the Governor-in-Council power to enact regulations "for carrying into effect the purposes and provisions of this Part".

This argument is applicable to several other regulations as well.[470] But it is especially relevant to Regulation 16.1, the only regulation that permits exports of substances by order without restricting the term or quantity of export. The NEB justifies the regulation by linking the language of section 81 with the powers granted by section 85 considering that the former section clearly contemplates that expert authorization other than by licence is permitted if the regulations so allow.

(iv) Discretion with Respect to Practice and Procedure

Several of the arguments raised by NEB Counsel in the Dow case concerned the agency's discretion in the choice of its procedure. Mr. Justice Cattanach agreed that "if the Board complies with the express procedural provisions, it is the master of its own procedure".[471] However, purported exercise of procedural discretion by the NEB on two matters in the Dow hearing placed intervenors in the position of not knowing precisely what procedure the agency was following. Both of these procedural matters were the subject of comment by the Court.

The first matter concerned the NEB's adoption of an *ex parte* public hearing procedure. NEB counsel argued that the agency acted

pursuant to a new rule made under section 7(*b*) rather than under Rule 6(1). Mr. Justice Cattanach responded immediately, indicating that a rule that had never been reduced to writing was difficult to envisage as a rule, and that a telex communication could only be considered a result of a rule, and not a simultaneous stating and communication of the rule. In his written judgment, however, the judge considered the effect of Rule 3 of the NEB's Rules of Practice and Procedure,[472] but concluded that Rule 3(1) requires the agency, when substituting new rules on its own motion, to state expressly that a degree of emergency prevails that justifies a departure from the ordinary rules. Otherwise, a recipient of a message about a proceeding before the NEB would be entitled to assume that the usual rules were applicable.

The NEB's discretion may not, however, be so easily contained. Could it not act pursuant to a new rule, albeit unwritten, under section 7(*b*) of the Act? Rule 3(1) states that the Rules apply to every proceeding before the agency upon an application, except as otherwise provided in the Rules. Since the NEB claimed to be acting pursuant to a new rule, it would seem that the agency was proceeding within the Rule 3(1) exception, and outside the application of Rule 3(2). What, then, is the validity of the new rule? On this question, NEB counsel argued that a proper interpretation of section 7 of the *NEB Act* and the Statutory Instruments legislation allows the NEB to act pursuant to new rules of procedure under section 7 of the Act without ever formally reducing them to writing.

The second procedural matter concerned the treatment of Dow's application as an application for a licence, or for an order. If it were the latter, then the NEB's failure to meet the requirements of section 20(1) was irrelevant, this section operating only on applications for licences. Mr. Justice Cattanach ruled that the NEB must decide the fundamental character of an application before embarking upon a hearing. An application cannot be cast in alternative forms because different procedures and consequences follow from available alternatives. Since the NEB made no decision on Dow's suggestion that the agency consider the application as one for an order, or at least did not make its decision known, Mr. Justice Cattanach concluded that the motion before him had to be assessed on the basis of the application as originally made.

(v) The Record on *Certiorari*

During the hearing, Mr. Justice Cattanach admitted in evidence a press release issued by the NEB before its hearing on the Dow

application commenced. Also admitted were certified copies of the decision and reasons given by the NEB on the earlier Dome and Dome-Cochin applications. Counsel for the applicants also requested that the transcript of the evidence at the prior hearings be produced, and the request was granted. In his judgment, Mr. Justice Cattanach stated that the material had been admitted to ensure that the matter in dispute might be effectively determined. Further, there had been no prior motion for direction as to what would comprise the record on *certiorari*. The judge did not explain whether the material admitted constituted the record.

The importance of this issue depends largely on the effect of section 10 of the *NEB Act* under which the agency is designated a "court of record". Several times in the course of the hearing, Mr. Justice Cattanach raised this question but no satisfactory answers were given. If the effect of section 10 is to confine the agency's deliberations to material on the record, the nature and extent of the record becomes very important. But the exact meaning of "court of record" for the NEB remains elusive.

(b) Cabinet Influence

The Dow application appears to be an example of direct Cabinet influence on the Board's handling of a particular export application. Admittedly, the circumstances were unusual. The issue for government was fostering the development of a strong Canadian petrochemical industry. Discussions were undoubtedly held by government officials with industry representatives concerning construction of world-scale ethylene plants. But this was done when ethylene was not considered to be subject to the NEB's regulatory jurisdiction. In fact, it was necessary for government to decide as a matter of policy whether, and if so under what authority, export and import controls on ethylene would be imposed. Through the agency's advisory role, NEB members were quite properly involved in these discussions.

Yet when the decision was taken to leave ethylene regulation to the NEB, there was already substantial government commitment to the Dow project. The result was pressure on the agency to expedite the proceedings, and the consequent decision to hold an *ex parte* public hearing. It is an example of a specific government policy decision — in this case, concerning a major industrial development — pre-empting the NEB's responsibility to determine whether export is desirable in the public interest. Such pre-emption is not unusual.

Another example involving the proposed Interprovincial Pipe Line Limited Sarnia - Montreal oil pipeline extension is documented in Case Study No. 2.[473] The Dow application is unusual only in that government pressure was so great that it appears to have affected the procedure by which the agency attempted to process the application.

(i) Sequential Applications

Since export applications usually involve construction of additional facilities, both matters are normally considered at the same time. In the Dow case, however, alternative product components and changing development proposals resulted in a situation in which an application was submitted for export of a product through a previously approved, but still unconstructed, pipeline.

Much of the evidence introduced at the Dome Petroleum Ltd. — Cochin Pipelines Ltd. hearings in the summer of 1973 concerned the availability of ethane for export. Ethane is a component of natural gas that is used in the manufacture of ethylene.

The earlier introduction of evidence on ethane had involved participation by many of the intervenors in the Dow application. And this was used by the NEB as a justification for its proposed *ex parte* public procedure.[474] A number of intervenors demonstrated that such a position can cut both ways. Several argued in their submissions to the NEB that if ethylene is regarded as "oil", then any decision on the Dow application should await the NEB's report on oil export criteria.[475] In the Federal Court several intervenors asserted that a specific surplus calculation should not be made in the Dow application until the results of the NEB's forthcoming general hearings on natural gas supply and deliverability were known.[476] Mr. Justice Cattanach did not deal with this latter argument in his judgment. However, his reasons make clear that an opportunity to participate fully in prior hearings on a related application does not allow the NEB later to prevent intervenors a full and fair opportunity to be heard.

(ii) Media Impact

The National Energy Board had not often received concentrated and probing attention from the media before mid-1974. Nor do its members appear to welcome such attention. The Dow Chemical application shows that media criticism, however unwelcome, appears to have a potential for influencing NEB policy and operations.

Newspaper comment on the application was extensively discussed by NEB members and staff both formally and informally. Reporters' questions forced articulation of reasons for the decision to proceed with an *ex parte* hearing. Interviews with NEB members suggest that offensive news coverage influenced the Board's decisions to stay the application pending the result of the litigation, and later to proceed only following a full public hearing. Similarly, the agency's concern that the media represented it as being "in bed with Dow" figured in the NEB's decision not to join in the appeal by Dow of Mr. Justice Cattanach's judgment. Editorials and columns also touched the sensitive subject of Board relations with Cabinet, suggesting that the Board was in fact asked by government to speed up the Dow application.[477]

All of this suggests that the media can play a significant watchdog role in NEB regulatory functions. By quickly focusing attention on policy and procedural shortcomings, the agency can be encouraged to alter its approach before a final decision has been reached.

CASE STUDY NO. 4

Application for Additional Facilities by TransCanada Pipelines Limited

I. THE APPLICATION

In May of 1974, TransCanada Pipelines Limited filed an application with the National Energy Board for a certificate under Section 44 of the *National Energy Board Act*. Sought was agency approval for 58.5 miles of additional pipeline on its main transmission system, 43 in Ontario on the "Montreal line" and the other 15.5 on the main TransCanada line in Manitoba and Saskatchewan. On its face, the application appeared to be a routine facilities application of the type that TransCanada had made on a number of occasions in the past.

Under Section 44 of the *National Energy Board Act*, the Board must be "satisfied that the line is and will be required by the present and future public convenience and necessity...". To continue in the language of the statute:

> In considering an application for a certificate, the Board shall take into account all such matters as to it appear to be relevant, and without limiting the generality of the foregoing, the Board may have regard to the following:
>
> (*a*) the availability of gas or oil to the pipeline, or power to the international power line as the case may be;

(*b*) the existence of markets, actual or potential;
(*c*) the economic feasibility of the financial responsibility and financial structure of the applicant, the methods of financing the line and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the line; and
(*d*) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

Through a number of applications of this type, the NEB has developed a rough set of criteria and priorities for considering the matters set out in Section 44. In the same way, basic procedure and the form and methods of proof of relevant matters have been established in hearings on prior facilities applications.

Although this should have been a routine proceeding for the NEB, the issues that arose at the hearing bore little resemblance to the facilities application issues previously encountered by the Board or contemplated by the draftsmen of Part III of the *National Energy Board Act*. That TransCanada's application was unusual first became apparent on filing.

The company specifically declared in its application, that it took no position on the question of the public convenience and necessity of the proposed facility — the most important determination the Board must make under Section 44. TransCanada, in other words, was a reluctant applicant. The company, in fact, had applied on behalf of other parties, who as intervenors in the proceedings, would strongly urge the Board to find that the proposed facility was required in the public interest.

A second unusual feature of the application was TransCanada's inclusion of information about its own system's gas supply, notwithstanding that the proposed facilities would not carry any TransCanada gas. The proposed pipeline would carry purchased gas belonging to other parties on a cost of service basis. This was the first time that TransCanada had applied to the NEB for approval of facilities necessary to carry out contracts for the carriage of natural gas not owned by TransCanada.

By the time of the meeting between the Board members assigned to the application and agency staff, routinely held one week before a hearing to discuss draft questions drawn up by staff members following a review of the application, the Law Branch was well aware of the potential jurisdictional issues involved in the application. At that meeting, agency lawyers suggested that the Board should decide

whether to consider gas supply solely in the context of the proposed facilities, or more widely in the TransCanada system as a whole. In jurisdictional terms, should Section 44(*a*) (that raises as a matter for possible consideration the availability of gas to the pipeline) be interpreted broadly or narrowly? Should the Board review the supply of gas available to the TransCanada system as a whole, or will it suffice to consider only the quantities of gas purchased and to be transported by the proposed facilities?

By this time, twelve interventions had been filed and the battle lines were forming. To expedite the proceeding, internal discussion was initiated by NEB counsel on the appropriateness of declaring the intervenors to be or not to be "interested parties", as Section 45 of the *National Energy Board Act* allows. Apparently, the agency's practice has been to allow participation by any person who files an intervention.[478] The motivating factor here appears to have been the possibility of litigation arising from this application, and the effect of recognition by the Board in its hearings on the standing of parties initiating or participating in judicial review proceedings.[479] In the end, no action was taken to rule formally on the status of intervenors. Nevertheless, the agency was aware from the outset of the underlying issues raised by TransCanada's application.

In the weeks between the hearing, the general public also became aware of the significance of the application. The Ontario Minister of Energy formally requested his federal counterpart to postpone hearings[480] on the application until after the forthcoming National Energy Board hearings on the general subject of natural gas supply and deliverability in Canada. The date for the gas supply and deliverability hearings had not then been set by the Board. But the deadline for submission of briefs was September 3 and it seemed likely that the hearings would take place in October.[481] Counsel for Ontario then served notice on the NEB that he would move for an adjournment when the hearing for TransCanada's application opened on August 7.

(a) The Real Applicants

Behind TransCanada's application were two major gas utilities — Gaz Metropolitain Inc. of Quebec, and Greater Winnipeg Gas Limited of Manitoba. Both of these utilities had previously been supplied by TransCanada with gas owned and transported by that company. However, events in 1973 led to the unusual situation of two utilities

seeking approval for facilities necessary to transport gas purchased directly by them in Alberta.

Since the construction of its pipeline,[482] TransCanada had been the sole supplier of gas to Greater Winnipeg Gas and Gaz Metropolitain. TransCanada had purchased gas in Alberta, obtained removal permits from Alberta regulatory authorities, then resold the gas to these and other utilities. The gas was delivered through TransCanada's pipeline system.

Demand for natural gas by TransCanada's customers in Manitoba, Ontario and Quebec had increased steadily through the last decade. TransCanada had met this increased demand by purchasing greater quantities of Alberta gas and by increasing the capacity of its pipeline system by constructing additional facilities as approved by the NEB. But in 1973, TransCanada announced that it would undertake no additional long-term commitments for the supply of new gas to customers. This was the direct result of TransCanada's inability to purchase additional Alberta gas at "reasonable prices". The government of Alberta had, of course, adopted a pricing policy that led to increases in gas prices to "realistic levels". Yet at the same time, TransCanada indicated its willingness to act as a contract carrier for the transport of natural gas purchased directly in Alberta by eastern utilities.

Greater Winnipeg Gas responded to this invitation and negotiated an agreement for a supply of gas with Gulf Oil Limited. A removal permit was obtained from the Alberta Energy Resources Conservation Board and a transportation contract entered into with TransCanada. Similarly, Gaz Metropolitain Inc. concluded a six-year supply agreement with Pan Alberta Gas Limited. This company had already obtained an Alberta removal permit for gas purchased in that province. A transportation contract had then been entered into with TransCanada.

Following an engineering feasibility study to determine what additional facilities would be necessary to transport these quantities of gas, TransCanada had filed the facilities application with the National Energy Board. In the meantime, TransCanada apparently had second thoughts about its earlier commitment to act as a contract carrier for eastern utilities. The company had written Greater Winnipeg Gas to renege on this earlier commitment but agree nevertheless to pursue the facilities application. The problem was the possibility of shortfalls in the TransCanada system. Excess capacity

in the line, aggravated by construction of the proposed additional facilities, could well act to the economic detriment of present TransCanada customers.

And so TransCanada was really an applicant in form only. The background to the application indicates why TransCanada, in its application, did not take a position on the key issues of public convenience and necessity. Also clarified is the company's unusual step of submitting evidence to the Board on gas supply for its total system. But the issues became even more clearly drawn when Greater Winnipeg Gas, in its intervention, specifically requested deletion from the application of all references to TransCanada's total gas supply. A final important factor was the disclosure in Gaz Metropolitan's intervention that Pan Alberta's contract with Alberta producers for the supply committed to Gaz Metro contained a clause allowing the producers to cancel the agreement at their option if all required approvals were not obtained by August 26, 1974.

(b) The Real Intervenors

A week before the hearing the Minister of Energy for Ontario announced that Ontario would seek postponement of the hearing of TransCanada's application until the NEB had completed its proposed hearings on natural gas supply and deliverability. Ontario's motion for adjournment on the first day of the hearing was supported by two major Ontario utilities, Union Gas of Chatham, and Consumers Gas of Toronto, as well as by the Ontario Industrial Gas Users Association. All argued that the essential question was the sufficiency of supply for existing TransCanada customers, having regard to recent supply uncertainty and apparent declining rates of deliverability in Alberta. For the Board to decide this particular application would indirectly and without the benefit of full evidence determine the question of sufficiency of supply of Alberta gas to meet the future needs of present Eastern consumers. To the extent that facilities could be approved for moving additional supplies of gas to the Winnipeg and Montreal market areas, correspondingly less gas could be available to utilities like Union Gas and Consumers Gas who are entirely dependent upon TransCanada sales contracts for their supplies.

There was an important issue of principle here for the province of Ontario and its major gas utilities, notwithstanding that the application involved only approximately one percent of the total

TransCanada system in terms of mileage, approximately 1.2 percent of the annual requirements of TransCanada customers, and just over one percent of TransCanada's yearly gross sales.[483]

Shrouded behind all of this was a battle between the provinces of Ontario and Alberta over natural gas prices. At the same time as Alberta, through the vehicle of Pan Alberta Gas, was purchasing gas supplies, then negotiating directly with eastern utilities for sales contracts, the Ontario Minister of Energy was putting pressure on Ontario utilities not to bid for Alberta gas at the new higher prices. Meanwhile, TransCanada was unable to compete with the substantially higher field prices being offered by Pan Alberta. One reason was fairly obvious. Higher prices in any new purchase contracts by TransCanada would trigger "favoured nation" clauses in existing producers sales contracts that would automatically shift a large number of contract prices up to the new higher level.

II. THE HEARING

When the hearing opened, following preliminary appearances and filing, the province of Ontario made its motion for adjournment. The motion had the effect of delineating adverse interests from the outset. Not surprisingly, the Board denied the motion to adjourn, noting that the application concerned particular quantities of gas only and that there was considerable urgency in assuring that gas would be available to meet the heating needs of consumers in Winnipeg and Montreal during the coming winter.

Undaunted, counsel for the Ministry of Energy for Ontario immediately presented another motion. He asked the Board to require first, that all of the proponent parties including Alberta Gas Trunk Line, Pan Alberta Gas Limited, Greater Winnipeg Gas and Gaz Metropolitain, be required to present evidence as a single applicant. This, he said, was logical since in fact the information in support of the application was found in the submissions filed by all of these parties. Second, he asked the Board to rule that no cross-examination be allowed among these "applicants" to prevent extensive self-serving questioning.

This application was also denied by the Board because, formally, there was only one application. All other parties are before the Board as intervenors and all clearly have differences in interest. If

self-serving questions were asked by proponent parties, then specific objection should be taken at that time.

It was mid-afternoon before TransCanada called its first witness, a Mr. L. Larson, responsible within the TransCanada organization for gas supply. Larson testified as to the overall gas supply and deliverability position of TransCanada's pipeline system. Generally, he indicated that the current supply situation was very tight, with shortfalls in supplies for Eastern customers anticipated beginning with the coming year.

This witness was extensively cross-examined by the major intervenors, including the Minister of Energy for Ontario and Union Gas. NEB counsel and Board members presiding also questioned Larson on TransCanada's supply projections.[484] No objection was taken to either the evidence in chief or the cross-examination by counsel for Gaz Metropolitain, Greater Winnipeg Gas and the other proponent parties.

The following day, TransCanada called a panel of four witnesses who testified about engineering aspects, construction costs and scheduling, right-of-way acquisition and environmental impact of the proposed facilities. These witnesses were vigorously cross-examined by the intervenors, particularly on environmental impact and protection measures and the effect of the application on TransCanada's rate structure.

The panel sustained objections on most of the questions concerning rates, pointing out that while this may be a factor relevant to the economic feasibility of the proposed facilities, rate questions generally must be dealt with in proceedings under Part IV of the *National Energy Board Act*. Cross-examination by Ontario's counsel raised substantial doubt about the adequacy of the environmental studies undertaken by the consultant for TransCanada. NEB counsel also focused on the fact that the detailed study of the environmental impact of the proposed facility had not yet been completed, stressing the point that full environmental studies should be completed in time to be available to the Board before the hearing.

TransCanada's engineering as well as its environmental evidence was tested vigorously. But no serious issues were raised until August 9, when Gaz Metropolitain presented evidence on the extent of gas reserves available in Alberta to support the application. The witness was M. E. Kilik, an employee of Pan Alberta Gas.

Following preliminary skirmishing over the cost of Alberta Gas Trunk Line gathering systems necessary to deliver the gas Pan Alberta Gas Limited had contracted to sell to Gaz Metropolitain, James McOuat, counsel for Union Gas, attempted to cross-examine Mr. Kilik on the availability of Alberta gas for the overall TransCanada system. Specifically, Kilik was asked whether he was aware of "any specific shortfall in British Columbia reserve ability to meet British Columbia markets". Objection was immediately taken by counsel for Pan Alberta Gas and argument was heard on the issue.

The proponents argued this was an application for a certificate in respect of particular proposed facilities and any questions related to gas supply must be limited to the particular quantities to be moved through those facilities. Counsel for Gaz Metropolitain stated that:

> . . . this application is an application for a certain very limited facility to transport a quantity of gas . . . that is *de minimus* in relation to the overall supply, and the only real issue before the Board is whether there is a public interest and need to transport this available contracted supply to Montreal at this time. That is the issue.[485]

Essentially the same argument was submitted by NEB counsel.[486] For the intervenors, Union Gas argued that questions about supplies and future disposition of Alberta gas went to the main issue before the agency — whether construction of the proposed facilities by TransCanada would impair the deliverability of the entire TransCanada system. It was plain that the arguments of both sides were not confined to the relevance of the particular question challenged. Rather they were directed to whether the scope of the hearing on the application was wide enough to include consideration of gas supplies available to the TransCanada system as a whole.

In view of the argument by NEB counsel and consideration of this very issue at the internal pre-hearing meeting, the pre-disposition of presiding Board members was undoubtedly to limit the scope of the hearing. However, these Board members were troubled by one thing. Earlier in the hearing, the TransCanada witness Larson had testified about Alberta gas supply generally and TransCanada's future requirements. In response to a question by Mr. C. G. Edge, one of the Board members, NEB counsel responded that he had not been asked his opinion in reference to Mr. Larson's evidence. Mr. R. Gibbs, for Pan Alberta Gas Limited, volunteered that "Mr. Larson's evidence went in because nobody objected. When those questions were asked we sat quietly because it seemed it had no relevance. . . ."[487]

When argument on the issue was completed, the Board adjourned over lunch and when the afternoon session resumed, the Chairman made the following ruling:

> The question of shortfalls of west coast transmissions supply and its implications on the availability of Alberta Gas to TransCanada's customers are not matters which the Board considers relevant to this hearing.
>
> Further, the Board does not, in the circumstances of this application and in view of the amounts of gas involved, attach great weight to the assertion that TransCanada's supply situation may or may not be adequate to serve consumers to whom it sells gas. This is so because in terms of TransCanada's deliverability problem, the total gas to be sold to Gas Metro and Greater Winnipeg are *de minimus* and, therefore, the public convenience and necessity does not warrant going into these questions here. The Board feels that the time and trouble it would take to explore these questions in all the ramifications outweighs the probative value such evidence would have to the determination it must make in this application, and the objection to Mr. McQuat's question is therefore allowed.
>
> Of course, these witnesses may be examined on all aspects of Pan Alberta's ability to meet its contractual commitments to Gaz Metro.[488]

On Monday, August 12, 1974, the next hearing day, Union Gas moved for adjournment of the hearing to allow it to apply to Federal Court for a writ of prohibition. The motion was denied by the Board, and the hearing continued.[489] In the meantime, Union Gas moved before the Trial Division of the Federal Court for orders of prohibition or *certiorari*, and for directions regarding the procedure to be followed for intervention in the action by interested parties. The NEB hearing ended Wednesday, August 14, with closing arguments by the various parties.

III. POST-HEARING DELIBERATION

Following the close of the hearing, the NEB's procedure for reaching a decision and preparing its report began as usual with a post-hearing conference of presiding members, NEB counsel and staff. The Board members involved had apparently decided to prepare a report for submission to Cabinet as soon as possible, then to issue the decision when permissible having regard to the proceedings before the Federal Court.

As usual, responsibility for preparation of various standard sections of the report was assigned to specific staff members. The

draft section "Conclusions and Disposition" was to be prepared by the panel members themselves. A meeting to consider preliminary drafts was scheduled for August 20, 1974. But the meeting was never held.

Instead, the Board used an "expedited procedure" in which the panel members wrote the report themselves, with the assistance and consultation of staff members. This apparently occurred because of the urgent need to be assurred of gas supplies for Winnipeg and Montreal consumers. Board members did not feel constrained by the legal proceedings. On a preliminary motion, Mr. Justice Cattanach of the Federal Court declined Union Gas request for a stay of proceedings pending the decision of the Court on the issues.[490] By August 20 it appears that the Board's Report had been forwarded to Cabinet. The Board's Report and the Certificate of Public Convenience and Necessity were not released publicly until August 23, 1974, following the disposition of the action by Union Gas in the Federal Court.

IV. THE UNION GAS CASE

(a) Preliminary Motions

When the preliminary motion by Union Gas came before Mr. Justice Cattanach on August 15, Greater Winnipeg Gas argued that the Union application for prohibition was an abuse of the court's process in that there was no provision in the *Federal Court Act* authorizing the Court to order a stay of proceedings with respect to any administrative proceeding. The applicant was resorting, it was argued, to prohibition to achieve this purpose. But in the alternative, Greater Winnipeg urged the Court to hear the matter on the merits immediately, given the urgent winter needs of Winnipeg gas consumers. The Court noted that the motion for interim relief had been abandoned by Union Gas. Accepting Union's submission that while ready, it would be better to postpone the hearing so that all parties represented could be adequately prepared, the matter was set down for hearing on Monday, August 19.

As for the *locus standi* of parties, Mr. Justice Cattanach followed his own decision in the Dow Chemical case.[491] While there is no specific provision for intervenors in the Federal Court Rules, he held that all parties involved in the hearing before the NEB had standing to participate in the hearing before the Federal Court.

There was also considerable argument about legal costs. The main concern was over whether the applicant Union Gas should be liable in the event of loss to bear the costs of all parties intervening in the action. This question, although very important in relation to the ability of public interest intervenors to participate effectively in actions of this kind, was reserved to be argued later in the subsequent hearing on the merits. Unfortunately, the matter was never dealt with by Mr. Justice Mahoney.

Argument was also heard on the question of what constituted the record of the proceedings before the National Energy Board, a matter that had caused Mr. Justice Cattanach some difficulty in the *Dow Chemical case*. However, a ruling became unnecessary when counsel for Union Gas and for the NEB undertook to meet and agree upon what would constitute the record for the purpose of this action. Board counsel apparently agreed that the items filed as exhibits to the affidavit of J. W. S. McOuat, previously filed in support of Union's notice of motion, should constitute the record. These were: the Board's hearing order, the Trans Canada application, the amendment to the Trans Canada application, the intervention of Gaz Metropolitain, the intervention of Greater Winnipeg Gas Company, the transcripts of the National Energy Board hearing for August 7, 8, and 9, 1974, the intervention of Union Gas Limited, the intervention of the Ministry of Energy for Ontario, the intervention of the Industrial Gas Users Association and the additional information filed by TransCanada in June of 1974 in response to an NEB request.

(b) Federal Court Hearing

When the hearing on the merits began on August 19, Mr. Justice Mahoney disclosed his ownership of 1500 shares of TransCanada Pipelines Limited and 200 shares of Northern and Central Gas Limited. In addition, he stated that he was one of the original incorporators of Consolidated Pipelines Limited. Parties were invited to object. No one did.

Counsel for Union Gas presented two main arguments. He submitted that the NEB had erred in law or in jurisdiction. This had resulted, first, from restricting the scope of the hearing by excluding cross-examination on the subject of gas supply available to the TransCanada system as a whole, and second, by failing to treat all of the proponents — TransCanada, Gaz Metropolitain, Greater Winnipeg Gas, Pan Alberta Gas Limited and Alberta Gas Trunk Line — as "applicants" for procedural purposes at the hearing.

The argument on the first point was based on the transcript and asserted that the Board had effectively precluded all questions relating to sufficiency of gas supply for the TransCanada system. This flowed from the Board's ruling on the objection to the Union Gas question concerning Westcoast Transmission Limited gas supply. The question of gas supply was as a result limited to whether there would be sufficient gas to be moved by the particular facility proposed by TransCanada. The Board's ruling, however, showed that the panel really regarded the general gas supply question as relevant, but did not attach much weight to the issue because it considered the quantities involved to be *de minimus*.

The Board's decision not to allow evidence on the issue of supply generally depended then on a finding of fact, namely that the quantities involved were *de minimus*. This finding was, however, made before all of the available evidence was introduced. As a Board member stated: ". . . the time and trouble it would take to explore these questions outweighs the probative value such evidence would have to the determination [the Board] must make in this application."[492] The esential basis for this decision was expediency. This amounted to a failure to determine the real issue — i.e., whether the proposed TransCanada facilities may result in impairment of gas supply in the main TransCanada system, and therefore whether the line "is and will be required by the present and future public convenience and necessity", in terms of section 44 of the *National Energy Board Act*. The Board, it was argued, had as a result abused its discretionary power under section 44 by basing its ruling on an improper purpose — expediency. And in effect, the Board had declined its jurisdiction.[493]

It was also argued that the Board's ruling was based on a non-existent exclusionary rule of evidence, namely that the time and trouble necessary to hear the evidence outweighs its probative value. This error of law was considered to be apparent on the face of the record.[494]

Union Gas contended as well that the Board actually heard evidence on gas supply generally "from beginning to end", and that this evidence was clearly considered relevant by the applicant, TransCanada.[495] Prior to the Board's ruling, counsel for Gaz Metropolitain and for Pan Alberta (whose objection precipitated the ruling) had extensively cross-examined TransCanada's witness.[496] NEB counsel had also cross-examined this witness on the subject of gas supply generally.[497] And so had the presiding Board members.[498]

The question of gas supply had been treated as relevant, it was argued, until the applicant had completed its submissions. Then the issue was abruptly cut off, effectively preventing intervenors from adducing evidence on this subject through cross-examination, and perhaps through direct evidence. This, asserted counsel for Union Gas, constituted an unreasonable exercise by the NEB of its discretionary power under section 44. By declining to permit cross-examination on the subject of gas supply generally, it failed to address the essential question — whether the proposed facility is and will be required by the present a future public convenience and necessity. The result again was the agency declining jurisdiction.[499]

The second main ground advanced by Union Gas for challenging the NEB arose from the effect of the Board's ruling of August 7, that denied a motion by counsel for Ontario that all of the proponents be treated as applicants for the purposes of the hearing.[500] The result was that the proponents, Gaz Metropolitain, Greater Winnipeg Gas, and Pan Alberta Gas gained an advantage by being able to cross-examine TransCanada's and each other's witnesses after the true intervenors had completed their cross-examination. Although, as pointed out, Pan Alberta Gas Limited did not call any evidence, Gaz Metropolitain did call a Pan Alberta employee who was then cross-examined by Pan Alberta's counsel.[501] Objections had been raised about this procedure that proponents' counsel recognized as having some merit. For example, R. J. Gibbs for Pan Alberta, in cross-examining the Gaz Metro panel, stated that perhaps part of his questioning could be classified as direct examination.[502] It was submitted that allowing parties in the same interest to cross-examine each other's witnesses, even after the true intervenors had completed their cross-examination, materially prejudiced the ability of the true intervenors to present their case. As such, the Federal Court was asked to consider whether this amounted to a denial of natural justice.

It should be noted that counsel for Union Gas did not specifically address how section 44 of the *National Energy Board Act* should be interpreted. In particular, his argument and cited authorities did not suggest restrictions on the discretion of the Board under that section to limit or abridge the scope of a hearing on any application.[503] Counsel for Ontario, however, attempted to do so. Noting that while section 44 does contain discretionary language, Ontario's counsel pointed out that the section clearly states that the Board "shall" consider all such matters as to it appear relevant. In other words, the NEB had at least a mandatory duty to consider carefully what matters it would take into account.

This argument relied extensively on an Australian decision involving a discretionary power conferred by statute on a labour board, unless "in its opinion the wage rate is anomalous".[504] The decision held that notwithstanding that the labour Board's discretion to form its opinion, the board had misconstrued the term "anomalous" in reaching its decision. This resulted in the Australian court finding that the board had exceeded its jurisdiction. Its error prevented it from actually forming the opinion required by the terms of the empowering statute. Similarly, so Ontario's counsel argued, the National Energy Board in purporting to form its opinion on the present and future public convenience and necessity of the proposed TransCanada facility had never really done so because its exclusion of intervenors' evidence on the subject of gas supply generally had prevented it from asking itself the proper question.

Many of the arguments that had been previously made by Union Gas were repeated by counsel for Ontario and for the Consumers Gas Company.

The respondents' case began with argument presented by NEB counsel F. H. Lamar and I. A. Blue. Blue began and spent considerable time reviewing the background to the TransCanada facilities application and outlining the substantive issues involved in the application. The NEB argument then emphasized two points. The first was that the NEB had authority under its enabling statute to limit the scope of the hearing to the particular facilities applied for and the particular quantities of gas to be moved therein. Agency counsel Blue referred to the term "pipeline" in section 44 and its definition in section 2 of the Act. He suggested that the scope of the hearing was a matter for the Board in exercising its discretionary power under section 44 to determine public convenience and necessity. Consequently, a court should be wary of enquiring into the merits of a matter that is clearly committed to the NEB under section 44.

Second, in any event, the NEB did not preclude the intervenors from cross-examining witnesses on TransCanada's system gas supply. The result was that the Board did inquire as fully as was reasonably necessary into the question of gas supply generally. Quotes were culled from the transcript[505] to demonstrate that the NEB had in fact ruled only on the relevance of the specific question asked by Mr. McOuat. By failing to press the matter further in cross-examination and failing to call direct evidence on the subject of gas supply, NEB counsel argued that Union Gas had waived its right to relief on this point. Although the NEB's ruling of August 9 did not specifically prohibit it from doing so, the Board had elected not to call

further evidence on the question of gas supply. And so there were no facts in the NEB's view to support the Union Gas argument that a denial of natural justice resulted from the Board's declining to permit the intervenors to cross-examine or lead evidence on the subject of gas supply. Nor were there facts to support the argument that the Board limited the scope of the inquiry and therefore failed to determine the question of public convenience and necessity.

On the first point, the subjective nature of the discretionary power contained in section 44 was stressed. It was also submitted that the NEB, clearly not bound by the legal rules of evidence, had in order to manage its proceedings efficiently an inherent power to determine the relevance of any evidence or submissions. Given the nature of the application, it would be unreasonable to require the agency to hear evidence on and consider the question of gas supply generally more fully than it did in the TransCanada application. To do so would require careful review of every field included in the reserve calculation, evidence of geologists as to reserves in Alberta and other producing areas, and evidence of the willingness of suppliers to contract with TransCanada. The last time the NEB considered this subject was in a major export application the previous summer that took some five weeks of hearings. The argument presented by NEB counsel Lamar was that the agency exercises an administrative function only, particularly in determining procedural matters. Decisions on what evidence the Board will hear and on the scope of cross-examination are procedural matters within the agency's administrative discretion and consequently unreviewable in *certiorari* proceedings. Mr. Lamar also argued that for applications under section 44 of the Act, the section makes Board decisions on the relevance of evidence unchallengeable if these decisions are made in good faith. There were no submissions in this case that the Board had not acted in good faith.[505a]

NEB counsel, in support of the Board's ruling of August 7, submitted that the proponents should not be regarded as a single applicant, because they were not in fact in the same interest. This was demonstrated by Greater Winnipeg Gas seeking to have the material on supply deleted from the TransCanada application. In any event, although different parties may support a single application, they do so for different reasons and purposes. Such is the motivation of many intervenors in many sorts of proceedings.

It was also argued that section 45 of the Act specifically requires that the Board shall consider the objections of intervenors. Section 45, read with section 20 that requires a public hearing, guarantees the

right of individual intervenors to cross-examine. This had become clearer following the decision in the *Dow Chemical case*, holding that hearings under section 20 must be conducted in a manner similar to trials and that all parties must be treated equally.[506]

In his argument, counsel for TransCanada attempted to maintain a relatively neutral position, just as he had before the National Energy Board. He emphasized the discretionary nature of the Board's power under section 44, arguing that the important question was the relevance of the question asked by Mr. McOuat regarding shortfalls in the gas supply of Westcoast Transmission Limited. The issue of relevance, he said, was a matter within the sole discretion of the National Energy Board.

The submissions of Gaz Metropolitain and Greater Winnipeg Gas echoed many of the arguments already submitted by NEB counsel. Counsel for both utilities, however, spent considerable time emphasizing matters that really went to the merits of their respective interventions before the National Energy Board. Gaz Metropolitain, in particular, outlined recent developments in the market situation for natural gas in the Province of Quebec. Counsel pointed out that Gaz Metropolitain was the only major gas utility in Quebec and TransCanada Pipelines Limited its sole source of supply. He asserted that the gas supplies relevant to the subject application were important in maintaining customer confidence in natural gas as a fuel so that natural gas use in Quebec could be increased to the levels in other provinces. Some important industries dependent on the availability of natural gas, such as the Atlas stainless steel mill of Rio Algom Mines Limited, could not be maintained without the supply. This was revealed in a separate submission by Rio Algom. Both Gaz Metropolitan and Greater Winnipeg Gas emphasized the need to expedite NEB approval of the application so that the necessary hook-ups could be made for the 1974-1975 winter season.

The Saskatchewan Power Corporation, the Attorney-General for Manitoba and the Attorney-General for Quebec also presented submissions. Union Gas counsel presented a brief, but forceful reply. He pointed out that while there might be some urgency in the application from the utilities' view, it was also urgent that the public interest in all its aspects be given full consideration by the National Energy Board.

(c) The Decision

When the hearing closed on August 20 it was apparent that Mr. Justice Mahoney was impressed by the need for expedition in

rendering a decision on the matter. He indicated that a decision would be available by the close of business on the following day, Wednesday, August 21. From the bench, he also dealt with the applicants' arguments based on the Board's ruling of August 7 concerning interparty cross-examination by the proponents. The Board had, in the judge's view, acted properly and within its statutory authority.[507] He remarked, however, that the other main argument based on the Board ruling of August 9 gave him somewhat more trouble.

In a judgment issued on August 21, Mr. Justice Mahoney dismissed the application.[508] He found that the effect of the Board's ruling of August 9 was not limited to what had been considered objectionable by the applicants. By this Order, the NEB declined to receive further evidence or to permit cross-examination on the subjects of national gas supply and the supply available for TransCanada's system as a whole.

The judge used as authority the case of *Canadian National Railways v. Canada Steamship Lines Limited*.[509] There, the Privy Council considered a decision of the Board of Transport Commissioners made under a provision very similar in form to section 44 of the *National Energy Board Act*. The Transport Commissioners were required by section 35 of the Transport Act of 1938 to "have regard to all considerations which to it appeared to be relevant". A list of particular matters followed. The Privy Council concluded that "so long as that discretion is exercised in good faith, the decision of the Board as to what considerations are relevant would appear to be unchallengeable".[510]

Mr. Justice Mahoney then stated that on the material before him it could not be said that the Board's decision to limit the scope of its inquiry was made in bad faith. He noted that the Order sought to be quashed was not a final Order but rather a procedural decision made in the course of arriving at a final decision. No precedent for the granting of *certiorari* against such an interim ruling had been cited by any of the parties. Unfortunately, the judge did not expand further on this issue, apart from referring to the opinion of Chief Justice Jackett in the Danmor Shoe case.[511] He concluded that *certiorari* was not an appropriate remedy.

Mr. Justice Mahoney's reasons were somewhat sparse. But his conclusion that the NEB has a wide discretionary authority under section 44 is hardly surprising. The section does appear to have been

modeled on section 35 of the *Transport Act* of 1938.[512] Apart from distinctions based on the minor differences in wording, the Privy Council's interpretation in the *Canadian National Railway's* case is directly relevant.

While more recent cases suggest that courts should supervise the exercise of such discretionary powers more closely,[513] several factors in the Union Gas case are likely to deter even the most sympathetic court. The essential determination authorized by section 44 is "public convenience and necessity". Apart from being rather vague and indefinite, this term has not been the subject of extensive judicial definition in Canadian courts.

Consider the cases relied on by Union Gas. The two leading Canadian cases involved labour relations matters.[514] It is one thing for a court to conclude that failure by a labour board to consider the resignations of certain employees amounts to a failure to determine whether a majority of employees in a unit are union members in good standing.[515] It is quite another matter to suggest that not considering the subject of national and system gas supply in a full fashion constitutes failure to apply a general standard of public convenience and necessity to a proposed minor pipeline facility. Gas supply generally had been given some consideration by presiding Board members. Intervenors were merely precluded as a matter of procedure from cross-examination that might have expanded the subject to unmanageable proportions. After all, as the Supreme Court of Canada concluded in *Union Gas Company v. Sydenham Gas*,[516] what is in the "public interest" is "primarily a matter of opinion".

Obviously, the NEB does not have a completely unfettered discretion under section 44. Nor does Mr. Justice Mahoney's decision break any previously existing fetters. His judgment indicates his view that the issues involved did not merit judicial intervention. Significantly, counsel for Union Gas deliberately chose not to emphasize the issue of the scope of the NEB's discretionary powers under section 44. Instead he focused on the prejudicial effects of the Board's rulings in order to establish either a denial of natural justice, or more generally, high-handed or erroneous conduct sufficient to induce the court to intervene on a jurisdictional basis.

Mr. Justice Mahoney appeared to suspect that the purpose of the application was not to redress procedural unfairness in the TransCanada hearing but rather to further unstated economic interests of the Province of Ontario and its major gas utilities. The

judge mentioned that the National Energy Board would be holding hearings on gas supply later that year. He also noted that the gas and facilities involved in the application represented only one percent of TransCanada's volume and system value.[517]

More difficulty is presented by Mr. Justice Mahoney's position that *certiorari* does not lie to review interim determinations of federal boards and tribunals. In *Danmor Shoe*,[518] Chief Justice Jackett referred to section 28 of the *Federal Court Act* when he stated that a refusal to follow a relevant line of inquiry is not a "decision" that may itself be set aside. While there are no federal cases directly in point, preliminary rulings incidental to the conduct of hearings by provincial tribunals have been set aside in *certiorari* proceedings.[519] The issue was not specifically considered in *Dow Chemical*, which involved proceedings under section 18 of the *Federal Court Act* to set aside a preliminary decision of the National Energy Board not to hold a full public hearing on the application to export ethylene. Prohibition, however, was granted in *Dow Chemical*.

If Mr. Justice Mahoney's decision is supportable on this narrow ground alone, why did counsel for Union Gas not couple his application for *certiorari* with alternative claims for prohibition and *mandamus*? It is clear that prohibition lies to prevent a tribunal from rendering a final decision if jurisdictional or legal error can be established at some earlier stage of the proceedings.[520] The question is particularly puzzling, since counsel for Union was aware of the *Dow Chemical* pleadings in which *certiorari*, prohibition and *mandamus* were claimed in the alternative.

V. FURTHER MANOEUVRES BY THE INTERVENORS

With the decks now clear, NEB's decision to issue Certificate of Public Convenience and Necessity No. GC-52 to TransCanada was approved by Cabinet on August 23, 1974. The Board's reasons for decision were released at the same time.[521] The quantities of gas involved in the contracts by Gaz Metropolitain and Greater Winnipeg were considered by the NEB to be *de minimus* in relation to TransCanadas overall gas supply and the supply of Canada as a whole.[522] It stated that:

> the urgent need of Gaz Metro and Greater Winnipeg for gas for the heating season beginning 1 November 1974 together with the satisfac-

tory arrangements for the supply, transportation, and marketing of the gas, to be the overriding consideration in relation to the Canadian public interest. The Board therefore finds, subject to environmental considerations, that it is satisfied that the line is and will be required by the present and future convenience and necessity.[523]

On September 10, 1974, Board members learned that the Province of Ontario intended to appeal the decision to issue this Certificate. Some members were concerned that additional legal proceedings might further delay construction of the facilities to the detriment of natural gas consumers in Winnipeg and Montreal. The NEB's Law Branch was consequently told to obtain any undertakings possible to "limit the scope of the appeal".

In its material filed with the Federal Court, the Province of Ontario covered every procedural possibility. One notice of motion requested an order granting leave to appeal to the Federal Court of Appeal under section 18 of the *National Energy Board Act* and section 29 of the *Federal Court Act* from the Board's decision on the TransCanada application.[524] A second notice of motion requested a stay of execution "of the Board's order granting the certificate of public convenience and necessity". A third notice of motion sought an order extending the time for the filing of an originating notice under section 28 of the *Federal Court Act* to review and set aside the Board's decision in granting the certificate. Finally, the material included a notice of appeal against the judgement of Mr. Justice Mahoney. In support of the motions, the province filed a lengthy affidavit of Robin Scott, Q.C., Chief Counsel for the Ontario Ministry of Energy.

Written representations in opposition to the motion to extend the time for filing an originating notice under section 28, and the application for leave to appeal the Board's decision, were filed by Gaz Metropolitain, Pan Alberta Gas Limited and the Alberta Gas Trunk Line Company.[525] In addition, Gaz Metropolitain served notice of motion under section 52(*a*) of the *Federal Court Act* and Rule 1100 for an order to quash the notice of appeal from Mr. Justice Mahoney's judgment. The motion to quash argued that the Mahoney judgment was, in effect, "spent" since the issue determined was of a preliminary procedural nature. The final decision has been made, a certificate of public convenience and necessity having since been issued by the NEB.

The motion for a stay of execution was heard and dismissed on September 28. Nothing in the Federal Court Rules authorizes the grant of such a stay.

The remaining motions were heard by a Federal Court of Appeal panel consisting of Chief Justice Jackett and Justices Choquette and Pratte on October 2. Counsel for the Minister of Energy for Ontario outlined an argument similar to that presented to Mr. Justice Mahoney, with emphasis on the NEB's narrowing the scope of the hearing to exclude the subject of gas supply generally. Mr. Scott added a few embellishments — including the suggestion that the NEB lacks jurisdiction to regulate pipelines that are located wholly within a province.

This constitutional issue was immediately challenged by Chief Justice Jackett, who emphasized that the court was not entitled to substitute its opinion for that of the NEB on matters within the NEB's discretionary authority. Is it possible, he asked, that the NEB could lack authority to limit evidence on a particular issue in a matter before it? From this point, the outcome of the application was hardly in doubt. The Chief Justice later asked whether the Board must consider national gas supply in an application for facilities to move a minuscule amount? In another query he asked whether there was any doubt that presiding Board members be motivated by a sense of expediency and limit evidence to save time. He inferred that agencies may need such powers to deal with a problem that was the subject of recurring complaint in legal actions, namely, delay caused by "lawyers yapping".

Again and again during the Ontario argument, the Chief Justice asked counsel to show specifically what error of law or jurisdiction the Board was alleged to have made. The real problem appeared to be the Chief Justice's inability to conclude that the intervenors had been prejudiced by the Board's decision to exclude evidence on national and system gas supply.

Union Gas, the original applicant before Mr. Justice Mahoney, although represented in the Court of Appeal, did not present any argument. The Consumers Gas Company presented a brief argument supporting the Ontario motions.

The Court stated, without calling on the respondents, that it was not persuaded there was an arguable question of law or jurisdiction regarding the Board's authority under section 44, or that there had been a denial of natural justice in the proceedings. The motion for leave to appeal was as a result denied. Having concluded that there was no arguable question of law or jurisdiction, the motion for leave to extend the time under section 28 fell as well.

Since Mr. Justice Mahoney's judgment had dealt with an interim procedural issue and not a final order itself, and since the final order had been made and the related certificate issued, the force of his judgment was spent. Consequently, the motion to quash the notice of appeal was granted without costs.

Both Gaz Metropolitain and the NEB asked for costs. Chief Justice Jackett doubted the power of the Federal Court to order costs against the Crown in right of Ontario. He suggested the possibility of doing what had been done in several earlier decisions, namely, "recommending" that costs be paid by the province involved. In the result, however, the appeal was quashed without costs.

VI. MONITORING IMPLEMENTATION AND CONSTRUCTION

A condition in the Certificate of Public Convenience and Necessity issued to TransCanada stipulated that the Certificate would not come into force until the NEB was satisfied that environmental requirements, whether proposed by TransCanada consultants and accepted by the agency or deemed necessary by the NEB alone, had been met.[526] In its accompanying decision, the NEB expressed concern that Phase 2 environmental assessment had not been available at the time of the hearing. The consultants' report containing this assessment was to identify areas of environmental concern and recommend how to deal with them. However, the decision went on:

> In view of the applicant's proven record of pipeline construction and operation and the fact that construction will occur within the Applicant's existing right-of-way, the Board is prepared to proceed with this matter and to deal promptly with the environmental matters after it receives the consultants' report. No certificate shall come into force until the environmental condition contained therein has been satisfied.[527]

The NEB also specified that TransCanada would be expected to work closely with its environmental consultants and to follow "to the maximum possible extent" recommendations to avoid or mitigate environmental damage by construction activities. NEB staff would "work co-operatively" with TransCanada during periodic visits to construction sites to monitor construction practices.[528]

The environmental condition was apparently met with a nine-page letter from TransCanada's counsel on September 10, 1974.

He confirmed that TransCanada would follow the recommendations made in a report by F. F. Slaney Consultants. In addition, TransCanada was to report to the NEB by October 15 on further on-going environmental work connected with the proposed construction. This included additional consultation with professionals, briefing of company field inspection staff, preparation of a field manual for staff use and assessment of construction schedules. The letter also outlined such matters as the basic procedure to be followed in controlling erosion at river banks and approaches, the names and qualifications of TransCanada personnel to be making on-site decisions of an environmental nature during construction, and the names and qualifications of F. F. Slaney Consultants' personnel who would be advising in the field. Construction procedures for the Ganaraska River, Rideau Canal and Gananoque River crossings were also set out. TransCanada confirmed that the NEB would receive the plans, methods and procedures to be used in post-construction monitoring by F. F. Slaney Consultants on or before November 1, 1974. The company also confirmed that it would report the results of post-construction monitoring to the agency by June 30, 1975.

When construction finally commenced, implementation of the environmental requirements did not go smoothly. The Environmental Group within the NEB learned that, although trenching had been completed across the Ganaraska River, the trench was to be left open for several weeks. The group's concern led to a letter being sent to TransCanada by the NEB, warning of possible harm to the trout migration expected to commence shortly. The letter also requested that the NEB be advised at least 48 hours before commencement of trenching across the other two major rivers on the right-of-way.

Even more problems arose at the Ganonoque River crossing. The company was unable to find the type of equipment it had promised to use and gravel to cushion the open trench was unavailable from local sources at the critical time. As a result the NEB sent another letter to TransCanada.

VII. ISSUES ARISING FROM THE CASE STUDY

(a) Judicial Review

The TransCanada application is an excellent example of tactical use of judicial review by intervenors in regulatory proceedings. The

immediate objective was delay. A possible consequence of delay could well have been the cancellation of the Gaz Metro supply contract approvals under the August 26, 1974 clause. So too might have been delay in construction to the detriment of TransCanada, as well as Greater Winnipeg and Gaz Metro. In addition, delay could have inhibited future purchases of Alberta gas by utilities such as Greater Winnipeg and Gaz Metro, thus providing a measure of future supply protection to the major Ontario utilities. The more general objective of judicial review was to weaken TransCanada's gas supply "competition" and thereby ensure more favourable prices for Alberta gas purchases.

The legal technique adopted for pursuing these objectives was a Federal Court judicial review action based on alleged procedural errors by the NEB. A specific ground advanced was that the intervenors had suffered a denial of natural justice as a result of the panel's decision not to permit evidence on the supply of gas available to TransCanada generally, and to Canada as a whole. The legal issues argued were only tenuously related to the real underlying supply and price issues between the proponents and the intervenors. The ultimate issue — the Alberta-Ontario gas price dispute — was not even before the regulatory agency. The NEB has no direct authority over the field prices of natural gas,[529] nor does it have jurisdiction to allocate gas supplies among competing utilities.

The application thus exposed important gaps in the NEB's regulatory jurisdiction and the procedural consequences of these gaps. The real applicants were Gaz Metro and Greater Winnipeg. But regulatory control applied only to the approval of pipeline facilities under Part III of the *NEB Act,* and so it was the carrier, TransCanada, that had to make the application. All would have been well if TransCanada were exclusively a contract carrier. However, the bulk of TransCanada's business involves purchasing Western Canadian gas, transporting it east and reselling it there. It has been in direct competition with Greater Winnipeg and Gaz Metro for Alberta supplies. And so TransCanada made the application, but left Greater Winnipeg and Gaz Metro to demonstrate the appropriateness of the application. Understandably, the NEB encountered difficulty processing the application in the same way as an ordinary additional facilities application.

The application and resulting litigation no doubt influenced several NEB and federal government initiatives concerning natural gas supply and price. First, a new interbranch gas policy group was established within the NEB. Its responsibilities were to carry out or

co-ordinate staff studies relating to natural gas matters, including issues of general concern that arise out of particular applications.

Second, a new Part III dealing with domestic gas price restraint was added to the proposed Petroleum Administration Act.[530] These provisions include a grant of power to Cabinet to allow it to "prescribe" zone prices for gas entering interprovincial or international trade.[531] The objective was to achieve uniform gas prices within Canada [532] on the basis of reasonable balances between producing and consuming interests and between the prices of alternative energy resources. In introducing the Bill, the Minister of Energy, Mines and Resources noted that the last few years had seen a tension between Alberta and Ontario, "marked by lawsuits, by threats to withhold gas and by threats to challenge provincial legislation".[533]

In addition to these price controls in which the NEB through its advisory function is likely to play an important role, agency officials indicated at the time that government discussions had begun on possible legislation concerning domestic allocation of natural gas supplies.

(b) Discretion Under Section 44

As a result of the Federal Court decision in *Union Gas*, the NEB's view of its discretion on certificate applications as virtually unlimited appears to have been strengthened. The court was concerned only to determine whether the agency's decision to narrow the scope of the hearing was made in good faith. The result was a very limited scope for judicial review of matters considered or not considered by Board members in certificate decisions.

It is unfortunate that the NEB's discretion under section 44 was not tested in a case involving stronger facts. One factor in the intervenors' decision to commence Federal Court proceedings was a broader desire to apply pressure through to the federal and Alberta governments, as well as to the NEB and the proponent utilities involved. The facts here were strong enough for this purpose. However, stronger facts might have led the Court to apply a less restrictive criterion than "bad faith".

(c) Environmental Considerations

This application indicates the weight given by the NEB at the time to environmental matters in certificate applications. It also

suggests a fundamental weakness in the NEB's procedure for implementing environmental requirements.

The agency permitted the applicant to file its Phase 2 environmental assessment following the close of the hearing. The Phase 1 environmental report, upon which the intervenors cross-examined at the hearing, was merely an inventory and overview. The rationale for this concession was stated in the decision to be the company's "good record" and the fact that the proposed pipeline was a loopline within an existing right-of-way. Significantly, the NEB was obliged to send two warning letters concerning inadequate protection at stream crossings during the early phases of construction. Measures to be taken at river crossings was one of the matters to be included in the Phase 2 environmental report.

The environmental evidence at the hearing indicated that detailed assessment of environmental impacts of pipelines normally cannot take place until after the grant of the Certificate of Public Convenience and Necessity. This is because the precise location of the pipeline cannot be known until a survey is completed. This is not usually done until the general route has been approved. Because of this conflict in the timing of the hearing and the survey, environmental witnesses at the hearing were unable to answer questions about the specific impacts of the proposed pipeline. But even had the Phase 2 study been available then, some environmental concerns would have gone unanswered. The techniques for avoiding or mitigating adverse effects are often inherent in construction methods and timing that were to be included in a Phase 3 study to be carried out by the environmental consultants at an even later stage. And so intervenors' questions concerning construction practices, equipment and scheduling could not be answered by TransCanada witnesses. They stated that these were matters to be included in contract specifications when tenders were called.

Under the environmental protection procedure applied to the TransCanada application, it was really only during construction that specific environment protection measures could be imposed by the NEB.[534] However, expediency, and equipment and materials limitations, may make it impossible to enforce adequate protective measures. In addition, while the agency did undertake to carry out "periodic" inspection visits, these may not be enough to detect many problems that arise in the course of construction. One regulatory approach would entail the development of detailed environmental requirements for incorporation in the Certificate.[535] These requirements could then be monitored and enforced through continuous on-site inspection.

CASE STUDY NO. 5

Oil Export Hearing, 1973-74

I. INTRODUCTION[536]

The circumstances of rising petroleum export prices coupled with uncertainty in supplies of imported crude for eastern Canada that led to the imposition of export controls on crude oil and subsequently on petroleum products have already been outlined in the Interprovincial PipeLine Case Study No. 2. The result was that oil exports could occur only when the NEB was satisfied that the requirements of section 83 of the *National Energy Board Act* were met. These requirements were: a) the quantity of the export proposed did not exceed the surplus remaining after allowance had been made for reasonably foreseeable requirements for use in Canada, and b) that the price to be charged was just and reasonable in relation to the public interest.

In the case of applications for licences to export natural gas, rough guidelines for determining these questions had emerged through a series of decisions on specific applications. In particular, the famous twenty-five - A4 formula had been developed to assist in the determination of exportable surplus.[537] No such guidelines or precedents existed for deciding on petroleum export applications.

It was recognized that, as with gas, the Board would have to take a long-term view of the level of exports to be permitted.

Consequently, at the time that the petroleum export controls were introduced, the Minister of Energy, Mines and Resources announced that the Board would hold a public hearing on oil export policy. The Minister stated that the purpose of the hearing was to "provide opportunity for interested parties to be heard as to the appropriate methods for protecting the public interest in respect of oil exports over the longer term."[538]

II. NOTICE

Notice of the hearing was issued on July 5, 1973 and published in 31 Canadian newspapers.[539] Interested parties were invited to file written submissions (in 25 copies) with the NEB by October 15, 1973 on the following matters:

(1) the principles and procedures for determining the available supply of oil from

  (a) established areas in Canada,
  (b) frontier areas in Canada,
  (c) tar sands and heavy crude reserves in Canada, and
  (d) imports;

(2) the principles and procedures for determining the reasonably foreseeable requirements for various grades of oil for use as feedstocks in Canada, and particularly the Canadian markets to be served by Canadian oil, having regard *inter alia* to interfuel competition;

(3) If available, current best estimates of supply and demand to illustrate the principles and procedures proposed under (1) and (2);

(4) the allowance that should be made for Canadian requirements and the advisability, in light of changing circumstances, of developing a formula for protecting future Canadian feedstock requirements;

(5) the factors that should be considered in determining the justness and reasonableness in relation to the public interest of the price of oil to be exported;

(6) the advantages to Canada, if any, of exporting oil in refined state rather than in the form of crude oil considering

  (a) the increased assurance, if any, of additional refined product availability for the Canadian market, and
  (b) the benefits and costs of increased refining activity in Canada;

(7) the order of priority to be given to the export of various grades of crude oil and refinery oil products;

(8) the term of licences for the export of oil; and

(9) any other matter which may appear to be relevant to the foregoing items.

The notice of the hearing also indicated that the agency would provide each party with a list of all other parties that made written submissions before October 15. It would then be the responsibility of each party to supply copies of its written submissions to all those listed.

The time for filing submissions was extended to December 17, 1973, and ultimately fixty-six submissions were received.[540]

III. HEARING PROCEDURE

The public hearing opened in Calgary, with later sessions in Vancouver and Ottawa. The NEB had already advised all parties that cross-examination would not be permitted since the merits of a particular application were not in issue and the purpose of the hearing was merely to gather information and solicit views on the general subject of oil export. There were apparently no significant complaints by parties about the absence of any opportunity to cross-examine.[541]

When the hearing began in Calgary on April 2, the Chairman stated in his opening remarks that:

> [This] hearing is very different from the usual type of adversary proceedings conducted by the Board. The Board is holding these proceedings for the purpose of obtaining relevant and trustworthy facts and opinions which will assist it in discharging its functions under Part VI of the Act in respect of exportation of oil. It thus follows that this hearing is in the nature of an investigation or inquiry.[542]

The NEB also announced that submissions at the hearing were to be limited to supplementing written briefs previously filed and replying to written submissions filed by other parties. Participants were cautioned to limit the scope of their submissions to the nine matters enumerated in the hearing order.[543] Each party was allowed one written rebuttal in addition to any oral submissions presented at the hearing.

Witnesses were sworn in the usual way and, following their oral submission, were cross-examined by Board counsel on both the oral submission and the previously filed written brief.[544] Members of the Board panel then questioned the presentor. In the absence of cross-examination, members of the Board panel considered it appropriate for Board members to question extensively in framing its questions and to take strong positions on certain issues.[545]

IV. PARTIES AT THE HEARING

Parties at the hearing included the usual array of oil companies, pipeline companies, petroleum associations, allied industries and provinces that had come before the Board in previous major oil pipeline facilities and export applications. In addition, participants at this hearing included a number of non-conventional intervenors. These were individuals and public interest groups without a direct economic stake in NEB decisions on petroleum export. They represented interests such as consumers and conservationists, likely to be affected in indirect, but nevertheless material and substantial ways.

The submissions of these groups varied a great deal in quality. Despite their limited resources, they raised issues and provided perspectives that were not available from any of the conventional parties. It is not surprising that many of these submissions strayed somewhat from the nine matters listed in the hearing order. However, since the primary purpose of the hearing was to solicit views on as many aspects of petroleum export as possible and not to obtain hard information, the participation and views of these groups were entirely appropriate for presentation to the Board panel. The panel recognized this, to the extent of treating the non-conventional intervenors fairly and courteously, and allowing substantial leeway in scope of presentation having regard to the terms of the hearing order.

Several of these groups raised important issues related to the role and extent of participation by public interest groups in hearings of this type. The Consumers Association of Canada complained about the lengthy delay between the original notice of the hearings and call for submissions, and the scheduling of the hearings themselves.[546] The problem was that circumstances had changed markedly since the original briefs were filed as a result of changes in world supply and demand conditions and political manoeuvering at national and international levels. It was pointed out that it is difficult for parties to keep on top of changing events, and that the passage of time may make the original brief filed entirely obsolete and no longer worthy of consideration or questioning by the Board.

The Consumers' Association also proposed that the Board should not continue to rely on industry supply forecasts as a basis for its policies and regulatory decisions.[547] This submission points out a fundamental problem with rule-making hearings of this type, namely that the format does not allow for comment on and testing of

proposals and forecasts developed by the Board through its staff resources. Interviews with Board members suggest that the NEB staff does in fact prepare independent supply forecasts, based on the same raw data used by industry. This is done on a field-by-field basis for the purpose of comparison with industry submissions. However, this information was not presented at the inquiry.

Another public interest group[548] raised the problem of lack of resources on the part of public interest participants in hearings of this type. If the views of interests represented by these groups were to be presented at hearings, they ought to be well documented and effectively stated. This requires financial and technical resources beyond those available to most groups of this type. As a result, this group requested that its participation in the hearing be funded by the NEB. The Chairman's response was that

> The NEB is not funded to grant these types of requests, sympathetic though one might be to some of the public interest groups. There is no provision in the federal funding for it.[549]

Unfortunately, this does not answer the problem raised.

V. PREPARATION OF THE REPORT

Following the hearing, preparation of the oil export report proceeded in much the same way that reasons for decision were prepared for applications involving specific facilities or exports. Staff members were assigned responsibility for drafting or providing clarifying information on particular sections of the report. A full draft was prepared by early August, and revisions continued through numerous further drafts.

On September 15, 1974, the NEB at last approved its final draft and submitted the report to the Minister of Energy, Mines and Resources for consideration. Since the report was considered to have been prepared in accordance with the Board's advisory responsibilities under section 22(2) of the Act,[550] there was no possibility of disclosing it before submission to the Minister. In view of the major policy significance of this report, a draft Cabinet memorandum was submitted to the Minister for his consideration along with the report. The ultimate policy decisions on matters of this kind and the question of the form of report or statement, if any, to be released to the public was therefore entirely in the hands of the Minister of Energy, Mines and Resources and his Cabinet colleagues.

The Minister and the Cabinet took considerable time to review and discuss the NEB report and its implications. On October 21, the Minister set the stage for the ultimate decisions by issuing a statement in which he acknowledged that Canada might be forced to reduce oil exports to the United States in order to protect future domestic supplies. The statement emphasized however that this cut-back would not be used as a lever in negotiations with the United States on international pipelines.[551]

The policy announcement was finally made on November 23, 1974,[552] and the NEB's report was released at the same time. The Board's main recommendations,[553] that exports be cut to 800,000 barrels a day on January 1, 1975 (from 973,000 in December, 1974), and reduced to almost zero by 1983, were adopted by the government. The export reduction was intended to have the effect of extending Canadian self-sufficiency in oil until 1983. The only significant difference between the announced policy and the Board's recommendations was that Cabinet proposed to reserve the 250,000 barrels a day earmarked for the Montreal market as of July 1, 1975, rather than in 1977 when the proposed pipeline was scheduled to commence operation.[554]

The blow to United States government and industry interests had been cushioned by at least a year of direct and indirect warnings from Canadian government officials.[555] Therefore, while U.S. officials expressed some concern, most were resigned and admitted that the policy came as no surprise.[556]

VI. ISSUES ARISING OUT OF CASE STUDY

(a) Rule Making

This inquiry represents one of the first attempts by the National Energy Board to establish policy guidelines or informal rules through a process involving open formal consultation with members of the public as well as representatives of the regulated industry. The reasons for the inquiry on the subject of petroleum export were fairly clear.

Section 87 of the *National Energy Board Act* provided for extension by proclamation of the Part VI export controls to oil, as defined by the Act. Such a proclamation was made by the Governor-in-Council on May 7, 1970. In February, 1973, the NEB

issued a special staff report entitled, "Potential Limitations of Canadian Petroleum Supplies".[557] The agency concluded in this report that production from all sources in Canada would not be able to supply potential export and domestic markets after 1973. Further, the declining rate of conventional maximum production in the western provinces (after 1977) would be unable to supply the Canadian domestic market by 1986. Protection schemes involving first, maintenance of a reserve of petroleum equivalent to 15 years of forecast demand, and second, maintenance of a reserve equivalent to 15 times the first year domestic market demand were found to exhaust surplus reserves from export from the conventional western provinces' reserves by 1979 and 1982 respectively.[558] It was recommended that "suitable action" should be taken before the sharp decline in export that was implied under most protection schemes occurred. This, it was said, "could include attempts to reduce export rate variations and adequate notification to U.S. authorities".[559] The report noted that a situation of insufficient petroleum supply for potential markets could lead to a problem of ensuring an adequate supply of oil for the Canadian domestic market.[560]

It was not long before these predictions began to be realized. In early 1973, market conditions threatened the adequacy of supply for Canadian refiners.[561] The result, as already mentioned, was the amendment of the Part VI Regulations to implement export controls on petroleum. The decision to announce public hearings made at the same time must be seen against this background.

While some consideration had been given by the NEB to the possibility of oil export regulations, specific strategies had not been fully developed when the emergency conditions necessitated immediate implementation of export controls. Reliable, tested guidelines for determining overall levels of export and for determining "just and reasonable" prices were not yet in existence. It was therefore considered desirable by the Board and the Minister to obtain the views not only of the industry but of other affected interests on a "philosophical basis" for the regulation of oil exports. The hearing was not intended to be primarily a way of gathering information.[562] Board staff had already done considerable work on the subjects of markets, supply and deliverability and had consulted extensively with industry. The real purpose of the hearing was to obtain the views of interested parties on policy issues. This was clearly shown by the subjects listed in the notice of the hearing. Of course, another purpose of the hearing may simply have been to

educate the oil industry to the inevitability of regulation and to give the industry a forum in which to respond to the changed rules.

The oil export hearing was apparently undertaken by the NEB on the specific request of the Minister of Energy, Mines and Resources. This suggests that the hearing was held under the authority of section 22(2) of the Act as an aspect of the Board's advisory function under Part II, rather than upon the Board's own motion under either section 14(2) or section 20(3).[563] Strangely, some doubt exists about which type of hearing was actually held. The hearing order was silent on this question, although the report itself refers specifically to section 22(2).[564] Several members of the NEB's Law Branch considered that the oil export hearing was more properly a hearing on the Board's own motion under sections 14(2) and 20(3).

The consequences of the different legislative basis for the hearing lay in the path of reporting following the hearing and in the authority to release any resulting reports and statements. If the matter fell under section 14(2) and 20(3), the Board retained control but if the hearing was at the Minister's request under Part II then the Board must report to the Minister who then had complete authority over the ultimate decisions as well as the release of the Board's report or recommendations.[565] The Minister's general policy had been to withhold reports or studies provided by the Board under Section 20.[566]

The usual procedure followed on receipt of a Board report saw the Minister obtaining advice from his staff in the Department of Energy, Mines and Resources. The resulting report as modified because of this advice is then likely to be considered by Cabinet after consultation with, and often extensive comment by, other interested departments. At this stage further informal comments were likely to be received from the NEB, but the final statement or report, if released to the public, could well bear little resemblance to the original report submitted to the Minister by the Board.

The entire procedure as a result is less like a rule-making activity of an independent regulatory tribunal than an *ad hoc* government commission of inquiry from which well-screened policy recommendations are brought to Cabinet through the Minister of Energy, Mines and Resources. The Board performs the inquiry duties and also functions in the latter stages, after submitting its report to the Minister, as an advisor in much the same way as other interested government departments.

(b) Procedure

The procedure used in the oil export hearing was a form of "notice and comment" rule-making that has been used by numerous regulatory agencies in the United States. It was also a type of procedure that has been employed by various Canadian commissions of inquiry.[567] In the context of this hearing, the limitation of cross-examination but extended questioning by members of the Board panel appeared entirely appropriate to the objective of hearing views on policy issues related to the general subject of oil export. As already indicated, there were few complaints from parties about this limitation.

It should be noted that a different procedure involving full cross-examination privileges for parties was used by the NEB in the more recent hearings on natural gas supply and deliverability. Apparently, a similar procedure to that used in the oil export hearing was originally considered for the natural gas hearings. However, the Board accepted the views of the British Columbia Energy Commission and other parties, that the gas hearings would involve presentation by various interests of reserve and deliverability data and projections that ought to be fully tested for accuracy and reliability through cross-examination. With some 60 parties, the problem of exceptionally lengthy hearings had already emerged. Individuals and inadequately funded public interest groups were at a disadvantage if they wished to participate fully through cross-examination, especially since the hearing is moved to six different cities over a period of some four months.

Perhaps the only major procedural problem emerging from the oil export hearing was the difficulty that some individuals and public interest groups experienced in meeting the NEB's requirement that the parties themselves reproduce and circulate copies of their written submissions to all other parties. The agency and parties did, however, exercise some indulgence on this matter, the NEB handling some reproduction through its own facilities.

(c) The Rule-Making — Adjudication Interface

The difficulty of distinguishing rule-making from adjudication for particular parties or subjects is a familiar problem in the United States. The oil export hearings have already raised at least one problem of this nature for the National Energy Board. Interprovincial PipeLine Limited (IPL) successfully sought an adjournment of the

NEB hearing on its application to extend its trunk oil pipeline from Sarnia to Montreal, partly on the ground that it should be given an opportunity to respond to the oil export report since the conclusions on domestic oil supply necessary to establish a basis for export determinations may indicate insufficient western crude to supply 250,000 barrels per day to the Montreal market.[568]

To some extent, the IPL argument based on the oil export report could be regarded as a ploy in the attempt by the company to obtain some form of federal government guarantee for the project. However, it was in fact possible that supply and export level conclusions resulting from the oil export hearings could effectively determine the IPL facilities application.[569] Conversely, the grant of a certificate to IPL would have materially affected the assumptions upon which domestic supply determinations and export guidelines were established by the government through the vehicle of the oil export inquiry. The Board panel on the IPL application appeared to be aware of these problems in granting the adjournment without specific reference to the oil export hearing.

Perhaps the most significant aspect of the rule-making — adjudication interface is that the difficulties that arise are not straight-forward issues of predetermination in adjudications nor prior adjudications constraining the establishment of general rules. The real difficulty for the NEB is that, in hearings like the oil export inquiry, only the adjudicative responsibilities lie clearly with the Board. The rule-making authority really rests with the Governor-in-Council, with the Board playing an advisory and consultive role only. The problem is complicated by the fact that many types of adjudication, such as the IPL certificate application, require the ultimate approval of the Governor-in-Council as well, and the practice has been to withhold public disclosure of the Board report until Cabinet approval has occurred.

(d) Public Interest Intervenors

The oil export hearing indicated that public intervenors could well participate fully and effectively in hearings of this type. These parties were welcomed by some Board members because they helped to provide balance in proceedings that were held to obtain the views of interested persons on policy issues. But several problems remain. One is the problem of procedural formality. This was well handled by the Board in the oil export hearings by broadly interpreting the terms

of reference of the hearing as set out in the hearing order, and by eliminating cross-examination and consequently lessening the need for legal representation. On the other hand, the difficulties experienced by public interest groups in the natural gas supply and deliverability hearings by the adoption of an adversarial-type procedure suggest that the NEB should reconsider its approach to procedures when planning future rule-making hearings.

The other major problem was lack of resources by individuals and public interest intervenors. Many of the participating groups did a remarkably good job on miniscule resources. However, reformulating effective policy recommendations does require a substantial underpinning of fact and tested hypothesis. And this requires funds to obtain the necessary expert advice, conduct the necessary research and draw the appropriate conclusions.

It is true, as the panel Chairman indicated in the oil export hearing in response to a request for funding by a public interest group, that there is no specific authority in the *NEB Act* to permit funding of parties. But neither is there any specific bar. In principle, there would seem to be no reason why the Board could not commission studies by public interest groups, the results to be presented in Board hearings, just as it contracts with professional consultants for particular research tasks. The real constraint might be in the budgeting process of the National Energy Board. Another possibility might be to arrange funding indirectly from the Department of Energy, Mines and Resources to be administered by the Board, much like the grants that have been provided to certain public interest parties by the Department of Indian and Northern Affairs through the Commission conducting the Mackenzie Valley Pipeline Inquiry.[570]

CASE STUDY NO. 6

TransCanada Pipelines Limited, 1974 Rate Application

I: BACKGROUND

(a) The First Rate Application

To place the 1974 TransCanada Pipelines Limited rate application in its proper context, it is necessary to review the series of TransCanada rate applications beginning with the first application filed in August of 1969. In the 1969 application, TransCanada requested an order fixing just and reasonable rates or tolls to be charged for natural gas distributed and sold in Canada, and disallowing any existing tariffs, rates or tolls found by the Board to be inconsistent with the just and reasonable rates so established. At the date of the application, Part IV of the *National Energy Board Act* had not been made applicable to companies such as TransCanada that had been operating a pipeline when the Act came into force. Therefore, on October 30, 1969, the Board by order[571] applied Part IV to companies like TransCanada. From 60 days following that date,[572] these companies could only charge such tolls that were specified in a tariff filed with the Board and approved.

Part IV of the Act empowers the Boards to make orders with respect to all matters relating to traffic, tolls or tariffs, and specifies

that all tolls shall be "just and reasonable".[573] It does not prescribe or define what constitutes "just and reasonable", nor does it specify the method the Board should use to fix such tolls. The Act does, however, provide that under substantially similar circumstances and conditions, tolls shall be charged equally to all persons at the same rate for traffic of the same type carried over the same route, and that utilities shall not make any unjust discrimination in tolls, services or facilities against any person or community.[574]

The Board decided to hear TransCanada's application in two separate phases. Phase 1 was to be limited to evidence and argument as to TransCanada's rate base, rate of return and total cost of service to its customers in both Canada and the United States. Phase 2 was to include evidence and argument related to allocation of costs and revenue, and to the justness and reasonableness of the tariffs and tolls proposed by the company.

Pursuant to section 13 of the National Energy Board's Rules of Practice and Procedure, a pre-hearing conference of counsel for all parties was convened on January 12, 1971. A number of matters, particularly issues of procedure including the order of presentation of evidence and order of cross-examination, were discussed at this meeting.

On February 2, 1971, an action was commenced in the Federal Court by Northern and Central Gas Corporation, the Consumers' Gas Company and Union Gas Limited, for a declaration that certain sections of Part IV of the *NEB Act* were *ultra vires* the Parliament of Canada. The applicants, all intervenors in the Trans Canada rate application, alleged that sections 50, 41, 52, 53, 54, 61 and 97(1) were *ultra vires* in that they purported to regulate the price of natural gas sold and delivered exclusively within a province. The National Energy Board did not stay its proceedings on the application but proceeded on the basis that, pending the decision of the court, it had jurisdiction to fix just and reasonable rates or tolls for gas sold by the applicant within Canada.

The court held that the matters dealt with in the Act are *intra vires* the Parliament of Canada.[575] Mr. Justice Gibson concluded that the Act empowers the NEB to regulate charges of pipeline carriers for transmission of gas across provincial boundaries and where, as in the case of TransCanada, the carrier purchases and sells gas as an inextricably connected part of its business, the Board has authority to regulate the price at which such gas may be sold in any province as an

aspect of regulation of transmission charges. These powers were considered to be valid under the commerce power in section 91(29) and 92(10)(*a*).[576]

Following a full public hearing at which the applicant presented evidence that was tested through cross-examination by intervenors (provinces, transmission companies, gas distributing companies and industry associations), the Board rendered its reasons for decision in Order TG-1-72 of January 27, 1972. The Board approved an overall rate base, cost of service, based on a twelve month test period ending December 31, 1970, and a nine per cent overall rate of return.

The hearing on Phase II of the TransCanada application regarding the justness and reasonableness of the proposed tariffs and tolls commenced June 6, 1972. The Board had apparently anticipated a lengthy and complex hearing since the hearing order itself scheduled a pre-hearing meeting of counsel for May 25, 1972. And indeed, twenty-seven interventions were filed. The hearings, including closing arguments by counsel, covered some eighty days, concluding on November 30, 1972. In addition, written argument was directed to be filed by the applicant by December 15 and by the other parties by January 3, 1973. Supplementary oral argument was heard in late January 1973. The resulting transcript totalled 14,986 pages.

The lengthy Phase 2 hearing proceedings were caused in part by the large number of legal issues debated. This should not be surprising since the Board was hearing its first rate application, and intervenors were interested in ensuring the establishment of favourable precedents on various issues. The Board's reasons for decision cite a substantial number of cases dealing with such things as statutory interpretation,[577] the relevance of decisions of other tribunals in other jurisdictions,[578] and the meaning of the terms "tariff" and "toll".[579]

One of the more interesting matters considered was the request by TransCanada for "automatic tracking". This would permit automatic adjustment of tariffs and tolls without specific reference to the Board to cover changes in the cost of purchased gas, gathering charges, transmission charges on the Great Lakes Transmission Line, increased sales taxes, and certain "additional taxes". This proposal was vigorously opposed by many of the intervenors, particularly gas utilities and major industrial gas users.

Another controversial issue in the application was the proposal by TransCanada to segregate costs of transmission as between a

"western system" and an "eastern system", divided by the Manitoba-Ontario border. Unit costs on an mcf/mile basis were then developed for each system. The western system unit costs were used to determine the cost of transmission in the Saskatchewan and Manitoba zones, and the eastern system unit costs were used for the other zones. This dual system proposal was supported by provinces, utilities and users located within the proposed western system, but opposed by similar interests located within the proposed eastern system.

In its reasons for decision issued in May of 1973,[580] the Board rejected the applicant's proposed separation of its system into eastern and western components.[581] The Board concluded that TransCanada was an integrated gas transmission company whose system was designed and operated as a single entity for the benefit of all of its customers. This was consistent with the principle of sharing total system transmission costs on the same basis among all customers that had generally been required of integrated gas transmission systems in the United States.

The Board also rejected TransCanada's request for inclusion of tariff clauses that would allow automatic tracking for rates on four cost items. The panel recognized the problem of regulatory lag, especially when item cost increases are severe and unexpected. However, the Board noted that this was the first rate proceeding and that regulatory lag in future rate applications would be substantially reduced.

Having rejected the proposal for automatic tracking, the Board did specifically recognize the need for expeditious approval "in special circumstances". It therefore considered alternative means of abridging the length of proceedings in such special circumstances.

The primary method contemplated was the design of special procedures for "expedited proceedings" that could be used by the Board to deal with certain types of rate applications. Consequently, amendments were made to the NEB's Rules of Practice and Procedure, and promulgated[582] concurrently with the Board's reasons for decision in the second phase of the TransCanada application. It is important to note that in these reasons the Board emphasized that the procedure for expedited proceedings was not to be used for applications raising "complex issues" or "new issues".[583]

In addition to providing an alternative to automatic tracking, the expedited procedure also responded to TransCanada's request in

Phase 1 for an "interim decision" pending conclusion of the rate proceedings. Following the original filing of the TransCanada application in 1969, long delays occurred while the staff review of the material filed was carried out. Apparently, staff shortage and inexperience in the rates area, as well as vacancies on the Board itself at that time, all contributed to this problem.[584] In any event, it was some time before the application was scheduled for hearing. The hearing that eventually took place took a long time as that Phase 1 decision was not issued until early 1972.

TransCanada had not anticipated such a long hearing. In the meantime, severe inflation threatened to increase certain costs drastically. The company therefore served notice of intention to apply for an interim decision that would provide some relief prior to final determination of the application. The idea was apparently based on U.S. Federal Power Commission procedure that provides for "interim rates" on filing, pending decision on a particular rate application, provided that utilities are required to reimburse customers the excess collected if the final decision establishes lower rates than those used for the interim service. In the result, TransCanada did not press this interim application, mainly because the proposal for expedited proceedings was already being developed.[585]

(b) TransCanada Pipelines Limited, 1973 Rate Application

It was not long before the new expedited procedure was used. TransCanada applied on June 15, 1973 for an order establishing just and reasonable rates or tolls under sections 50 and 53 of the Act, and for an expedited proceedings order under section 5.2(1) of the NEB's Rules of Practice and Procedure. It was proposed that the new tolls be effective as of August 1, 1973. In the notice of the application, the Board requested submissions from all interested parties regarding the merits, and also as to whether *viva voce* evidence should be heard, and if so on what parts of the application.[586]

On August 16, 1973, TransCanada filed an amendment to its application requesting an order establishing new rates and tolls effective November 1, 1973 as a result of a very substantial increase in the cost of Western Canadian gas. The material filed by the applicant was restricted to the cost of gas purchased.

The Board granted the expedited proceedings order on the ground that no new issues were raised following the Phase 2 rate decision of May, 1973, and the matters raised in this application could be determined by expedited proceedings consistent with the principles established in the May, 1973 decision.[587] At the same time, and taking into account written representations filed by interested parties, the Board rendered its decision regarding just and reasonable rates or tolls in the expedited proceedings.

The amendment with respect to the cost of gas purchased item was denied.[588] However, the Board indicated that this matter could appropriately be dealt with in a "limited hearing". A separate application was subsequently made and the limited hearing held on October 15 - 17, 1973. Reasons for decison were issued before the end of that month.[589]

II. THE 1974 RATE APPLICATION

On December 28, 1973, TransCanada filed an application pursuant to section 50 and 53 of the *NEB Act* in two phases. In Phase 1 the company sought a new rate of return (9.5%) on its rate base, and a revised cost of service based on costs to October 31, 1974. Consequently, a new schedule of tolls and tariffs was requested. In Phase 2, TransCanada sought higher rates of depreciation and approval of a "normalized" approach to income tax accounting.

The procedure used by the Board in Phase 1 was based on the procedure used in the first TransCanada rate application. However, this time both TransCanada and the Board and its staff were very sensitive to the problem of excessive delay. Following filing of the application, TransCanada staff offered to meet with NEB staff to answer questions that might facilitate Board review of the application. But Board staff deferred such a meeting pending consultation with the Board hearing panel that was yet to be appointed. No action was taken on the proposed staff meeting. After the matter was set down for hearing beginning June 4, 1974,[590] the Board decided that the circumstances of the application did not require either an informal meeting or a formal pre-hearing conference.

In late April, after TransCanada had proposed a substantial amendment to its application, the company indicated that it planned to meet with representatives of its customers and with Board staff to answer questions and provide information that may be helpful in

shortening the hearing process. TransCanada also announced plans to distribute the prepared testimony of many of its witnesses in advance and to arrange a general meeting of interested parties "in the nature of a pre-hearing conference" to attempt to reach agreement on some principal issues with a view to cutting down the length of the proceeding.

On May 6, TransCanada's general counsel telephoned the Board Secretary to advise that TransCanada had met successfully with representatives of its major customers in Toronto on April 7, and to propose again a meeting with NEB staff to clarify certain issues. By this time, however, the Board's view was firm that staff should not become formally involved with representatives of TransCanada, since the application had now been set down for hearing.

Later, on May 17, TransCanada sent to the Board thirty copies of the direct testimony of six TransCanada witnesses that would be formally presented at the hearing. On May 24, certain additional data that had been requested by the TransCanada customers was also sent to the Board in a further effort to speed the application.

Meanwhile, the lengthy staff review of the application was in progress and several planning meetings had been held by members of the Board panel with staff. It was agreed that studies related to the application should be undertaken in an orderly manner and, in general, should only be initiated by staff expressing concern or upon recommendation of the full panel. Further, staff should not attempt any predetermination of issues to be considered at the hearing nor submit any reports in conclusiary terms. Later, it was decided that no staff studies should be conducted prior to the conclusion of the hearing.

As for the application, staff agreed that no deficiency letter was required and that it would not be necessary to informally request additional information.

At one point, staff members suggested a "staff rate committee" to consider rate matters on a regular basis rather than simply dealing with such issues *ad hoc* as they arose. However, the response from the various branch heads was not enthusiastic and the proposal was eventually dropped. Apparently, a rate design model computer program had been developed for the earlier TransCanada application and modifications were made to adapt the program for the 1974 Phase 1 application.

On May 27, a meeting of staff and panel members was held to discuss draft questions and some of the interventions that had been received. The hearing commenced the following week on June 4, and continued until June 19. The applicant formally presented its case and its witnesses were vigorously cross-examined by counsel representing essentially the same intervenors that had appeared at previous TransCanada rate hearings. The only important new intervenor was an organization known as the Industrial Gas Users Association, an industrial consumers' group composed of representatives of major southern Ontario manufacturing interests.

From a procedural standpoint, the most interesting aspect of the hearing was a first-day motion by Union Gas Limited to exclude Board member J. R. Farmer on the ground that, prior to his recent appointment to the Board, he was a senior executive of Gaz Metropolitan Incorporated. Gaz Metropolitain, the major Quebec utility, was one of the intervenors in the application and it was alleged that Mr. Farmer had held his position with the company at the time this application was filed and that he had worked on it for Gaz Metropolitan. The Board panel rejected specifically any suggestion of apprehension of bias, but Farmer "decided to remove himself" nevertheless.[591]

Following the hearing, the usual post-hearing meeting of Board and staff was held and responsibilities for preparation of the reasons for decision were assigned. Briefing papers and draft sections of the report were to be prepared by late June or early July. Subsequently, a number of briefing papers were forwarded to the panel members and another meeting held. Finally, on July 22, the draft order establishing a new rate base for a test period ending October 31, 1974, a new cost of service and rate of return (9.8%), and new tariffs, tolls and rates effective September 1, 1974, was approved by the Board. The order was then released together with an explanatory press release.[592] The full reasons for decision were scheduled to be completed for release during September, 1974, but were delayed for a number of months.

III. TRANSCANADA PIPELINES LIMITED APPLICATION DATED AUGUST 9, 1974

This was another limited hearing application dealing with two matters only — increased costs of purchased gas, including adjustments to the cost of service, and the appropriateness of a tariff

amendment filed with the Board with respect to "normalization" of purchased gas costs. The latter would permit TransCanada to maintain monthly accounts of unrecovered purchased gas costs and monthly carrying charges at the allowed rate of return. Each year within a specified time, the company would apply to the Board for approval of a revised rate schedule for the next twelve months incorporating the necessary adjustments to reflect the situation in the purchased gas cost account for the preceding twelve month period. This would provide greater assurance to TransCanada that all gas purchase costs would be passed directly on to its customers.

Even in this limited hearing, TransCanada had voluntarily and as a matter of courtesy filed with the agency additional material in the form of reports and working papers that had already been provided to other intervenors. The idea was to give the Board a preview of material that would subsequently be filed as exhibits at the hearing. In addition, TransCanada had requested a meeting with NEB staff on this material. However, this request was denied on the advice of NEB counsel, who then himself met with counsel for TransCanada shortly before the hearing. There was relatively little consultation by Board or staff with the applicant outside the hearing on this application, mainly because of the strong opposition to off-the-record informal consultation by the chairman of the panel.[593] As a result, there was less interaction than usual by panel members with staff, for example, in reviewing questions before the hearing.

The hearing was held on September 24, 1974. The panel consisted of A. Cossette-Trudel, C. G. Edge, and M. E. LeClerc. Mr. LeClerc, then Director General, Special Projects, with the NEB, was sitting as a temporary substitute member. The hearing itself was routine. TransCanada simply presented its "canned testimony", after several intervenors objected to the proposal to simply place this evidence on record and forego the reading of questions and answers. A good deal of cross-examination was directed to possible effects on TransCanada and its consumers of the proposed normalization of purchased gas costs clause. In particular, there was concern that such a clause would "lessen the risk of loss" and therefore remove TransCanada's incentive to bargain aggressively for field contracts.

The intervenors included the usual array of gas producers and suppliers, pipeline companies, distributors and provinces. It is interesting to note that there was a total absence of consumer interests, including industrial consumers, even though approval of the proposed normalization of purchased gas cost tariff amendment

would have represented an important step toward automatic tracking of costs.

It is also important to note that the tariff amendment proposed by TransCanada included what were in fact procedural provisions. These involved an undertaking by TransCanada to apply yearly for Board approvals of the adjustments based on purchased gas costs and the requirement that this be done not later than sixty days prior to November 1 of each year. Approval would have meant incorporating procedural rules in TransCanada's filed tariff.

The Board's report was prepared with staff assistance in the usual way, and reasons for decision were issued on October 25, 1974. The Board accepted the applicant's estimate of purchased gas costs for the year commencing November 1, 1974. However, the proposed adjustment to cost of service related to purchased gas costs for 1973-1974 was disallowed. The proposed tariff amendment concerning normalization of purchased gas costs was also disallowed.

The Board stated that the proposed tariff amendment did not give either TransCanada or its customers any right, privilege or obligation that they did not already have. Nor did it assure the parties of any particular Board decision on such matters. The Board was apparently concerned about the possiblity of fettering its discretion on this matter. What the tariff amendment would have to do was to establish a presumption in favour of the "prudence" of TransCanada's gas purchases in the absence of unusual circumstances. Without the approved account and yearly application schedule that would have been established by the tariff amendment, the onus remains on TransCanada to establish the prudence of its purchases.

It is interesting that the reasons for decision in this application omitted the usual summary of the views of the intervenors. The reason may be that none of the intervenors specifically objected to the proposed tariff amendment.

IV. ISSUES ARISING OUT OF THE CASE STUDY

(a) Rate-Making: Policy and Procedure

The Board has faced a considerable challenge in the field of rate-making. The first TransCanada application severely tested both

members and staff, since it involved plunging into a lengthy and complex proceeding with a small staff and relatively little rate-making experience on the part of the Board members. In this latter regard, the 1969 appointment of Mr. A. Cossette-Trudel with twenty-five years previous experience as a member of the Quebec Fuel Board assisted materially. Staff shortage in the rates area may still be a problem. One difficulty has been the competition for qualified rates personnel among the NEB and the various newly-created provincial energy agencies.

The Board has not developed policy guidelines for dealing with issues in rate applications. Rather, each case is decided on its facts within the broad "just and reasonable" criterion established by the Act. The Board relies on all of the evidence presented in each case, and in particular on:[594]

(1) the evidence of expert witnesses;

(2) other Canadian decisions and cases; and

(3) U.S. public utility decisions (particularly FPC decisions), and U.S. public utility regulation texts.

Major applications are normally dealt with under four main headings:

(1) rate base;

(2) cost of service. This involves a consideration of the efficiency of the applicant's operation;

(3) rate of return. Here, two tests are particularly relevant: (a) comparable earnings, and (b) interest coverage. A consideration of the time when facilities ought to start earning a return is also involved; and

(4) rate design. Rate zones were determined in the first TransCanada rate application with regard to cost, historical precedent and reference to the U.S. situation.

It was emphasized by the Board members interviewed that rate decisions are not made on an incremental basis having regard to previous rate decisions — that is, simply by making adjustments to reflect developments in the most recent period. Rather, the full range of evidence in the current proceeding is carefully considered. The Board does not in any way attempt to provide "good public relations" for utilities by giving the stamp of approval to proposed rate increases. Instead, the Board is aggressive in determining the

"prudence" of prices actually paid for cost of service items, including the cost of purchased gas.[595]

The Board has not paid much direct attention in rate determinations to the interests of consumers in particular rate zones. Some issues have been raised by industrial consumers, but residential and institutional consumer interests have not actively participated. The Board has considered the consumer interest to fall within provincial jurisdiction and consequently to be a matter for the relevant provincial regulatory authorities.[596]

United States precedents were used extensively by both parties and the Board. In the course of the 1974 Phase 1 hearing, many FPC and other U.S. public utility cases, as well as related court decisions were cited by various parties. The Board staff in reviewing the application also used American authorities as guides in unfamiliar areas. For example, in considering the question of how to treat costs incurred by TransCanada in its first rate case, Board staff referred the panel members to a number of decisions from the U.S. Public Utility Report Digest (Second Series) that dealt with this subject. In its reasons for decision in Phase 2 of the first TransCanada rate case, the Board stated that, to the extent that practices and decisions of other tribunals dealing with similar matters could be of assistance and were not in conflict with Canadian jurisprudence, these were considered when making the decision. The principal reference here was to the U.S. Federal Power Commission.

(b) Procedures to Mitigate Delay

The review of the succession of TransCanada rate applications has already shown how the procedural techniques of "expedited proceedings" and "limited hearings" were adopted by the Board to mitigate the substantial delays that occurred in the first TransCanada application. It is also apparent that these procedural devices were adopted in an attempt to meet the problem of delay as alternatives to the "interim decision" and "automatic tracking" methods that had been proposed by TransCanada. The result is that the Board retains maximum substantive decisional flexibility. It avoids conferring an undue measure of security on the regulated utility that may affect the utility's incentive to resist strongly any price increases on cost of service items.

Generally, it appears that the Board's efforts to expedite rate proceedings have been successful. It is true that there was some delay in the preparation and release of the reasons for decision in Phase 1 of

the 1974 application. However, the Board order on that application was released fairly promptly.[597] Speed was demonstrated by the disposition of the TransCanada application of August 9, 1974, in time for related proceedings by provincial and U.S. regulatory agencies to be completed by November 1st. This latter application covered only two and a half months from application through limited hearing to reasons for decision, while Phase 1 of the first TransCanada application spanned two and a half years. The more extensive 1973 application handled under expedited proceedings required only two and a half months as well.

There is some evidence that the NEB may be making more liberal use of these procedural expedients than is strictly necessary, at the expense of openness and full participation by affected interests. The terms of the Board's reasons for decision in Phase 2 of the first TransCanada rate application show that the expedited procedure was intended to deal with the problem of rapid increases in particular cost of service items — especially the cost of purchased gas. However, the amendment to the Rules of Practice and Procedure subsequently adopted was so broadly worded that the expedited proceedings could potentially be used even for complex rate applications involving rate of return determination and consideration of many items under the cost of service head.[598] The fact that expedited proceedings were approved for Phase 1 of the 1973 TransCanada rate application which was not concerned only with a particular cost of service items suggests that this may have already happened.

Approval of limited hearings to deal sequentially with certain aspects of applications represents a further erosion of full and open procedures in rate applications. Through limited hearings, the applicant is able to negotiate the breakdown of issues and the sequence of consideration of these issues to its best advantage. The most recent TransCanada rate hearing on the application of August 9, 1974, may be regarded as an illustration of the use of this tactic.[599] The basic problem is that this process of segregating issues and narrowing the scope of participation gradually relieves the regulated utility of the onus of continually supplying a wide range of information to the Board and having this information tested through cross-examination in open rate hearings.

(c) *Ex Parte* Consultation with Applicants

Another technique that TransCanada hoped would speed the decision-making process was extensive consultation with potential intervenors and with the NEB staff. In earlier applications, there had

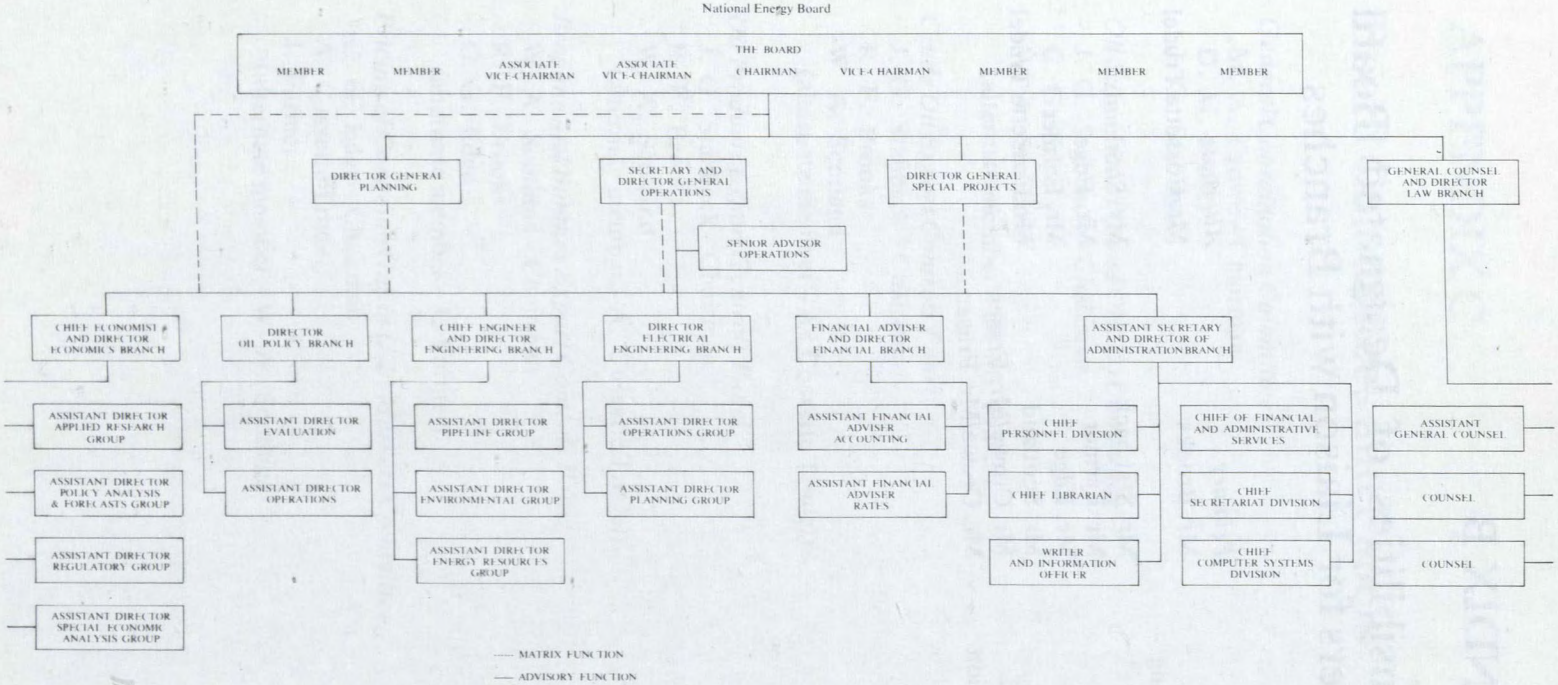
been considerable informal consultation by TransCanada with Board staff in addition to the formal pre-hearing conference. However, in the 1974 application, the Board panel was much more wary of the dangers of pre-application and particularly post-application consultation with TransCanada staff. Board staff was directed to keep informal consultation to a minimum and the "pre-hearing conference" proposed by TransCanada to include Board staff never did take place. The primary reason for this appears to be the special concern of the panel chairman, Mr. A. Cossette-Trudel, for safeguarding the integrity of the Board's quasi-judicial functions.

(d) Parties

The problem of openness and interest representation in rate applications requires further comment. Even under the full formal hearing procedure, the range of interests represented by the intervenors has been extremely narrow. Until recently, there was no consumer representation at all in rate proceedings. There is now evidence of some activity by major industrial users and organizations representing those interests.[600] However, residential and institutional users and related interests up to the time of writing have never intervened in a rate application. One consequence is that, in the most recent TransCanada application, none of the intervenors objected to the proposed automatic adjustment tariff item. It appears that this was one of the factors that was considered relevant by the Board panel. It is hardly surprising that none of the intervenors objected. Utilities wanted the precedent established by TransCanada so that they could carry it back to their respective provincial regulatory agencies. Producing interests considered that such a procedure would make contract negotiation easier for them. The Province of Ontario did not object because the Province appeared to be on the threshold of a natural gas shortage.

Some Board members believe that effective interventions by consumer interests are important in balancing the views that are presented to the Board in rate applications. Nevertheless, because consumer interests often have limited resources, and because the NEB is concerned only with transportation tariffs and not with the distribution tariffs that contain so much potential for discrimination, most consumer groups will likely pass up NEB rate proceedings in favour of participation in rate hearings before provincial agencies. This view is strengthened by the fact that the Board has considered questions of competing consumer interests within particular rate zones as essentially outside its jurisdiction.

APPENDIX A
Organization Chart (as of early 1975)



APPENDIX B

Responsibilities of Designated Board Members for Liaison with Branches

	Primary	*Alternate*
Electrical Engineering	Mr. Brooks	Mr. Cossette Trudel
Oil Policy	Mr. Stabback	Mr. Scotland
Financial	Mr. Farmer	Mr. Edge
Economics	Mr. Edge	Mr. Farmer
Engineering	Mr. Scotland	Mr. Cossette Trudel
Law	Mr. Crowe/Mr. Fraser	
Administration	Mr. Crowe/Mr. Fraser	

APPENDIX C

Board Committees and Panels

General Coordination Committee
M. A. Crowe - Chairman
D. M. Fraser
J. G. Stabback

Oil Supply (NATO and OECD) Committee
J. G. Stabback - Chairman
C. G. Edge
W. A. Scotland
(alternate member - D. M. Fraser)

Crude Oil Export Controls Panel
J. G. Stabback - Chairman
R. F. Brooks
W. A. Scotland
(alternate member - A. Cossette Trudel)

Oil Products Export Controls Panel
J. G. Stabback - Chairman
R. F. Brooks
W. A. Scotland
(alternate member - A. Cossette Trudel)

Propane and Butanes Export Controls Panel
W. A. Scotland - Chairman
R. F. Brooks
C. G. Edge
(alternate member - J. Farmer)

Pricing of Canadian Gas in U.S. Markets Committee
C. G. Edge - Chairman
A. Cossette Trudel
J. Farmer
(alternate member - W. A. Scotland)

Pipe Line Development Safety and Environment Committee
W. A. Scotland - Chairman
R. F. Brooks
A. Cossette Trudel
(alternate member - J. Farmer)

Pipe Line Earnings Committee
J. Farmer - Chairman
A. Cossette Trudel
C. G. Edge
(alternate member - D. M. Fraser)

Energy Studies Committee
D. M. Fraser - Chairman
R. F. Brooks
C. G. Edge
(alternate member - W. A. Scotland)

Legislative Program
M. A. Crowe - Chairman
D. M. Fraser
(alternate member - J. G. Stabback)

Northern Pipe Line Committee
J. G. Stabback - Chairman
A. Cossette Trudel
W. A. Scotland
(alternate member - J. Farmer)

APPENDIX D

National Energy Board Representation on Interdepartmental Committees and Task Forces

Ad Hoc Interdepartmental Committee on Manpower Requirements for Northern Pipelines
Advisory Committee on Northern Development:
(a) Policy Committee
(b) General Committee
(c) Transportation Subcommittee
Bank of Canada - Northern Gas Pipelines Study Group
Canada/U.S.A. Emergency Planning
Capital Requirements Committee:
(a) Task Force on Capital Requirements
(b) Macro-Economics Projections Subcommittee
Energy Conservation Committee
Engineering Review Committee for Tidal Power
Federal/Provincial Committee on Noise
Federal/Provincial Committee on Oil and Gas Statistics
Foreign Investments Review Agency:
(a) Task Force on Ownership of Canadian Natural Resources
(b) Committee to Study Hypothetical Foreign Take-overs in the Oil and Gas Industry
Initiating Committee on Price Survey of Petroleum Products
Interdepartmental Committee on Candide - Candide Users Group
Interdepartmental Committee on the Disposal of the Haines-Fairbanks Pipeline
Interdepartmental Committee on Energy Statistics:
(a) Executive Committee
(b) Subcommittee on Coal and Coke
(c) Subcommittee on Oil and Gas
(d) Subcommittee on Special Projects
Interdepartmental Committee on the Environment and Subcommittee on O.E.C.D. Environmental Activities
Interdepartmental Committee for Metric Conversion
Interdepartmental Committee on Oil
Interdepartmental Committee on Rehabilitation of the Alaska Highway

Interdepartmental Committee on Socio-Economics of Pollution Abatement
International Joint Commission – Standing Committee on Health Aspects
NATO – Petroleum Planning Committee
National Advisory Committee on Petroleum Statistics; and Ad Hoc Working Group on LPG Statistics
National Design Council
National Gas Advisory Committee
O.E.C.D.:
(a) Ad Hoc Group on Natural Gas
(b) Interdepartmental Energy Panel
(c) Oil and Energy Committee
Petroleum Resources Committee – Subcommittee on Economic Analysis Task Force on Energy Research and Development; and Transmission Panel Task Force on Northern Oil Development:
(a) Economic Impact Committee
(b) Markets Subcommittee
(c) Pipeline Engineering Committee
(d) Social and Environmental Subcommittee
Technical Advisory Committee on Petroleum Supply and Demand; and
(a) Subcommittee on Data Needs
(b) Subcommittee on Seaway Movement of Oil
(c) Subcommittee on Shipping
Technical Advisory Committee to Hydro Quebec Institute of Research

Notes

1. For the purposes of this series we view an administrative agency as a statutorily created governmental or public authority that, while neither court nor legislative body, possesses attributes of each, and that affects the rights of private parties through adjudication or by playing an important role in the making of rules or regulations. "An administrative agency may be called a commission, board (or tribunal), authority, bureau, office, officer, administrator, department, corporation, administration, division, or agency. Nothing of substance hinges on the choice of name, and usually the choices have been entirely haphazard.": Davis, *Administrative Law* (1965), 1.

2. The series includes studies of the Immigration Appeal Board, the National Parole Board, the Atomic Energy Control Board, the Canadian Transport Commission, the Unemployment Insurance Commission, the Pension Appeals Board, the Canadian Radio-Television and Telecommunications Commission and the Anti-Dumping Tribunal, all carried out under the general guidance of the Commission's Administrative Law and Procedure Project.

3. These case studies are attached. A sixth case study on the Dow Chemical of Canada Ltd. ethylene export application (heard June 25-27, 1974) was developed without direct access to Board files and staff meetings.

4. Our "interviews" with Board staff were most often merely conversations about particular aspects of the applications we studied in detail, usually sparked by our questions.

5. That ocourred, fortunately for us, during the course of our research.

6. Beginning at page 21.

7. At page 29.

8. This outline of the historical background to the establishment of the National Energy Board is based in part on the following review articles: B. Fisher, *The Role of the National Energy Board in Controlling the Export of Natural Gas From Canada* (1971) 9 Osgoode Hall L.J. 553, 554-558; and I. McDougall, *The Canadian National Energy Board:*

Economic "Jurisprudence" in the National Interest or Symbolic Reassurance? (1973) 11 Alberta L. Rev. 327, 329-338.

9. Canada Royal Commission on Canada's Economic Prospects, Final Report, November, 1957.

10. *Id.*, Chapter 7, especially at 146.

11. Order-in-Council of October 15, 1957, as quoted by the Hon. Gordon Churchill, Minister of Trade and Commerce in *Hansard* 3766, May 18, 1959.

12. Canada, Royal Commission on Energy, First Report, October, 1958. The Commission's Second Report, issued in July, 1959 covered matters of energy supply and demand, including export demand.

13. National Energy Board Act, S.C. 1959, c. 46, as amended; consolidated as R.S.C. 1970, c. N-6 (hereinafter cited as NEB Act).

14. *Hansard*, May 18, 1959 at 3766, quoting a statement made by a fellow Conservative two years earlier.

15. The Hon. Gordon Churchill, *Hansard*, May 22, 1959 at 3922.

16. These ambiguities are particularly apparent when the "facilities" certificate of public convenience and necessity provisions (Part III) are compared with the export and import provisions (Part VI). The former were largely borrowed from the Pipelines Act; the latter from the Exportation of Power and Fluids and Importation of Gas Act. For example, Part III contains a provision taken from the Pipelines Act (s. 45) authorizing the Board to determine who is an "interested person" for the purpose of that Party; Part VI contains no equivalent provision. This issue arose in the *Dow Chemical Case*, discussed at 100 *infra*. See Case Study No. 3.

17. *Id.*, at 3930.

18. *Supra* note 14, at 3936. In fact, there has been relatively little duplication. In Part II of this Study we suggested that related problems have been caused by the Board acting too much like an ordinary government department.

19. *Hansard*, May 25, 1959 at 4001.

20. *Supra* note 14, at 3770.

21. *Supra* note 14, at 3929.

22. *Id.*, at 3930.

23. *Supra* note 14, at 3774-5.

24. Toronto *Globe and Mail*, July 2, 1974.

25. Mr. Walter Herridge, *id.*, at 3777.

26. The term "regulatory" in this paper refers to the process of making decisions authorized under statutory authority to control or modify the behaviour of individuals, organizations or groups. Thus nearly all aspects of the NEB's actions arising out of formal (written) and

informal applications for the various approvals (i.e., certificates, licences and orders) authorized by the NEB Act are included. All of these approvals involve licencing, allocation or price regulation. See B. Doern, I. Hunter, D. Swartz and V. Wilson, "Approaches to the Study of Federal Administrative and Regulatory Agencies, Boards, Commissions and Tribunals", a report prepared for the Law Reform Commission, April, 1974, and published in a condensed version in 18 Can. Pub. Admin., 189 (1975).

"Advisory" describes the NEB's activities in developing and communicating information, advice or recommendations to members of the federal Cabinet or senior governmental officials. The problems caused because much advisory information is derived through regulatory processes and regulation may be imposed directly by Cabinet on the advice of the Board, are discussed in Part II under the heading, "Advisory/Regulatory Conflict".

27. The Board's powers in relation to pipeline facilities are based mainly on s. 92(10)(*a*) of the British North America Act which gives the Dominion exclusive jurisdiction in relation to "...works and undertakings connecting a province with any other or others of the provinces, or extending beyond the limits of a province". The definition of "pipeline" in s. 2(*m*) of the NEB Act is in precisely these terms. The federal declaratory power under s. 92(10)(*c*) of the B.N.A. Act may also be relevant.

One of the principal unresolved constitutional issues relevant to pipeline facilities is whether federal jurisdiction extends to regulation of pipelines or gathering systems physically connected to interprovincial or international pipelines, but located wholly within a province. See G. Acorn, "Background" at 389ff and G. Holland, "The Federal Case" at 394-402, in Symposium: "Constitutional Problems in Canadian Oil and Gas Legislation" (1964) 3 Alberta L. Rev. 367, 389ff; and J. Ballem, "The Constitutional Validity of Provincial Oil and Gas Legislation", (1963) 41 Can. Bar Rev. 198, 219-227.

The other major source of federal energy authority is s. 91(2), "The Regulation of Trade and Commerce". Also relevant are section 91(3), "The Raising of Money by any Mode or System of Taxation", and the preamble and conclusion of s. 91, the "residuary power".

The extent of federal authority to regulate production and pricing of petroleum and natural gas at the early production stage is not clear. Much depends on when the substance is considered to enter the "flow of interprovincial or international trade" within s. 91(2), and therefore to leave provincial jurisdiction in relation to "the management and sale of the public lands belonging to the province" — s. 92(5), "property and civil rights in the province" — s. 92(13) and "generally all matters of a merely local or private nature in the province" — s. 92(16).

At present, there is tacit federal recognition of provincial prorationing legislation, as well as legislation regulating petroleum and natural gas field price and removal from the province. In fact, NEB certificate applicants are specifically required by item 16 of Part I of the Schedule to the NEB's Rules of Practice and Procedure to submit evidence of

having obtained provincial removal authorization for the gas or oil proposed to be transported by the facility.

Detailed consideration of the scope of federal constitutional authority in relation to energy and energy resources is beyond the scope of this paper. However, the literature is fairly extensive. The following articles are also most relevent to the NEB:

Symposium: "Constitutional Problems in Canadian Oil and Gas Legislation", (1965) 3 Alberta L. Rev. 367; R. McKimmie, "A Discussion on the NEB, its Jurisdiction and Problems", and J. Saucier, "Legal Problems Involved in the Transmission, Distribution and Pricing of Natural Gas in Canada", Canadian Bar Association Annual Meeting Papers (1960); A. Smith, "The Legislative Authority of Parliament under section 91(29) and 92(10)(*a*) and under section 91(2) of The B.N.A. Act, In Relation to Interprovincial and International Natural Gas Pipelines and In Relation to Interprovincial and International Transactions in Natural Gas", unpublished manuscript (1958); A. Thompson, "Implications of Constitutional Change for the Oil and Gas Industry", (1969) 7 Alberta L. Rev. 369; J. Rathwell, "Constitutionality of the Prorationing Scheme in Alberta", (1965) 4 Alberta L. Rev. 142; J. Robertson, "Canadian Regulation and Transmission of Natural Gas", (1973) 18 Rocky Mtn. Min. L. Ins't 299; I. McDougall, "The National Energy Board: Economic 'Jurisprudence' in the National Interest or Symbolic Reassurance?", *supra* note 8; and M. Crommelin, *Jurisdiction over Oil and Gas Resources*, unpublished Ph.D. Thesis, Faculty of Law, U.B.C. 1974.

28. NEB Act, s. 22(1). The full section 22 reads as follows:

(1) The Board shall study and keep under review matters over which the Parliament of Canada has jurisdiction relating to the exploration for, production, recovery, manufacture, processing, transmission, transportation, distribution, sale, purchase, exchange and disposal of energy and sources of energy within and outside of Canada, shall report thereon from time to time to the Minister and shall recommend to the Minister such measures within the jurisdiction of the Parliament of Canada as it considers necessary or advisable in the public interest for the control, supervision, conservation, use, marketing and development of energy and sources of energy.

(2) The Board shall, at the request of the Minister, prepare studies and reports on any matter relating to energy or sources of energy, and shall recommend to the Minister the making of such arrangements as it considers desirable for co-operation with governmental or other agencies in or outside Canada in respect of matters relating to energy and sources of energy.

(3) In carrying out its duties and functions under this section, the Board shall, wherever appropriate, utilize agencies of the Government of Canada to obtain technical, economic and statistical information and advice.

29. *Id.*, s. 22(2).

30. *Id.*, s. 24.

31. *Id.*, s. 22(3).

32. *Id.*, s. 24.

33. It is arguable, for example, that the Board's regulation-making

functions (ss. 85, 88, and 7 — Rules of Practice and Procedure) are in practice an aspect of the advisory function. See "Advisory/Regulatory Conflict", Part II, *infra*.

34. NEB Act, ss. 25, 27(*a*).

35. *Id.*, s. 44.

Applicants for certificates must file a map in specified scale showing the general location of the proposed pipeline and of all population centres, railways, and navigable waters through, under or over which the line is to pass — s. 28(1). The application must also include detailed information set out in Parts I and II of the Schedule to the Rules of Practice and Procedure. The Board has a discretion to demand such further information as it considers necessary (s. 28(1); Rules of Practice and Procedure, s. 5.3).

36. *Id.*, ss. 27, 29, 30. The Board is specifically empowered to correct errors (ss. 32, 33); authorize deviations (s. 36); and direct diversions, relocations (s. 37), and safety modifications (s. 39).

37. *Id.*, s. 26.

38. *Id.*, ss. 40-43. Ancillary powers are found in the International Power Line Regulations, P.C. 1962-703.

39. *Id.*, s. 46.

40. *Id.*, s. 44.

41. *Id.*, ss. 47, 48.

42. *Id.*, s. 49.

43. *Id.*, s. 81, as extended to oil by s. 87, proclaimed May 7, 1970. In certain circumstances, exports or imports may be authorized by order. See NEB Part VI Regulations, P.C. 1959-1411 as amended, ss. 6A (power), 6B (gas), 16 (propane and butane), 17 & 18 (emergency gas import and export), and 19 (emergency power import and export). These powers are discussed in Part III, *infra*. The Board has not, however, asserted jurisdiction over the import of oil by means of regulations.

44. NEB Part VI Regulations, s. 8.

45. *Id.*, ss. 11, 11A, 12.

46. *Id.*, s. 7.

47. NEB Act, s. 83. See discussion of policies in Part II *infra*.

48. *Id.*, s. 84.

49. *Id.*, s. 86.

50. *Id.*, s. 51(1).

51. *Id.*, s. 51(2).

52. *Id.*, s. 52.

53. *Id.*, s. 55.

54. In 1969, following filing of the first TransCanada PipeLines Limited rate application, the Board by order made Part IV applicable to companies operating pipelines before the Act came into force, thus clearing the way for the TransCanada application. Previously, the Board had informally imposed a uniform classification of accounts, and secured continuous filing of tariffs by oil pipeline companies, and sales' contracts or (in the case of TransCanada) rate schedules by gas pipeline companies. The initial filings were obtained in certificate or export licence applications under information requirements in the Part VI Regulations — s. 4(2)(*c*) — which included copies of all sales' contracts.

55. NEB Act, s. 51(1). In practice, utilities act on proposed tariff items as soon as they are submitted to the Board without waiting for notice of approval. Probably they are not entitled to do so, since some meaning must be given to the words "in effect" in s. 51(1).

56. As in the Inland Natural Gas application, concerning a proposed Westcoast Transmission Limited Tariff in 1974. See Reasons for Decision, May, 1974, File no. 1562-J6-1.

57. Gas Pipeline Uniform Accounting Regulations, P.C. 1969-2056; Pipeline Companies Records Preservation Regulations, P.C. 1967-1623.

58. NEB Act, s. 53.

59. *Id.*, s. 59.

60. *Id.*

61. *Id.*, s. 60.

62. *Id.*, s. 58.

63. *Id.*, s. 63.

64. *Id.*

65. See Law Reform Commission Working Paper on Expropriation (1974).

66. NEB Act, ss. 11, 14(2), 20(3), 24. There is also a power under s. 12 to issue mandatory orders to enforce certain determinations made under these powers.

67. *Id.*, s. 18. Otherwise every decision or order of the Board is "final and conclusive".

68. See Part II at 45.

69. Brief resumés of current members are attached as Appendix A.

During members' terms, renewable to seventy years of age, security of tenure seems ample since (subject to good behaviour) removal is only by the Governor-in-Council upon address of the Senate and the House of Commons — NEB Act, s. 3(1)(2).

Members are required to be Canadian citizens — s. 3(5), to reside in Ottawa — s. 3(7), and to devote full time to their duties — s. 3(8). They are prohibited from engaging in or retaining any interest in the business

of dealing with power or hydrocarbons — s. 3(5). Salaries for members are in the Assistant Deputy Minister range. The Chairman earns the equivalent of a Deputy Minister's salary.

70. NEB Act, s. 5(2)(3)(4)(5); and see s. 13 for delegation to one or more members.

71. *Id.*, s. 6(2).

72. Biographies of Board members are on file in the Ottawa office of the Law Reform Commission.

73. Sections 8 and 9 of the NEB Act make provision for staff. The Board's budget appropriation for fiscal 1973-1974 was $5,055,352, which included $4,235,957 for salaries and $819,395 for all other expenses. See NEB Annual Report, 1973 at 3. The equivalent figures for fiscal 1972-73 were $3,650,000 total including $3,061,812 for salaries and $588,188 for all other expenses. Staff increased from 207 at the end of 1972 to 280 at December 31, 1973. See NEB Annual Report, 1973 at 2. The Board was in a period of rapid growth during our research.

74. See Organization Chart attached as Appendix A. The functional responsibilities, line organization and liaison duties of the Branches are set out in the Board's official Organization Manual, compiled in 1973 and continuously updated.

75. E.g., R. F. Brooks in the electrical energy field, D. Fraser and A. Cossette-Trudel on rate matters, and J. G. Stabback on oil and oil products' issues. See Appendix B for a complete list of Board Members' responsibilities.

76. We noted that M. E. LeClerc, Director-General, Special Projects, was appointed a part-time Board member during a period of heavy hearing activity to sit on a panel considering a rate application.

77. Section 8(3) of the NEB Act makes its staff public servants only for the purposes of the Public Service Superannuation Act.

78. It will be interesting to observe the consequences of the recent decision to separate the positions of Secretary and Director-General, Operations.

79. That must be vetted by the Department of Justice, and by the Privy Council Office under procedure established by the Statutory Instruments Act, S.C. 1970-71-72, c. 38. The Rules of Practice and Procedure are considered to be statutory instruments within the Act.

80. One factor may be N. J. Stewart's move to the Energy Supplies Allocation Board in 1973 which left the Board without a legally trained member. Some staff members noted that the waning of the policy role of the law branch coincided with its move last year to offices on a different floor than those of Board members.

81. This organizational change was a response to the recent domestic supply and price problems outlined in Case Study No. 4. The TransCanada PipeLines Limited additional facilities application itself, and the resulting *Union Gas Case* may have contributed to this development. See Part II, *infra*. By contrast, staff proposals for a

cross-branch rates committee have not been implemented. See Case Study No. 6.

82. A list of Committees and Panels is attached as Appendix C.

83. Under Part III of the NEB Act. See *infra*, for application of criteria for the decision whether or not to hold a hearing.

84. I.e., other than "expedited proceedings" under s. 5.2 (1) and (2) of the NEB Rules of Practice and Procedure.

85. The chart was prepared by NEB staff for internal use.

86. In practice there are certain senior individuals in each branch who normally co-ordinate certain types of applications.

87. See St. Lawrence Power Company export application, Case Study No. 1, for discussion of the delegation problems raised in these circumstances. In one case, the Board refused to accept the recommendation of the presiding member, and the hearing was reopened before a full panel. The presiding member's report, which differed from the ultimate Board decision, was never released. See Ontario Minnesota Pulp and Paper Company, power export application, 1970; Report to Governor in Council, June, 1972.

88. It is difficult to characterize an "ordinary" application. Sometimes an apparently straightforward application can take on "unusual" characteristics in the course of the decision process. Thus, IPL's Sarnia-Montreal pipeline extension application was adjourned four and a half months when environmental information was deemed insufficient, then adjourned indefinitely. See Case Study No. 2. Similarly Dow Chemical's ethylene application fell into indefinite abeyance. See Case Study No. 3. Also the use of expediting techniques must be taken into account.

I. A. Blue, assistant general counsel in a paper prepared for an Energy Seminar at the Faculty of Law, University of Ottawa, March, 1974, estimated that it usually took 4 to 5 months to hear, decide and issue reasons in a gas export hearing. The three case study applications that have reached decision (St. Lawrence Power, TransCanada Facilities, and TransCanada's August 29, 1974 rate) required an average of slightly over 3 months from filing application to release of decision.

89. Requests to Interprovincial Pipe Line Limited for supplementary information, prior to resumption of the hearing on October 9, 1974 were made without a formal deficiency letter. See Case Study No. 2.

90. *Id.*

91. *Id.* See also Case Studies No. 4, No. 6.

92. See NEB Rules of Practice and Procedure, s. 5.2, and *infra* at 56. Time consuming hearings on facilities applications can be avoided by exemption orders under s. 49. See *infra* at 55. Certain exports can also be approved by order without a hearing. See *infra* at 56.

93. The breakdowns for 1972 and 1973 are as follows:

	1972	1973
Certificates of public convenience and necessity	8	6
Licences & orders for export of gas and power	21	1,086
Facilities exemption orders	32	23
Order approving plans, profiles & books of reference for new pipelines, and deviations of existing lines	94	40
Permits for correction of registered plans, profiles and books of reference	2	1
Orders approving plans for compressor, pump and meter stations	41	51
Leave to open orders	146	150
Orders authorizing operation of existing facilities at higher pressures	4	3
Orders approving sale or conveyance of parts of pipelines	8	13
Crossing orders	686	825

94. The Board's 10,000th order was issued in December, 1972. See NEB Annual Reports, 1972 at 24-25; 1973 at 15-16 and Appendix XXIII.

95. See Case Studies Nos. 3 and 4.

96. Because staff advice is available to the Board directly, counsel's role is considered to be that of "counsel to the Board". He is not considered to be a "party" in the same sense as intervenors.

97. See Case Studies Nos. 4 and 6.

98. *Id.*

99. The Report is normally not released to the public until it has been approved and release authorized by Cabinet. See Part II *infra*.

100. The Act and Regulations provide only that *issue* of certificates or licences, i.e. approvals of applications, must be approved by the Governor-in-Council.

101. See Rules of Practice and Procedure, s. 2(1)(*e*) definition of "Complaint"; and s. 2(1)(*c*)(xiv).

102. An interview with R. A. Stead, Board Secretary, suggests that the yearly total averages fewer than 10.

103. E.g., a complaint was received in 1974 concerning the safety of the Westcoast Transmission Limited Fraser River crossing at the Agassiz Bridge. Board engineers examined the pipe and advised Westcoast. The Company indicated that painting was scheduled for the Fall of 1974, and that an examination could be carried out in the course of this operation. The Board agreed, and was awaiting results of the examination in late 1974.

104. At St. Catharines on November 29, 1961 following the grant of certificate OC-10 to Interprovincial Pipe Line Company; and at London May 3-5, 1967 under order OP-201-67 following the grant of another IPL certificate.

105. Between 1962 and 1974, $12,100 millions were invested in Canada by the Oil and gas industry. See *An Energy Policy For Canada: Phase I*, Vol. II at 307.

106. E.g., fixing of compensation under s. 72, and "routine order" powers under ss. 29, 36, 38, 63, 76 and 77.

107. See Part III, *infra*, at 55.

108. E.g., Canadian Standards Association, Committees on Codes for Oil and Gas Pipeline Transportation Systems; Safety in Handling L.N.G. and electrical standards. See NEB Annual Report, 1973 at 15, 35.

109. See TransCanada PipeLines Limited rate application, Phase II, Reasons for Decision, May 1973 at 3-15. United States utility decisions are also regarded as persuasive (3-13). See Case Study No. 6.

110. E.g., rulings on relevance of evidence related to tariffs and tolls, and alternative routes in the Interprovincial Pipe Line Limited (IPL) Sarnia - Montreal oil pipeline extension application. See Case Study No. 2.

111. E.g., TransCanada PipeLines Limited additional facilities formal application of 1974, in which the applicant specifically declined to take a position on public convenience and necessity. See Case Study No. 4. See also IPL Sarnia - Montreal oil pipeline extension formal application, Case Study No. 2.

112. See IPL Sarnia - Montreal oil pipeline extension application evidence of company President D. G. Waldon, Transcript at 456. See also Case Study No. 2.

113. See Ontario-Minnesota Pulp & Paper Limited, power export application, Report to Governor-in-Council, June, 1972.

114. See B. Fisher, "The Role of the National Energy Board in Controlling the Export of Natural Gas from Canada", (1971) 9 Osgoode Hall L.J. 553, 588.

115. *Id.*, at 585.

116. The Board concluded in its August, 1970, Report to the Governor-in-Council on the joint gas export hearing at 4-35 that this provided a protection factor for "reasonably foreseeable" Canadian needs. This guideline is usually referred to as the "25-A-4 formula".

117. See I. McDougall, "The Canadian National Energy Board: Economic 'Jurisprudence' in the Public Interest or Symbolic Reassurance", (1973) 11 Alberta L. Rev. 327 at 358.

118. For example, in the 1974 Gas Supply and Deliverability Hearings, submittors were asked to predict "surplus for export" under the present 25-A-4 formula for the next 25 years. The following table shows the variations:

SURPLUS/DEFICIENCY PREDICTED UNDER THE 25-A-4 FORMULA (IN TRILLIONS OF CU. FT.)

	1977	1979	1980	1985	1987	1990	1992
Gulf Oil Ltd.	ng	ng	2.6	39.7	ng	nil	ng
Imperial Oil Ltd.	−3.1	−4.3	−6.1	14.7	89.8	−0.4	−9.3
Northern & Central Gas Ltd. (gas distributor)	−6.7	−11.2	−12.9	14.3	13.5	9.1	3.4
Canadian Arctic Gas Pipeline Ltd.	6.2	8.3	31.4	42.8	39.5	35.9	32.4
Foothills Pipelines Ltd	−2.4	−2.5	−3.5	−15.8	−20.5	−28.9	ng

119. Natural Gas Export Joint Hearing, Reasons for Decision, June, 1971, at 5-8.

120. Westcoast Transmission Company Limited, Report to Governor-in-Council, December, 1967, at 7-1. See also Natural Gas Export Joint Hearing, Report to Governor-in-Council, August, 1970 at 5-31; Fisher, *supra*, note 114, at 591-92; McDougall, *supra*, note 117, at 369-70.

121. The terms of the licences granted to Alberta and Southern Gas Co. Ltd., and Canadian Montana Pipeline Company were fixed at 15 years. See Report to Governor-in-Council, August, 1970 at 10-16; Fisher, *supra*, note 114, at 590.

122. NEB, Part VI Regulations, s. 11A, added by P.C. 1970 - 1706. The 1974 Natural Gas Export Price Hearing was held under s. 11A (and s. 14(2) of the Act), and the recommended $1/mcf export price was implemented under this power.

123. See McDougall, *supra*, note 117 at 365-66.

124. *Id.*, at 370-72.

125. *Id.*,, at 367. See TransCanada PipeLines Limited, Report to the Governor-in-Council, March, 1960, at 11-27.

126. See note 116 *supra*.

127. See Reasons For Decision, June, 1971.

128. Such as the application by Pan-Alberta Gas Limited, filed November 12, 1973, withdrawal noted September 26, 1974. (File No. 1537-P23-1). The documentation filed will remain public.

129. Applications by Alberta and Southern Gas Ltd., filed June 26, 1973; and Canadian Montana Gas Ltd., filed July 17, 1973, and November 26, 1973.

130. Hearing Order GHP-1-74; hearing commencing March 26, 1974. See also press release announcing the Board's Report by the Hon. Donald Macdonald, Sept. 20, 1974; see note 122, *supra*.

131. Hearing Order GHR-1-74; File No. D1122-2-1.

132. *Supra* note 130.

133. The Board was required to oversee implementation of the price increase. One problem was how to amend existing licences to incorporate the higher price without resort to formal amendment, or revocation and reissue under sections 17 and 84 respectively of the NEB Act that may require public notice and hearing. Apparently existing licence holders 'consented' to a revocation of old licences, and issue of new ones with the new price term pursuant to section 17. *Quaere* whether a hearing was required under the Act, in view of the *Dow Chemical Case*, *infra*, note 274?

134. A general policy-oriented or legislative type of proceeding that could result in a new or revised policy or rule.

135. By the Proclamation of s. 87 of the NEB Act on May 7, 1970.

136. See *Hansard*, May 22, 1959 at 3928.

137. Initially regulatory power was extended to motor gasoline only. See S.O.R./70-193, and *Caloil cases*, *infra* 43-44.

138. See House of Commons statement by Hon. George Hees, Minister of Trade and Commerce, February 1, 1961.

139. See The Hon. D. Macdonald, Minister of Energy, Mines and Resources, Notes for Appearance before the House of Commons Natural Resources and Public Works Committee on Bill C-236, December 18, 1973 at 14; see also statement in the House of Commons, in November, 1973.

140. *Id.*

141. See Report to the Minister of Energy, Mines and Resources in the matter of the Exportation of Oil, October, 1974. [Oil Export Report].

142. See Case Study No. 5.

143. Notice of the hearing was published in 31 Canadian newspapers, and sent to people on the Board's mailing list.

144. See generally, Case Study No. 5.

145. E.g., a propane and butane export licence application by Imperial Oil (Files 1543-J10-2 & 3) which would normally be decided by the panel was brought before the full Board because while the Alberta Energy Resources Conservation Board had approved the 10 year contract to export from the province, the Alberta Cabinet had not approved the volumes beyond the current year.

Similarly, the Oil Export Panel raised for discussion at a September 5, 1974 Board meeting, the question of whether, in view of recent downward trends in international oil prices in general, and U.S. gasoline over-supply in response to the 1973-74 winter's shortage (which have resulted in short supply of heavy crudes and lower spot prices for lighter fuels), the panel should take "margin" and "spot" prices into account in establishing the "just and reasonable" export price. It was decided that there should be no change for the present.

146. Oil Export Tax Act, S.C. 1973-74 c. 53. The tax was to be administered by the NEB (s. 5). See also Energy Supplies Emergency Act, S.C. 1973-74, c. 52, that provides for allocation of supplies to different regions, rationing, transportation charges and price control, under an Energy Supplies Allocation Board.

147. Bill C-32, 1974. See The Hon. Donald Macdonald, *Hansard*, October 31, 1974 at 913 ff; and predecessor Bill C-18, 2nd sess., 29th Parl., which died with the 29th Parliament.

148. See *Hansard*, December 6, 1973 at 8479.

149. NEB Act, s. 44.

150. See 37 *infra*; Case Study No. 2.

151. TransCanada PipeLines Limited, Application for an Order pursuant to Sections 11 and 50 of the NEB Act - Coal Gasification Project (File No. 1562-T1-7). Having established a general rule, it would then be possible to handle particular applications of this type by order under s. 51. However, it was ultimately decided that since a rush of applications of this type was not expected, it would be sufficient to hold a "limited hearing" on the application filed.

152. The Board stated in its Oil Export Report at 4 - 9 that it would hold "public hearings periodically" for submission of data relevant to the determination of potential oil productibility. The first of these hearings was originally scheduled for March, 1975.

153. See Government Organization Act, S.C. 1970-71 c. 42 Part I, proclaimed in force June 11, 1971.

154. Including the Canada Water Act, R.S.C. 1970, 1st Supp. s. 52; the Clean Air Act, S.C. 1970-71-72 c. 47; the Fisheries Amendment S.C. 1969-70, c. 63; and the Canada Wildlife Act, S.C. 1973-74, c. 21. See M. Whittington, "Environment Policy", Chapter 8 in Doern and Wilson (eds.), *Issues in Canadian Public Policy* (1974).

155. The Environmental Contaminants Act, 1974-75, Bill C-25.

156. The first activity appears to have been the intervention by Pollution Probe in the 1971 Joint Gas Export Hearing, and the N.W.T. Indian Brotherhood's intervention in the Westcoast Transmission Facilities application of 1971 concerning the pipeline from the Pointed Mountain (N.W.T.) field. (File No. 8-1-5-25). There had, of course, been previous interventions by affected farmers, agricultural organizations, trade unions, municipalities, and even M.P.'s and M.L.A.'s. See, e.g.,

intervenors listed in the Ontario-Minnesota Pulp and Paper Ltd. power export application, Report to Governor-in-Council, June, 1972.

157. Examples include the experience of Pollution Probe and the Consumers Association of Canada in the 1973 Ontario Hydro power export application, discussed *infra*; and that of the Ontario Waffle Group in the 1971 joint gas export hearing. The Board found that the Waffle intervention contained "a substantial amount of material advocating political, statutory and policy changes in respect of the administration of energy resources subject to federal jurisdiction", and therefore ruled all but three paragraphs of the brief irrelevant to the hearing. Testimony and cross-examination was admitted only in relation to matters in the three paragraphs. See Reasons for Decision, November, 1971 at 3-8.

158. As indicated by criticism resulting from the alleged unfairness of the proceedings in the 1974 Dow Chemical Limited ethylene export application. See Case Study No. 4, *infra*.

Several of the environmental groups such as Polution Probe and the Canadian Arctic Resources Committee that have strongly criticized the Board, have the resources to participate in Board hearings and to initiate judicial review proceedings if necessary. See Pollution Probe Mackenzie Valley Pipeline Information Packet No. 6; S. Osler, Letters to the Editor, *Toronto Star*, February 27, 1973 at 7; Pimlott, Vincent and McKnight (Eds.), *Arctic Alternatives* 324-32 (C.A.R.C., 1973).

159. See M. Whittington, *supra* note 154.

160. See P. Pearse (ed.), *The Mackenzie Pipeline, Arctic Gas and Canadian Energy Policy*, (1974); I. McDougall, "The NEB: A Regulatory Agency and Its Track Record", (1973) 1 Northern Perspectives at 2.

161. Task Force on Northern Oil Development, Environmental-Social Committee. See "Pipeline North", Environmental-Social Committee Report No. 72-1.

162. Expanded Guidelines For Northern Pipelines, 1972 (D.I.N.A., 1972).

163. 1970 Guideline No. 6, *Id.*, at 2.

164. *Id.*

165. See e.g., *Arctic Alternatives*, *supra* note 162 at 328-329.

166. Concerning a proposed generating station in the Maritimes, see New Brunswick Electric Power Commission, Lorneville export application, Report to Governor-in-Council, July, 1972.

167. *Id.*, at 33. The policy had changed since the Westcoast Transmission Limited Pointed Mountain pipeline application when the Board stated that it was not required to consider environmental aspects of a proposed pipeline easement since the applicants' letter of intent for a right of way agreement with the Department of Indian and Northern Affairs had already been approved. See Report to Governor-in-Council, January, 1972.

However, in the Lorneville application the Board accepted the

committtment given "unequivocally" by the applicant to meet all relevant environmental regulations. None of the licence terms and conditions imposed by the Board concerned environmental matters.

168. *Id.*, at 32.

169. See *Canadian National Railways v. Canada Steamship Lines*, [1945] A.C. 204 (P.C.); *Estate and Trust Agencies v. Singapore Improvement Trust*, [1937] A.C. 898 (P.C.).

This opinion is based largely on the Privy Council decision in the *Singapore Improvement Trust Case*. In that case, the trust exercised its discretionary power to declare a building unfit for human habitation and therefore unsanitary on the basis of standards of fitness found in the Official Manual of Unfit Houses of the English Ministry of Health. It was held that since the Trust had relied on the English Manual and failed to consider local standards, it had applied a "wrong and inadmissible test".

It is difficult to see how consideration of environmental effects of pipelines could be said to be application of a totally inappropriate standard in the same way as application of English housing standards to Singapore. The Board is clearly empowered under s. 44(*e*) to have regard to "any public interest that in the Board's opinion may be affected...."; and this would logically include the environmental interest. If Board counsel is correct, then while the Board may consider environmental impacts, it can act on this consideration only if an application is also deficient as regards "economic feasibility", "financial responsibility", "markets", or one of the other enumerated 'heads' of section 44. If the Board were to consider the environmental impact of a pipeline application *and nothing else*, then there is authority to suggest that the Board may be held to have abused its discretion by failing to take relevant matters into consideration. See *Metropolitan Life Insurance Company v. International Union of Operating Engineers Local 796*, [1970] S.C.R. 425; *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 W.L.R. 163 (H.L.); Re *Lloyd and Superintendent of Motor Vehicles*, (1971) 20 D.L.R. (3d) 181 (B.C.C.A.); *Jackson v. Beaudry*, (1969) 70 W.W.R. 572 (Sask. Q.B.); *The King v. Port of London Authority, ex parte Kynoch*, [1919] 1 K.B. 176 (C.A.).

170. Part VI Regulations, s. 7.

171. Rules of Practice and Procedure, s. 5.1; and s. 28 of the Act.

172. S. 6(2)(*aa*) concerning power export licence applications (S.O.R. 73-48).

173. October 17, 1974; for pipelines and international power lines under Parts I - III of the Schedule (File nos. 130-1; 132-9; 134-2).

174. See Case Study No. 2.

175. *Id.*

176. E.g., in the 1974 TransCanada PipeLines Limited additional facilities application. See Case Study No. 4.

177. Section 22 is set out in Part I, note 28, *supra*.

178. See D. Fraser, Address to the Petroleum Accountants Society of Western Canada, Calgary April 10, 1963 at 8; and D. Fraser, "The Work of the National Energy Board", Speech to Annual Meeting of Public Utility Commissioners, Montreal, June 13, 1966 at 16.

179. Department of Energy, Mines and Resources Act, R.S.C. 1970, c. E-6, am. R.S.C. 1970 (2nd Supp.) c. 14.

180. See Hon. Donald Macdonald, Speech to the Canadian-American Committee, C. D. Howe Research Institute of Canada, and National Planning Association of the United States, September 28, 1973.

181. See Apppendix D for Interdepartmental Committees and Task Forces in which the NEB participates.

182. Also, see *supra* note 180 at 10, 18.

183. *Id.* See Case Study No. 2.

184. This is evident in comments by the media on the Dow Chemical Limited ethylene export application. See 84 *infra*; and Case Study No. 3.

185. As in the 1971 joint gas export hearing. See Reasons for Decision, November, 1971.

186. *Id.*

187. See 31 *supra*; and Case Study No. 2.

188. See R. Foulkes, "The Regulatory Function of Government: The National Energy Board" 105-6, unpublished thesis, Carleton University, School of Public Administration, April, 1972. The present recently appointed Chairman, Marshall Crowe, continues in this tradition.

189. The course of policy and implementation decisions to meet the "energy crisis" over the winter of 1973-74 is a good example. See Hon. Donald Macdonald, *supra*, note 180.

190. Case Study No. 2.

191. See Pearse, *supra*, note 160.

192. See TransCanada PipeLines Limited, Report to Governor-in-Council, March, 1960.

193. See Interprovincial Pipe line Company, Report to Governor-in-Council, September 1, 1961.

194. See 47 *infra*; and Case Study No. 3.

195. See Report to Governor-in-Council, August, 1966.

196. See I. Macdougall, *supra*, note 117, at 355-56; W. Kilbourne, *Pipeline* 182 (1970).

197. See Case Study No. 2.

198. During argument on the application to the Federal Court of Appeal by

the Consumers' Association and Pollution Probe for leave to appeal the Board's decision on the 1973 Ontario Hydro power export application, Hyde J.A. commented to the effect that it did not require much imagination to see what might happen when reports are not disclosed prior to submission for Cabinet approval. See *Consumers' Association of Canada and Pollution Probe v. N.E.B.*, [1974] 2 N.R. 479. See also [1974] F.C. 453, 460 for applications to bring the matter on for oral argument, and to extend the time for a review action under s. 28 of the Federal Court Act.

It is arguable that approval of the Governor-in-Council is not required for export applications, since the requirement is imposed by the Regulations (s. 8) which must be regarded as subject to the provisions of the Act. The point was raised in *Consumers Association of Canada and Pollution Probe v. N.E.B., supra*. But since the Governor-in-Council had already approved the licence and made no change, Thurlow J.A. decided that even if this objection was upheld, an order striking out the licence condition requiring such approval or returning the matter to the Board would be futile. Hyde J.A., noted that the applicant had applied for *either* a new licence, or an amendment to an existing licence. He chose to treat the Board's decision as an amendment which under s. 17(2) of the NEB Act clearly requires Cabinet approval.

199. Energy, Mines and Resources has responsibility in Hudson Bay and Davis Strait.

200. The only exception is the formal brief submitted by the Department of Industry, Trade and Commerce at the 1974 Natural Gas Export Price hearings.

201. The Department of the Environment decided, upon consideration, not to formally intervene in the Interprovincial Pipe line Limited Sarnia - Montreal extension hearing. See Case Study No. 2. Intervention in the Canadian Arctic Gas Pipeline Ltd. application was apparently considered by this eepartment.

202. As in the Interprovincial Pipe Line Limited Sarnia - Montreal oil pipeline application. See Case Study No. 2.

203. See Interdepartmental Committee on the Environment, "A Procedure for Implementation of A Federal Environmental Assessment, Review and Protection Process" (1974).

204. See 31 *supra*.

205. E.g., I. Mcdougall, *supra*, note 117 at 373 concludes that, "An alliance of interest between regulators and regulated was both inevitable and natural...."

206. Prime Minister John Diefenbaker specified "outstanding men" in the field of energy resources. See *Hansard*, May 26, 1959 at 4021-2.

207. See Part III, *infra* at 64.

208. Only exploration information for federal lands — principally the northern territories and offshore — is available to the Board. The NEB

has no legal right to information required by provincial law. However, certain additional information is received by the Board from producers on a "confidential basis". See R. Howland (former NEB Chairman), Minutes of Standing Committee on Natural Resources and Public Works, February 15, 1973 at 1:33.

209. See Case Study No. 2.

210. There are situations, however, when the past involvement of Board members with industry, can create what the Supreme Court of Canada has described as a "reasonable apprehension of bias". In a case that arose after the research for this study was completed, the present Chairman of the N.E.B. was disqualified by the Court from membership in the Board panel hearing applications to construct a Mackenzie Valley gas pipeline. The Chairman's industry involvement had been with one of the applicants in his previous role as a director and president of the Canada Development Corporation. He had participated in a study group of the applicant (a consortium called Arcticgas of which the CDC was then a member) that conducted early feasibility studies on the movement of Arctic gas to southern markets. The Court held that this involvement raised a reasonable probability that the Chairman as an adjudicator may not act in an entirely impartial manner. See *The Committee for Justice and Liberty et al v. The National Energy Board* (1976) 68 D.L.R. (3d) 716.

211. See Toronto *Globe and Mail* editorials, "Between Dow and the N.E.B.", July 19, 1974; and "Strange Ways of the N.E.B.", July 26, 1974.

212. "Between Dow and the N.E.B.", *Id.*

213. Ronald Anderson, "The hot seat", Toronto *Globe and Mail*, August 15, 1974. The third case was the application for leave to appeal application by the Consumers Association of Canada and Pollution Probe, *supra*, note 198.

214. This conclusion is based on interviews with the NEB Chairman, and several Board members.

215. E.g., "Oil self-sufficiency by 1982, Report says", Toronto *Globe and Mail*, November 21, 1974 at 1 citing the "yet-to-be released N.E.B. report on crude oil supplies...."

On at least one occasion, the Board has been careful to smooth over apparent leaks with the company or industry concerned.

216. See "Oil Export to U.S. may be cut", The Ottawa *Citizen*, October 21, 1974, just over 1 month prior to the release of the Oil Export Report.

217. See "Oil cutoff brings concern, resignation in U.S.", Toronto *Globe and Mail*, November 25, 1974 at 1.

218. See 30-1 *supra*.

219. [1974] 2 F.C. 502.

220. *Crow's Nest Pass Coal Company Ltd. v. Alberta Natural Gas Company*, (1963) 38 D.L.R. (2d) 311 (S.C.C.).

221. (1970) 15 D.L.R. (3d) 164 (Ex. Ct.).

222. S.O.R./70-193, May 5, 1970.

223. The Board's authority had been extended to oil by proclamation of s. 87 on May 7, 1970.

224. S.O.R./70-372, August 12, 1970.

225. [1970] Ex.C.R. 535; 15 D.L.R. (3d) 177.

226. *Caloil Inc. v. A.G. Canada (No.2)*, (1971) 4 W.W.R. 37 (S.C.C.).

227. See Case Study No. 6.

228. *Northern and Central Gas Corp. Ltd. v. A.G. Canada*, (1971) 26 D.L.R. (3d) 174; [1971] F.C. 149.

229. See Case Study No. 6.

230. Unreported, No. 9489, November 28, 1961 (S.C.C.).

231. The plaintiff's main ground was that the Board had erred in law in deciding to certify because it concluded that the proposed moving U.S. North Dakota oil to U.S. mid-west markets through the Canadian I.P.L. system was "desirable" from the standpoint of the Canadian public interest in protecting U.S. markets for Canadian oil and favourable treatment of facilities to carry Canadian oil through the U.S., even though it was not "required" (in terms of s. 83) in the sense of "essential" or "indispensable".

    Construction was not commenced on the line, and following three extensions, the certificate was revoked following a public hearing by order M.O.-7-63, approved, P.C. 1963-160.

232. NEB Act, s. 18, as amended by the Federal Court Act, R.S.C. 1970 (2nd. supp.) c. 10, Schedule II, item 24.

233. *Saskatchewan Power Corporation and A.-G. Saskatchewan v. Trans-Canada PipeLines Limited*, Unreported, F.C.A. No. 73-A-304, August 1, 1973, Jackett C.J.; Thurlow and Pratte JJ. The application was decided on the basis of written argument under Federal Court Rule 6324. No motion for oral argument was brought within the 45 days limited by the judgment.

234. See Case Study No. 6.

235. *Supra*, note 198.

236. See Part III, *infra* at 67-68.

237. Under s. 83 of the NEB Act.

238. See Case Study No. 4.

239. F.C.A., October 2, 1974, Jackett C.J., Choquette and Pratte JJ.

240. *Id.*

241. [1974] 2 F.C. 313 (F.C.T.D.).

242. *Supra* note 239.

243. The *Dow Chemical Case*, *supra* note 219; and *Union Gas*, *supra* note 241.

244. *Supra*, note 219.

245. See "N.E.B. lifts bar to public in Dow Case", Toronto *Globe and Mail*, August 16, 1974 at B-1.

246. See Part III, *infra*, and Hyde J.A. in *Consumers Association of Canada and Pollution Probe v. National Energy Board*, *supra*, note 198.

247. See "N.E.B. will not join Dow ethylene plea", Toronto *Globe and Mail*, August 27, at B-2. With regard to the NEB's assumption of jurisdiction over ethylene, Board Chairman, Marshall Crowe, is quoted as stating, "I thought we were just clearing the decks for the future".

248. See "N.E.B. plans *ex parte* hearings into Dow ethylene application", Toronto *Globe and Mail*, June 18,1974, at B04; Case Study No. 3.

249. See 37, *supra*.

250. See Toronto *Globe and Mail* editorials, "Between Dow and The N.E.B.", July 19, 1974; and "Strange Ways of the N.E.B.", July 19, 1974; "N.E.B. defers decision on hearing, despite requests for adjournment", Toronto *Globe and Mail*, June 24, 1974 at B-2.

251. Filed August 8, 1974. See *supra*, note 219; and "Third court trip for N.E.B. as Union Gas Objects", Toronto *Globe and Mail*, August 14, 1974 at B-1.

252. See Case Study No. 4.

253. Pan Alberta was created in 1972 in co-operation with the Alberta government as a subsidiary of Alberta Gas Trunk Line Ltd.

254. See Case Study No. 4.

255. The issue was raised with the Board by the Consumers Association of Canada.

256. See "N.E.B. will not join Dow Ethylene plea", *supra* note 247.

257. Citing *Canadian National Railways v. Canada Steamship Lines Limited*, [1945] A.C. 204 in which the Judicial Committee of the Privy Council interpreted s. 35(13) of the Transport Act, 1938, which is in terms very similar to s. 44 of the NEB Act.

258. An example occurred recently when TransCanada PipeLines Limited construction under certificate GC-52 (Case Study No. 4) involved trenching across the Ganaraska River then leaving the trench open for several weeks. Upon the recommendation of the Environmental Group, a letter was sent by the Secretary to the Company warning of possible harm during the imminent trout migration, and requesting to be advised at least 48 hours prior to commencement of trenching across two other major rivers on the route. Subsequently, a similar warning was issued concerning the Gananoque River crossing after the

Company failed to act promptly on an undertaking to cushion the trench with gravel.

259. As in the case of complaints by Mr. T. Arnesen concerning welds in certain TransCanada PipeLines Limited welds (File No. 1582-T1).

260. N.E.B. Annual Report, 1973 at 14.

261. Under the powers conferred by s. 15 of the Part VI Regulations.

262. See NEB Act, ss. 47, 84.

263. Under the scheme of Part III, (s. 29), applications for approval of plans, profiles and books of reference are made *after* a certificate has been granted.

264. See note 258 *supra*; Case Study No. 4.

265. In *Hamilton v. The Toronto, Hamilton and Buffalo Railway Company*, (1914) 50, S.C.R. 128, the Supreme Court of Canada interpreted a section of the Railway Act very similar in terms to s. 12 of the NEB Act as allowing the Board of Transport Commissioners to make mandatory orders only in respect of matters under authority conferred directly by the Act.

265a. Memorandum of N.E.B. General Counsel (dated November, 1976) reviewing an earlier draft of this study.

266. Violation of public safety regulations (s. 39(3)); offering, granting or accepting oil or gas shipping rebates or concessions, or preparing or participating in false billing or reporting (s. 57 - no prosecution without consent of Board); and violation of any provision of Part VI of the Part VI Regulations (s. 86). Violation of any regulation made under s. 88 is also an offence (s. 88(2)).

267. E.g., certificate OC-9 granted to Matador Pipe Line Company in 1961 was revoked following three extensions and a public hearing under Order MO-7-63, approved by P.C. 1963-160, when the project was not commenced.

268. Emphasis added.

269. See statement by the Hon. George Hees, Minister of Trade and Commerce, *Hansard*, May 22, 1959 at 3928-9.

270. *A.-G. Manitoba v. National Energy Board and Dow Chemical of Canada Ltd.*, [1974] 2 F.C. 502.

271. *Id.*, at 525.

272. *Id.*, at 528.

273. NEB Part VI Regulations, s. 16.1.

274. S. 20(1) merely states that "hearings ... shall be public". Subsection (2) deals only with suspension or revocation and subsection (3) uses the term "public hearing" in conferring a discretion to hold hearings on matters within the Board's jurisdiction. Nowhere is it provided that the "Board shall hold a public hearing".

275. NEB Act, s. 2.

276. Memorandum of Guidance in Applying for the Issue of a Certificate of Public Convenience and Necessity Under Part III or An Order Pursuant to Section 49 of the NEB Act in Respect of a Pipeline, December 12, 1963, Appendix I [hereinafter cited as "Memorandum of Guidance"]. In the case of gas, products extraction plant costing more than $500,000 and new underground storage projects are specified under Class A.

In 1972, the Board issued 5 Certificates for pipelines involving over 1,500 miles of pipeline and related facilities costing an estimated $524.5 million. In addition, 2 certificates for three international power lines totalling less than one quarter mile in length and new conductors on another line at a total cost of less than $200,000 were approved. The 1973 figures were four pipeline certificates for 587 miles of pipeline and related facilities, costing $193.5 million; and 2 international power line certificates for approximately 14 miles of power line and facilities at an estimated cost of $7.7 million. See NEB Annual Reports, 1972 and 1973, Appendix I.

277. *Id.*, e.g., complete new gas purification plants and additional storage facilities costing not more than $500,000 and not less than $100,000 are specified.

278. I.e., NEB Act, ss. 25-29, 38.

Thirty-two exemption orders were issued by the NEB during 1972 involving approximately 60 miles of pipeline, and 1.5 miles of international power line and facilities at an estimated cost of approximately $65 million. In 1973, 23 exemption orders were issued for approximately 10.5 miles of pipeline and facilities at an estimated cost of approximately $26.5 million. See NEB Annual Reports 1972 & 1973, Appendix II.

279. Memorandum of Guidance at 2.

280. *Id.*, Appendices II - IV.

281. Westcoast Transmission application, objection by B.C. Hydro.

282. TransCanada PipeLines Limited, application under s. 49 dated April 28, 1970, to replace line destroyed by an explosion and fire near North Bay.

283. In a 1972 application by TransNorthern Pipelines Ltd. concerning a small diameter line to move jet fuel from Montreal to Dorval Airport, the NEB required the applicant to publish notices in local and area papers. There were no objections. If objections had been filed, it is likely that a hearing would have been held.

284. Twelve miscellaneous construction exemptions were granted in each of 1972 and 1973. See NEB Annual Report, 1972 at 44-45, and 1973 at 47-48.

285. Memorandum of Guidance, at 2.

286. NEB Act s.44; definition of "international power line", section 49(*b*).

287. See NEB Annual Report, 1972 at 46.

288. NEB Part VI Regulations, ss.18, 19.

289. *Id.*, ss. 6A, 6B.

290. *Id.*, s. 16, as am. S.O.R./73-610, October 9, 1973.

291. *Id.*, s. 16.1; S.O.R./74-391, P.C. 1974-1457, June 20, 1974.

292. See Case Study No. 3.

293. See Reasons For Decision, December, 1971; Case Study No. 6.

294. NEB Rules of Practice and Procedure, ss. 4.2-5.4 added by S.O.R./73-273, May 24, 1973.

295. E.g., TransCanada PipeLines Limited rate application, August 29, 1973. See Reasons For Decision, October, 1973.

296. See Order E.P.O.-I-73, August 27, 1973, and Reasons For Decision in expedited proceedings No. TG-2-73, August 29, 1973. See Case Study No. 6.

297. *Supra*, note 295. Expedited proceedings were denied by Order RH-1-73, and the limited hearing held October 15-17, 1973.

298. TransCanada PipeLines Limited rate application, August 9, 1974, File No. 1562-T1-6 and Reasons For Decision, October, 1974. See Case Study No. 6.

299. Expedited proceedings were also denied recently for a TransCanada rate application covering gathering charges and municipal tax charges. The primary Board concern was that there might be offsetting costs for other items. The matter was therefore set down for hearing on January 14, 1975 (File No. 1562-T1-8).

300. The specific source of authority has not always been clear. See Oil Export Hearing, Case Study No. 5.

301. See Schwartz and Wade, *Legal Control of Government* 162-73 (1972).

302. See K. C. Davis, *Administrative Law Treatise*, Sec. 6.05-6.

303. See Case Study No. 5.

304. *Id.*

305. The Board decided as a result to hold public hearings on oil export "periodically". See Oil Export Report, October, 1974 at 4-9; and Part II, *supra*, at 29.

306. Hearing Order No. A.O.-1-G.H.R.-1-74, and Additional Memo to Submittors, October 18, 1974 (File No. D1122-2-1).

307. I.e., amendments to other routine orders.

308. GO-1, GO-2, July 21, 1961.

309. Interview with R. A. Stead, then NEB Secretary.

310. Pipeline Overhead Crossing Order, S.O.R./73-306, June 11, 1973.

311. Re Hortig and M. J. LaBelle Company Limited and TransCanada PipeLines Limited, Decision, February 25, 1964.

312. At the time of writing, application for Compensation, Nick Sekora and Westcoast Transmission Company Limited, 1974, File No. 1582-W5.

313. *Id.* One problem that arose was whether a "deficiency letter" should be sent to Sekora since his application did not include details of the nature of his mineral interest or his claim against Westcoast. It was pointed out by NEB counsel that this would not be strictly proper since in this type of application the Board is clearly acting as judge on issues involving adversary parties. It was decided to demand from Sekora, "particulars" of facts that support his claim.

314. The earliest of these were: St. Catharines, November 29-30, 1961, Hearing Order No. M.H. 4-61; London, May 3-5, 1967. See Order No. O.P.-201-67.

315. See Westcoast Transmission Limited, Report to Governor-in-Council, June 1973, File No. 1555-W5-34.

316. Some have not intervened fully (i.e. to be present and involved in cross-examination throughout), but have merely filed or presented submissions without seeking full intervenor status. Some members feel that the NEB will be squarely faced with the problem of too many intervenors in the Canadian Arctic Gas Pipeline Company Limited application to build a natural gas pipeline down the Mackenzie River Valley, a concern that does not appear to have materialized so far. These concerns were expressed by past NEB Chairman Robert Howland in "Principal Requirements for Northern Pipelines" 11-12, Paper presented at the Camadian Northern Pipeline Research Conference, Ottawa, February 3, 1972.

317. See Case Study No. 4.

318. *Supra*, note 108. See Case Study No. 3.

319. *Union Gas Limited v. TransCanada Pipelines* [1974] 2 F.C. 313; See also Case Study No. 4.

320. See K. Sabey, *Locus Standi*, Law Reform Commission of Canada internal memorandum, 1974; W. Estey, "Public Nuisance and Standing to Sue", (1972) 10 Osgoode Hall L.J. 563.

321. Including *C.P.R. v. Toronto Transportation Co.*, [1930] A.C. 686; and Re *Consumers Gas Co. and Public Utilities Board*, (1971) 18 D.L.R. (3d) 749.

322. The IGUA is an association of the following companies: Abitibi Paper Company Limited, Allied Chemical Canada Limited, Brockville Chemical Industries Limited, Canadian Industries Limited, Cyanamid of Canada Limited, Domtar Limited, Du Pont of Canada Limited, Polysar Limited, Spruce Falls Power & Paper Company Limited, The Great Lakes Paper Company Limited, The Ontario Paper Company Limited, Union Carbide Canada Limited.

323. *Supra*, note 108 at 15.

324. See *Thorson v. A.-G. of Canada*, [1974] 1 N.R. 225 (S.C.C.); *Nova Scotia Board of Censors v. McNeil*, (1975) 55 D.L.R. (3d) 632 (S.C.C.) and *Stein v. City of Winnipeg, (1975) 48 D.L.R. (3d) 223 (Man. C.A.).*

325. See Case Studies Nos. 2, 4, and 6.

326. As well as full simultaneous translation facilities that unfortunately have frequently failed during recent hearings.

327. Case Study No. 4 contains the best examples since the panel of Board members there was aware that legal proceedings to challenge procedural rulings were likely.

328. Sometimes one or more panel members will not give evidence, but will be available for cross-examination on the material in the written application.

329. See Case Studies Nos. 2, and 6. In addition, with leave of the Board, evidence taken at previous NEB hearings can be received under s. 18 of the Rules of Practice and Procedure. In this way, evidence at previous related hearings was adopted in the Dow Chemical of Canada Limited ethylene export application. See Case Study No. 3.

    Under the same rule evidence given before provincial tribunals for authority to remove gas from a province along with resulting reports or findings may similarly be received in evidence. This rule is tailored expressly for evidence, reports and orders of the Alberta Energy Resources Conservation Board.

330. E.g., Peter Lewington in the Interprovincial Pipe Line Limited Sarnia - Montreal extension hearing. See Case Study No. 2.

331. *Id.*

332. Such as R. White who represented the Ontario Federation of Agriculture in the I.P.L. hearing. See *Id.*

    Several experienced NEB counsel have suggested that on technical issues cross-examination should be by the technical experts themselves, rather than through the medium of barely comprehending lawyers. See J. Robertson, "Canadian Regulation of Transmission and export of Gas", (1973) 18 Rocky Mtn. Min. L. Ins't 299, 330. Robertson's criticism is supported by the writers' observations of NEB hearings.

333. See Schwartz and Wade, *supra*, note 301 at 70.

334. Any person will be placed on one or more of the Board's Gas, Oil, Electricity and General lists on request. Attorneys General of relevant provinces are named for service in notices of hearing and hearing orders. At his request, counsel for the Minister of Energy for Quebec has similarly been named in recent hearing orders.

335. For decisions that require Cabinet approval, these reasons are entitled "Report to the Governor-in-Council".

336. See Minutes of the Standing Committee on Natural Resources and Public Works, February 27, 1973 at 2:28.

Committee member E. Woolliams moved that all reports prepared under the NEB's s. 22 advisory power regarding production, reserves and exports requested by all present and former Ministers of Energy, Mines and Resources be produced as evidence before the Committee.

Energy, Mines and Resources Minister Donald Macdonald who was testifying before the Committee asked Woolliams to withdraw his motion on the ground that disclosure of these files and reports would destroy the Board's access to confidential industry information, "without which the Board, and through the Board, the Minister, just cannot operate in maintaining an overview of the energy business in Canada." He added, that by s. 23 of the NEB Act (reports may be made public with the approval of the Minister), "Parliament has indicated that such reports are not to be generally produced", since production would "effectively hamper the Board and myself as Minister in carrying out our obligations under this Act".

The Committee watered down the motion to a "request", amended it to add "and this Committee recognizes the discretion given to the Minister under s. 23 of the Act," and passed it, as amended, by an 11-1 margin. No documents were ever produced by the Board or the Minister.

337. Such as the current pipeline treaty negotiations with the U.S., in which NEB members are involved. See "High gas prices fuel U.S. ire, but pipeline talks still flow", The *Financial Post*, December 7, 1974.

338. See Case Studies Nos. 2 and 6.

339. If the NEB considers that release of a study or report may prejudice the Minister in some way, it is likely that he will be consulted.

340. E.g., by an interdepartmental committee.

341. See "Advisory/Regulatory Conflict", Part II, *supra* at 32.

342. Five are engineers. None have legal training. See Appendix A.

343. For this purpose the NEB maintains a Divisional Office in Calgary, where many company head offices are also located.

344. See R. Howland, *supra* note 316 at 15.

345. Case Study No. 2.

346. Such a request was made by Gaz Métropolitan Inc. in the TransCanada PipeLines Limited additional facilities application hearing. The panel ruled that the price provisions were relevant and must be disclosed. See transcript for August 12, 1974 at 530. See also Case Study No. 4.

347. E.g., Gaz Métropolitan contracts in the TransCanada additional facilities application. Disclosure was ordered only after a formal motion at the hearing regarding blank pages in the contracts filed with the Board. *Id*. This practice is also followed in Propane and Butane export applications.

348. See Case Study No. 2.

349. See Part II, *supra* at 32-35.

350. Since one of the matters that the NEB must consider in the Canadian Arctic Gas Pipeline Limited facilities application is the "financial responsibility and financial structure of the applicant, the methods of financing the line and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the line...." (NEB Act, s. 44(*d*)).

351. Such as continuing NEB participation in subcommittees of the Advisory Committee on Northern Development, which has responsibility for making recommendations to the Minister of Indian and Northern Affairs on the application by Canadian Arctic Gas Pipeline Limited for a pipeline right-of-way down the Mackenzie Valley. The same pipeline is the subject of an application pending before the NEB.

352. See Figure 1, NEB Current Applications Procedures, Part I, *supra*. Specific examples are outlined in the following Case Studies: No. 1, St. Lawrence Power Company Application, File No. 1923-S38-1; No. 2, Interprovincial Pipeline Limited Sarnia - Montreal Extension Application, File No. 1755-A1-34; and No. 6, TransCanada PipeLines Limited, 1974 Rate Application, File No. 1562-T1-5-6.

353. E.g., the Interprovincial Pipe Line Limited Sarnia - Montreal extension application cleared staff review in just two days following a "hurry-up" memorandum from the Board Secretary. See Case Study No. 2.

354. E.g., on a power export licence application by Hydro-Quebec dated October 30, 1974 (File No. 1923-4/Q2-3), the staff co-ordinator cut one week off the application process by reporting orally to the Board meeting rather than first preparing a memorandum based on comments from relevant branches.

355. Copies of hearing orders are sent to persons and corporations on the relevant Board mailing list. All major companies are on this list. See note 334 *supra*.

356. E.g., meetings by TransCanada PipeLines Limited with its customers on rate applications are outlined in Case Study No. 6.

357. See 56 *supra*; and Case Study No. 6.

358. See Case Study No. 5, Oil Export Hearings, 1974, File No. D1722-1. Industry has also been consulted informally in the development of new standards and guidelines, such as the existing safety standards, and the recent environmental guidelines (see 64 *supra*; Case Study No. 2); and new regulations such as the Gas Pipeline Regulations, S.O.R./74-233, April 10, 1974, and the proposed Oil Pipeline Regulations concerning high vapour pressure controls.

359. See Case Study No. 3, Dow Chemical Limited, Ethylene Export Application, hearing June 25-27, 1974. The 1974 TransCanada PipeLines Limited additional facilities application, in which the NEB limited the scope of intervenors' cross-examination and evidence is another example. See Case Study No. 4.

360. *Id*; and see the *Dow Chemical Case*, *supra*, note 270.

361. In the TransCanada PipeLines Limited Additional Facilities Applica-

tion, May, 1974 (Case Study No. 4), File No. 1555-T1-71) Ontario officials sought a postponement of the hearing from both the Board and the Minister of Energy, Mines and Resources. Similarly, some of the complaints concerning proposed procedure in the natural gas supply and deliverability hearings (see 101 *supra*) were made directly to the Minister.

362. See Case Study No. 4.

363. *Union Gas Limited and A.-G. Ontario v. TransCanada Pipeline Ltd.* [1974] 2 F.C. 313.

364. E.g., the participation of Peter Lewington in the Interprovincial Pipe Line Limited Sarnia - Montreal oil pipeline extension hearing. See Case Study No. 2.

365. At a special hearing on pipeline alignment in St. Catharines on November 29, 1961 following complaints by landowners and agricultural associations after grant of certificate of public convenience and necessity No. OC-10 to Interprovincial Pipe Line Company, Board member D. M. Fraser stated that:

> In this case the Board has decided, in the light of certain representations made to it, to hold a public hearing to afford an opportunity to affected residents along the proposed route of the pipeline to make any relevant representations. However, no conclusion should be drawn from this instance that a public hearing will be held in every instance where a landowner objects to a pipeline being permitted to cross his land. Where construction of the pipeline has been found, as evidenced by the issue of a certificate, to be in the public interest, undue delays might result if public hearings were held on objections of individuals as to the location of the line, and these delays might be contrary to the general public interest. It is the duty of the Board to be more concerned with the requirements of the public at large than with those of private individuals.
>
> (See transcript at 4-5).

366. See Case Studies Nos. 2 and 4.

367. E.g., intervention by the Consumers Association of Canada (CAC) in the 1973 Ontario Hydro power export application, heard October 23-25, 1973. See Report to Governor-in-Council, November, 1973.

368. Pollution Probe intervened jointly with CAC in the 1973 Ontario Hydro Application, *Id.* Probe had previously intervened and presented evidence in the natural gas export "joint hearing" of July, 1971. (Reasons For Decision, November, 1971) and in a 1973 Interprovincial Pipe Line Company facilities application (Hearing March 13 & 14, 1973 under Hearing Order OH-1-73; file 802-1-32).

369. E.g., Committee For an Independent Canada, intervention in the Interprovincial, Sarnia - Montreal oil pipeline extension application. See Case Study No. 2. Much of the material filed by the NDP Ontario Waffle Group in its intervention in the 1971 joint hearing was ruled irrelevant as outside the scope of the hearing order. See Reasons for Decision, November 1971 at 3 - 8. The Saskatchewan Waffle encountered similar difficulty in its participation in the Oil Export

hearings of 1974 (Case Study No. 5). See Calgary hearing transcript, Vol. 1.

370. Based on interviews with the following: Andrew Roman, then Counsel, Consumers' Association of Canada; Brian Kelley, (formerly) Pollution Probe Energy Group; G. Hunter, Counsel for Committee for an Independent Canada in I.P.L. Sarnia - Montreal extension hearing; G. F. Culhane, Environmental Systems Community Association, Vancouver; A. R. Thompson, Chairman, Canadian Arctic Resources Committee; C. G. Sutton, Counsel, Indian Brotherhood of the N.W.T.; G. Gallon, Canadian Scientific Pollution and Environmental Control Society, Vancouver; R. Page, Chairman, Committee for an Independent Canada.

371. *Supra*, notes 367, 368.

372. See transcript, October 24, 1974 at 205-333, October 25, 1974 at 334-403. (File No. 1923-01-2) Leave to appeal was subsequently denied by the Federal Court. See Part II *supra*, at 45-6. The earlier application was the Electric Power Commission of New Brunswick export application related to the Lorneville thermal generating station. See Part II, *supra* at 30; and Report to Governor-in-Council July, 1972.

373. This factor was mentioned by all public interest group representatives interviewed.

374. Particularly when added to the cost of coping with a series of policy hearings, like those on natural gas supply and deliverability that ran for four months and involved 59 different submissions in six different cities. The Consumer's Association of Canada could not afford to have counsel present in all of these sessions.

375. See the panel statement in the oil export hearing in response to a funding request by the Canadian Scientific Pollution and Environmental Control Society that the NEB has no authority to fund public interest parties. Oil Export Hearing, 1974, transcript at 411, 431 (Vancouver). See Case Study No. 5.

376. See *supra* 60.

377. See *supra* 60-1.

378. Board members have of course demonstrated patience and courtesy toward novice intervenors in many instances.

379. File No. 1923 - S.38-1.

380. The bulk of staff review was by the Electrical Engineering Branch, one of its senior members acting as co-ordinator.

381. See Memorandum from Electrical Engineering Branch dated June 28, 1974.

382. In accordance with Board policy of holding hearings where there is most interest in an application.

383. See notes of staff meeting August 13, 1974.

384. By the Cornwall Street Railway Limited.

385. See Transcript at 5.

386. Notes of Board Meeting, August 29, 1974.

387. Report to Governor in Council, August, 1974.

388. *National Energy Board (NEB) Act*, R.S.C. 1970 c. N-6, s. 6(2).

389. See *Speers v. Labour Relations Board* of Saskatchewa, (1948) 1 D.L.R. 340, and cases cited in R. Reid, *Administrative Law and Practice*, at 271-72. But see *R. v. Board of Broadcast Governors, ex parte Swift Current Telecasting Ltd.*, (1962) 33 D.L.R. (2d) 449 (Ont. C.A.).

390. This section is based in part on the review contained in the 1973 NEB Annual Report at 19-27.

391. SOR/73-88, February 15, 1973.

392. *Export Tax Act*, S.C. 1973-74, c. 53.

393. Effective June 15, 1973; SOR/73-333.

394. SOR/73-610, October 4, 1973.

395. Effective October 15, 1973; SOR/73-610.

396. *Energy Supplies Emergency Act*, S.C. 1973-74, c. 52.

397. *Hansard*, December 6, 1973 at 8479. This amplified a previous statement by the Prime Minister on September 4, 1973.

398. A meeting had already been held with Quebec Ministers Hon. Gérard Levesque (Vice-Premier) and Hon. Gilles Massé (Minister of Minerals and Natural Resources) on September 14. The Prime Minister had stated on September 4, 1973 that consultation with provinces and industry would be undertaken concerning extension of the oil pipeline system to Montreal. See Hon. D. Macdonald, Speech to the Canadian-American Committee, C. D. Howe Research Institute of Canada and National Planning Association of the U.S., September 28, 1973.

399. Interprovincial had actually been contacted prior to the Prime Minister's September 4 statement by the Deputy Minister of Energy, Mines and Resources. See Hearing Transcript at 482.

400. See *Id.*, cross-examination of D. G. Waldon, Interprovincial President by G. Hunter, Counsel for Committee for an Independent Canada at 482. See also responses by Interprovincial witness Jones at 80-81.

401. *Id.*, at 485.

402. *Id.*, at 481-82.

403. See Expanded Guidelines for Northern Pipelines, 1972; Report to Governor-in-Council, N.B. Electric Power Commission, July, 1972; and Report to Governor-in-Council, Ontario Hydro, November, 1973.

404. Cochin Pipelines Limited, Report to Governor-in-Council, 1973.

405. Westcoast Transmission Limited, Report to Governor-in-Council, February, 1974.

406. The hearing date had been advanced one week at the instance of the governments of Ontario and Quebec.

407. Consisting of W. A. Scotland as Chairman, and members R. F. Brooks and J. Farmer.

408. Hearing Transcript at 12.

409. *Id.*, at 16.

410. *Id.*

411. *Id.*, at 17-18. Emphasis added.

412. *Id.*

413. *Id.*, at 23.

414. *Id.*, at 19.

415. *Id.*, at 72.

416. See *id.*, at 45-71.

417. See *id.*, at 244.

418. *Id.*, at 265.

419. *Id.*, at 479.

420. *Id.*, at 484-5.

421. *Id.*, at 486.

422. See the Toronto *Globe & Mail*, August 27, 1974, at B-1 and B-14.

423. See "Fall 1976 Completion Predicted for Montreal Pipeline Extension", Toronto *Globe & Mail*, October 10, 1974, at B-2.

424. It should be noted that the Committee for an Independent Canada was not represented at the resumed hearing. The group considered that its resources were limited, and that in any event, federal government statements made the result a foregone conclusion. To a large degree, CIC objectives had been accomplished at the earlier hearing.

425. See Hearing Transcript at 830 (Duncan).

426. *Id.*, at 832.

427. *Id.*, at 841-2.

428. *Id.*, at 912 ff.

429. See Case Study No. 5. The report issued did in effect reserve 250,000 barrels per day for the Montreal market. However, it also concluded that domestic requirements will exceed domestic supply by 1983, even if exports are phased out by that year.

430. Hearing Transcript at 931-32. The chairman noted that the motion was unopposed.

431. See "Interprovincial Requests Delay in Montreal Pipeline Hearing", Toronto *Globe & Mail*, October 10, 1974, at B-1.

432. See "Government Still Sees Need", Ottawa *Citizen*, October 16, 1974, at 10.

433. See "Government May Be Forced to Build Sarnia-Montreal Pipeline", Ottawa *Citizen*, October 29, 1974, at 33; Editorial "Buy the Pipeline", Ottawa *Citizen*, November 2, 1974.

434. See "Pipe Production Starting but Montreal Project Stalled", Ottawa *Citizen*, October 31, 1974, at 14.

435. See "Sarnia-Montreal Oil Pipeline Puts Federal Government in Bind", Ottawa *Citizen*, November 26, 1974, at 16. Research for the case study ended in January, 1975.

436. Of course, it is possible to reject or delay an application on any of these grounds, as the adjournment and request for additional environmental information suggests.

437. See Hearing Transcript at 548.

438. The TransCanada Pipelines Limited Additional Facilities application of 1974 raised the same environmental evidence problems. There TransCanada was permitted to file the phase 2 environmental report following the grant of the certificate. See Case Study No. 4.

439. Case Study No. 5.

440. By Board decision, or judicial order. See Dow Chemical Ltd. ethylene export application. Case Study No. 3.

441. Commenced in Calgary, November 12, 1974, under Hearing Order GHR-1-74.

442. This may, if proven, be regarded as a fettering of discretion. See *Re Lloyd and Superintendent of Motor Vehicles*, (1971) 20 D.L.R. (3d) 181 (B.C.C.A.); *Jackson v. Beaudry*, (1969) 70 W.W.R. 572 (Sask. Q.B.); and *The King v. Port of London Authority, ex parte, Kynoch*, (1919) I.K.B. 176 (C.A.). See also H. Molot, "Self-created Rule of Policy and Other Ways of Exercising Administrative Discretion", (1973) 18 McGill L.J. 310.

443. See Report to the Governor-in-Council In the Matter of Applications under the National Energy Board Act of Dome Petroleum Limited, Amoco Canada Petroleum Ltd., PanCanadian Gas Products Ltd., and Cochin Pipe Lines Ltd., May, 1973.

444. See Report to the Governor-in-Council In the Matter of the Applications under the National Energy Board Act of Dome Petroleum Limited and Cochin Pipe Lines Ltd., January, 1974.

445. The result, according to one NEB lawyer was "confusion and breakdown in communications".

446. See "NEB plans *ex parte* hearings into Dow ethylene application", Toronto *Globe & Mail*, June 18, 1974, at B-4.

447. See "Between Dow and the NEB", Toronto *Globe & Mail*, June 24, 1974, at 6.

448. See "NEB defers decision on hearing despite requests for adjournment", Toronto *Globe & Mail*, June 24, 1974, at B-2.

449. Those who had intervened in the Dome-Cochin applications of 1972-73.

450. Section 20 of the NEB Act.

> (1) Subject to subsection (2), hearings before the Board with regard to the issue, revocation or suspension of certificates or of 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.
>
> (2) Where the Board revokes or suspends a certificate or licence upon the application or with the consent of the holder thereof, a public hearing need not be held if the pipeline or international power line to which the certificate or licence relates had not been brought into commercial operation under that certificate or licence.
>
> (3) The Board may hold a public hearing in respect of any other matter if it considers it advisable to do so.

451. Rule 6 provides that:

> (1) Except in any case where the Board directs that an application may be heard and determined *ex parte*, the Board shall, as soon as possible after the filing of an application, set the application down for hearing.
>
> (2) Where an application has been set down for hearing, the Secretary shall forthwith notify the applicant of the time and place fixed for the hearing thereof and shall, by such notification, indicate
>
> (*a*) the persons to whom and the time within which notice of the application shall be given by the applicant,
>
> (*b*) the manner, whether by public advertisement, personal service or otherwise, in which notice of the application shall be given by the applicant, and
>
> (*c*) the form and contents of the notice to be given by the applicant and the information to be included therein, including the time and place fixed for the hearing of the application and the time within which any reply or submission shall be filed with the Secretary.

452. Section 7 provides:

> The Board may make rules respecting . . .
>
> (*b*) the procedure for making applications, representations and complaints to the Board and the conduct of hearings before the Board, and generally the manner of conducting any business before the Board . . .

453. Amendment to Regulations under Part VI, NEB Act, adding s. 16.1: P.C. 1974-5457, June 20, 1974, registered pursuant to the Statutory Instruments Act, S.C. 1970-71, C.38.

454. See "NEB expected to announce decision today on full or *ex parte* hearing on Dow exports", and "Ethylene legal status still to be decided", Toronto *Globe & Mail*, June 26, 1974.

455. No attempt is made to identify all parties with the issues they raised or to discuss the arguments in the order of presentation at the hearing.

456. Adding s. 16.1 to the NEB Part VI Regulations, *supra* note 453.

457. *Attorney General of Manitoba v. The National Energy Board and Dow Chemical of Canada Ltd.*, (1974) F.C. 501.

458. *Id.*, at 521.

459. See "NEB decision on Dow awaits ruling by court", Toronto *Globe & Mail*, July 31, 1974, at B-2.

460. August 19, 1974, F.C.A. No. T-2669-74.

461. See "Dow files appeal on ethylene export issue", Toronto *Globe & Mail*, August 20, 1974, at B-2.

462. See "NEB lifts bar to public in Dow case", Toronto *Globe & Mail*, August 16, 1974, at B-1.

463. See "NEB will not join in Dow ethylene plea", Toronto *Globe & Mail*, August 27, 1974, at B-2.

464. See "Alberta held favouring joint venture for Dow", Toronto *Globe & Mail*, August 13, 1974, at B-3.

465. See "NEB will be off hook if Dow, Alberta firm join in ethylene plant". Toronto *Globe & Mail*, August 16, 1974, at B-3. It appears that such an agreement has since been reached between Dow-Dome and Alberta Gas Ethylene Ltd. However, the NEB had received no new export application from Dow as of December 31, 1975.

466. *Union Gas v. Trans Canada Pipelines Limited*, (1974) 2 F.C. 313 (T.D.)

467. *Supra* note 457.

468. *Hansard*, May 22, 1959, at 3928-9.

469. Interview with George Hunter, Scott & Aylen, Ottawa.

470. National Energy Board Part VI Regulations, s. 16 (propane and butane), s. 17 (emergency imports), s. 18 (emergency exports) and s. 20 (oil).

471. *Supra* note 457.

472. Rule 3 provides that:

> (1) Subject to the Act and the regulations and except as otherwise provided in these Rules, these Rules apply to every proceeding before the Board upon an application.
>
> (2) The Board may, in any proceeding before the Board upon an application, direct either orally or in writing that the provisions of these Rules or any of them shall not apply, or shall apply in part only, and without restricting the generality of the foregoing the Board may, for the purpose of ensuring the expeditious conduct of the business of the Board and the hearing and determination of any such proceeding.

(a) extend or abridge the time fixed by these Rules for the doing of any act or thing.

(b) dispense with compliance with any provision of these Rules requiring the doing of any act or thing, or

(c) substitute other rules for the provisions of these Rules or any of them.

(3) In any case not expressly provided for by the Act, the regulations or these Rules, the general rules of practice in the Exchequer Court of Canada may, in the discretion of the Board, be adopted and made applicable to any proceeding before the Board upon an application.

473. Another is the application by Canadian Arctic Gas Pipeline Limited. Both Cabinet Ministers and NEB members are on record as supporting MacKenzie Valley pipeline.

474. See "NEB plans *ex parte* hearings into Dow ethylene application", Toronto *Globe & Mail*, June 18, 1974, at B-4.

475. Particularly the Government of Saskatchewan and TransCanada PipeLines Limited. The same argument was made by Interprovincial PipeLine Limited in seeking an adjournment of the hearing on its Sarnia-Montreal oil pipeline extension application. The Report of the NEB to the Minister, EMR, in the Matter of the Exportation of Oil, was released November 23, 1974.

476. Commencing November 12, 1974, under Hearing Order GHR-1-74 and resulting in a Report: Canadian Natural Gas, Supply and Requirements, April, 1975.

477. E.g., Toronto *Globe & Mail* editorials: "Between Dow and the NEB", June 24, 1974; "Strange ways of the NEB", July 26, 1974; and "On the merits of an open energy policy", August 14, 1974; and Ronald Anderson's columns in the *Globe & Mail*: "Law by Telex", July 24, 1974; "Ethylene Supply", August 16, 1974; and "The Hot Seat", August 13, 1974.

478. Interviews with Law Branch members.

479. In preliminary proceedings related to the *Dow Chemical Case*, parties were given standing in the review proceedings by Cattanach J., largely on the basis of participation in the NEB proceedings. See Case Study No. 3.

480. See the Ottawa *Citizen*, August 3, 1974 at 16.

481. In fact, it commenced November 12, 1974 under Hearing Order GHR-1-74.

482. See generally W. Kilbourne, *Pipeline* (1970).

483. See argument of Ian Blue, NEB counsel in Federal Court, August 19, 1974, and the subsequent judgment of Mr. Justice Mahoney in *Union Gas Ltd. v. Trans Canada Pipelines Ltd.* [1974] 2 F.C. 313, hereinafter "The Union Gas Case".

484. See Hearing Transcript August 7, 1974; affidavit of Robin Scott, filed in

Ontario motion for leave to appeal at paragraph 17-18; judgment of Mr. Justice Mahoney.

485. Hearing Transcript at 409.

486. *Id.*, at 410.

487. *Id.*, at 411-412.

488. *Id.*, at 423-24.

489. This decision was based on a previous opinion by NEB counsel, which in turn was based on the decision of the Ontario Court of Appeal in *Re Cedarvale Tree Services Limited and Labourers International Union*, (1972) 22 D.L.R. (3d) 40.

490. Order of August 15, 1974.

491. *Supra*, note 479.

492. See hearing transcript at 423-24.

493. Citing S. A. de Smith, *Judicial Review of Administrative Action* 301 ff. (3rd ed., 1973); *Denby v. Minister of Health*, [1936] 1 K.B. 337.

494. Citing *R. v. Northumberland Compensation Appeal Tribunal, ex parte Shaw*, [1952] 1 K.B. 338.

495. See Hearing Transcript, August 14, 1974 at 828-30.

496. *Id.*, at 146 - Gaz Metropolitan; and at 94-97 - Pan Alberta Gas Limited.

497. See *Id.*, at 147-159, 148, 152.

498. See *Id.*, at 159-160 regarding TransCanada's new purchases of Alberta Gas, and at 161 regarding Alberta Gas reserves.

499. See Re *Toronto Newspaper Guild and Globe Printing Company*, [1953] 2 S.C.R. 18; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers*, (1970) 11 D.L.R. 336 (SCC); *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C., 147.

500. Hearing Transcript at 2.

501. *Id.*, at 390.

502. *Id.*

503. This was apparently a deliberate tactic. It was thought by Union Gas counsel that the applicant's case was stronger if argued on the basis of material prejudice and denial of natural justice.

504. *R. v. Connel, ex parte Hetton Bellbird Collieries Ltd.*, (1944) 69 C.L.R. 407 (High Court of Australia).

505. Especially at 423-424.

505a. N.E.B. Counsel Lamar cited in support of the position *CNR v. Canada Steamship Lines* (1945) A.C. 204.

506. *Supra*, note 479 at 22.

507. See Judgment No. T-2983-74, August 21, 1974 at 3.

508. *Id.*

509. [1945] A.C. 204.

510. *Id.*, at 211.

511. [1974] F.C. 22, 30 and 31.

512. See I.A. Blue, "The National Energy Board", 20, paper prepared for Energy Seminar, University of Ottawa, Faculty of Law, March 1, 1974.

513. See e.g., Re *Toronto Newspaper Guild and Globe Printing*, [1953] 2 S.C.R. 18; *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997.

514. The *Globe Printing* and *Metropolitan Life* cases, *id.*

515. As in the *Globe Printing case*, *ibid.*

516. Union Gas Co. v. Sydenham Gas, (1957) 7 D.L.R. (2d) 65 (SCC).

517. *Supra*, note 507 at 10.

518. *Supra*, note 511.

519. See Re *Hooker Chemicals (Nanaimo) Ltd.*, (1970) 75 W.W.R. (NS) 356, denial of information and opportunity to be heard; *The Queen v. The City of Calgary; ex parte Sanderson*, (1966) 53 D.L.R. (2d) 477 - cross-examination.

520. See *Bell v. Ontario Human Rights Commission*, [1970] 2 O.R. 672, 11 D.L.R. (3d) 658.

521. Decision, August, 1974, at 10.

522. *Id.*

523. *Id.*, at 10-11.

524. Pursuant to Federal Court Rules 1307 and 324.

525. Pursuant to Federal Court Rules 324 and 325.

526. Certificate No. GC-52, August 23, 1974, condition 5.

527. *Supra*, note 521 at 12-13.

528. *Id.*

529. See TransCanada Pipelines Ltd., Report to Governor-in-Council, March 1960 at 11-27.

530. Bill C-32, First Sess., 30th Parliament, 1974. A predecessor, Bill C-18, 2nd Sess., 29th Parliament, 1974, died with the 29th Parliament. Bill C-18 contained no provisions related to domestic gas price restraint.

531. *Id.*, ss. 48, 50, 51, 52.

532. I.e., exclusive of transportation costs for gas used outside its province of production. See s.49.

533. *Hansard*, October 31, 1974 at 917.

534. Precisely the same problem arise in the Interprovincial PipeLine Limited Sarnia-Montreal oil pipeline extension application. See Case Study No. 2.

535. Interviews with Board members suggest that at present the NEB is reluctant to write detailed requirements into certificates because of a deemed need for flexibility. The result is conditions requiring the applicant to meet all environmental requirements "deemed necessary".

536. This section is based in part on the review in the Board's 1973 Annual Report at 19-27.

537. See Gas Export Joint Hearing, Report to Governor-in-Council, August, 1970 at 4-35.

538. See Minutes of Standing Committee on Natural Resources and Public Works, February 15, 1973 at 1:7.

539. NEB, Report to Minister of Energy, Mines and Resources, in the matter of the exportation of oil, October 1974 at 1-2 [hereinafter: Oil Export Report].

540. See Appendix I.

541. Interviews with Board members and members of the Law Branch.

542. Hearing Transcript at 2.

543. *Id.*, at 3A.

544. Board Counsel questions included a number submitted to him by other parties at the inquiry.

545. Interview with W. A Scotland, Member, NEB, November 8, 1974.

546. Hearing Transcript at 1589.

547. *Id.*, at 1601.

548. See Canadian Scientific Pollution and Environmental Control Society (SPEC), Vancouver.

549. *Id.*, at 431.

550. See Oil Export Report at 1-1.

551. See "Oil Export to U.S. May Be Cut", Ottawa *Citizen*, October 21, 1974 at 1.

552. See "Ottawa Orders Gradual Cut-off of Oil to U.S.", Toronto *Globe and Mail*, November 23, 1974 at 1. The NEB report was apparently leaked several days before this announcement. See "Oil Self-sufficiency by 1982, Report Says", Toronto *Globe and Mail*, November 21, 1974 at 1.

553. See Oil Export Report, ch.4, 6.

554. See Oil Export Report, Appendix 4-IV. See also Case Study No. 2. The applicant, Interprovincial PipeLine Limited, had successfully sought an indefinite adjournment of the hearing on the ground that the

consequences of the then pending Oil Export Report may affect the viability of the project.

555. Including the medium of NEB reports such as "Potential Limitations of Canadian Petroleum Supplies", December, 1972, released in February, 1973.

556. See "Oil Cut-Off Brings Concern, Resignation in U.S., Toronto *Globe and Mail*, November 25, 1974 at 1.

557. *Supra*, note 552.

558. "Potential Limitations of Canadian Petroleum Supplies", *supra*, note 552, at 18-19.

559. *Id.*, at 19.

560. *Id.*

561. See p. 145, *supra*.

562. Interview with J.G. Stabback, Assoc. Vice-Chairman, NEB, September 20, 1974. See opening statement by panel chairman Stabback quoted at 147, *supra*.

563. Section 14(2) was regarded by the Law Branch as the substantive provision, while section 23 was merely the related procedural section. Interview with Ian Blue, Assistant General Counsel, NEB.

564. Oil Export Report.

565. NEB Act, section 23.

566. See Hon. Donald Macdonald, evidence to Commons Standing Committee on Natural Resources and Public Works, February 28, 1974, at 2:28.

567. Assuming that the hearing is under Part II of the NEB Act, section 24 specifically gives the Board all the powers of commissioners under Part I of the Federal Inquiries Act.

568. See Case Study No. 2.

569. In fact 250,000 bbls/day was specifically reserved for the Montreal market commencing July 1, 1975. However, Board and Cabinet did differ somewhat on this issue. See p. 150, *supra*.

570. See "Northern Assessment Group", (1974) 2 Northern Perspectives.

571. Order No. MO-62-69 (SOR/70-20) under s. 97(1) of the NEB Act made Part IV applicable to companies that had been operating pipelines at the date the Act came into force.

572. *Id.*, s. 97(2).

573. *Id.*, ss. 50, 52.

574. *Id.*, ss. 52, 55.

575. *Northern and Central Gas Corporation Limited v. National Energy Board*, [1971] F.C. 149.

576. *Id.*, at 164.

577. Reasons For Decision, January, 1972, at 3-9, 3-14.

578. I.e., F.P.C. See *id.*, at 3-13, 3-15.

579. *Id.*, at 3-23, 3-24.

580. File No. 8-9-1-1.

581. Two of the intervenors, Saskatchewan Power Corporation and The Attorney General of Saskatchewan were subsequently denied leave to appeal this decision by the Federal Court of Appeal. See *Sask. Power Corp. and A.G. Sask. v. TransCanada Pipelines Limited*, Unreported, F.C.A. No. 73-A-304, August 1, 1973, Jackett C.J., Thurlow and Pratt J.J.

582. SOR/73-273, May 24, 1973. Basically the procedure involves the submission of *written* rather than *viva voce* evidence and submissions. There is no hearing and no opportunity for cross-examination. See Rules of Practice and Procedure, ss. 4.2-5.4.

583. See Reasons For Decision, May, 1973 at 9-1 - 9-2.

584. Interviews with Board members and Financial Branch Staff.

585. *Supra*, note 582.

586. Order No. MO-12-73.

587. See Order EPO-1-73, August 27, 1973 and Reasons for Decision in Expedited Proceedings, August, 1973 at 10. (Order TG-2-73).

588. Expedited Proceedings were denied (Order No. EPO-1-73) and the hearing set down by Order No. RH-1-73. See Reasons For Decision, October, 1973.

589. See Reasons for Decision, October, 1973.

590. Hearing Order No. RH-2-74, March 21, 1974.

591. See Hearing Transcript, June 4, 1974 at 13-15.

592. Dated July 25, 1974.

593. See notes of Board-staff meeting held on this application, September 18, 1974.

594. Based on interviews with Board members and staff.

595. See TransCanada Pipelines Limited, Reasons for Decision, October, 1974.

596. See Reasons for Decision, May, 1973.

597. The time from application to decision in this relatively complex application was 6 1/2 months. The first TransCanada application, which was comparable in substance, required 2 1/2 years.

598. See NEB Rules of Practice and Procedure, s.s. 2(1), as amended by SOR/73-273, May 24th, 1973.

599. Though unsuccessful in the result from the point of view of the applicant.

600. Particularly the Industrial Gas Users Association.

A review of the policies, procedures and practices
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and take the reader to the Board's offices,
meetings and hearings for an inside look.