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In This Issue

In the Next Issue: The Winter 1988 issue of *Resources* will feature an article on the Canada-United States Free Trade Agreement as it concerns natural resources.

Bypass Pipelines

by Janet Keeping

The deregulation of natural gas is threatening the process of public utility rate setting in a fundamental way. This result may not have been forseen by those who catapulted the industry into deregulation. But anticipated or not, the ultimate outcome may be unfortunate. It is doubtful that rates based solely on cost criteria are in the public interest and yet that is what may eventuate if the momentum towards further deregulation does not abate.

The ultimate goal of an exercise in public utility rate setting is the fixing of rates to be paid by customers of the utility, for example, a gas distribution company. Both regulatory theory and the statutes which create the legal context for rate setting provide that utility rates must be "just and reasonable", and not unduly discriminatory.[1] Different classes of customers are assessed different rates and the criterion according to which differences in rates are primarily justified is said to be "cost of service": as the Alberta Public Utilities Board has stated,

> It is recognized that various criteria will influence rate design but the primary standard of reasonableness of a rate must be the relationship to cost of service.[2]

The problem is that while cost of service as the basis for rate-setting is theoretically consistent with the deregulation of gas, as traditionally implemented by public utility boards, it is in conflict with it.

The deregulation of natural gas got under way with the agreement concluded on October 31, 1985, between the federal government and the governments of the producing provinces. Gas may be sold under contracts entered into after that date at a negotiated, rather than government administered, price. Because the distribution utilities in the consuming provinces have been tied to long-term contracts with TransCanada PipeLines (TCPL) for gas supply, most of their customers have not benefitted from deregulation to any considerable extent. But large industrial users have: when their contracts with distributors have expired, they have been able to negotiate direct purchases from gas producers or participate in the competitive marketing programs offered by TCPL to attract their business, thereby substantially lowering their fuel or feedstock costs.

The sales and transportation functions of TCPL and the local distribution companies have had to be severed to allow large volume consumers in central Canada to move gas purchased in Alberta to their industrial sites. This separation of functions has rocked the pipeline utilities but deregulation is being taken further: in the most celebrated case, a major industrial user is going beyond direct purchase and has applied to build a pipeline to connect its plant to the TCPL system thereby bypassing the local distribution utility, The Consumers' Gas Co. Ltd., entirely. The industry in question, Cyanamid Canada Inc., is located only a few kilometres from the TCPL line and it would cost Cyanamid significantly less to construct its own pipeline than to pay for continuing service by Consumers'. "Bypass" is attractive to Cyanamid because it pays more in rates to Consumers' than it costs Consumers' to serve it.

Bypass is financially sound, at least for companies like Cyanamid which are in close proximity to the interprovincial gas pipeline, but for the overall system it poses a potentially lethal threat. With every bypass the rates for remaining customers increase, because the utility's fixed costs are spread over less volume. As

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The opinions presented are those of the authors and do not necessarily reflect the views of the Institute.

rates go up, bypass becomes financially attractive to an increasing number of customers whose withdrawal from the distribution system causes further rate increases, and ultimately the system collapses: the Ontario Energy Board has referred to this phenomenon as a "death spiral".[3]

Bypass can be prevented in two ways. Regulators could as a matter of policy refuse bypass applications (legislative support would probably be needed to avoid jurisdictional challenges) or it could be made financially more attractive to remain within the distribution system. The former has been viewed as "ideologically unsound" in most jurisdictions where the issue has been raised. The Ontario Energy Board, while lacking enthusiasm for the idea, has refused generally to rule out bypass[4] and the National Energy Board approved Cyanamid's application in early 1987, although the fate of that pipeline remains uncertain given that both the NEB and the OEB have claimed jurisdiction over bypass facilities in the province.[5] The British Columbia government has also endorsed bypass: the provincial Energy Minister stated in the spring that "Given our commitment to deregulation, we now must allow the bypass alternative .... Bypass arrangements have been proposed elsewhere in Canada to reduce the cost of gas to industry, and in order to be competitive we must allow similar market-oriented practices here".[6] (Like Ontario, B.C. has asserted jurisdiction over bypass arrangements and as of June there were two such applications before the provincial utilities commission.)

Manitoba is the sole holdout so far. In the Public Utilities Board's interim report on the impact of the October 1985 Agreement on natural gas distribution in the province the Board stated its unequivocal opposition to bypass:

> The Board considers bypass to be inefficient and contrary to public interest. One distribution system serving all gas customers in a given franchise area is the appropriate method for providing safe, reliable and efficient distribution.[7]

But even in those jurisdictions which view bypass more favourably, the preferred alternative is that which would avoid wasteful duplication of facilities. It has been suggested that the impetus for bypass would be removed if the distribution utilities' rates were to be restructured: the more closely cost-based the rates, the less industry would save taking the bypass route.[8] Hence, the challenge for rate-setters posed by deregulation.

But why is this a challenge? Isn't cost of service the benchmark for reasonable rates? Well, yes, as noted above, *and* no — for the principle as enunciated is always subject to numerous caveats. Cost of service tops the list of requirements for acceptable rate design in all jurisdictions, but it is not the sole criterion. It is always tempered by other factors such as stability of rates, policy measures such as energy conservation and even administrative convenience. Rates are never set with cost of service only mind. Furthermore, it is not obvious that it would be in the public interest to do so.

The Ontario Energy Board has earlier this year to decide whether the utilities' transportation rates should be distance-related or designed such that rates would be uniform within specified areas. The latter are called "postage-stamp" rates. The Board concluded that "to meet the dual objectives of administrative simplicity and operational efficiency ... postage stamp rates are appropriate at this time". As opposed to the gas brokers and numerous other groups, the local distribution companies (LDCs) had supported postage-stamp rates:

> They argued that distance-based rates create administrative problems due to the complexity of the pipeline network and that this makes it difficulty to derive and apply these rates. Distance-based rates were claimed to be discriminatory by the LDCs in that they give preference to accidents of geography, i.e., to those situated near pipelines. The LDCs noted that distance-based rates are contrary to public policy which encourages a balanced economic development throughout the Province. They argued that distance-based rates would encourage regionalism as a result of industry locating near TCPL's pipelines.[9]

The utilities' arguments before the Board are often self-serving, but it would appear that they were onto something of broader import here. Public utility rates are not to be unduly discriminatory, but there would seem to be more to the concept of discrimination at work in this context than mere cost of service. There is as the principle has been applied in Canadian jurisdictions a strong element of common sense fairness — rates for essential services should not vary according to, for example, "accidents of geography" — and it is not crystal clear that this is misguided.

So something has to give. If bypass represents a serious threat to gas distribution systems it should be avoided. But *strictly* cost-based rates may also be inconsistent with the maintenance of an acceptable level of gas service. Perhaps a greater but not total reliance on cost of service for rate-setting will both meet the needs of industry and allow the rest of the system to function more or less as usual. In the report of the Manitoba Public Utilities Board already referred to faith seems to have been put in this possibility: "The Board considers that continued movement toward costs based rates will reduce the incentive for large volume users to duplicate an existing system." However, if a compromise position does not suffice then a difficult question of policy arises: is the apparent commitment to bypass, in the name of deregulation, really worth the cost?

Footnotes

1. For example, see the *National Energy Board Act*, R.S.C. 1970, c.N-6, s.52, and the *Ontario Energy Board Act*, R.S.O. 1980, c.332, s.19(1).
2. Alberta Public Utilities Board, Decision E85133, December 16, 1985, at 124.
3. Ontario Energy Board, E.B.R.O. 410-I, 441-I, 412-I, December 12, 1986.
4. *Id.*
5. *Id.*, and National Energy Board, Cyanamid Canada Pipeline Inc., December 1986. The Ontario Energy Board's assertion of jurisdiction was upheld by the Ontario Supreme Court in March 1987. The provincial government has referred the matter to the

Ontario Court of Appeal. Simultaneously, the National Energy Board has referred the question of its jurisdiction over bypass facilities to the Federal Court of Appeal.

6. British Columbia, Ministry of Energy, Mines and Petroleum Resources, News Release, 1987:10, March 19, 1987.
7. Manitoba Public Utilities Board, Order No. 158/86, at 21.
8. For example, see *supra*, note 5, National Energy Board, at 29.
9. Ontario Energy Board, E.B.R.O. 410, 411, 412, March 23, 1987, Vol. 4, at 3/23-3/24.

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International Corona Resources Ltd. v. *Lac Minerals Ltd.*; the Court of Appeal Decision

by Barry Barton

On October 2, 1987 the Ontario Court of Appeal affirmed *International Corona Resources Ltd.* v. *Lac Minerals Ltd.*, (1986), 53 O.R. (2d) 737 (Ont. H.C.J.), which was the subject of a comment in *Resources* no. 15 (Summer 1986). This is the case in which Lac was ordered to hand over the massive Page-Williams mine at Hemlo to Corona on the grounds of breach of confidence and breach of fiduciary duty by Lac. Lac had received information from Corona in negotiations towards a joint venture and had used this information to acquire, ahead to Corona, the Williams property that adjoined Corona's existing property. The Court of Appeal, in a unanimous judgment, dismissed both Lac's appeal and Corona's cross-appeal.

The trial judge's findings of fact received considerable scrutiny in the Court of Appeal. Lac argued that he had erred in his inferences from the facts, had overlooked and misconstrued evidence, and had failed to make relevant findings. But the Court of Appeal strongly affirmed his findings. Even if some of his findings were rather terse, he was not obliged to cite every piece of relevant evidence to show that he had considered it. The Court's review of the evidence actually resulted in a far clearer picture of the facts that made Lac liable to Corona. The two main points of focus were: (1) the understanding between Corona and Lac as to how each would conduct itself while they were seriously negotiating toward a joint venture, and (2) the extent to which the information that Lac received from Corona during the negotiations was in fact confidential and not available from public sources, and was material to Lac's making an offer to Mrs. Williams.

With respect to conclusions of law, one of the Court of Appeal's two main departures from the trial judge's approach was to rely entirely on the existence of a fiduciary duty owed to Corona by Lac, and to put breach of confidence to one side, though not actually disapproving of it in any way. The Court held that a fiduciary duty can at times arise between parties involved in arms-length commercial negotiations, whether or not a formal agreement results. In finding that a duty existed in this case, the Court was strongly influenced by the evidence from mining industry experts of a custom or practice in the industry that requires parties seriously negotiating in these circumstances not to act to the detriment of each other, especially in the use of confidential information. The custom was a reasonable one and it was only just and proper that the Court found that a fiduciary duty existed.

With respect to remedies, the Court confirmed the thoroughgoing sweep of the relief granted by the trial judge in ordering Lac to turn the property over to Corona. Such a transfer of the property would cause Lac, the fiduciary, fully and accurately to disgorge the benefit obtained by its breach.

The other main departure from the trial judge's legal conclusions was on compensation for the mine and the mill that Lac had built on the property. The Court agreed that Corona should pay Lac the value of those improvements, not on the basis of the "mistaken improver" section of the Ontario *Conveyancing and Law of Property Act*, but as a matter of general principle to shape a remedy that would avoid an unjust enrichment to Corona.

The Court stressed that its holding of a fiduciary duty recognized a custom that was established on evidence from the mining industry only, but there can be little doubt that similar customs and expectations would be proved to exist in the oil and gas industry in similar circumstances.

Lac has applied for leave to appeal to the Supreme Court of Canada.

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The Canadian Environmental Protection Act

by Alastair R. Lucas

The *Canadian Environmental Protection Act* (Bill C-74, 1987, "CEPA"), which was recently given second reading and is now under review by a House of Commons Special Committee, is the first major federal environmental statute introduced in over a decade. It represents both a consolidation of existing federal environmental legislation, and a charting of new directions for federal environmental law.

The title "Environmental Protection Act" suggests comprehensive coverage of environmental issues, along with environmental leadership and advocacy. Since the Act's scheme is largely enabling, in the sense that direct regulation depends on identification of toxic substances in an initial assessment process, and since provincial cooperation appears to be a significant implementation factor, it remains to be seen whether the Act's promise will ultimately be fulfilled.

Existing federal statutes consolidated in CEPA include the *Environmental Contaminants Act*, the *Ocean Dumping Control Act*, the international air pollution and fuels regulation elements of the *Clean Air Act*, and the nutrients regulation part of the *Canada Water Act*. Also included are the powers to establish environmental guidelines for federal departments and agencies from the *Department of the Environment Act*.

The new parts of the Act are far more sweeping than they appear at first impression. Part II, headed "Toxic Substances", initially appears to be largely a repeal and re-enactment of the *Environmental Contaminants Act*. There is some extension, including powers to compel production of a broader range of information on potentially toxic substances.

In fact, Part II provides comprehensive regulatory powers for life cycle management and control of toxic substances, as defined. Extensive powers allow production of information and assessment of substances, including substances proposed to be manufactured or imported for the first time, to determine whether a substance is toxic. If toxicity is found, the substance may be subjected to further assessment, temporary prohibition, regulation, and ultimately, listing in Schedule I. Listed substances may then be the subject of regulations to impose a wide range of controls, including complete prohibition. A "Priority Substances List" will contain substances to be given priority in this assessment process.

The broad scope of Part II is apparent from the definitions of "substances" (s.3) and "toxic (s.11). "Substance" is not limited to chemicals, but includes

> any distinguishable kind of organic or inorganic matter, whether animate or inanimate, that is capable of being dispersed in the environment or of being transformed in the environment into matter that is capable of being so dispersed ...

"Toxic" is defined in terms of harm both to human life and to important biological processes in the environment itself. Immediate as well as long term harmful effects are recognized. These definitions make it clear that all air, water, and land contaminants may be assessed, listed in Schedule I, then made the subject of detailed regulations. Even if a substance is not scheduled and the responsible Ministers believe that it is toxic, or if it is listed and the Ministers believe that it is not adequately regulated, emergency orders may be made. (The Act vests particular powers in either the Minister of the Environment or the Minister of National Health and Welfare, in both ministers or in the Minister of the Environment alone.)

Part IV completes the broad sweep of the Act by authorizing the Governor in Council, on the recommendation of the Minister of the Environment, to make environmental protection regulations in relation to any federal works, undertakings, or lands, in circumstances where no other federal act provides such regulation-making powers. Federal lands include territorial and coastal marine belt lands. "Federal works or undertakings" is defined expansively to include any work or undertaking within the legislative authority of Parliament. Thus all interprovincial connecting works or undertakings, such as pipelines and powerlines, are included, along with aeronautics and broadcast undertakings, and even banks.

Introduction of the Bill was preceded by a consultative process related to a draft *Environmental Protection Act* that was released in December, 1986. A large number of industrial and public interest groups and individuals made oral and written submissions during this consultation, CEPA reflects a number of the concerns that were raised.

"Jump Start" Toxic Substance Regulation

A major concern of public interest groups and of the Canadian Environmental Advisory Council, which advises the Minister of the Environment, was that immediate regulatory powers would be limited to the five substances that have already been assessed and scheduled under the existing *Environmental Contaminants Act*. It was pointed out that after 12 years these are the only substances scheduled and that given the complexity of the new Act's assessment process and the potential for delay through the Board of Review mechanism, it may be years after the Act comes into force before any new substances are regulated. It was argued that enough is known about the toxic properties of a large number of substances as a result of existing scientific research and regulatory actions in other jurisdictions to justify a "jump start" for the Act by enacting it with a substantially expanded Schedule I list of substances.

This approach was not adopted, apart from adding the four substances that are already the subject of regulations under the *Clean Air Act* to Schedule I. One concession to this concern, however, is the provision for a "Priority Substances List" that will specify substances to be given priority in the assessment process.

A Comprehensive Environmental Protection Act

During the consultation process, some interests urged that an "Environmental Protection Act" should incorporate all of the main federal environmental protection legislation and areas of activity. This would include, for example, section 33 of the *Fisheries Act*, the *Pest Control Products Act*, and the pollution provisions of such acts as the *Canada Shipping Act* and the *Northern Inland Waters Act*. The Federal Environmental Assessment and Review Process (EARP), which lacks a full statutory basis, should also be included.

The *Ocean Dumping Control Act* provisions are the only major additions to the contents of the original draft bill. The EARP is now the subject of a separate Environment Canada review initative. Inter-departmental problems

proved insurmountable in the case of major statutes administered by other departments such as the *Pest Control Products Act* (administered by Agriculture Canada).

Board of Review Process

CEPA contains no appeal provisions. There is, however, an elaborate internal Board of Review mechanism. These Boards are intended to be expert bodies of not less than three members, with the powers to compel production of evidence and summon witnesses of commissioners appointed under Part I of the *Federal Inquiries Act*. They appear to be intended to conduct relatively formal proceedings, since in addition to their evidentiary powers, they will hold hearings, and will have power at their discretion to fix costs and to direct by whom and to whom costs are to be taxed and allowed.

Boards of Review are established at the discretion of the Minister or Ministers when a notice of objection is filed in relation to certain orders or proposed regulations. These include: orders adding or deleting substances from the Schedule I list of toxic substances (s.36); Ministerial decisions not to add assessed substances that are on the Priority Substances List to the toxic substances list (s.13(2)); proposed regulations in relation to toxic substances (s.37) or fuels (s.44(a)); orders adding or deleting substances from the list of substances requiring export notification (s.44); orders in relation to ocean dumping permits (s.68); proposals to make international air pollution regulations (s.56(2)); and proposals to make ocean dumping regulations (s.78(4)). It is apparent that the Boards of Review are intended to function as administrative appeal bodies in relation to specific orders, and to carry out formal rule-making procedures for proposed regulations and general orders.

One potential problem is that in all cases establishment of Boards of Review is within the subjective discretion of the Minister or Ministers. No person, no matter how strong their interest, is entitled to establishment of a Board of Review.

A more serious concern has been raised about the potential for delay inherent in the Board of Review process. The Canadian Environmental Advisory Council has suggested that the two stage Board of Review process (i.e., at the scheduling and again at the regulation-making stages) could be used tactically to delay the regulation of toxic substances (Canadian Environmental Advisory Council, *Review of the Proposed Environmental Protection Act*, March, 1987, p. 23). Including *Canada Gazette* publication, reporting, ministerial recommendations, and Board of Review establishment and proceedings, the Council charted no less than 17 potential steps between a proposed order to list a substance in Schedule I and the promulgation of a regulation in relation to that substance. This does not include the the potentially lengthy front end assessment of toxicity. The addition in CEPA the Priority Substances List and potential Board of Review following decisions *not* to list substances in Schedule I adds several more steps.

Disclosure of Information

With certain specific exceptions, there is a prohibition on disclosure of confidential business information (s.19). This consists of trade secrets; confidential financial, commercial, scientific, or technical information; or information which, if disclosed, is reasonably likely to result in financial loss, prejudice competitive position, or interfere with contractual obligations or negotiations (s.18). Certain information is defined as not confidential, including general data on uses of a substance, information on safe handling, disposal and safety measures in relation to substances, general physical and chemical data, summaries of health and safety data, and test data from government institutions.

Any person who objects to an information requirement on the ground of confidentiality may apply to the Minister of the Environment for a determination of whether the information is confidential business information (s.20). Following an unfavourable determination, the objector may require the Minister to establish a special review panel. If, however, the Minister agrees that the information should not be disclosed, there is no provision for objection by other persons (s.23). The panel will consist of one representative each from the federal government, industry, labour, and an environmental public interest group. The latter three are chosen from lists compiled by Environment Canada. Review panel determinations are final and binding on the Minister and the objector. They are protected from judicial review by a heavy — duty privative clause that purports to preclude review even on the grounds that the panel lacked or exceeded its jurisdiction (s.23(6)). The definition of confidential business information, as well as the dispute resolution procedure, has been the subject of criticism by both industry and environmental public interest groups.

Public Participation

CEPA contains extensive and innovative provisions for public involvement in the environmental protection process. "Any person" who has or is about to suffer loss or damage as a result of conduct contrary to the Act, may sue for an injunction (s.128(2)). This represents a step toward an "environmental bill of rights". A true environmental bill of rights would give any person, regardless of loss or damage, standing to enjoin environmentally damaging activity.

In addition, environmental public interest groups are represented on confidential information review panels (s.23); "any person" may object to trigger establishment of a Board of Review for proposed international air contaminant regulations (s.56(2)); reports of assessment of the toxicity of substances on the Priority Substances List must be made public (s.13(11)); Boards of Review

have powers to fund public participants through cost awards (s.86); and protection is given to "whistle-blowers" who report toxic substance violations (s.40).

A unique provision permits any 12 Canadian residents to apply to the Minister for investigation of an alleged offence (s.100). The Minister must then inform the applicants on request, and must, if an investigation is discontinued, prepare a written report outlining the investigation steps and the reasons for discontinuance.

Public interest groups had urged inclusion of a right to formally petition the Minister to have substances added to the Schedule I list of toxic substances. A right of this type is included in CEPA, but it relates only to requests that substances be added to the Priority Substances List before assessment stage (s.13(2)).

Enforcement and Provincial Cooperation

CEPA contains an impressive array of enforcement mechanisms, including Ministerial emergency orders (ss.38, 39), civil rights of action (ss.127, 128), and quasi-criminal offences (ss.103-108). The offence provisions themselves are rich in alternatives. Separate offences relate to failure to provide information (ss.103, 104), breach of regulations or orders (s.105), fraud (s.106), and environmental and human health damage (s.107). The latter offence carries a maximum five year prison term. Penalties for other offences range up to a $1 million fine or three years imprisonment in proceedings by way of indictment. Directors of corporations may be guilty of offences (s.114). Upon conviction, mandatory judicial orders may be made against offenders (s.122). Certain offences may be handled by a ticketing procedure (s.126).

Potential use of these and other compliance tools has been outlined in a Draft Enforcement and Compliance Policy. The aim is tough and effective enforcement that is fair, predictable, and consistent. This kind of national enforcement effort requires substantial resources, and must be carefully managed if costly duplication with provincial programs is to be avoided. These constraints suggest that provinces are likely to play a major enforcement role under federal-provincial agreements that are contemplated by CEPA.

At present, however, no federal-provincial agreements are being negotiated, and even preliminary discussions have stalled. The problem is that a number of provinces apparently view the Act as yet another federal incursion into an area of traditional provincial constitutional authority. There is fear that CEPA and the companion Enforcement and Compliance Policy with their national standards will produce significant duplication, particularly in provinces with sophisticated environmental laws.

A further concern is that CEPA, with its environmental offence emphasis consequent upon efforts to base the Act on the relatively secure criminal law constitutional power, represents an undue criminalization of environmental law at the expense of traditional provincial administrative approaches. The battle is being waged around the concept of "equivalency". The Act requires that before proposed regulations are recommended, the Minister must offer to consult the provinces to determine whether all provinces are prepared to implement provincial laws that are substantially the same. Provincial ministers have gone much further, urging CEPA not be implemented at all in provinces to the extent that equivalent provincial laws already exist, and further, that this equivalency commitment be expressly written into CEPA. The latter demand raises constitutional issues, since the federal government cannot effectively delegate its exclusive legislative powers to provinces. An acceptable definition of equivalency may prove elusive in any event. The federal government does not wish to see its CEPA initiative end with an Act that has only patchwork effect nationally, and that may be of little or no significance in some provinces.

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A New Federal Water Policy

by J. Owen Saunders

Two years after the final report of the Inquiry on Federal Water Policy[1] (the Pearse Inquiry) Environment Canada has released its long-awaited *Federal Water Policy.*[2] Perhaps predictably, given the speculation about water in the context of the proposed U.S.-Canada free trade agreement, much of the media attention has focussed on the issue of major water exports — and indeed the government's own press release stresses this point as well. This aspect of the *Policy* is not without significance, of course; it would seem effectively to kill for now any serious consideration of, or government-funded research on, the GRAND Canal scheme — whereby James Bay would be dyked and turned into a freshwater reservoir, with large volumes of water shipped southward into the Great Lakes and thence into the American southwest and Canadian prairies. In fact, however, the *Policy* itself devoted less than a page to such interbasin transfers, and its position on the matter, while asserted somewhat more forcefully than in the past, is hardly new. Canadian governments of all political stripes have been consistently opposed to major interbasin exports for many years.

The *Policy* is heavily influenced by the Pearse Inquiry which preceded it, although it is not yet clear whether all the measures ultimately adopted to implement the *Policy* will be as strong as those advocated in the Pearse Report. Essentially the *Policy* adopts five strategies to promote water quality enhancement and efficient management of the resource. These strategies relate to water pricing, science leadership, integrated planning, legislation and public awareness. It then sets out

twenty-five brief policy statements on specific matters that will be addressed by these strategies. Some of these policy statements represent not much more than a reaffirmation of the status quo — as for example with the continuing federal role in protecting navigation rights. Some reflect initiatives that are already in progress — as with the treatment of toxic chemicals in the proposed *Canadian Environmental Protection Act* (discussed at more length in the comment by Alastair Lucas in this issue). Yet others suggest the adoption of new federal approaches.

With respect to new approaches, one of the most encouraging aspects of the *Policy* is the acceptance, at least in principle, of the concept of realistic pricing for water. The concept that the beneficiaries of water services should be expected to pay for them was a fundamental principle of demand management advocated by the Pearse Inquiry.[3] While the federal government has pledged in the *Policy* to apply this principle in those areas that come within its jurisdiction, any meaningful implementation of the concept obviously depends on the cooperation of provincial and municipal governments.

Indeed, the cooperation of provincial authorities seems fundamental to the accomplishment of most of the goals in the policy. Certainly there are a number of areas where the federal government clearly has the primary mandate — for example with respect to fisheries, navigation and boundary waters issues. Thus it seems clear that the federal government can in effective prohibit interbasin exports of water to the United States under its existing powers. The more interesting development awaited in the *Policy*, however, was whether the federal government would be willing to assert a stronger voice than hitherto in areas of more doubtful federal authority. Perhaps the most controversial issue in this respect is the role the federal government should take with respect to interjurisdictional waters. That is, apart from the "normal" heads of constitutional authority such as fisheries, navigation and agriculture, does the federal government possess a more general responsibility for the management of interprovincial waters? (Shared federal-provincial waters raise similar but not identical issues.) There is some judicial precedent for such a position in the *Ipco* decision.[4] That case dealt with the attempt of the Manitoba government to collect damages from plants located in Saskatchewan and Ontario polluting Manitoba waters. While the Manitoba legislation was struck down as an *ultra vires* attempt to interfere with extra-provincial rights, the majority judgements by Pigeon, J. and Ritchie, J. both suggested that the federal government would have had jurisdiction in the matter as it involved pollution of interprovincial waters.

It is conceivable that *Ipco* could be read narrowly as dealing only with the application of the fisheries power to interprovincial pollution. The broader view of the case, however, is that the federal government has a wider constitutional interest in such shared waters on the basis of its general power with respect to peace, order and good government, and specifically under that branch of the power which gives the federal level authority in matters having a "national dimension".[5] This is certainly the view taken by the Pearse Inquiry. The Inquiry recommended that where provincial (or territorial) governments fail to agree on how interjurisdictional waters should be treated, and following a complaint by one of the affected jurisdictions, the federal government should be able to intervene through the creation of a board on which the affected jurisdictions would be represented. On the basis of the board's recommendations the federal government could in effect impose a solution on the parties.[6] The Inquiry made special reference in this regard to the failure to date to reach an agreement on the sharing of the waters of the Mackenzie River Basin.

This is not the first time a greater federal voice in such matters has been proposed. The *Canada Water Act* of 1970 authorized unilateral federal measures with respect to waters where water quality management had become a matter of "urgent national concern".[7] The provincial reaction to this assertion of federal authority, however, was so strongly negative that the section has never been invoked; indeed, the Pearse Inquiry recommended its repeal.[8]

Not surprisingly, then, the new *Federal Water Policy* has been very cautious in its handling of the Pearse recommendation for a more assertive federal stance on this issue. In dealing with potential interjurisdictional water conflicts in Canada it begins with the principle — which would be endorsed by the Pearse Inquiry — that such problems should be resolved, if possible, by agreements between the affected jurisdictions. However, in the event of failure it proposes only

> that steps be taken to develop appropriate procedures so that ... those disputes can be referred to mediation or arbitration; and to negotiate with the provinces the development of a mechanism which would allow for the ultimate resolution of interjurisdictional disputes in cases where all other means of reaching agreement have failed.[9]

The uncomfortable question of what should be done should a province not *wish* to negotiate such a mechanism is not answered directly by the *Policy*. This emphasis on cooperation is similarly reflected in the policy statement on water quality[10] managment, where there is no hint of the unilateralist approach held out out as a possibility in the *Canada Water Act*.

In sum, the *Federal Water Policy* reflects many of the approaches to water management that were advocated by the Pearse Inquiry, but does not depart significantly from the traditional federal position of deference to provincial interests and a reluctance to test the full range of federal authority over water issues of arguably national interest. Water continues to provide an almost textbook example of Canadian cooperative federalism. If, however, as many suggest, we are facing harder rather than easier decisions on the sharing of

interjurisdictional waters in the future — whether through increased demands or decreased supplies — the *Policy* may only put off to another day the difficult legal question of what happens when provincial property rights and broader national interests collide.

Footnotes

1. Environment Canada, *Federal Water Policy* (1987).
2. Canada, Inquiry on Federal Water Policy, Final Report, *Currents of Change* (Ottawa, 1985).
3. *Supra*, note 1, recommendation 10.2, at 99.
4. *Interprovincial Co-operatives* v. *the Queen in Right of Manitoba*, [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321.
5. See *A.-G. Ontario* v. *Canada Temperance Federation*, [1946] A..C. 193 (P.C.), at 205, *per* Lord Simon.
6. *Supra*, note 1, at 74-75.
7. *Canada Water Act*, R.S.C. 1970 (1st Supp.), c.5, Part II, and especially s.11.
8. *Supra*, note 1, at 74.
9. *Supra*, note 2, at 33.
10. *Id.*, at 18.

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Around the Institute

The Institute made an agreement with the law firm Atkinson McMahon to hire one of the firm's associates, Jonathan Scarth, as an Institute Research Associate for a six month period which commenced in September, 1987. During his employment with the Institute Mr. Scarth's primary focus will be in the area of reclamation law.

Acting Executive Director Alastair R. Lucas made an invited submission to the Alberta Environment Review Panel on Environmental Law Enforcement. He also participated in a workshop on the proposed Federal *Canadian Environmental Protection Act* Enforcement Policy, and in a seminar on Energy and the Environment at Niagara-on-the-Lake, that was part of the Federal Energy Options consultative process.

In early November Research Associate Owen Saunders presented a paper on "Management and Diversion of Interjurisdictional Rivers in Canada: A Legal Perspective" at the National Symposium on Diversions. The symposium, held in Saskatoon, was sponsored by the Canadian Water Resources Association and the National Hydrology Research Centre.

Publications

Liability for Drilling- and Production-Source Oil Pollution in the Canadian Offshore, Christian G. Yoder. Working Paper 12. 1986. ISBN 0-919269-20-6. 85 p. $15.00

A Guide to Appearing Before the Surface Rights Board of Alberta, (Second Edition) by Barry Barton and Barbara Roulston. Working Paper 11. 1986. ISBN 0-919269-19-2. 124 p. $15.00

Crown Timber Rights in Alberta, by N.D. Bankes. Working Paper 10. 1986. ISBN 0-919269-17-6. 128 p. $15.00

The Canadian Regulation of Offshore Installations, by Christian G. Yoder. Working Paper 9. 1985. ISBN 0-919269-18-4. 116 p. $15.00

The Assignment and Registration of Crown Mineral Interests, by N.D. Bankes. Working Paper 5. 1985. ISBN 0-919269-11-7. 126 p. $15.00

Oil and Gas Conservation on Canada Lands, by Owen L. Anderson. Working Paper 7. 1985. ISBN 0-919269-16-8. 122 p. $15.00

Public Disposition of Natural Resources, Essays from the First Banff Conference on Natural Resources Law, Banff, Alberta, April 12-15, 1983; Nigel Bankes and J. Owen Saunders, eds. ISBN 0-919269-14-1. 366 p. (hardcover) $45.00

Canadian Maritime Law and the Offshore: A Primer, by W. Wylie Spicer. Canadian Continental Shelf Law 3; Working Paper 6. 1984. ISBN 0-919269-12-5. 65 p. $11.00

Fairness in Environmental and Social Impact Assessment Processes, Proceedings of a Seminar, The Banff Centre, February 1-3, 1983; Evangeline S. Case, Peter Z.R. Finkle and Alastair R. Lucas, eds. Proceedings 2. ISBN 0-919269-08-7. 125 p. $15.00

Canadian Electricity Exports: Legal and Regulatory Issues, by Alastair R. Lucas and J. Owen Saunders. Working Paper 3. 1983. ISBN 0-919269-09-5. 40 p. $7.50

The International Legal Context of Petroleum Operations in Canadian Arctic Waters, by Ian Townsend Gault. Canadian Continental Shelf Law 2; Working Paper 4. 1983. ISBN 0-919269-10-9. 76 p. $7.00

Acid Precipitation in North America: The Case for Transboundary Cooperation, by Douglas M. Johnston and Peter Finkle. 1983. ISBN 0-919269-02-8. 75 p. $8.00

Petroleum Operations on the Canadian Continental Margin - The Legal Issues in a Modern Perspective, by Ian Townsend Gault. Canadian Continental Shelf 1; Working Paper 2. 1983. ISBN 0-919269-02-8. 113 p. $8.00

Environmental Law in the 1980s: A New Beginning, Proceedings c a Colloquium, The Banff Centre, November 27-29, 1981; Peter Z.R. Finkle and Alastair R. Lucas, eds. Proceedings 1. ISBN 0-919269-05-2. 233 p. $13.50

Environmental Regulation - Its Impact on Major Oil and Gas Projects: Oil Sands and Arctic, by C.D. Hunt and A.R. Lucas. 1980. ISBN 0-919269-00-1. 168 p. $10.95

Resources: The Newsletter of the Canadian Institute of Resources Law. ISSN 0714-5918. Quarterly. Free

1986-87 Annual Report. Free

Publications are available from: Canadian Institute of Resources Law, 430 Bio Sciences Building, Faculty of Law, The University of Calgary, Calgary, Alberta, Canada T2N 1N4. Telephone (403) 220-3200. Telex 03-821545. Telefax (403) 220-7000.

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Managing Natural Resources in a Federal State, Essays from the Second Banff Conference on Natural Resources Law, Banff, Alberta, April 17-20, 1985. Edited by J. Owen Saunders. Published by Carswell Legal Publications, 1986. 372 pages hardcover. $62.50. This book may be ordered from: Carswell Legal Publications, 2330 Midland Avenue, Agincourt, Ontario, M1S 1P7 or call toll free 1-800-387-5164. If payment accompanies your order, Carswell will pay for postage and handling.