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THE ROLE OF THE NATIONAL ENERGY BOARD IN CONTROLLING THE EXPORT OF NATURAL GAS FROM CANADA

BARRY D. FISHER*

1. INTRODUCTION

The export of Canada's primary resources to the United States has become a major contemporary issue to Canadians. This is particularly true of the export of Canadian energy resources and there is currently a controversy over whether Canada should continue to export energy. Views range from support of U.S.-proposed continental energy schemes to charges that the sale of any energy is a sell-out by Canada of the country's resources and is contrary to the country's interests and will make Canada more dependent on the U.S. economically and politically.

Canada's energy resources are substantial—oil, gas and atomic—and there is a history of the export of these resources to the United States. In this paper the writer will examine the formulation of policies towards the export of natural gas. Gas was chosen as the subject of discussion because there is a well developed system designed to protect Canadian interests by regulating exports. Since the 1947 discovery of substantial petroleum reserves, both oil and gas have been exported to the United States. However the pattern developed differently for gas and oil. While Western Canadian gas supplies have been tied to the major Eastern Canadian markets by pipe line, this is not the case with oil. The National Oil Policy has divided Canada along the Ottawa River: East of this boundary only imported oil (mainly from Venezuela) is used, while to the West only Canadian crude is used. Because of U.S. domestic policies (the Mandatory Oil Import Program) the export market for Western Canadian oil has been very limited. But gas has always been treated differently and has virtually free access to U.S. markets. As a result Canada has been forced to formulate a policy towards the export of this resource. Stating the problem is simple. Natural gas is a depleting resource and the object of all resource development should be to maximize the benefit to Canada. The question which follows is whether Canada should continue to export natural gas, and if so, on what terms?

The National Energy Board was established in 1959 to manage the export of natural gas. In this paper the writer will attempt to consider whether the Board has been effective and whether it is the appropriate body to make these decisions.

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2. THE DEVELOPMENT OF THE OIL AND GAS INDUSTRY AND EXPORT CONTROLS

a. Pre-1947

While natural gas in Canada has attained national significance only since 1947, gas was discovered as early as 1883 in Alberta and 1888 in Ontario.\footnote{Gray, The Great Canadian Oil Patch (1970), at 59-60.} These discoveries and others in subsequent years\footnote{For accounts of the early history of gas discoveries in Canada, see Gray, \textit{id.}, at 59 ff; Hanson, Dynamic Decade (1958), at 40-58; Leeston, Crichton, and Jacobs, \textit{The Dynamic Natural Gas Industry} (1963).} led to the early commercial use of natural gas. By 1910, Calgary was served by gas and by 1912 a natural gas pipe line connected the city to the Bow Island well.\footnote{Interestingly this line, 170 miles long, was at the time the world’s longest pipe line.}

The gas discovered in Ontario was used to service Southern Ontario and Detroit, and represents the first significant natural gas export to the United States. The rapid exploitation of these reserves for export threatened rapid depletion and resulted in implementation of the export controls in the \textit{Electricity and Fluids Exportation Act},\footnote{\textit{Electricity and Fluids Exportation Act}, S.C. 1907, c. 16.} passed by Parliament in 1907. The legislation required a licence for gas export, issued by the Minister of Trade and Commerce.\footnote{\textit{Id.}, Little information is available on the use of export controls in this legislation, but gas exports were of only minor importance until the 1950’s. The legislation continued in effect until 1955 when it was replaced by the \textit{Exportation of Power and Fluids and Importation of Fluids Act}, S.C. 1955, c. 14, discussed \textit{infra}.}

The Province of Alberta was marked by a frenzy of exploration for oil and stock promotion in the 1920’s and 1930’s, but natural gas was only of marginal importance, being sold only to local markets. All efforts were directed at the discovery of oil, and vast quantities of natural gas which could not be used locally were flared at the well, and wasted. In 1938, the Alberta Petroleum and Natural Gas Conservation Board was established and a system of prorating was introduced to regulate the output of the large number of wells and maintain a quota system.\footnote{Hanson, \textit{supra} at 49. Pro-ratoning takes on importance when there is a large number of producing wells and a limited number of buyers.} The Board was also charged with imposing conservation measures to deal with the problems of inefficient operation, through excessive rates of production, and the problem of gas waste. During this period, natural gas exports were relatively insignificant.

b. 1947-1959

The 1947 Imperial Oil discovery of the Leduc field, in Southern Alberta was an important turning point in the development of the industry,\footnote{See Hanson, \textit{supra and Gray, \textit{supra}, for a detailed discussion of the discoveries and developments in this period, and the early schemes to remove gas from the Province.} since along with the gas discovered in other fields reserves were sufficient to generate an interest in export schemes. However, there was strong public opposition to these schemes in Alberta, on the grounds that exports would result in increased local gas prices, would deplete supplies required for Alberta’s use, and would result in the loss to the province of gas-dependant industries.
which would locate elsewhere if gas was exported.\textsuperscript{8} Albertans particularly feared the loss of a very cheap form of energy they had long enjoyed. The political pressure led to the appointment of the Dinning Royal Commission in 1948, to enquire into the relationship of reserves to provincial consumption. In its Report, in 1949,\textsuperscript{9} the Commission estimated the Province’s gas requirements for 50 years and concluded that exports from the Province might be justified, but it recommended that Albertans should have prior claim on the use of the resource, and that Canadian users should have priority over gas removed from the Province.

In 1949, the \textit{Gas Resources Preservation Act}\textsuperscript{10} was passed, based on the Dinning Recommendations. It provided that gas which was surplus to reasonably foreseeable provincial requirements could be removed from the province by export permit, issued by the Oil and Gas Conservation Board.

A number of applications for export permits, based on competing proposals designed to serve three different markets, were filed with the Board in 1950. Three companies sought to serve the U.S. Pacific Coast market, two the Eastern Canadian market and one company applied to serve the Montana market.\textsuperscript{11} The Board initially refused all the applications, in early 1951, since the current reserves were considered inadequate, but the parties were invited to re-apply in September, 1951. In March, 1952, the Board again rejected all applications, except the Westcoast proposal which was approved. The export projects which emerged will be described briefly.

\textit{The Southern B.C. and U.S. Pacific Northwest Markets}

The schemes contemplated the removal of gas from the Peace River areas of Northern Alberta to British Columbia, where together with gas from the recently discovered reserves in the B.C. Peace River district, the total supply would be sent through B.C. by pipe line to the Vancouver area, which would be supplied by gas, and from where the gas would be exported to the U.S. Pacific Northwest markets. The Canadian Government issued the necessary export licence in 1953, but the project was set back by the refusal in 1954 of the U.S. Federal Power Commission to grant the necessary import permit.\textsuperscript{12} The FPC had instead approved a proposal by

\textsuperscript{8} Gray, \textit{supra} at 164-5.

\textsuperscript{9} The discussion is based on the account of the Report in Gray, \textit{supra} at 164-5.

\textsuperscript{10} \textit{Gas Resources Preservation Act}, S.A. 1949, c. 17. This legislation was subsequently re-enacted with changes as the \textit{Gas Resources Preservation Act, 1956}, S.A. 1956, c. 19, which is the basis of the present Alberta control. See \textit{Energy Resources Conservation Act}, S.A. 1971.

\textsuperscript{11} For a more complete discussion of the proposals, see Hanson, \textit{supra} at 227-231; Alberta, Oil and Gas Conservation Board, \textit{Gas Export 1950-60}, January 1961 (A summary of Board proceedings compiled by D. P. Goodall). [The Oil and Gas Conservation Board will be referred to hereinafter as the "OGCB"; The Federal Power Commission as the "FPC"; and the National Energy Board as the "NEB"].

\textsuperscript{12} The details of the Westcoast export are discussed in full in the Report of the Borden Commission \textit{loc. cit.}, f.n. 15, at 13-24. The disposition is discussed, \textit{infra}, Section 5. C(3) ). The main reason for rejection was that U.S. consumers would not be adequately protected if the sole source of supply for the Northwest market was from imports. Apparently, the converse, that an American market would be dependent on Canada, did not trouble any of the Canadian decision makers, at least not enough to result in refusal to grant export authorization.
Pacific Northwest Pipeline Corporation to supply this market with gas from U.S. supplies, and refused to let the U.S. market become dependent on Canadian gas supplies. In December, 1954, the two companies agreed to a new gas sale which rescued the pipe line project and assured Southern B.C. of a pipe line supply of natural gas. Approval of the new arrangement was received from all three bodies (the OGCB, Canadian Government, and FPC) and the project was completed in 1956.

The result of the initial FPC rejection had been to place the entire project in jeopardy since the U.S. market was essential to the successful financing of the pipe line. As a result of Westcoast's weak bargaining position the 1954 export contract was made at a price which was unfavourably low. This arrangement continued to be criticized long after. For example, in its Report of 1957 the Gordon Royal Commission criticized the structure of export arrangements and noted in particular that the power of the FPC, and the resulting effect on Canadian export prices and recommended the creation of a "national energy authority". In 1958 the Borden Commission gave detailed consideration to the contracts as well as to certain aspects of the financing of the project, and found that the U.S. exports were not a source of profit to the company.

The Eastern Canadian and Northeastern U.S. Market

Two competing proposals emerged to serve the eastern market areas. Western Pipe Lines proposed to build a pipe line east to Winnipeg and from there south to the U.S. border at Emerson, Manitoba, for export to the Minnesota and North Dakota markets. Canadian Delhi Oil proposed to build a line as far east as Montreal, based on a market restricted to Canada. The project which eventually evolved stands as one of the most interesting ventures in Canadian history and culminated in the Great Pipe Line Debate of 1956 and the defeat of the Liberal Government in 1957.

In 1951 Canadian Delhi obtained a charter for Trans-Canada Pipe Lines, as a wholly-owned subsidiary, under the Pipe Lines Act. The eastern pipe line project proposals were both rejected by the OGCB in March, 1952 and

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18 The Canadian government issued a licence in June, 1955, for 20 years at a maximum of 125 billion cubic feet per year, under the Exportation of Power and Fluids and Importation of Fluids Act, supra. This was the only major export permit granted under this legislation that came to the attention of the writer.


16 For an interesting and more complete discussion of the development of these proposals and in particular the history of the Trans-Canada Pipe Line and the Great Pipe Line Debate of 1956 in the House of Commons, see Kilbourn, Pipe Line (1970). See also Gray, supra, at 177-218; Borden Commission, First Report, at 54-88.

17 Pipe Lines Act, S.C. 1949, c. 20, R.S.C. 1952. Later repealed and replaced by the National Energy Board Act, S.C. 1939, c. 46
again in November, 1953. Following the latter decision, the Alberta Government (through Premier Ernest Manning) and the Canadian Government (through Minister of Trade and Commerce C. D. Howe) interceded in order to salvage the projects. This resulted in the merger of Trans-Canada and Western in January 1954 to form Trans-Canada Pipe Lines. In May the Alberta Board authorized the export from the Province.

Howe was committed to the principle of an all-Canadian pipe line, located entirely within Canada, and supplying Western Canadian gas to the Eastern Canadian markets. But these criteria complicated the financing of the project and almost resulted in its failure. In November, 1955, the Ontario and Federal Governments agreed to save the project through the instrumentality of a Crown Corporation which would build the Northern Ontario section of the line and lease it to Trans-Canada, which would eventually purchase the line. An export component was integral to the scheme. It is noteworthy that this export helped finance the line, and in effect, led to the integration of the Western gas supplies and the Eastern Market.

A temporary “displacement” arrangement was incorporated, whereby Trans-Canada would build the first stage of the line to Manitoba and export part of the gas at Emerson, Manitoba to Midwestern Gas Transmission, a subsidiary of Tennessee Gas Transmission; Tennessee would supply gas to Ontario from U.S. sources, through Niagara. Thus, while the Northern Ontario line was under construction, the Ontario market would be served, and when completed the Ontario import would end, and would be replaced by a small export at Niagara, and the export at Emerson would continue, at a reduced level.

The events that followed form an important chapter in Canadian Parliamentary history—the Great Pipe Line Debate of 1956. Since time was critical to the project and its financing, the Government tried to force the legislation creating the Crown Corporation through the House of Commons

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18 Gray, supra, at 185-6. Westcoast had been granted a permit in March, 1952, since a surplus of gas was found for the Peace River gas reserves, but the Board determined that there was not a surplus of gas in the rest of the Province. In its November, 1953 decision, the Board approved the export permit of Canadian-Montana Pipe Line and determined that there was a surplus of gas sufficient to supply either of the eastern proposals. But the applications were both refused because of the economics of the projects, and in the case of Western, because of the price. OGCB, Gas Export 1950-60, supra at 43-48, 92-96.

19 See Kilbourn, supra, for a discussion, esp. at 34 ff.

20 This meant locating the pipe line north of the Lakehead and going through the rocky terrain of Northern Ontario, a more expensive method than the producer-proposed project to route the line south of the Great Lakes through the U.S. The producers were interested in a more export-oriented project, which they reasoned would bring higher prices than the Canadian market. This Federal Government commitment to the “all Canadian pipe line policy” was to become an issue again in 1966, when Trans-Canada sought to route a new line through the U.S.A., south of the Lakes.

21 This displacement scheme was integral to the project, in that it permitted the development of the Ontario market and the effect utilization of the Western part of the line until the Northern Ontario line was completed. However displacement schemes have subsequently been rejected by the Government policy. Thus, in 1966, the proposal of Northern Natural of the U.S. to augment supplies to Ontario through a displacement scheme, rather than a pipe line, never got off the ground.
amidst confusion about the nature of the plan and charges that private parties would profit from Government assistance in the financing. The famous debate that followed was not concerned with the merits of the scheme, but rather with the way the Government was handling the matter in Parliament. This contributed to the Liberal Government defeat in the 1957 election. The pipeline proceeded and in October, 1958, the all-Canadian system was completed. While Western Canadian gas supplies were successfully integrated with the Eastern Canadian market, there were many unanswered questions about the project. The study of these matters by two Royal Commissions led directly to the creation of the NEB.

The Establishment of the National Energy Board

The Gordon Commission, which reported in 1957, had pointed to the inadequacy of information on Canada's energy resources and the weak bargaining position of Canadian producers, which had resulted in the 1954 Westcoast export contract, on most unfavourable terms. It recommended the formation of a comprehensive energy policy and the establishment of a "national energy authority to advise the Government on energy matters and approve all contracts for the export of gas, oil and power." In 1957, the new Conservative Government appointed the Borden Royal Commission on Energy, to study the energy situation, the financing of Trans-Canada Pipe Lines, and other matters and to make recommendations about the formation of a National Energy Board and how gas exports should be treated. In its First Report, the Commission considered the Westcoast export contracts and financing and the Trans-Canada financing, and recommended that gas export be permitted by licence. The Commission had no criticism of the handling of the financing of Trans-Canada although it did point to the need for the NEB and it made specific recommendations on the formation of the Board and the control of the export of natural gas. The Government acted quickly on the recommendations and introduced legislation in May of 1959 and the National Energy Board Act was passed in July.

C. Since 1959

By late 1959 the National Energy Board had been established and it held its first export hearings in January, 1960. These included the final dispos-
sition of the Trans-Canada application for export at Emerson, Manitoba, and other export applications totalling 6.7 trillion cubic feet.

An entirely new export project developed in the late 1950's. Alberta and Southern Natural Gas, a subsidiary of Pacific Gas and Electric, was incorporated to supply Albertan gas to the Northern California market of Pacific Gas and Electric through a pipe line which was wholly export-oriented.

In the early 1960's there was a rapid expansion of the Eastern Canadian gas market and consequently a need for increased pipe line capacity to serve the market. This resulted in the emergence of Trans-Canada's Great Lakes project, whereby Canadian gas would be carried to Eastern markets by a pipe line south of the Great Lakes through the U.S. This project was eventually approved by the necessary regulatory bodies and was completed in October, 1968.

The most recent major pipe line project proposal emerged in 1969. Northern Natural Company of the U.S.A., incorporated Consolidated Natural Gas Company in Canada to export a large volume of gas to serve the Minneapolis and Wisconsin markets, but their application was refused by the National Energy Board in September, 1970.

D. The Present Situation

Most of Canada's proven natural gas reserves are in Western Canada, predominantly Alberta, with reserves in British Columbia, and lesser amounts in Saskatchewan, while the major Canadian energy market is in Eastern Canada — Ontario and Quebec. Trans-Canada Pipe Lines represents the export was approved by the NEB in March, 1960. The Canadian-Montana Pipe Line, approved in the 1950's and serving the Montana market is also wholly export-oriented, although the volume of gas is much smaller than the Alberta and Southern project.

This project is discussed in greater detail, infra, Section 6.

NEB Report (August, 1970). Discussed throughout this paper.

realization of a Federal Government policy enunciated by C. D. Howe in the mid-1950's, to supply natural gas to Eastern Canada through an all-Canadian pipe line, wholly within Canada. As a result natural gas has become an important energy source even in Eastern Canada. The B.C. market is served by the Westcoast project. Gas export has always been an important element of both these projects. There are also two wholly export-oriented projects, the Canadian-Montana pipe line, and the Alberta and Southern — Alberta Natural Gas project of Pacific Gas and Electric.

Today, natural gas exports account for a substantial portion of gas production. In 1968, 604 Bcf were exported, comprising approximately 40% of the total production of 1493 Bcf. The United States is currently facing a severe energy shortage, particularly in natural gas and if Canada is prepared to sell there is certainly a large future export market.

While most of the current gas reserves are located in the Western Canadian Sedimentary Basin, the projected potential reserve areas include the possibility of major producing areas in the Arctic Islands and in the Atlantic Offshore areas. The Canadian Petroleum Association projects ultimate potential reserves of 724.8 Tcf, which should be compared with the present established reserves determined by the National Energy Board to be 57.4 Tcf at the end of 1969. There have been major discoveries in the Arctic area already, but none of significance off the East coast. The production and marketing of these supplies will undoubtedly be controversial issues in the next decade, because of the ecological risks involved.

3. THE NATIONAL ENERGY BOARD ACT AND THE FUNCTIONS OF THE BOARD

A. The Structure of the Board and its Members

The Board was established in 1959 by the National Energy Board Act which implemented most of the recommendations of the Borden Commission's

88 The standard measurement of natural gas is in cubic feet at atmospheric conditions. The following abbreviations are commonly used:

1 Mcf = 1000 cubic feet
1 MMcf = 1,000,000 cubic feet (million)
1 Bcf = 1,000,000,000 cubic feet (billion)
1 Tcf = 1,000,000,000,000 cubic feet (trillion)

87 Fraser, Lugg, *supra* at 154-64.


40 The Board is created as a court of record, with the powers of a superior court of record with respect to witnesses, documents, and enforcement of its orders. (*Act*, ss. 10, 15). Orders may be enforced by making them a rule of the Federal Court or any superior court, and mandatory orders may be issued. (s. 12). The Board is empowered to initiate proceedings and inquiries on its own ss. 11, 14(2), and may (1) change or rescind orders and decisions (s. 17(1)); and (2) change (but not rescind, apparently) pipe line certificates and export licences (s. 17(2)). The writer is unaware of any proceedings using these powers with respect to the export of natural gas. In fact, in its August, 1970 Report, the Board indicated that it would be adverse to using the s. 17 powers in respect of existing export licences.
First Report.\textsuperscript{41} The Board performs both advisory and regulatory functions. While the focus of this paper is on the regulatory functions of the Board, it should be emphasized that the advisory functions are of equal, and perhaps greater importance. There are seven Board Members, increased from five by the 1970 amendments to the Act.\textsuperscript{42}

Consideration of the role played by individual members in policy-making is difficult because of their limited public exposure. NEB members have participated in public discussion only to a limited extent, while FPC Commissioners make speeches and otherwise enter public discussion quite frequently. In Canada, the attention in energy matters is focused on the Minister of Energy, Mines and Resources.\textsuperscript{43} It would be useful for Members of the NEB to participate in public discussion, to promote knowledgeable discussion about gas export policy, as well as to let public discussion influence the thinking of Members.

There is an apparent Board policy of issuing only unanimous decisions in their Reports. By contrast, the FPC issues decisions in individual's names, and includes dissenting decision. The NEB only indicates the various arguments put forward by parties on various issues, in its Reports, and never recognizes dissent amongst Members or indeed amongst the Board's Staff. Whether the Board should adopt a policy similar to the FPC depends on one's view of the role of the Board. If dissenting opinions were published then a potential problem would be presented to the Government which effectively gives approval to the policies of the Board, in the form of Cabinet approval of decisions.

B. The Advisory Function

From the earliest discussions about the formation of the National Energy Board considerable emphasis was placed on this aspect of the Board's func-

\textsuperscript{41} Borden Commission, \textit{First Report}, op. cit.

\textsuperscript{42} Act, s. 3(1), as amended. Members are appointed by the Governor in Council. The number of members was increased because of the increased work load of the Board, particularly recent long hearings. The most recent export hearing (NEB Report, August, 1970) lasted 54 hearing days, from November 25, 1969 to March 20, 1970. An application by Trans-Canada Pipe Lines to increase its rates (Act, Part IV) is expected to last at least that long. Since the quorum requirement of a hearing panel of the Board remains at 3 (s.6(2) ), it will be possible in future to form two panels and overlap hearings. In addition this will free the Members to devote more time to advisory functions than in past, because of the work load. Members are Cabinet-appointed for 7 years (Act, s. 3(1) ) and hold office during good behaviour, subject to removal by the Cabinet upon address of the Senate and House of Commons. Members must be Canadian citizens and are prevented from holding any interest in the petroleum or power industry (s. 3(5) ) or holding "any office or employment inconsistent with their duties and functions under this Act." (s. 3(8) ).

\textsuperscript{43} It should be pointed out that a fundamental difficulty is presented by the Canadian political system, which adheres to the concept of Ministerial responsibility and accordingly conflicts with emphasis on the role of civil servants and regulatory bodies. However, it seems clear that in formulating energy policies, the latter groups have played a dominant role, as evidenced by the almost uniform policy towards export of gas over the last 10 to 20 years (discussed later). If the regulatory bodies are to continue playing a major role then this should be publicly recognized.
They were given prominence, as Part II of the Act, which imposes a heavy duty on the Board:

22. (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 cooperation 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.

Thus the Board functions as a Government advisor on energy policy, making recommendations directly to the Minister. This function includes all forms of energy and energy sources and is not restricted to oil, gas, and electric power, which are the limit of the regulatory functions.

Any evaluation of the Board's functions in this area is necessarily limited by the requirements of Cabinet secrecy. Reports made under this Part are only made public with the approval of the Minister. While some reports have been published, these represent only a small part of the Board's activities in this area.

One of the most important aspects of activity is the Board's continuing study of energy resources in Canada, their supply and their demand. Coupled with this, the Board studies the energy supply and demand situation in the U.S.A., and to a lesser extent that in other countries, particularly the oil

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44 See for example, Borden Commission, First Report, op. cit., at 43-53. The Commission recommended (at 43):

That a National Energy Board be established ... as a permanent board to study and to recommend to the Governor in Council policies designed to assure to the people of Canada the best use of the energy and sources of energy in Canada.

The Commission also recommended specific measures which were enacted and are discussed, infra.

46 Act, s. 22. In exercising its Part II functions the Board is given powers under the Inquiries Act.

47 The relationship with the Cabinet is discussed, infra, Section 6.

48 Act, s. 23. The Minister refers to the Minister of Energy, Mines and Resources.

49 These are reports of a technical nature, concerned mainly with operation research studies of the gas industry and energy demand forecasting techniques.

50 In the course of his research the writer tried to obtain a copy of a historical review of Canada's energy policies tabled by the Board with the Energy Committee of the Organization for Economic Cooperation and Development. The Board serves as "the focal point for Canada's contribution to the energy activities of the OECD." Annual Report (1969), p. 28. However, the Board Chairman advised the writer that this was a confidential document and would not be released, at least not immediately, in the interest of Canadian security. Surely if a document can be released internationally to foreign governments then it should be open to the Canadian public.
producing countries. Their surveillance of supply and demand is of considerable importance to the decisions made on particular gas export applications, since the Act requires the Board to be satisfied that the quantity of gas to be exported “does not exceed the surplus remaining after due allowance has been made for the reasonably foreseeable requirements for use in Canada.” If the Board were placed in a position of dependence on industry-submitted data its effectiveness would decrease. The Board bases its determination of gas reserves on its own interpretation of geological data from wells, as provided by producers. In aid of its reserve-estimating activities the Board maintains a small office in Calgary, and maintains a close relationship with the Alberta Oil and Gas Conservation Board.

Perhaps the most striking aspect of the Board’s advisory function, is an absence of published discussion of the underlying questions through the whole discussion of energy export in general, and gas in particular, namely should Canada continue to export energy or energy sources. Certainly this question falls within the Board’s jurisdiction. In view of the importance of the question, particularly against the background of U.S.-proposed continental energy planning, this question should surely be the object of greater study by the Board, than is obvious from the available published material. While the Board recently published a study on energy supply and demand, it contains no discussion of the underlying policy issues.

C. Regulatory Functions

The Board’s regulatory jurisdiction extends only to electric, gas, and oil and does not include other forms of energy or energy sources such as coal, atomic energy, or water resources. Three main types of regulatory control are exercised:

1. Certification of interprovincial pipe lines and international power lines;

2. Rate regulation;

3. Exports and imports: This includes the export of power, gas, and oil and the import of gas and oil. The power over oil exports is not exercised to date, but in the event of future substantial oil sales to the U.S., this will become important. The National Oil Policy which dictates that the oil market west of the Ottawa River should be supplied by Western Canadian oil exclusively, but the market east of the boundary should be supplied by imported oil, is based on the Board’s power over imports.

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50 Act, s. 83 (a). This provision is discussed in greater detail, infra, Section 5. B.
53 Act, ss. 26, 38, 34.
54 Id., ss. 43, 2(b), 2(r).
55 Id., Part IV, s. 50. This power is only being exercised this year, following the application of Trans-Canada Pipe Lines to increase its rates.
56 Act, ss. 81-82, 87.
4. EXPORT APPLICATION PROCEEDINGS

A. Authority to Export Gas

Part VI of the Act, provides a general prohibition on the export\(^5\) of natural gas:\(^6\)

Except as provided in the regulations, no person shall export any gas or power or import any gas except under the authority of and in accordance with a licence issued under this Part.\(^6\)

There are three procedures whereby gas exports may be authorized:

(1) Export Licences. The Board is empowered to issue export licences,\(^6\) which authorize specified export levels for a specified term which may be a maximum of 25 years.\(^6\) Licences are subject to Cabinet approval.

(2) Export "Orders". Further procedures may be implemented by regulation. Two such procedures have been introduced:

(a) A 1966 amendment to the Regulations added a procedure whereby the Board can authorize, by order, the export of one million cubic feet of gas per day for a term of 20 years, subject to Cabinet approval.\(^6\) It should be noted that the provision does not state any criteria to be considered by the Board, while there are very specific criteria with respect to licences.\(^6\)

(b) Under the second procedure, the Board may authorize exports:

Where, in the opinion of the Board, emergency conditions have arisen that have caused or may cause an interruption in the supply of gas to consumers in the United States of America served by pipe lines in Canada, the Board may, by order, authorize a person operating a pipe line to export gas in such amounts and for such periods of time as the Board considers necessary, and upon such terms and conditions as the Board may prescribe.\(^6\)

It is understood that this section is used several times a year to authorize minor exports where there is a U.S. shortage of gas due to a U.S. pipe line break or other temporary emergency conditions. That this is possible is some indication of the degree of interconnection of Canadian and U.S. pipe lines.

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\(^5\) "Export" is defined broadly, Act, s. 2(d): "export" means . . . (ii) with reference to gas or oil to send from Canada by any means.

\(^6\) "Gas" is defined for the purpose of Part VI, Act, s. 80A(a): "gas" means natural gas or any fluid hydrocarbons other than oil. The definition of oil, s. 80A (b) (iii): "any natural gasoline or condensate resulting from the production, processing, or refining of gas" effectively excludes controls on the export of the liquid by-products of natural gas, since they are exempted from the operation of Part VI of the Act and the Part VI Regulations, Regulations, s. 22 (as amended by P.C. 1970-1419). However control is retained over certification of pipe lines carrying these products.

\(^6\) Act, s. 81.

\(^6\) Id., s. 82.

\(^6\) Regulations, s. 9 (a) pursuant to Act, s. 85 (b). In case of provinces with their own controls over removal of gas from the province the term is further limited to the provincially authorized term. Regulations, s.9(a).

\(^6\) Regulations, s.6B (Added by P.C. 1966-427, SOR/66-188). This would be equivalent to 6.3 Bcf over a 20 year term, while current export licences typically authorize volumes of 1-2 Tcf, about 15 to 30 times greater.

\(^6\) Act, s. 83, discussed, infra, Section 5.

\(^6\) Regulations, s.18 (1) Cabinet approval is not required with respect to these orders; notification of the Minister and a report to him are, however, required (s. 18(2)).
B. The Respective Roles of Government and Private Parties in Gas Exports

All export sales of natural gas are effected through the contracts of private parties, namely pipeline transmission companies, in the two countries, rather than the efforts of government bodies. The role played by governments is essentially one of approving or disapproving particular exports (or imports) applied for by the parties.

This is not to say that the respective heads of governments play no part in energy sales between the U.S. and Canada. Their role would appear to be at a different level and most recently has involved the discussions between the two governments concerning the sale of Canadian oil to the U.S. The governments reached an apparent agreement whereby oil sales would increase over the next few years. Clearly, the N.E.B. played a role in these discussions, and in fact, the Chairman attended the talks of the Prime Minister and President as an adviser. Similarly the Canadian government is directly involved in discussions with U.S. oil companies and the U.S. government concerning the proposed Trans-Alaska Pipe Line system and the Canadian-proposed Mackenzie pipeline, to carry U.S. Alaskan oil to the U.S. markets. The Chairman has been directly involved here as well, in an advisory capacity. It is in discussions of this type that the expertise and advice of the Board are particularly important.

An example of the dominating role of private parties in export transactions is provided by one case where the NEB declined to allocate markets amongst gas producing areas. In 1965, Alberta and Southern applied to increase its authorized export volume by 2 Tcf, involving the sale of gas produced in Southwestern Alberta to the California market. Westcoast Transmission, which had been exporting gas only to the U.S. Pacific Northwest market intervened to claim a share of the California market for gas produced in northern British Columbia and Alberta.

PG & E had already rejected Westcoast's proposal as uneconomic, since the delivered gas price would be greater than that of Southern Alberta gas.

The Board summarized the issue as it was raised by Westcoast:

The principal reason for its intervention was to test whether it was in the national interest of Canada for large new volumes of gas to be exported at a low price and withdrawn from the area at present supplying all Canada east of the Rocky

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65 At the present time the U.S., through its Mandatory Oil Import Program has imposed a quota on imports of Canadian crude oil. See “United States Oil Import Restrictions: A Program in Need of Reform”, (1970) 3 N.Y.U.J. Int. L. & Politics 343; Plotnick, Petroleum: Canadian Markets and United States Foreign Trade Policy (1964).

66 The Board as part of its advisory functions, Act, s. 22(2), is required, upon request of the Minister, to recommend “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.”

Mountains while at the same time similar volumes of gas in northern British Columbia, which were much more distant from these Canadian markets, were to remain shut in ... The Board was requested to clearly state the gas policy for general use in Canada. This need not necessarily involve dedication of markets but should enable all the producing areas to share some measure of the available export markets.88

The Board rejected the Westcoast proposal and approved the Alberta and Southern export, but their analysis of the issues raised by the parties was not satisfactory. Underlying the rejection seemed to be the fact that PG & E had already refused the proposal by Westcoast and had stated they would purchase gas from alternative U.S. sources.69 While the Board made no final finding on the relative price of B.C. and Alberta gas, Westcoast submitted data which were not objected to by other partied. The most favourable result to Westcoast, comparing the rolled-in costs at the PG & E distribution centre, Antioch, California, indicated that B.C. gas was approximately 10% more costly than Alberta gas.70 But the Board apparently considered that Canadian gas should be competitive with alternative U.S. sources71 and rejected the Westcoast intervention.

Most important, the Board declined to formulate any policy in respect of market allocation, as requested by the parties:

The Board believes that it is neither practicable nor desirable to enunciate a general policy regarding the “allocation” of markets in the sense proposed by the intervenors ... It appears to the Board that to attempt to encourage development in one area of the country rather than another in spite of competitive disadvantages, would be more likely in the long run to impair rather than to assist the orderly and sound development of a gas industry in Canada capable of competing not only in Canadian markets but in those United States markets to which Canadian gas may penetrate.72

It seems that the Board was willing to permit the export market and private parties determine the pattern of development of Canadian gas resources. Implicit in the decision is a limited view of the Board’s role in promoting and affecting the development of gas resources.73

C. Export Application Procedure

The Board is empowered to make rules concerning the making of applications74 and the National Energy Board Rules of Practice and Procedure75 have been made pursuant to this power. The Rules specify the form of the

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68 Id., at 8-2-3.
69 Id., at 8-31, 8-32.
70 Id., at 8-14. The rolled-in cost lumps the costs of gas supplies and transmission together to consider the cost to the final user, irrespective of the gas source.
71 Id., at 8-31. The Board’s policy with respect to price has been modified substantially since this decision. See infra, Section 5. C.
72 Id., at 8-29 -30.
73 The decision never considered whether export should not be permitted at all, if there was not sufficient benefit to Canada. This question is discussed infra, Section 5. A.
74 Act, s. 7(b).
75 Cited hereinafter as “NEB Rules”.

application and the information required for export applications is specified by the Regulations. Export applications are usually coupled with an application for a certificate of public convenience and necessity to construct a pipe line and further information is required in this respect. Multiple copies of the application are submitted to the Board and are circulated amongst the Board's staff for about two weeks for comments, following which the Board meets with its staff to discuss deficiencies in the application. A "deficiency letter" is then sent to the applicant. Usually there are amendments required in the application and it is understood that sometimes deficiency comments will range outside the scope of the application, to include proposals not made by the applicant. In this sense the staff exerts limited influence over the form of the application. Before setting the application down for hearing the Board may meet with the applicant to determine how the application will be heard. The application is then set down for hearing and the applicant is notified by the Board Secretary of the time for the hearing and the applicant is notified by the Board secretary of the date of the hearing and the method of notice. Notices are required to be published in specified newspapers at least four weeks before the hearing and specified notices are required to the Provinces, and interested parties. It is understood that the Board notifies the Minister in advance of public announcement of the application, for the purpose of keeping him advised with respect to questions in the House of Commons.

Applications are not public documents until the application has been amended for deficiencies. It is submitted that applications should be public from the time of filing with the Secretary. There is no reason to allow an applicant to air deficiencies privately. If information is missing then this can be provided later and if the Board staff is influencing the course of the application, this should be done with public knowledge.

D. Intervenors

The Act is unclear in respect of the right of parties to intervene in export application proceedings. There is specific provision in Part III, in respect of applications for certificates:

Upon an application for a certificate the Board shall consider the objections of any interested person, and the decision of the Board as to whether a person is or is not an interested person for the purpose of this section is conclusive.

76 NEB Rules, Rr. 4-7.
77 Regulations, s. 4. Applicants are required to submit detailed information of the proposed export, markets, nature of gas purchase contracts, deliverability data, evidence of satisfaction of provincial removal requirements, evidence that gas is surplus, pipe line data, financial information on the pipe line system, etc.
78 Applications for certificates require further information specified in Part I, Schedule, NEB Rules. Included is detailed information on the route of the line.
79 NEB Rules, R. 13, provide for conferences before or during hearings.
80 NEB Rules, R. 6.
81 The relationship of the Board and Cabinet are discussed, infra, Section 6.
82 Act, s. 45.
However the Act is silent with respect to interventions in proceedings for an export licence. Even the right of “interested persons” in certificate proceedings is not wide since the Board is only required to “consider the objections” of the “interested Party” and the Board may decide who qualifies as an “interested person”. While the safeguards in the Act leave much to be desired, the actual practice of the Board is another matter and will be considered here.

The importance of the role of third parties in proceedings before the Board must be emphasized. While the framework in which exports are authorized is the approval of private arrangements, clearly the Board was established to consider the public interest in respect of such exports and it is directed to consider matters beyond the immediate interests of the applicant. While applicants are required to present evidence with respect to satisfaction of export criteria (Canadian requirements, surplus, and trends in discovery) the matter is by no means one of adjudication of private rights. Third parties may serve a most useful role in directing consideration of the policy questions involved and challenging the policies of the Board.

The Board’s practice since its first hearing has been to allow third parties to participate in hearings. The writer is unaware of any case where the Board refused to allow a third party to intervene, and on the contrary, participation in the hearings is encouraged. As discussed earlier, export applicants are required to publish notices of the hearing in specific newspapers as well as written notice to specified persons, usually the Provinces, and other companies involved. Certainly parties in the industry, including producers and companies dealing with gas, will be aware of proceedings. However, it is understood that the notice is not published in all newspapers in a city, and that notice is sometimes carried for only a day. Some doubt must be expressed about the effectiveness of the notification procedure for parties outside the industry.

The procedure for intervention is in itself very simple, particularly because the document required to be filed by an intervenor before the hearing need not be a complete statement of his case. This is important, since the applicant may have spent several months in preparing his submission, while the intervenor has less than four weeks to prepare a submission. As suggested earlier, it would seem useful, to the writer, to require notice of the application immediately upon its receipt, rather than after the deficiency letter procedure (which represents a delay of two to four weeks), to give intervenors more time to prepare. Since the intervenor must file his submission in less than four weeks, these tend to be limited in scope to a statement of the intention to oppose (or support) the application and general argu-
ments that will be offered. It is understood that most of the preparation takes place during the hearing of the applicant's direct case and in the adjournment that follows before hearing interventions.

The role that intervenors have played in past has varied considerably and will be considered here briefly. There are several classes of intervenors representing various interests:

1. **Gas Producers.** The producers are usually supporting the export application, as would be expected, since they seek to maximize their production. Typically they will support a particular pipe line company with which they have contracted to sell gas for export. Probably one of the most active intervenors was associated with the Westcoast attempt to gain a share of the California gas market, for the northern British Columbia producing area, in 1965.87

2. **Provinces.** The stance of individual provinces varies. Typically, the producing provinces support applications. In Alberta's case the removal from the Province will have been approved and thus the Province is in the position of supporting the O.G.C.B. decision. The consuming Provinces, are typically interested in assuring the availability of adequate supplies of favourably priced gas and hence may seek to reduce the volume of export.

3. **Transmission Companies.** These companies, which operate the pipe lines, are usually the applicants for export licences, and they may intervene in the applications of competing companies. An excellent example is the continuing conflict between Trans-Canada Pipe Line and Northern Natural Gas. Northern Natural serves the Minneapolis-Wisconsin gas market in the U.S. and has since the development of the Trans-Canada system competed for access to Canadian gas supplies. In 1966, Northern intervened to oppose the proposed Great Lake Pipe Line System, which passed through their market area and proposed instead a displacement scheme.88 At the NEB hearings, Northern Natural sought to have the Board delete a proposed condition of the export-import licence, requiring the gas exported at Emerson, Manitoba to be re-imported.89 However the Board ruled during the hearing that it was "not prepared to issue a licence as unconditioned as is proposed by the Northern Companies"90 and that in the event of approval of the scheme by the NEB, but FPC preference for the Northern project, then a new hearing would be required. The Board refused to hear evidence concerning the Northern project, since this would be irrelevant to the application.91 Thus Northern was prevented from using the intervention as a backdoor way to apply for a licence, when they did not have any Canadian or

87 See discussion, supra, Section 3.B.


90 Id., at 3-11.

91 Id., at 3-10 -11.
American contracts to support an application. They were still permitted "to participate if cross-examination and argument are kept relevant to the issues now before the Board," but the Board did not state in what sense Northern was an interested person. This decision is significant in that it seems clear that the Board will allow American parties to intervene to discuss the Canadian public interest issues and in doing so a very broad interpretation is given to "interested persons" who may appear.

(4) Distribution Companies and Utilities. There is an obvious interest here in the protection of supplies for Canadian consumer markets as well as protecting the price of Canadian gas. Thus these parties will seek to increase the protection of Canadian requirements so as to reduce the surplus available for export.

(5) Other Parties. Outside of the parties discussed above, very few interventions have been made. In the Great Lakes case, discussed elsewhere, a joint intervention was filed by the Fuels Research Council, National Coal Association and the United Mine Workers of America, in opposition to the project, to protect their interest in the U.S. coal industry. In the same hearing a major intervention was entered by the Fort William-Port Arthur and District Labour Council and Local 628, United Association of Journeyman Plumbers and Apprentices of the United States and Canada. This group opposed the looping of the Trans-Canada line through the U.S. and sought to have the line built through northern Ontario instead, parallel to the existing line, to secure the benefits of construction to that area, rather than to the U.S. To the writer's knowledge, this was the most active intervention ever conducted in a proceeding before the Board by a private party outside the industry, and the intervention contributed substantially to the broad policy discussions carried out before the Board.

Clearly absent from past interventions have been public interest groups seeking to participate in the discussion concerning the policy concerning natural gas export and to oppose or support export proposals. All the groups discussed above have a financial interest in the outcome of the application.

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02 This objection was apparently not raised in the Westcoast intervention in the Alberta and Southern application for export to California, discussed infra, Section 4.B, (NEB Report (July, 1965), which was similarly an attempt to apply for an export indirectly when Westcoast did not have any export contracts to support an application.

03 NEB Report (August, 1966), at 3-12.

04 In the same hearing the Board permitted a joint intervention by the Fuels Research Council Inc., National Coal Association, and the United Mine Workers, NEB Report (August, 1966), at 3-12. The sole interest of these parties was in the U.S. coal industry, and thus sought a high export price for Canadian gas and argued that injury to the U.S. coal industry would be detrimental to the Canadian public interest. Unfortunately the Board did not respond to the latter argument.

05 The most obvious recent example is the intervention of Ontario Hydro in the August, 1970 decision of the Board, supra, in which Ontario Hydro sought, successfully, to reduce the volume of gas exported, to protect gas supplies for its own use.

06 See f.n. 94.


08 The case is discussed, infra, Section 5.B.

09 Since the writing of this paper, Pollution Probe of University of Toronto and the N.D.P. Waffle Group have appeared before the Board at an export hearing which commenced in July, 1971.
While the representation of provincial governments, particularly Ontario, comes closest to performing this function, it is the writer's understanding that such interventions have been narrower in scope and confined to the details of particular proposals. It is suggested that if the Board is to fulfill its function, then hearings should be concerned with the broad implications of gas export and its benefit to Canada.

While it is clear that public discussion of export policy is important in the process of formulating these policies, it is not clear how it can be accomplished. The hearings before the Board, are very long (the most recent lasted 54 days) and parties with a financial interest in the outcome will invest a substantial amount of money in preparing for and participating in the hearing. It is understood from discussion with the Board Chairman that any interested party, (such as a pollution group, political organization, or citizen's group) could make a submission to the Board, but in order to influence the Board, the party should present testimony and hence be open to challenge by other parties. It is also understood that applicants before the Board object to the admission as evidence of such interested statements and opinions. Thus we are left with a dilemma. A well-prepared intervention before the Board, supported by expert testimony and represented by experienced counsel would be very costly and probably impossible, as a result, to such parties. Thus, discussion of many issues will be left to the participation of provincial governments and the conduct of the hearing by the Board. Certainly this is a weakness of the system chosen to protect the Canadian public interest.

E. Hearings

There is no express requirement in the Act that the Board hold a hearing in respect of the issue of either a certificate of public convenience and necessity or an export licence. However, a hearing is specifically required with respect to the revocation or suspension of a certificate or licence and if a hearing is held for the issue, revocation, or suspension of a licence, it must be held in public. It would be academic, however, to consider whether hearings are required in respect of export licences, since the Board does in fact hold hearings.

A serious question arises concerning what evidence the Board may act on. The concern is not with respect to the exclusionary rules of evidence or

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100 The Board draws a distinction between submissions and interventions, NEB Report (August, 1970), at 2-1:

... an intervention is a document filed as an exhibit at the hearing that was supported by testimony or argument and that was consequently open to cross-examination or rebuttal. A submission is an expression of opinion or a statement of fact that was submitted to the Board which, while it may have been filed as an exhibit, was not supported by testimony and hence was not subject to cross-examination.

101 Act, s. 47 (certificates), s. 84 (licences).

102 Id., s. 20(1).

103 It should be noted, however, that hearings are not held in respect of orders authorizing exports. See supra, Section 3.A, for a discussion of exports by order.
the sufficiency of the evidence, but evidence which is not introduced at the hearing and hence not on the record.

On the basis of certain decisions of the Board, it would seem that its findings are not always based on evidence on the record. In the Great Lakes case one of the main issues was the economics of the Trans-Canada proposal for a pipe line south of the Great Lakes, through the U.S. relative to a route through Northern Ontario, parallel to the existing pipe line. At the hearing Trans-Canada presented evidence demonstrating that the Great Lakes line would substantially decrease transmission costs (relative to a Northern Ontario line), but the Board Staff carried out its own study and concluded that after five years of operation the transmission costs of the two systems would be almost the same. The study made by the Board Staff was not on the record and not presented at the hearing. While the Board approved Trans-Canada's application, it expressed serious doubts about the project in its Report and the proposal was initially rejected by the Cabinet, apparently largely because of this factor.

In the most recent export application proceeding, the Board included in its finding of Canadian gas requirements an amount for the Hearn thermal-electric generating station in Toronto which is converting from coal to natural gas as a fuel supply. This finding was based on evidence not on the record and Ontario Hydro-Electric did not approach the Board until after the hearing. It would seem to the writer that this could have a substantial influence on the bargaining position of Trans-Canada with the distributor, Consumers' Gas, and Ontario Hydro, since Trans-Canada would apparently not know what volume of gas supply was involved. This is not to criticize the Board decision to set aside this gas for Canadian use but rather to question whether the practice of considering such matters out of the hearing is appropriate. It is apparent from comments by the Minister of Mines and Minerals that Alberta may have objected to the decision to set this gas aside and this should have been brought out at the Hearing.

While the Board is directed to hold all hearings in public, they are also directed to "have regard to all considerations that appear to it to be

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104 See Carter, "The National Energy Board of Canada and the American Administrative Procedure Act — A Comparative Study," (1969), 34 Sask. L. Rev. 104, at 123-27, where it is concluded that the Board is not bound by the exclusionary rules of evidence and courts will not consider the sufficiency evidence on which the Board bases these decisions.
106 Id., at 5-20-38.
107 See discussion, infra, Section 5.C.
109 Id., at 3-7, 3-15, 10-9.
110 In its decision the Board commented on the contracting practices of the utility companies, and said that there was an obligation on the distribution utilities to ensure adequate protection of their future requirements. NEB Report (August, 1970).
111 Globe and Mail, October 15, 1970, at B3. The Minister is quoted as objecting to the Board's decision, no doubt because, in part, it resulted in part in the rejection of the Consolidated Natural Gas application to build a new export pipe line, since the Board determined that there was not an exportable surplus of gas sufficient to support that project.
112 Act, s. 20(1).
Since the Board functions as an administrative body, taking into account public policy, they can look to public policy considerations not on the record. Certainly it would seem preferable for these matters to be discussed at the hearing, and then be disposed of by the Board on their merits in order to permit public discussion of the issues.

F. Post-Hearing Proceedings

After the hearing, the Board together with its Staff considers the application; the time required to reach a decision is typically several months. While there is no statutory requirement to give a reasoned decision the Board in fact does so in all cases. The decision appears in the form of a "Report to the Governor in Council," since Cabinet approval is necessary in respect of all certificates and export licences. Furthermore the report is not published until after the Cabinet has disposed of it, although the Report is published even if the Cabinet refuses to approve it.

A right of appeal is provided:

18. (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal upon a question of law or a question of jurisdiction, upon leave therefor being obtained from that Court upon application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court or a judge thereof under special circumstances allows.

(2) No appeal lies after leave therefor has been obtained under subsection (1) unless it is entered in the Federal Court of Appeal within sixty days from the making of the order granting leave to appeal.

There have been only two appeals from NEB decisions. One involved the jurisdiction of the Board to award compensation for interference with mineral rights by a pipeline and is of no interest here. The other concerned a certificate issued by the Board for a pipeline carrying American oil through Canada and back to the U.S. However the Supreme Court dismissed the appeal on the question of whether the Board erred in law in determining on the facts that the proposed line "is and will be required by the present and future public convenience and necessity." Since the appeal was dismissed with no written reasons, we are left with no judicial comment on the scope of judicial review of the Board’s decision with respect to exports.

113 Id., s. 83.
114 See eg., Re Cloverdale Shopping Centre Ltd. [1966] 2 O.R. 439.
115 Act, ss. 44. The role of the Cabinet is considered, infra, Section 6.
116 Regulations, s. 8.
117 The Great Lakes application is the only case where the Cabinet refused to approve the Board’s decision. This was subsequently approved with modification to the scheme. See infra, Sections 5, 6.
118 Act, ss. 18-19. See Carter, op. cit., at 131-9, for a discussion of the right of appeal from NEB decisions.
122 Act, s. 44.
GAS EXPORT POLICY

A. The Formulation of a Gas Export Policy

One of the reasons for the establishment of the Board was to formulate a national policy with respect to gas export. In this section some of the considerations involved in this question will be discussed.

Natural gas, and all petroleum resources, are depleting and non-renewable resources and there is clearly an upper limit on the extent of these resources. It is assumed that the underlying policy objective should be to maximize the benefit to Canada from the development and use of these resources. This involves a consideration of whether the resources should be developed and used; if so, when, keeping in mind the long term interests of Canada; and finally, how the resource should be used, which includes a decision as to whether they should be used outside the country. The approach taken is to look at the benefits and costs to Canada as a whole from the development of the resource, and the main question considered is whether gas should be exported at all.

(1) Benefits from Development and Export

The most obvious benefits accrue from the sale of the resource by their owner. Most Canadian production of natural gas comes from Alberta, produced from gas reserves on Crown lands. There are substantial potential reserves in lands under Federal jurisdiction, especially the Arctic as well as in lands off the East coast, under ownership of the maritime provinces and the Federal government. Thus the respective governments receive a direct benefit from the sale of the resources to private parties who develop them. There is also a revenue benefit from taxation of the profits of the companies involved in the industry. A further benefit from exports arises from contribution to balancing the balance of payments with the U.S. The development and exploration activities represent a major input to the economy of the producing provinces, and particularly Alberta.

It is arguable that the export market for the resource encourages development and hence underwrites the cost of development while protecting the availability of the resource for Canadians. This however assumes that present development of the resource is a desired goal, while it might be argued that it would be best to defer development until the future.

Substantial benefits are associated with the transmission pipe lines. The construction of pipe lines represents a major economic activity with direct benefits from employment of construction and operation personnel,

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123 During the 23 year period ending in 1969, the governments of the four western provinces collected revenues totalling $3.5 billion from the lease of oil rights. Gray, supra at 10. In 1970 the total revenues to the Alberta Government from exploration and development of gas reserves on Crown land was $218,215,983. Alberta, Department of Mines and Minerals, Alberta Oil and Gas Picture 1947-1969 and 1970 (1970). This constitutes approximately 20 - 25% of Alberta's Provincial Revenues.

124 It might be argued conversely that this is of little or no benefit since construction employment is temporary and causes regional dislocations of the labour force.
purchase of capital equipment (pipelines, compressors, etc.) to the extent that this occurs in Canada. There are also economic multiplier effects resulting from the construction of pipelines, in the manufacturing sector. An important benefit from exports has been to the Trans-Canada line and thus benefit Eastern Canadian markets.

It is also arguable that since it is likely that there will be major innovations in the energy industries in the next 20 to 30 years, that there is no point in “sitting on resources” and we should sell them now. This assumes that there is a present benefit from export of the resource and that there will be no benefit from its future development. The development of alternative energy sources, however, is a contingency which may not be realized in the near future, as evidenced by the problems encountered in the development of atomic energy for power generation. Furthermore, the NEB forecasts that natural gas will increase in importance as a source of energy in Canada. Thus it might be in Canada’s interests to defer development of the resource to protect future needs.

An important benefit, which is often ignored, is the effect of development of gas resources on the development of the petrochemical industry. While natural gas is important as a form of energy, it is the by-products from the processing of the gas near the producing area, before the gas is sent to the consumption markets, which are used in the petrochemical industry. On this basis, Alberta has developed an important petrochemical industry, due in part to the availability of an export market for the processed natural gas.

There is also a substantial input to the economy from investment in the petroleum industry, in exploration, development, and marketing. However this may not be a benefit, but a diversion of the investment of scarce financial capital away from other activities.

(2) Costs of Development

The strongest argument offered against the development of the resource for export is that it is not in Canada’s interest to continue as a primary resource-based economy. Thus, it is argued, the resources should be used domestically as the basis of a strong secondary industry economy, since energy is of fundamental importance to such an economy.

A further cost is the extent to which commitments are made to continue supply of gas once the American market is supplied with gas. Thus, it might be argued that once the flow of gas is started it cannot be turned off at will, since commitments are for a long term (15 to 25 years). Furthermore once a pipe line is connected to an American market, that line effectively represents a permanent drain on Canadian reserves, and renewal of exports will be assured.127

127 It is interesting to note that while Canadian gas supplies represent only 3% of the total gas demands of the U.S. at this time, the NEB forecasts that this will increase to 15% by 1990.
There is also the risk that by becoming tied to supplying the U.S. energy market, the price for Canadian gas will be a reflection of the American price. This may mean an inadequate price for Canadian gas, as was the case in the Westcoast export. The presence of major American gas pipe lines in the market for Canadian-produced gas might result in a price increase to Canadian consumers, due to the increased demand. Against this proposition, it is argued that without the export market, gas prices will rise because of reduced incentive for exploration and hence the supply will decrease.

The end use of the gas should also be considered. Thus, it should be asked whether the activity using this energy is in Canada's long-run interests. This of course raises fundamental questions about our social goals and the society we live in and also forces us to consider whether the use being made of the gas in the export market is in Canada's best interests. This includes examination of the spill-over effects (such as environmental pollution) of the industries using the gas, both in Canada and the U.S. It might be argued that by continuing to supply gas to these industries an opportunity is lost to change the nature of that activity. Closely related is the ecological damage resulting from the development of the gas reserves such as the damage to the countryside, and interference from pipe line construction and operation.

The nature of the gas producing industry must be considered. Like the petroleum industry in general, it is almost wholly foreign-owned. Thus part of the profits realized from production are lost to Canada. More important, the decisions concerning development of the resources are made outside the country. The same is true of a market which is largely export-oriented since it is this market which largely determines the pattern of development of the producing areas.

(3) Conclusions

It is not possible to offer a simple yes or no answer to the question of whether Canada should continue to export natural gas. While a number of factors have been offered for consideration, they do not lead to any final determination of the question. Certainly at a high enough price, export may be in Canada's interest. However because of the uncertainties and unquantifiable factors involved it is not possible to determine this level. Furthermore it would seem that a long term commitment to export markets is undesirable, because of the risks and uncertainties involved. Perhaps exports can be justified if the terms are favourable to Canada, meaning a good price and a short term commitment. However, the factors weighing against this argument are formidable and a large question mark remains.

B. The Gas Export Policy of the National Energy Board Act

Although the apparent intention of the National Energy Board Act and the reason for the establishment of the Board is to maximize the benefit to Canada from the country's energy resources, there is no statement of this purpose in the Act, which contains no preamble, and in fact the statutory direction to the Board is in much narrower terms. The regulatory control of the Board is contained in Part VI of the Act:

81. Except as provided in the regulations, no person shall export any gas or
power or import any gas except under the authority of and in accordance with
a licence issued under this Part.

82. (1) Subject to the regulations, the Board may issue licences, upon such terms
and conditions as are prescribed by the regulations,
(a) for the exportation of power or gas, and
(b) for the importation of gas.
(2) A licence issued under this Part may be restricted or limited as to area,
quantity or time or as to class or kind of products.
(3) Every licence is subject to the condition that the provisions of this Act and
the regulations in force at the date of issue thereof and as subsequently enacted,
made or amended, as well as every order made under the authority of this Act,
will be complied with.

83. Upon an application for a licence the Board shall have regard to all consi-
derations that appear to it to be relevant and, without limiting the generality of
the foregoing, the Board shall satisfy itself that
(a) the quantity of gas or power 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 for gas or power exported by him
is just and reasonable in relation to the public interest.

There is a general prohibition on all exports of gas which may be author-
ized only by export licence.\textsuperscript{128} Section 83 contains the consideration which the
Board is required to take into account in making a determination of the sur-
plus of gas and that the price is “just and reasonable in relation to the public
interest”. The introductory words of the section are vague (“all considerations
that appear to it to be relevant”) and provide little direction other than to
permit the Board to introduce any factors it wishes. Of course it may also
be used by applicants and intervenors to introduce various arguments, but it is
up to the Board to decide their relevancy.\textsuperscript{129} The surplus requirement is nar-
row, but the Board has concentrated on this consideration in all its decisions,
as will be seen from the discussion in the next section.

The price consideration is potentially the broadest direction to the Board.
Strangely, the “public interest” requirement, in relation to a “just and reason-
able” price is the only mention of the public interest in respect of export
licences. There is no mention of the public interest in relation to the quantity
of gas to be exported, the term of the export, or indeed whether gas should
be exported at all, having regard to the objective of maximizing resource

\textsuperscript{128} Exports may also be authorized by order. This is discussed, \textit{supra}.

\textsuperscript{129} For example in the Great Lakes case, \textit{NEB Report} (August, 1966), Northern
Natural, in its intervention, attempted to convince the Board to consider the merits of
a displacement scheme, whereby Western Canadian gas would be sold to the Western
U.S. markets in exchange for the sale of U.S. gas into the Eastern Canadian market,
rather than the system proposed by Trans-Canada whereby Western Canadian gas
would be carried to the Eastern Canadian markets, with no connection to U.S. gas
supplies. By deciding not to hear evidence on the proposal (on the ground that there
was no specific application for such a proposal and the evidence was irrelevant) the
Board refused to consider the merits of such a scheme to Canada. It is suggested that
the Board should have considered this question and reviewed the original Canadian
policy, enunciated by C.D. Howe in the 1950's, that Eastern Canadian markets should
be supplied by Canadian gas, against the energy picture at the time. Instead, the Board
in effect deferred to this government policy without a consideration of its merits in the
contemporary setting.
benefit to Canada. It is suggested that a broad reading of s.83(b) could lead to such an analysis, since the Board could determine, on a benefit-cost analysis, that the "just and reasonable" price would be so high that there would be no export market. In fact the Board has not taken such an approach and has limited its decisions to an analysis of the cost of transmission, and the Canadian and American energy market prices. This is discussed in the next section.

Other considerations are introduced by Part III of the Act, which requires a certificate of public convenience and necessity issued by the Board to operate a pipeline. The criteria to be considered by the Board in respect of issuing a certificate are much broader than the export licence provisions:

The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipe line or an international power line if the Board is satisfied that the line is and will be required by the present and future public convenience and necessity, and, 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 oil or gas to the pipe 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 pipe line or international power line;

130 The Act does not give the Board power to regulate the well-head price of gas, and the price considered by the Board is that at which the gas is sold to the U.S. transmission company at the border (the "border price"). In its first decision, NEB, Report to the Governor in Council: In the Matter of the Application under the National Energy Board Act of Trans-Canada Pipe Lines Ltd., et al., March, 1960, at 11-27. Hereinafter, "NEB Report" (March, 1960), the Board considered its jurisdiction over well-head prices and decided that there is nothing in the Act giving the Board such jurisdiction and commented that approval of an expert did not constitute approval of gas purchase contracts. Subsequent decisions of the Board, particularly with respect to escalation clauses have certainly affected the price of gas at the well-head. By contrast the FPC has jurisdiction over the well-head price of gas under the Natural Gas Act, 1938, 15 U.S.C.A. 717 ff. as a result of the U.S. Supreme Court decision in Phillips Petroleum Company v. State of Wisconsin (1954), 3 P.U.R. 3d 129. See generally, Saucier, "Legal Problems Involved in the Transmission, Distribution, and Pricing of Natural Gas in Canada" [1960] Can. Bar Papers 298, for a discussion of regulation of the natural gas producer.

131 Act, s.26 (1) (a). The Act also retains indirect control over the persons operating pipe lines since only a "company" is defined, s.2(c) as a "person having authority under a Special Act to construct or operate pipe lines." While this was an important control prior to the establishment of the Board, and in fact led to many stormy debates in the House of Commons (in particular the Great Pipe Line Debate of 1956), the control would seem to be of very little significance today. It might be argued that the introduction of the Board, which had the effect of removing all these considerations from Parliament, was an attempt by the Government to avoid the difficult questions posed by export of natural gas, and in particular the controversial public debates. One example of a control exercised by Parliament over a pipe line is the Act incorporating Trans-Canada Pipe Lines, S.C. 1950-51, s. 92, as amended, S.C. 1953-54, c. 80, s. 6(a), providing that the Company may "within or outside Canada construct ... pipe lines ... provided that the main pipe line or lines shall be located entirely within Canada," an expression of the national policy about pipe line stated by C. D. Howe. The provision was raised by opponents of the Great Lakes project as preventing Trans-Canada from using the proposed line to be located in the U.S. for supply of Eastern Canada, but rejected by the Board.
(d) 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
(e) any public interest that in the Board's opinion may be affected by the granting or refusing of the application.\footnote{133}

Since major export applications always involve the construction of new facilities, an export licence application will usually be joined with an application for a certificate and accordingly these provisions must be considered. It is suggested that the requirement of "present and future public convenience and necessity", which is reinforced by the requirement that the "line is and will be required ..." is broad enough to encompass the widest analysis of the benefits and costs to Canada of export of natural gas, especially when combined with the specific requirements as to availability of gas\footnote{133} and the public interest requirement.\footnote{134} However, the Board has not taken such a wide approach in applying section 44, and it tends to look to the specific requirements of the subsections in a limited way.\footnote{135}

Further standards may be found in Part II of the \textit{Act} in which the advisory functions of the Board are set out:

22. (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.\footnote{136}

(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 for co-operation with governmental or other agencies in or outside Canada in respect of matters relating to energy and sources of energy.\footnote{136}

While this does not relate directly to the disposition of particular applications by the Board it would certainly seem to require the Board to comment on the public interest implications of export schemes, even if not publicly, and the Board is charged with recommending policies to the Minister. Similarly

\footnote{133} \textit{Act}, s. 44.\footnote{134} \textit{Id.}, s. 44(a).\footnote{135} \textit{Id.}, s. 44(c).

The Board has however considered the benefits of scale from the operation of a pipe line which serves both domestic and export markets. In the Westcoast case, \textit{NEB, Reason for Decision: In the Matter of the Application under the National Energy Board Act of Westcoast Transmission Company Limited, December, 1967} [hereinafter, "\textit{NEB Report (December, 1967)}"], the Board did consider that while the export markets had contributed to Canadian benefit by making the line economically feasible, this was no longer the case since gas was being exported at a very low price and there was no longer a benefit from the operation of the line. In the most recent decision, \textit{NEB Report (August, 1970)}, the Board turned down the application of Consolidated Natural Gas to export natural gas by a wholly export-oriented pipe line since there would be no benefits of the economies of scale of the operation of a large pipe line according to Canadian consumers.\footnote{136} \textit{Act}, ss. 22(1), (2).
the provision in s.22(2) would require the Board to consider the arrangements Canada has with the U.S. in respect of trade in energy,\textsuperscript{187} and evaluate whether the present framework for sale of natural gas is desirable.\textsuperscript{188}

In the general jurisdiction section granting powers to the Board there is a very wide hearing power:

11. The Board has full and exclusive jurisdiction to inquire into, hear and determine any matter

(b) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be done.\textsuperscript{189}

This would authorize the Board to conduct the widest possible public hearing to determine matters in the public interest.\textsuperscript{190}

Thus, in conclusion, there are potentially very wide criteria provided in the Act which would require the Board to consider the benefit and cost to Canada of natural gas export (and development in general). The writer expresses his apprehension however about the drafting of s.83, which sets out the criteria to be considered by the Board in disposing of an export application, since it seems to contemplate only limited consideration by the Board of the public interest.

C. An Analysis of the Decisions of the National Energy Board

In this section some of the factors considered by the Board will be discussed and related to the earlier discussion of the benefits and costs to Canada of exporting natural gas. The comments are based on the Reports of the Board to the Governor in Council which include lengthy discussions of the considerations taken into account by the Board. The most comprehensive

\textsuperscript{187} Since the "request of the Minister" relates only to studies and reports, the writer concludes that there is a continuing obligation on the Board to make recommendations concerning arrangements with other governments.

\textsuperscript{188} The Board apparently played an important role in the discussions between Canada and the U.S. with respect to the sale of crude oil. The private contract system of trade in natural gas is discussed, \textit{supra}, Section 5.C.

\textsuperscript{189} \textit{Act}, s. 11(b).

\textsuperscript{190} However in its most recent decision, \textit{NEB Report} (August, 1970), at 10-7, the Board rejected the idea of holding regular special hearings to consider Canadian requirements for natural gas:

The relative frequency of hearings on export licence applications and on domestic certificates applications, along with the Board's own activity in market surveillance and forecasting, which bring the Board into constant contact with industry thinking, appear to afford adequate opportunity for interest parties and for the Board to review future Canadian requirements.

In contrast, the Alberta Oil and Gas Conservation Board recently decided to hold special requirements hearings every three years, although it concluded that reserve hearings were not required. Alberta, Oil and Gas Conservation Board, \textit{Report and Decision of Policies and Procedures under the Gas Resources Preservation Act, 1956}, October, 1969. (OGCB Report 69-D). The writer has already expressed doubts about whether the export licence hearings provide a forum for interested parties, without a financial interest in the outcome of the decision, to express their views on the export policies of the Board. Perhaps a hearing of the type suggested would fulfill such a need and could be broadened to consider all the policy questions involved.
recent discussion of policies is found in the August, 1970 decision of the Board,\textsuperscript{141} authorizing the export of 6.3 Tcf of natural gas by four projects. The Board has not published any comprehensive review of its policies and criteria in respect of natural gas export, although it is suggested that this may be done in the future.\textsuperscript{142} The Federal Government is also making a comprehensive review of natural resource policy which may result in the production of two white papers, on minerals policy and energy policy,\textsuperscript{143} which will certainly influence the discussions between Canada and the U.S. concerning energy trade. A review and re-appraisal of Canadian energy policy, particularly with respect to exports would be most constructive at this time.

(1) Gas Export Policy

The most disappointing aspect of the Board’s decisions to date, in the writer’s opinion, has been the limited nature of the discussion of the Board’s policies in respect of the export of natural gas, in the context of an analysis of the benefits and costs to Canada of exporting gas. For the most part the decisions dwell on the mechanics of surplus determination evaluation of border prices, and the feasibility of the pipeline, without coming to grips with the broader policy questions. Part of the problem is, no doubt, the pressure on the Board to reach decisions and dispose of applications in minimal time. Certainly the delay involved is substantial. In the most recent case, Trans-Canada filed its application in June, 1969, hearings were held from November, 1969 to March, 1970, the Board submitted its Report to the Cabinet in August, 1970 and licences were issued on September 29, 1970.\textsuperscript{144} While this delay, in fact the entire proceeding, is expensive for the parties involved, it would likely impair the effectiveness of the decision-making if the Board were to give in to pressures to reach early decisions.

In its first decision, in March, 1960,\textsuperscript{145} the Board undertook virtually no analysis of the policy considerations and went through the mechanical calculation of the surplus available for export. Although the Borden Com-

\textsuperscript{141} NEB Report (August, 1970).
\textsuperscript{142} Id., Foreword, p. iii.
\textsuperscript{144} The writer was surprised to discover that the Board issued a certificate to Trans-Canada, in June, 1970, for the construction of the necessary pipeline facilities, before the final disposition of the export application. NEB, Interim Report to the Governor in Council: In the Matter of the Application under the National Energy Board Act of Trans-Canada Pipe Lines to Construct and Operate Certain Additional Pipe Line Facilities, June, 1970. Trans-Canada had commitments to U.S. customers starting in November, 1970 and it requested the early disposition to enable construction of the facilities in time to meet its commitments. The Board reasoned that if the construction was not completed in time, that: (at 7)...

... Trans-Canada would suffer a loss of revenue and there would be inconvenience, and possibly unnecessary hardship, to United States users of gas who are dependent on increased supplies from Trans-Canada. Apparently the certificate was issued with the understanding that Trans-Canada was proceeding at its own risk in the event that the export was not approved, and there were no interventions opposing the disposition.

\textsuperscript{145} NEB Report (March, 1960).
mission had considered the question and there had been extensive debates in the House of Commons, it would have been useful for the Board to open its first decision with a statement of the principles involved. Indeed, the Report lacks even an analysis of the statutory provisions.

Subsequent decisions have elaborated on various policies, mostly concerned with surplus calculation and the price of exports, but have not examined the export policy question in depth. Thus in the August, 1970 decision the Board commences Chapter 10 of the Report with a statement of “the basic policy of Canada in respect to exportation of natural gas”:

The basic concept is clear and simple. Natural gas may be exported if the Board, having satisfied itself that the gas is surplus to Canadian requirements and that the price is just and reasonable in relation to the public interest, and having regard to all considerations that appear to it to be relevant, is prepared to issue a licence and the Governor in Council approves the licence.

The concept is not “clear and simple”. However this represents a policy which has been consistently followed by Canada since the early 1950’s, namely that all “surplus natural gas” may be exported. There has also been an underlying policy favouring the winning of a share of the U.S. gas market for Canada. Until recent years, there was only a limited market for Canadian gas since U.S. gas was cheaper and the FPC opposed dependance on Canadian supplies. However, the drastic change in the U.S. energy supply situation has altered that and there appears to be a major market available for Canada. Far from opposing the sale of gas to the U.S. outright, the writer considers that Canada may be able to benefit from the U.S. situation, but it is imperative that there be an understanding of the implications of selling gas to the U.S.

It has been suggested earlier in this paper that one of the considerations which has been relevant in the Board’s decisions is the benefit from economies of scale accruing to Canadians from the operation of a pipe line serving both domestic and export markets. The Westcoast and Trans-Canada pipe lines are both examples of this.

In both cases the export component has contributed to the cost of operation of the line and hence Canadian consumers in Southern British Columbia and eastern Canada have benefitted from the export, since the pipe lines might not have been built but for the export market and the revenue from export has helped to decrease the cost of operating the line.

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146 Borden Commission, First Report. Even the Royal Commission attempted very little discussion of its recommendation that export be permitted under licence. Attention was focussed on formulae for determining surplus and price terms in contracts.

147 NEB Report (August, 1970), p. 10-1 -2. The writer does not intend to imply that the Board does not take into account other considerations. Indeed in this Report, the Board considered the term of export, the benefits of scale to Canadians accruing from the operation of a wholly export-oriented pipe line, protection of Canadian interest from the contracting practices of gas distribution utilities, and other matters, some of which are discussed in this paper.

148 In particular, natural gas which supplies approximately 1/3 of U.S. energy requirements is in short supply, partly as a result of increased demand for gas, since it is very low in sulphur content and hence not a major pollutant like crude oil, and also because the discovery of U.S. gas reserves has decreased substantially in recent years.
When Consolidated applied for a certificate and licence for a pipe line the Board was faced with the question of whether the line would be in the public interest. The question was complicated by the fact that there was a deficiency relative to the amount of gas applied for.\textsuperscript{149} In rejecting the Consolidated application the Board indicated that the economies of scale were an important factor:

In approaching the problem of assessment of the merits of individual application, the Board holds that, as part of its responsibility for making allowance for requirements for gas for use in Canada, it must bear in mind the need for sound development of those pipe line transmission systems which are the means of providing gas service to Canadian consumers. The carrying of gas should be a profitable activity, which when undertaken by transmission systems serving Canadian customers, should make available to such customers a share in the economies of scale and such benefits as may arise from the contribution of exports to the financial health of the transmission system. In effect this means that where a choice has to be made between licencing exports by a project wholly oriented towards exports and a project which serves Canadian customers and export customers, if all other factors were equal the choice would have to be in favour of the project serving Canadian as well as export customers.\textsuperscript{150}

This was a good decision on the Board's part, and this policy is weighted strongly in favour of ensuring benefit to Canada from the operation of pipe lines.

The Board's policies towards development of Canadian natural gas resources are not as clear. The problem here arises from the question of what rate the development of resources should proceed at. The producers argue that exports are important to provide an incentive to exploration and hence encourage development of reserves, which will protect Canadian requirements. Accordingly at the hearings they are usually at issue with the protection requested for Canadian requirements by the parties tied to the Canadian consumer market (such as Trans-Canada). The problem with this assertion, however, is that Canada already has sufficient established reserves to protect Canadian requirements for at least 20 years, and accordingly the development, at least at the rate desired by producers is not required for protection of the Canadian market. The Board would appear, however, to have made a choice to encourage present development:\textsuperscript{161}

\ldots The Board agrees with the producers and those who speak for them that estimates of Canadian requirements must be realistic and that those included in the forecasts must be reasonable. An unallocated "contingency allowance" in the requirements estimate might indeed result in unnecessarily locked-in reserves of gas, loss to producers, and discouragement of exploration and development.

Since Canadian requirements are protected it seems clear that this development is directed to the export market. Indeed the Board noted the increasing U.S. market requirements and the U.S. gas shortage.\textsuperscript{162} But it is not clear from the decision what benefits will accrue to Canada from continuing to supply that market and encouraging development of gas reserves to accomplish

\textsuperscript{149} The application for export totalled 8.9 Tcf and the Board determined that there was an exportable surplus of 6.4 Tcf. Thus it would be necessary to refuse one of the applications or alternatively share the supply among the applicants. \textit{NEB Report} (August, 1970), at 10-14.

\textsuperscript{150} \textit{NEB Report} (August, 1970), at 10-14 -15. Also at 10-42, -43.

\textsuperscript{161} \textit{Id.}, at 10-8 -9.

\textsuperscript{162} \textit{Id.}, at 10-9.
that end. While the Board does discuss the export price,\textsuperscript{185} it does not evaluate the effects on the Canadian petrochemical industry, whether detrimental or beneficial, nor the lost benefit of using this energy in Canada.

The Board does, however, indicate that it expects Canada to benefit from "reliable accessibility of export markets for Canadian crude oil."\textsuperscript{184} This is a reference to the U.S. import controls on crude oil from Western Canada. But it is questionable whether this would be a benefit, since the same questions about the benefit from the export of crude oil\textsuperscript{186} arise, as with natural gas.

With certain exceptions (such as analysis of benefits of scale) the Board's decisions have not evidenced any consideration of the underlying policy questions in considering Canadian gas export policy. This is not to say that exports have not been or will not be in Canada's interests, but the analysis to date has been very limited and has not considered the fundamental issues.

(2) Determination of Surplus

It has been suggested earlier in this paper that one of the main considerations of the Board, though not the only one, is the determination of whether there is a surplus of gas, as required by the Act:

\begin{quote}
the Board shall satisfy itself that
(a) the quantity of gas . . . 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 of discovery of gas in Canada . . .\textsuperscript{156}
\end{quote}

The determination of whether a surplus exists becomes a major focus of the Board's attention in its decisions. However, since the determination is a very technical one the writer will only review some of the factors involved. Essentially three stages are involved:

(a) quantifying "reasonably foreseeable requirements";
(b) determining the supply of gas, present and future; and
(c) quantifying the surplus.

The accompanying table,\textsuperscript{157} the current surplus calculation from the most recent case, demonstrates the elements involved in the calculation.

The established reserves include only proven reserves and not probable reserves. It should be noted that reserve estimation is not an exact science and hence there is an underlying risk involved in relying on these estimates.\textsuperscript{158}

\textsuperscript{185} \textit{Infra}, Section 5.B(4).
\textsuperscript{184} \textit{NEB Report} (August, 1970).
\textsuperscript{186} There are no export restrictions on the export of crude oil at present. In fact, the Canadian Government has been actively seeking increased access to U.S. markets for Canadian crude.
\textsuperscript{156} \textit{Act.}, 83 (a).
\textsuperscript{157} From \textit{NEB Report} (August, 1970), at 4-38.
\textsuperscript{158} Natural gas reserve estimation is based largely on techniques used to estimate oil reserves. Geologists have expressed considerable doubt about the techniques used and the reliability of the estimates. See North, "Oil Reserve Forecast are Unrealistic," \textit{Toronto Daily Star}, January 18, 1971, at 6; North, "Canada May Have Less Oil than We Think," \textit{Id.}, January 19, 1971, at 6. K. F. North is a Professor of Geology, Carleton University, formerly a petroleum geologist with Standard Oil of California); Hawkins, "Protecting Future Gas Supply," (1969), 84 Public Utilities Fortnightly, No. 4, at 39.
There is an allowance made for both reserves deferred for conservation purposes (that is to ensure maximum well output) and wells beyond economic reach. The latter would include remote gas fields which cannot be connected to transmission lines economically. It is understood that the Board bases its estimates of reserves largely on its evaluation of well measurements carried out by producers and the Alberta Oil and Gas Conservation Board. The Alberta Board estimates are particularly important, and this would seem sensible since that Board has the expertise and personnel to carry out reserve estimates. Authorized imports\(^{169}\) are added to the above figures, to yield the total supply.

### CURRENT SURPLUS CALCULATION

(Tcf at 1000 British Thermal (heating) units per cubic foot)

#### Supply

<table>
<thead>
<tr>
<th>Description</th>
<th>Quantity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Established reserves</td>
<td>57.4</td>
</tr>
<tr>
<td>Less reserves deferred (for conservation)</td>
<td>(1.7)</td>
</tr>
<tr>
<td>Less ½ gas considered beyond economic reach</td>
<td>(1.8)</td>
</tr>
<tr>
<td>Plus imports</td>
<td>0.1</td>
</tr>
<tr>
<td><strong>Total Supply</strong></td>
<td><strong>54.0</strong></td>
</tr>
</tbody>
</table>

#### Requirements

<table>
<thead>
<tr>
<th>Description</th>
<th>Quantity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada, except Alberta</td>
<td>25.9</td>
</tr>
<tr>
<td>Alberta</td>
<td>7.5</td>
</tr>
<tr>
<td>Processing shrinkage (from removal of by-product)</td>
<td>2.2</td>
</tr>
<tr>
<td>Existing export licences</td>
<td>12.0</td>
</tr>
<tr>
<td><strong>Total Requirements</strong></td>
<td><strong>47.6</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Description</th>
<th>Quantity</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Current Surplus</strong></td>
<td>6.4</td>
</tr>
<tr>
<td><strong>Requested Exports</strong></td>
<td>8.9</td>
</tr>
<tr>
<td><strong>Current Surplus (Deficiency)</strong></td>
<td>(2.5)</td>
</tr>
</tbody>
</table>

\(^{169}\) Imports of natural gas are only authorized under licence, the same as exports. *Act*, s. 81. However, as seen from the table, gas imports are relatively unimportant in quantity. The only recent import application of which the author is aware was made by Union Gas Company of Canada Ltd. to import 1.1 Tcf of gas, over 20 years, from Panhandle Eastern Pipe Line Co. into Windsor, Ontario. NEB, *Reasons for Decision: In the Matter of Union Gas Company of Canada Ltd.*, December, 1968. The Board refused to approve the import. Union Gas argued that the imported gas would cost $2,000,000 less over the term of the import than gas supplied by Trans-Canada (.194$/Mcf cheaper). However the Board concluded (at 41) that this was only a marginal benefit and furthermore there was a strong possibility that the import would be more expensive because of a sensitive price term in the contract and a possibility of a U.S. rate increase. The Board concluded, at 46:

> The Board believes that before it should issue an import licence and recommend its approval to the Governor in Council, it must be satisfied that the importation of the gas will be of some advantage to Canada. Where the alternative to importation is the use of Canadian gas, the inherent advantages of the use of indigenous gas resources might be expected to be offset by a lesser cost of the imported gas or by a greater availability of supply, or by some combination of these two factors.
The evaluation of “reasonably foreseeable requirements for use in Canada” is more complex. In its analysis the Board projects Canadian requirements for a 30 year period\textsuperscript{100} for each province and for the different market uses.\textsuperscript{101} However the Board does \textit{not} use these figures in determining surplus. Rather, a protection level is projected by multiplying the forecast requirements in the fourth year of the proposed export times a factor of 25.\textsuperscript{102} In the case of Alberta, the Board uses the OGCB protection level of 30 times the first year Alberta requirement.\textsuperscript{103} It should be noted that there is a substantial difference between the 30 year forecast requirements (66.9 Tcf)\textsuperscript{104} and the requirements figure used in the calculation of current surplus (33.4 Tcf).\textsuperscript{105} This difference is due to growth forecast in Canadian requirements, which must come from the trend gas, discussed below. The difference between the supply and projected requirements gives the current surplus, determined here to be 6.4 Tcf. The figures adopted by the Board in its determination of requirements are obviously critical to the outcome of the application, and is usually one of the main issues of the hearings.

The Board also calculates the future surplus which is derived by repeating the current surplus calculations at 5 year intervals for a 20 year period. This calculation includes an allowance for trends in discovery as required by the \textit{Act},\textsuperscript{106} and the Board arrived at a figure of 3.5 Tcf per year, based on the historical finding rate for the past 10 years.\textsuperscript{107} The result of this calculation is that this historical finding rate of 3.5 Tcf per year was not sufficient to support all the exports applied for. The calculation was performed including the Consolidated application, which was refused. Unfortunately the Board did not repeat the calculation using the approved exports,\textsuperscript{108} but they commented:

\begin{quote}
It is therefore clear that the rate of discovery of the last ten years, 3.5 Tcf per annum, will not support any large increases in exports beyond those now under consideration, with due provision for supply for those exports, as well as Canadian requirements, either large new sources of gas in the frontier areas will have to be established, or the rate of discovery in the portion of the Western Canadian Sedimentary Basin already under development will have to be substantially increased.\textsuperscript{109}
\end{quote}

\begin{flushleft}
\textsuperscript{100} \textit{NEB Report} (August, 1970), Chapter 3.
\textsuperscript{101} Residential, commercial, industrial, thermal-electric power generation, pipe line losses, and fuel required to power the gas turbine-driven compressors along the pipe line.
\textsuperscript{102} \textit{NEB Report} (August, 1970), at 4-35.
\textsuperscript{103} This is but one example of the unique treatment given Alberta, as a result of requirements that export applicants must show authority to remove gas from a province in applying for an export licence. \textit{Regulations}, s. 4(2) (i).
\textsuperscript{104} \textit{NEB Report} (August, 1970), at 3-19.
\textsuperscript{105} That is, Canadian requirements 25.9 Tcf
Alberta requirements 7.5

Total Canadian requirements 33.4 Tcf
\textsuperscript{106} \textit{Act}, s. 83 (a).
\textsuperscript{107} \textit{NEB Report} (August, 1970), at 4-18.
\textsuperscript{108} Furthermore, many of the figures used in the calculation are unexplained, and it is consequently very difficult to assess the significance of the future surplus calculation.
\textsuperscript{109} \textit{NEB Report} (August, 1970), at 4-41.
It further seems clear from these calculations that future Canadian requirements cannot be supplied from existing reserves, even including the historical finding rate and as a result the finding rate will have to increase just to protect Canadian use of gas.

Thus, not only is the Board encouraging immediate development of gas reserves, but it is in fact forcing it, just to protect Canadian requirements. It is submitted that this is due to an excessive estimate of the amount of trend gas which may be included in the determination.

(3) Policy Towards Commitment of Canadian Gas Resources to Export Markets

One of the problems in considering exports is the commitment of Canadian resources which may result from supplying the U.S. gas market. While Canadian gas exports represent only 3% of the U.S. natural gas supply, there are certain U.S. market areas which are supplied solely by Canadian gas. Can, or will, Canada ever cut off the gas supply to these markets? The question arose, in 1960, in the first case before the Board. Niagara Gas Transmission was applying to export gas, which it purchased from Trans-Canada, to St. Lawrence Gas Company, at Cornwall, Ontario. The Board rejected the application, because it was not satisfied with the price terms, but suggested that Niagara re-apply. In its evaluation of the application the Board noted that the gas purchase contract made no provision for increments in market demand, after 1963, and that Trans-Canada would be the sole supplier source of gas to be supplied to the area, and commented:

... acceptance of the present application would imply acceptance of some responsibility to supply, within a short period and thereafter, additional gas to meet the peak load growth of the area, or else would imply a rather casual view by the Board of the responsibilities of Canada in commencing a strictly limited supply of gas to a wholly dependant export market. Neither implication is acceptable to the Board.

Upon hearing a revised application by Niagara, the Board approved the export licence, being satisfied with the price terms, but elaborated on the problem of Canada being the sole supplier. The Board considered the effect of the export on the competitive position of industries of the two countries, but was satisfied that there would be no disadvantage to Ontario, since gas was available in Southwestern and Central Ontario at prices which were at least as favourable as the export price. This would not seem to be

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170 The NEB projects that will increase to 15% by 1990.
171 Examples are the Montana market, supplied by the Canadian-Montana Pipe Line Company, the northern New York and the Vermont market supplied by the Trans-Canada system, and the Upper New York State market supplied by the Trans-Canada system, through Niagara Gas Transmission in Canada. In addition several small U.S. border communities are supplied by the Trans-Canada main line.
173 Id., at 12-26 -27.
175 Id., at 10. This factor which is essentially a consideration of the benefit to Canada from using gas domestically rather than for export, to improve the competitive position of Canadian industry from a supply of inexpensive energy has not been discussed elsewhere by the Board to the writer's knowledge.
adequate. Surely Canadian gas should be used to improve the competitive position of Canadian industry. They also considered the advisability of impairing Trans-Canada's ability to satisfy the potential peak requirements of its customers, but concluded with respect to the export that it would be "consistent with Canadian-United States relations to allow the export of gas to small communities lying adjacent to the international boundary where this does not cause undue difficulties in Canada," and that since the volume was small, the situation was unlikely to cause embarrassment to Canada or the United States. They added a caveat to their approval, advising the parties that the Board could not undertake to issue a future licence for the incremental demand in the market, which would have to be considered at the time of an application, and that the Board could not commit the Governor in Council to validate any licence. The Board did not satisfy its own objections to U.S. market dependence, raised in its first decision. The decision would seem to imply that the Board is willing to make a future commitment to the market, in spite of its caveat.

The Federal Power Commission has been concerned with the converse question: is it the United States' interest to allow an area to become dependent on Canadian gas supplies? The question arose in the Westcoast application to supply gas to the Pacific Northwest states and in 1954 the Commission concluded:

Regardless of the long and cherished friendly relations with any neighbour nation able to supply such area with natural gas, it would not be in the public interest to permit the importation of its gas as the sole source for the consumers in need of an uninterruptible supply at a reasonable price, which should always be assured by this Commission to the full extent of its powers.

The Commission later approved the modified import scheme on the basis of a supply of gas supplementary to domestic supplies. It should be noted that Canada had approved this export through the issue by the Minister, in 1953, of an export licence, with apparently no concern for the dependence of the U.S. market on Canada.

The FPC has subsequently changed its position and has permitted Canadian gas to become the sole source for several U.S. markets. The pressures in U.S. markets for additional natural gas is such that the FPC would be willing to become more dependent on Canadian supplies. But this should make Canada wary since freedom in export policy formulation then becomes compromised by the presence of a large dependent market.

A problem arises from the very existence of a Canadian pipe line connected to a U.S. market. There will be a continuing pressure on the Board to permit exports through the line at its capacity, from the pipe line company, as well as the markets being supplied. Thus it is questionable how

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170 Id., at 12.
177 Id., at 19.
178 (1954) 13 FPC 221. See Miller, Foreign Trade in Gas and Electricity—A Legal and Historical Study (1970), at 100 ft., 195 ft.
realistic it is to expect that after the expiry of a licence the Board would refuse to issue a new licence. Indeed there would be a pressure on the Board to authorize the line to be used to its capacity. The Board considered this in rejecting the Consolidated proposal:

Whatever disclaimer might be set forth as to any commitment or obligation to authorize increments of export beyond the original, the suppliers, owners, and customers of a pipe line which is not used to its full capacity all have a strong incentive to use every means to ensure its repletion. Once a large diameter pipe line is in place, the "cheap expansibility" available in it gives its owners a very powerful lever in seeking supply contracts and authorizations to develop the system to optimum capacity, but the cost of service concept makes it unlikely that Canada would receive the full value of gas exported in the later stages of development of such a system. 180

Coupled with the Board's reservations about wholly export-oriented pipe lines, this represents a very useful approach to export of natural gas, and in the writer's opinion is one of the best indications of the protection that the Board has insisted upon, so as to maximize the benefit to Canada of natural gas exports.

However, at the same time the Board has indicated that it considers export licences to be firm commitments and virtually rules out the possibility of altering a licence:

Although section 17 of the Act enables the Board to review its decisions, and, with the approval of the Governor in Council, to alter a licence issued by it, it is a premise of the Board's approach to the licencing of the export of natural gas that, once a licence for firm export for a fixed period has been issued, it should not be diminished in effect or put in jeopardy so long as the conditions of the licence are observed. Such reliability of licences is desirable both in equity to producers, exporters, United States importers and consumers of the gas licenced for export, and in the interest of orderly development of relations between Canada and the United States in respect of natural gas. But the Act contemplates that Canadian requirements be given first preference. In order to minimize potential conflict of these objectives, it is necessary to use reasonable caution in ensuring that provision for Canadian requirements is adequate. 181

The implication of this statement is to virtually repeal s.17 of the Act which provides:

(1) Subject to subsection (2), the Board may review, rescind, change, alter or vary any order or decision made by it, or may rehear any application before deciding it.

(2) The Board may change, alter or vary a certificate or licence issued by it but no such change, alteration or variation is effective until approved by the Governor in Council.

In discussions with the Chairman of the Board, it was indicated that the wording of this statement was too strong and it does not mean that the Board will not review a licence, however, he re-iterated the Board policy in favour of the firmness of contracts. 182

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180 NEB Report (August, 1970) at 10-41 -42. The cost of service type of contract adds on transportation costs to the wellhead price of gas and does not relate the export price to the price of other forms of energy in the market where the gas is sold. This is discussed infra, Section 5.C(4).

181 Id., at 10-8.

182 The effect of the policy is altered somewhat by Regulations, s. 11A which directs the Board to review the price of exports. See infra, Section 5.C(4).
While the Regulations\textsuperscript{183} and the Act\textsuperscript{184} provide that exports shall be for a maximum period of 25 years, in 1970 the Board concluded that exports should be authorized for periods less than 25 years. This was based on concern that the price of a gas export might not be satisfactory in the future because of rapidly changing U.S. market conditions and because of concern with the accelerated rate of take from reserves which was resulting in a situation where a considerable portion of the term of an export would have to be provided for out of future discoveries. Consequently the Board reduced the term of the licences to 15 years and indicated that in future the term might be reduced even further.\textsuperscript{185} From the viewpoint of financing pipe lines this could raise problems, since they have traditionally been financed through debt instruments, linked to contracts for supply, sales for 20 to 25 year terms. However the Board rejected the applicability of such “conventional wisdom” in the current energy market, at least in respect of established pipe line enterprises and served notice on producers, transmission agencies, export purchasers and Canadian gas distributors to change their contracting practices in anticipation of “relatively short export licences.”\textsuperscript{186}

The approach taken by the Board in reducing the term of export licences is in the Canadian public interest and will reduce some of the risks arising from the firm commitments made in respect of exports.

(4) The Price of Exports

The problem here lies with the nature of the contractual arrangements in the natural gas industry. Unlike the oil industry where producers contract for relatively small quantities of oil for short periods, of less than one year, the natural gas industry developed a system where transmission companies in order to finance their pipe lines, insisted on long term commitments from gas producers, for 20 to 25 years. In the early stages of development of the natural gas industry there was a buyer’s market for gas and consequently gas purchase contracts were fixed price arrangements, the transmission company paying a fixed price to the producer and the distributor paying a fixed price to the transmission company (although there was often allowance for increased transmission costs). This contributed in part to very low consumer prices for natural gas, since gas prices would not fluctuate to reflect the energy market.

Earlier in this paper, the background of the Westcoast gas export contract of 1954 was discussed and it was shown how the unsatisfactory nature of the price of the contract, which resulted from the uneven bargaining power of the parties and the pressure exerted by the FPC, led to dissatisfaction with the current export arrangements and was one of the factors leading to the establishment of the NEB.\textsuperscript{187}

In the 1960’s the market demand for natural gas changed drastically and consequently most-favoured-nation clauses (where a gas purchaser would

\textsuperscript{183} Regulations, s. 9.
\textsuperscript{184} Act, s. 85(b).
\textsuperscript{186} Id., at 10-20 -22.
\textsuperscript{187} Supra, Section 2.
pay a producer the same price as he paid to all other producers) and escalation clauses (either a fixed increase per year or tied to the price of either gas supplies in the market area) became the prevalent practice. Thus in 1967, Westcoast and its American customer, El Paso Natural Gas, agreed to a new pricing arrangement in which the 1954 contract would be absorbed into a new contract which included an escalation clause. The Board approved the export but the FPC refused to approve the price term and the result was a major confrontation between the two regulatory bodies. Ultimately the two bodies approved a compromise contract, which represented a substantial improvement over the prior contractual arrangements. These cases will be discussed only in reference to the price criteria which emerged.

It will be recalled that the Act requires that the Board be satisfied that

... the price to be charged by an applicant for gas or power exported by him is just and reasonable in relation to the public interest.

before issuing an export licence. Earlier in the paper the writer suggested that this requirement might be read very broadly to require the Board to examine the costs and benefits of the proposed export to Canada, The Board has not interpreted the provision in this way but has taken a narrower view, restricted to a consideration of the costs incurred by the parties and the prices paid in the markets in Canada and the U.S. In the Westcoast case, when the Board refused to approve the export terms required by the FPC, the Board stated its criteria to be:

1. The export price must recover its appropriate share of the costs incurred;
2. The export price should, under normal circumstances, not be less than the price to Canadians for similar deliveries in the area;
3. The export price should not result in prices in the United States market area materially less than the cost alternative for energy from indigenous sources.

The first test requires as a minimum price the cost of service, that is the exporting company must recover all its cost, including provisions for increased costs.

The second test is a direct result of the Westcoast situation, discussed earlier, where as a result of FPC pressure Westcoast agreed to very unfavourable contracts for the export from B.C. to the Pacific Northwest market. The Borden Commission examined these arrangements in which the gas was

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189 Re El Paso Natural Gas Company, Opinion No. 526, (1967), 70 P.U.R.
190 See Miller, op. cit., at 99-111 for a good discussion of this case.
192 Act, s. 83(b).
193 Supra, Section 5.B.
being exported at 22¢/Mcf but being sold to B.C. customers in Vancouver for 32¢/Mcf. A study prepared for the Commission concluded that the operating profits of Westcoast were coming solely from the Canadian consumer and no profit was being made by Westcoast from the export.\textsuperscript{195} While these facts are startling it should be pointed out that the B.C. consumer was receiving a very real benefit from the export, since without the export the Vancouver market would not have been able to support the pipe line from Northern British Columbia and hence Southern B.C. would not have been serviced by gas until considerably later. These arrangements have been varied considerably as a result of the 1967 conflict of the FPC and NEB.

The third test presents difficulty because of the long term contracting arrangements in the gas industry. In 1970 the Board found that the consolidated export would result in the sale of Canadian natural gas in the U.S. at prices substantially lower than competing energy costs since the contract was based on the cost of service approach and consequently would not reflect the future market conditions. This led the Board to express further doubt about wholly export oriented contracts since they are based on a cost of service approach:

> It can be said that the projects which are wholly oriented for export can meet this third test, if at all, only by coincidence at occasional periods in the life of the projects. This follows because the cost of service approach, upon which they are based, by definition ignores the price of alternative energy sources in the market area, except to the extent that such prices constitute a ceiling on the price at which the exported gas may be sold to the extend that the prices received for gas exported fall short of reflecting the value of the gas in the market area, the revenue foregone may be described as the “cost of the cost of service,” which is ultimately borne by Canadians.\textsuperscript{196}

The Board consequently rejected the Westcoast application. The solution seen by the Board to the problem is two-fold: shorter term contracts and exports, and a continuing review of export contracts. The latter was expressed in a new regulation passed by Cabinet immediately prior to the approval of the export licences in September, 1970:

\textsuperscript{11A. (1) Every licence for the exportation of gas is, in addition to any other terms and conditions imposed by or under the Act, subject to the condition that the price to be charged for gas, the export of which is authorized under the licence, shall be subject to review by the Board, and where, in the opinion of the Board there has been a significant increase in prices for competing gas supplies or for alternative energy sources, the Board shall report its findings and recommendations to the Governor in Council.}

\textsuperscript{11A. (2) Where the price to be charged for gas, the export of which is authorized under a licence, is reviewed and reported on by the Board pursuant to subsection (1), the Governor in Council may by order establish a new price below which gas exported under the authority of that licence may not be sold or delivered after such date as may be specified in the order.}

\textsuperscript{11A. (3) Where an order is made pursuant to subsection (2), it is a condition of the licence in relation to which the order is made that gas exported under the authority of that licence shall not be sold or delivered at a price below the new price after the date specified in the order.}\textsuperscript{197}


\textsuperscript{197} Regulations, s. 11A added by P.C. 1970-1706. Since the regulation was passed prior to the new export licences, it is clear that it applies to them, but it is not clear whether it applies to prior licences.
The Chairman of the Board had indicated that he doubted that an order would be made and that he would not want to use the power, except in extreme circumstances. Rather, he viewed this as a pressure device which would encourage the industry to "co-operate" with the Board and change their contracting practices.

As has been seen, the contracting practices of the gas industry have changed drastically in the last 20 years. Now that there is a shortage of energy it remains to be seen how effective the Board will be in securing the benefit of this situation to Canada. Certainly, the writer considers that the changes proposed by the Board in 1970 represent a considerable improvement in the Canadian position, at least in respect to the price at which gas is sold. However, the criticism offered earlier is repeated. The Board should in its consideration of export prices analyze the benefits and costs to Canada from export of natural gas.

6. THE ROLE OF THE CABINET AND ITS RELATIONSHIP TO THE BOARD

The relationship of the Cabinet and the Board is a strange mix of independence and direct control. The Members of the Board are appointed by the Cabinet, but are given independence by their term of office (7 years). In its advisory functions the Board reports to the Minister of Energy, Mines and Resources, and the Minister may require the Board to carry out studies. The Board is further required to submit an annual report to the Minister and the Minister answers for the Board in the House of Commons.

In its regulatory functions, particularly the issuing of certificates and licences, the Board is required to act independently by the Act since it is required to be satisfied that the criteria of the Act are complied with. However, the Cabinet maintains ultimate control over these functions since it is required to approve all certificates and licenses. The question which logically follows is which body sets the policies? Certainly it is clear to the writer from an interview with the Chairman that there are no discussions

108 Act, ss. 3(1), (2).
109 Id., s. 22. The Minister even controls the publication of all studies and reports, s. 23.
200 Id., s. 91.
201 Id., ss. 44, 83.
202 Id., s. 44 (certificates); Regulations, s. 8 (licences). An argument may be offered to challenge the validity of the Cabinet approval requirement in respect of licences. Gas may only be exported under the authority of Part VI of the Act. (s. 81) This authority may arise through a licence issued by the Board (s. 82(1)) or through other means provided in the regulations (s. 81 "Except as provided in the regulations"). The regulations do provide two further methods of exports by orders, discussed supra, Section 4.A. In issuing licences the Board is "subject to the regulations" (s. 82(1)). However the authority to pass regulations is limited ("regulations for carrying into effect the purposes and provisions of this Part," s. 85). It is submitted that Cabinet approval does not carry into effect the purposes or provisions of Part VI, since the Part contemplates a system where the Board decides. Certainly the Cabinet could not authorize an export without involving the Board. Furthermore the regulations are tied to the purposes and provisions of Part VI and hence one cannot look to the Cabinet control over the Board through the advisory functions of Part II.
between the Board and Cabinet members in respect of particular applications. However this does not answer the question with respect to policy decisions and evaluation of the public interest. The analysis may really be circular. Most of the expertise in energy matters lies with the Board and the Minister has only a small staff of energy experts. Thus it may be that influence is exerted by the Board on the formulation of Government policy, which in turn influences the Board’s decisions.

The writer is unaware of any statements by the Board that it considers itself bound by Government policy. The Chairman commented, however, in discussion with the writer, that he felt a duty to “take note” of Government policy as stated in the House of Commons and he also said that the Board takes note of Cabinet approval of licences and considers this approval of the criteria enunciated in the Board’s Reports, calling this a form of “economic jurisprudence”.

The only occasion where the Cabinet refused to approve an export licence approved by the Board arose in the Great Lakes case. This is probably one of the most fascinating examples of the working of government.203 By the early 1960’s the Eastern Canadian gas market had grown so rapidly that the Trans-Canada line through Northern Ontario was at its capacity and Trans-Canada had to increase the flow of gas to the market. Faced with two possible approaches — looping the line through the rough terrain of Northern Ontario or building a new line south of the Great Lakes through the U.S. — the company chose the latter, which it estimated would be much less expensive and would result in lower transmission costs for Eastern Canadian consumers. As a result of the strong opposition which was presented at the initial FPC proceedings by American Natural, which proposed to build a line through the same area to carry gas on behalf of Trans-Canada, the two companies agreed to a joint venture with equal ownership of the line, with the further advantage to Trans-Canada that it would have an American market which would enable them to use the line to its capacity in its early stages, improving the economic feasibility of the line.

There was strong opposition to the project from two quarters, as discussed earlier. Northern Natural of the U.S. proposed a displacement project instead of the direct line, but this was unacceptable to Trans-Canada in light of the Canadian policy dating to the early 1950’s against such a scheme.204 There was also strong opposition to the project from parties in Northern Ontario who wanted the line to go through the area, to gain the obvious economic benefits. In August, 1966, the NEB approved the project.205 However, the Board’s decision expressed serious doubts about the project, includ-

203 See Kilbourn, op. cit., at 167-193 for a more complete discussion of the events surrounding this case.

204 Northern’s opposition was strong both at NEB and FPC hearings. In fact they carried the matter to an anti-trust suit in the U.S. when the FPC authorized the line, alleging that the joint venture of the two companies was in violation of U.S. anti-trust laws. The question was not finally settled until July, 1970, Re Great Lakes Gas Transmission Company, Opinion No. 580 (FPC). In the meantime the line had been approved by the FPC which allowed the construction and operation of the line to continue pending the final outcome of the legal proceedings.

ing concern about whether the means of transmission should become established in another country subject to foreign regulatory control, the effect on the balance of payments, the loss of the benefits of the extensive construction programme, and doubts about whether the Great Lakes proposal would really be more economical in the long run. The decision raised so many doubts about the project that one is left wondering why the Board approved the application. It would seem that the Board had decided to leave the final decision to the Cabinet based on the Board’s analysis of the proposal.

On August 25, 1966, the Cabinet refused to approve the project, noting all the factors presented by the Board and concluded that it was not in Canada’s interest that a main line carrying gas to Canadian consumers be located outside the country. The Cabinet statement commented:

In its reasons for decision, the Board drew the attention of the Governor in Council to aspects of the public interest which extend beyond its field of responsibility.

This would seem to confirm the writer’s doubts about the Board’s disposition of the application, and raises serious questions about the Board’s role in regulating the export of natural gas. The Cabinet comment certainly indicates an intention to retain control over certain aspects of the public interest. We are thus left with a strange situation where the deciding body, under the Act, is ostensibly the Board, but in practice it is the Cabinet which makes the important policy decisions.

The picture is complicated by the events that followed the Cabinet rejection on August 24, 1966. Trans-Canada entered into direct negotiation with Cabinet ministers (and a flurry of lobbying followed) and two days after the announcement the Minister of Trade and Commerce expressed interest in a company proposal that the Great Lakes line should never carry more than one half of the supply for Eastern Canada. Shortly after, a meeting was held, attended by senior Cabinet ministers and a formidable group of Canadian businessmen. Coincident with these negotiations a conference of provincial premiers was being held in Ottawa, and the premiers of Alberta, Manitoba, Ontario and Quebec were seeking to have the Cabinet decision reconsidered. Alberta was concerned about gas markets while the others were concerned about the price effects. The Cabinet reversed its decision on October 4, 1966, approving an arrangement which would require a minimum of 50% of gas destined for Eastern Canada to be carried by the Canadian line.

The role of the Board in the events between August 25 and October 4 was clearly subordinate to that of the Cabinet. It is understood that no Board members participated in the Cabinet discussions with the Trans-Canada pro-

207 Id., at 1. Emphasis added. This represented adherence to the Canadian policy which originated in the 1950’s, that the main line supplying gas to Eastern Canada should be located entirely in Canada under exclusive Canadian control.
208 Kilbourn, op. cit., at 182.
ponents. The Cabinet referred the modified proposal to the Board for consideration, in its advisory capacity, but a public hearing was not held by the Board and there was no opportunity for the intervenors to comment on the proposal. The Cabinet stated in announcing its new decision:

The Board has also informed the Cabinet that in its view, the undertakings given and representations made by Trans-Canada are an adequate and acceptable response to the reasons given the Government statement of August 25 for not approving the certificate and licences sought by the Company. Thus the final decision was taken by the Cabinet and it was the Cabinet’s policy which was applied. What is most disturbing is the complete change of position taken by the Cabinet in 6 weeks. In the writers’ opinion the modified plan was not really a major departure from that which the Cabinet had earlier rejected. What made the Cabinet change its decision? It would seem to the writer that major factors were the pressure applied by the provincial premiers and the strong statement made by the President of Imperial Oil of Canada in favour of the Great Lakes scheme at the September 9th meeting.

The Great Lakes case leaves a good deal of confusion about the respective roles of the Cabinet and the Board. If the effect of this decision is to discourage the Board from considering the difficult policy questions raised in considering the export of natural gas, then it is a turn in the wrong direction in the development of the Board’s role in decision-making in respect of export policy. However the Board appears to have strengthened its role in subsequent decisions. This is seen in the Board’s decision in the Westcoast case and in particular in its 1970 decision in which the Board formulated new methods of protecting the Canadian public interest.

The criticisms in this section concerning the role of the Cabinet should not be interpreted to mean that the Cabinet should not be involved in the process. Quite the contrary. Since the export of natural gas and energy policy in general is a matter of national interest, the formulation of policies towards export must involve the Cabinet. But it is important, in the writer’s view, that a statement of policy be made which will clarify Canada’s position. If the Board is to be influenced by Government policy, which it should be, and if the present system whereby exports are authorized in an adjudicatory proceeding is to continue, it is in Canada’s interests that a clear public statement of energy export policy be made. This should be done by the Cabinet with the advice of the Board. The Board should also hold public hearings, in which all interest groups should be encouraged to participate, in order to assist it in considering the costs and benefits to Canada from the export of energy, and natural gas in particular. Such hearings are clearly within the Board’s jurisdiction and would be beneficial to the formulations of a clear policy by the Cabinet together with the Board.

210 The Chairman informed the writer that the Minister had asked the Board if it objected to the Cabinet dealing directly with Trans-Canada but the Board did not object, since it had already indicated its approval for the project as applied for.
212 Kilbourn, op. cit., at 182.
7. THE FRAMEWORK OF CANADIAN-AMERICAN RELATIONS IN THE TRADE OF NATURAL GAS

Since the early 1950's the trade between Canada and the United States in natural gas has grown to considerable proportions and it appears likely to continue. In the future the relationship between the two countries in matters of energy trade will become the focus of far greater attention than we have seen to date, as a result of the development of energy resources in the northern regions of Canada and Alaska. At the time of writing this paper the construction of a pipe line carrying Alaskan oil to the lower 48 states is the subject of considerable attention. There are also discussions between the two governments concerning increased sale of Canadian energy to the U.S. In this section the writer will consider the existing framework of Canadian-American relations and whether it is appropriate for the future.

In the case of natural gas, the two regulatory agencies — the NEB and the FPC — are the dominant bodies making decisions but the framework of trade is the export contract of private parties. Governments do not initiate exports (or imports) — they merely approve them — and decisions of the two bodies are made independently of each other. This system has been compared earlier with the system that existed before the NEB was established and the writer commented on the unsatisfactory nature of the previous arrangements, to Canada, as evidenced by the Westcoast export case in 1954. Certainly the situation has improved as a result of the appearance of the NEB, particularly since the 1967 Westcoast decision. But how does the system resolve conflicting Canadian and American natural gas trade policies? The 1967 Westcoast conflict came about as the inevitable result of the independently formulated policies of the two bodies, concerning terms of trade in natural gas. It would seem inevitable that new NEB policies announced in the 1970 decision, concerning the term of export contracts and especially the policy concerning export prices will lead to future confrontations. Does this confrontation between regulatory bodies really accomplish anything? In the Westcoast case the NEB emerged as the apparent winner. Although in form the price of the contract approved was a compromise, the Board succeeded in introducing escalation clauses in export contracts. But is independent unilaterial action the best method?

In 1960 the Joint United States-Canadian Committee on Trade and Economic Affairs called for close cooperation between the NEB and FPC. Subsequent meetings in 1964 and 1967 produced communiques favouring closer cooperation between the two countries. There have been talks between the Prime Minister and President concerning trade in oil and these resulted in a lessening of U.S. oil import restrictions on Canadian crude.

\[\text{216} \text{ Regulations, s. 11A.}\]

\[\text{217} \text{ Miller, op. cit., at 293-295. Canada maintains an officer in the Canadian Embassy in Washington as a liaison with the official title, Counsellor (Energy).}\]

\[\text{217} \text{ The Board made guarded comments in its 1970 decision implying that accessibility of Canadian crude oil and sulphur to U.S. markets would become a condition precedent to future gas exports. NEB Report (August, 1970), at 10-10 -11.}\]
It is not clear, however, whether Board policy is formed as a result of cooperation or agreements between the two governments.\textsuperscript{218}

The Members and Commissioners meet informally periodically\textsuperscript{219} and the staff of the two agencies are in continual contact on technical matters. The Chairman of the NEB emphasized to the writer that the meetings never discuss the disposition of particular applications. Discussions have covered topics such as the position of the two countries in respect of reserves and surplus and the criteria used to evaluate these factors, as well as policies in regard to prices and the general policies of Canada towards natural gas export.

If Canada and the United States are to agree to follow policies which will affect the pattern of energy trade then the Canadian public should be aware of what these policies are so that informed discussion debate may follow and all the implications may be fully discussed. It might be that if trade in energy is to increase substantially in the future then such matters should be the subject of direct and open arrangements between the two Governments, based on publicly stated policies.

8. CONCLUSIONS

While the statement of the issues and problems concerning the export of natural gas is relatively simple, their resolution is not, and serious doubts and reservations remain about the most basic question: should Canada export natural gas? There has not been sufficient analysis by the Board of the benefits and costs of the export issue. While gas exports have benefitted Canada, the future is not clear. These doubts lead to the conclusion that it is not in Canada’s interests to export gas. Part of the problem is that only future generations will know if the policies have worked. And it is imperative that this question be analyzed carefully before any further comments are made.

More definite comments were offered about the National Energy Board, in particular the absence of analysis by the Board of the question posed

\textsuperscript{218} It is interesting to note that the Borden Commission recommended:
That, if possible, reciprocal arrangements be made with the United States of America for a Commissioner of the Federal Power Commission of that country to sit as an ad hoc observer, but without vote, when the National Energy Board is considering any application for a licence for the export of natural gas from Canada to the United States; and for a member of the National Energy Board to sit as an ad hoc observer, but without vote, when the Federal Power Commission is considering the correlative application for the licence to import from or export to Canada such natural gas.

\textit{Borden Commission}, First Report, p. 47. The Government however rejected the recommendation since it would be “embarrassing for either government to have the regulatory agency of the other government make decisions adverse to its own interest when a member of its own regulatory agency had participated in the events leading up to such a decision.”

Canada, House of Commons, \textit{4 Debates} 3924 (May 29, 1959). However, s. 22(2) of the Act requires the Board to recommend arrangements for cooperation between governmental agencies.

\textsuperscript{219} The most recent meeting the writer is aware of was in July of 1969. The discussion included the prospects of gas supply in North America, particularly Northern Canada and Alaska and the respective procedures of the two bodies in relation to the laws governing the agencies. NEB, “National Energy Board Meets with Federal Power Commission,” July 14, 1969. (Press Release).
above — should gas be exported? All the Board’s decisions seem to start from the premise that Canada should export all surplus gas if the price is right, and proceed to calculate the surplus and consider the price. The Board’s policies clearly favour encouraging the present (as opposed to future) development of natural gas resources. Only future generations will know if this is wise. However a change was noted in Board policies over the last four years and the 1970 decision has introduced new policies (shorter export terms and better price protection) which should remove some of the uncertainties and ensure greater benefits to Canada from exports.

Doubts were also expressed about the appropriateness of current export application proceedings as a means of disposing of these issues. In particular the apparent absence of public involvement (except for the provincial representation) prompt suggestion that there should be periodic public hearings to re-evaluate export policy, held by the Board, separate and distinct from hearings of individual applicants, and public interest groups should be encouraged to participate.

The Board should continue to play a major role in formulating policy, and the present procedure whereby the Board issues licences is preferable to the pre-1959 system where the Minister issued the licence with no hearings. In its decisions the Board should be influenced by Government policy, formulated with the advice of the Board, but these policies must be clearly stated. If the result of the Great Lakes case, and the Cabinet’s disposition of the case, in particular the comment that certain matters of public interest are beyond the Board’s responsibility, is to decrease the Board’s role in evaluating the public interest then this is a most unfortunate development. Certainly the Board should not act independently of the Government but it was established to consider and protect the public interest and should not abdicate this function.

Finally reservations about the framework of Canadian-American relations in the trade of natural gas are repeated. If Canada is to continue to export natural gas to the United States then this must be the result of deliberate Government decisions and the terms of this trade should be arrived at as the result of Government policy, not the decisions of private industry parties. Negotiations between the countries should continue as a basis for defining the trade, but the public should be aware of exactly what agreements or arrangements have been made and what benefit they will bring to Canada.