esources

No. 24 Fall 1988

The Newsletter of the Canadian Institute of Resources Law

Energy and Canadians into the 21st Century: The Energy Options Report

by P.S. Elder and W.A. Ross

In the past decade, Canadian energy policy has been the subject of sustained debate.[1] The most recent major study is that submitted by the federal Energy Options Advisory Committee in August, 1988.[2]

The composition and process of this body were interesting. As well as senior energy executives and consultants, well-known "soft" energy advocates, environmentalists, labour and a former President of the Dene nation were included on the Committee. The process involved a "dialogue among Canadians", which showed, not surprisingly, that many people wish direct involvement in the important process of making energy policy. The committee publicized widely its call for participation and justifiably believed that its sequence of activities was "an important advance in this regard".[3] It received advice through regional conferences and seminars, written submissions (over 100) and mailing in of Participation Forms (over 500).

The report and recommendations are worth study, but particularly significant was the convergence of views in two important areas – the role of the market and the importance of the environment. "The degree of consensus (about the need for a more market-oriented and efficiency-driven energy policy) was astonishing".[4] As for environment and habitat issues, "to varying degrees, these concerns were shared by almost all participants".[5]

The Committee itself claimed to take a long-term, comprehensive policy approach, rather than making specific recommendations on technological options or particular policies. (Nevertheless, a majority of Committee members did specifically recommend the continuance of nuclear power.)

Seven principles commended themselves to the Committee. Three were considered as basic, and four as instruments to effect the first three. The seven were:

1. developing Canada's energy to its economic potential, to provide growth and prosperity;
2. providing energy security, but through increasing choice and adaptability, rather than hoarding;
3. giving the same importance to environmental considerations as to other economic and social goals when planning, developing and using energy;
4. relying on market mechanisms wherever possible;
5. having a fiscal system that raises and spends money "in ways that are non-discriminatory, neutral, stable and predictable";
6. including as an "essential component of energy policy" the enhancement of the economic efficiency with which energy is used (for both economic and environmental reasons); and
7. adopting a commitment to research, development and management of technology so as to enhance Canada's energy choices and environmental quality.

This summary of the Report's thrust confirms a recent trend. The majority of the Committee's membership came from business and "mainstream" energy sectors. It is clear that two ideas, marginal in the 1970s, have now become part of enlightened conventional wisdom. First, energy conservation, if cheaper than mega-projects, should precede them as a source of new supplies. Second, the environment is as important in decision-making as economics. The report's most important contribution to energy policy is the clear statement of these principles. They appear to be an accurate reflection of Canadian views on energy and to form a useful basis for a comprehensive energy policy to guide the country into the twenty-first century.

Nevertheless, the report becomes more and more self-contradictory as one considers its examples and analysis. Although the importance of sustainable development is stressed, nowhere (except in some of the dissents) is there any explicit acknowledgement that continued economic growth and the burning of fossil fuels to their "economic potential" may threaten sustainability. True, the pervasive effects of energy development upon the environment (including the "greenhouse effect") and the need for tough trade-offs are mentioned in the text. It is not acknowledged, however, that these effects follow from the very reliance on market signals which the Committee favours. Nor is any guidance whatever given as to what some specific trade-offs might be and how they might be resolved. The only clue is that environmental impact assessment will be an important aid to the project approval process.

Some very important and obvious implications follow from the Report's guiding principles, but the Committee seems unable to see them. The clearest example relates to the Committee's support for intervention in markets when they "are not sufficiently

INSIDE

Environmental Protection Under the Peace, Order and Good Government Power – The *Crown Zellerbach* Case (Page 3)

competitive and when there are social costs such as environmental damage that prices do not reflect ..." .[6] The principles certainly imply this, but it would seem to follow that, if we are worried about the greenhouse effect, the Committee might support intervention (perhaps through imposing a substantial tax) to discourage the burning of coal. (Coal produces particularly high levels of carbon dioxide – the major cause of the greenhouse effect – compared with other fossil fuels.) Instead, the report suggests that Canadian coal is "potentially a major Canadian resource asset" and that "the greenhouse effect cannot be solved by one nation alone". [7]

One would also expect such a major report at least to mention the possibility that pursuit of its first basic principle – development of "growth and prosperity" through the continued exploitation of conventional energy, where economic – could exacerbate serious and global environmental problems, which are supposed to be as important as economic concerns. Again, the greenhouse effect will inevitably be more pronounced if this advice is followed.

Furthermore, one could make a strong argument that if the developed nations continue to pursue economic growth based on burning fossil fuels, not only will the greenhouse and other global environmental stresses increase, but the chance for developing nations to follow the same path to prosperity will be drastically reduced. As the Brundtland Commission noted, "the industrial world has already used much of the planet's ecological capital".[8] Surely it would be immoral for the developed nations to occupy the whole assimilative capacity of the atmosphere. This kind of oversight in the Report simply will not do. On this ground alone, it is to be hoped that the Minister of Energy, Mines and Resources will ask for further advice before implementing the Report's policy recommendations.

Another example of the Committee's failure to follow through on its principles relates to provincial electricity utilities, which the Committee suggests should "become more responsive to markets through the action of regulatory agencies". A recent study suggests that such a policy for Hydro-Québec would imply a rate increase of 44% and a consequent decrease in electricity use of 17%.[9] It is not clear whether the Committee advocates this sort of adjustment in electricity rates, although it would seem to be implicit in the Report's principles.

Why, one might ask, does the Committee not make explicit the implications of its major recommendations? Certainly some of its members understand them. The answer, we fear, is that, like so many reports before it, virtually every energy source was included in its "range of options" so that all of the major energy industries (and participants on the Committee) could endorse the report. Energy policy is paying dearly for this kind of consensus.

To summarize, the Energy Options Advisory Committee's Report is conceptually correct in many ways, but operationally empty. This is illustrated by the fact that both the Chairman of the Committee and the Minister of Energy feel that subsidies to projects like Hibernia are consistent with the Report, despite its strong support for a policy of non-intervention in the marketplace and the principle that regional development considerations should not be allowed to confuse energy policy objectives. If we are correct in our belief that more is needed than business as usual, with better environmental assessment, energy policy in Canada needs more thought.

In the light of our remarks about the extraordinary importance of the greenhouse effect, one might ask if nuclear energy based on the Candu technology could be the answer. One of the environmentalist members of the Committee took this approach in his Comment. Although space does not allow a detailed examination of this issue, we agree with those who argue that the nuclear option would be inappropriate. First, it is a very high-cost technology. Secondly, it offers risks which society is reluctant to accept. These include the dangers of a serious accident, of nuclear terrorism, or of nuclear proliferation, as well as problems with stored radioactive wastes which would be a threat for thousands of years.

Given our disagreement both with plans to exploit all our economically recoverable carbon fuels and with any expansion in the use of nuclear energy, what is left? The elaborate answer can be found in the 1983 study prepared by the Friends of the Earth and funded by the federal government.[10] The short answer is that a rigorous combination of energy conservation and renewable energy could provide the bulk of Canada's real energy needs by 2025, with a substantially greater quality of life than we now enjoy. Fossil fuels would be used largely as a bridge to this future, as well as for energy-efficient transportation. This prescription accords with the recommendations of the Brundtland Commission,[11] which is cited approvingly by the Energy Options Committee. Under this scenario, the greenhouse effect would not be worsened and the principle of sustainability would be honoured far more than under the approach suggested by the Energy Options Advisory Committee. As the Brundtland Commission observed, "choosing an energy strategy inevitably means choosing an environmental strategy".[12]

P.S. Elder is Associate Dean and Professor of Law in the Faculty of Environmental Design, The University of Calgary.

W.A. Ross is Professor of Environmental Science in the Faculty of Environmental Design and has interests in energy policy analysis and environmental impact assessment.

Notes

1. Special Committee of the House of Commons on Alternative Energy and Oil Substitution, *Energy Alternatives* (1981); David B. Brooks *et al., 2025: Soft Energy Futures for Canada* (1983), a study prepared by the Friends of the Earth and funded by the federal government; and Economic Council of Canada, *Connections: an Energy Strategy for the Future* (1985).
2. Energy Options Advisory Committee, *Energy and Canadians into the 21st Century a Report on the Energy Options Process.* Ottawa: Energy Mines and Resources Canada (August, 1988).
3. Report at 2.
4. *Id.* at 6.
5. *Id.* at 8.
6. *Id.* at 6.
7. *Id.* at 110 & 64 respectively.
8. World Commission on Environment and Development (the Brundtland Commission), *Our Common Future.* Oxford: University Press, 1987 at 5.
9. Jean-Thomas Bernard and Simon Thivierge, "Les politiques fiscales et financieres des services d'electricite: Le Cas d'Hydro-Québec", *Canadian Public Policy,* XIV no. 3, p. 239 (1988).
10. *Supra,* note 1.
11. *Supra,* note 5, c. 7.
12. *Supra,* note 5, at 168.

This topic will be addressed at the Institute's conference "Legal Challenge of Sustainable Development", to be held May 10-12, 1989 in Ottawa.

New Publication

The Framework of Water Rights Legislation in Canada, by David R. Percy. 1988. ISBN 0-919269-21-4. 103 pages. $20.00

This is the first major study of the systems which allocate rights to consume water in the common law provinces of Canada. The study recognizes that water law is shaped more by geographical necessity than by legal heritage and that, as a result, different principles apply in the major regions of Canada. A distinctive system can be discerned within each region, although there are frequently significant differences in the water law of the individual jurisdictions.

The study first deals with the western system of prior allocation, which forms the basis of water law from British Columbia to Manitoba. The second section of the study discusses the authority management scheme, which was adopted by the federal government for the Northwest Territories and the Yukon. The third section analyzes the Ontario permit system which is used as a representative model of the riparian system that provides the basis of water law in Ontario and eastern Canada. Throughout the study, the water law systems are compared and their individual defects are examined. Suggestions for reform are made in the light of the objectives of the individual system of water law and the experience of other jurisdictions.

This is the second of a series of studies resulting from the Institute's Canadian Water Law Project, sponsored by the Donner Canadian Foundation and Environment Canada.

To order: please send a cheque for $20 ($22 for non-Canadian orders) payable to "The University of Calgary" to: Canadian Institute of Resources Law, 430 Bio Sciences Building, The University of Calgary, Calgary, Alberta T2N 1N4.

Environmental Protection Under the Peace, Order and Good Government Power – The *Crown Zellerbach* Case

by Alastair R. Lucas

Environmental protection has suddenly become fashionable with federal politicians, as witnessed by the recent speeches of the Prime Minister, the Minister of the Environment, and even the Minister of Finance.[1] Given the election campaign, these remarks have been greeted with skepticism in some quarters. There may be more to federal environmental protection, however, than meets the eye; in fact, there may be a significant newly-defined constitutional basis for more extensive federal environmental legislation as a result of the Supreme Court of Canada's March, 1988 decision in *Regina* v. *Crown Zellerbach.*[2]

The Crown Zellerbach Case

At issue in *Crown Zellerbach* was the validity of section 4(1) of the *Ocean Dumping Control Act* [3] which prohibits the dumping of any substance in the sea except in accordance with the terms and conditions of a permit. "The Sea" is defined to include the territorial sea and fishing zones of Canada and the internal waters of Canada other than inland waters. Crown Zellerbach was charged under section 4(1) after its employees, acting without a permit, dredged wood waste from the floor of Beaver Cove and deposited it in deeper waters some 25 meters further offshore. The waste consisted of bark, wood and slabs that, the evidence showed, was not likely to cause harm to marine life. Beaver Cove, located on the northeast coast of Vancouver Island, is within the boundaries of the province of British Columbia.

The company was acquitted at trial on the ground that section 4(1) was *ultra vires* Parliament, a decision unanimously upheld by the B.C. Court of Appeal. In both courts the constitutional competition was between provincial land and resources jurisdiction *(Constitution Act 1867,* ss. 92(5) and (13)) and federal fisheries and navigation powers (ss. 91(12) and (10)). Apart from the Court of Appeal's brief rejection of the argument that marine pollution is a new matter unknown to the drafters of the *British North America Act* and therefore within the federal peace, order and good government (POGG) power, there is little indication that the POGG power was given serious consideration in the lower courts. As a result, both constitutional and environmental lawyers were surprised by the Supreme Court of Canada's elaborate analysis of the POGG power and conclusion that marine pollution is an appropriate POGG subject matter. In a 4-3 decision, the Court upheld the constitutionality of section 4(1) as a valid exercise of the POGG power.

Le Dain J., for the majority, concluded that marine pollution is a matter of national concern within POGG "because of its predominately extra-provincial as well as international character and implications".[4] He also found that marine pollution is a single or distinct subject matter and therefore appropriate for the POGG power. As shown by its treatment in United Nations scientific reports and in the Convention on the Prevention of Marine Pollution and Dumping of Wastes and Other Matter (The London Dumping Convention),[5] it is regarded as a form of water pollution distinct from fresh water pollution.

The minority took what La Forest J. described as a "more traditional approach".[6] He reviewed the authorities that support federal power to regulate extra-provincial pollution and noted that these can be complemented by prohibitory provisions under the criminal law power and the more specific fisheries power. La Forest J. also emphasized that the interrelatedness of ecological systems poses problems in drawing a clear line between marine and fresh water pollution and suggests that effective control of marine pollution requires control of air and fresh water pollution produced by industrial activities within provinces. He concluded that section 4(1) cannot be supported under POGG: it "simply overreaches"[7] because potentially, it includes moving inert and in no way dangerous material from one provincial property to another. It requires, he said:

> a quantum leap to find constitutional justification for the provision, one, it seems to me, that would create considerable stress on Canadian Federalism as it has developed over the years.[8]

This view underscores a serious problem with the majority opinion, as a result of which even core provincial areas of jurisdiction - property, natural resources and local industries - could be subject to significant federal encroachment under POGG.

There are two immediate implications of the *Crown Zellerbach* decision. One is that it conveniently shores up federal jurisdiction to enact the recently-proclaimed *Canadian Environmental Protection Act* (CEPA).[9] A second, more general implication is the possibility that an extended POGG-based federal environmental protection jurisdiction may be a basis for significant indirect federal regulation of provincial natural resource development and management.

Validity of CEPA

The *Canadian Environmental Protection Act* (CEPA) (see Resources No. 20) consolidates certain existing federal environmental statutes, including the *Ocean Dumping Control Act,* the *Environmental Contaminants Act,* the *Clean Air Act,* the nutrients part of the *Canada Water Act,* and the federal department and agency guideline power from the *Department of the Environmental Act.* Its core is a system for identification, assessment, scheduling, and ultimate regulation of toxic substances. "Toxic" is defined broadly in terms of damage to human life, health or the environment; and "substance" is defined to embrace not only new or existing chemicals, but also all manner of organic and inorganic materials including the products of biotechnology and contaminant emissions. This regulatory system for toxic substances strains the limits of the criminal law and the trade and commerce (for imported or exported substances) powers as a constitutional basis for CEPA, forcing reliance upon the POGG power.

The majority approach in *Crown Zellerbach* suggests that a strong case in favour of POGG support for CEPA can be made. Specifically, the validity of the *Ocean Dumping Control Act* is clarified. More significantly, *Crown Zellerbach* may provide a basis for upholding the toxic substance regulatory provisions. Such substances are persistent and cross provincial boundaries in air and water. The definition of toxic substances in terms of damage to human health and the environment may sufficiently distinguish them from the class of less damaging, less persistent substances that may be effectively regulated locally. Arguably, such a distinction is analogous to the salt water - freshwater pollution distinction in *Crown Zellerbach.* This would be significant in meeting the singleness or indivisibility test for POGG subject matter. Like marine pollution, reports of international agencies and international agreements to which Canada is a party[10] have recognized toxic substance contamination as a distinct subject matter with its own characteristics and scientific considerations. The equivalency provisions (under which a CEPA regulation will not apply in a province when the federal and provincial ministers agree in writing that the provincial laws are equivalent,) suggest that the scale of CEPA impact on provincial jurisdiction may be limited. These provisions also emphasize the uniform national standard objectives of the statute over specific regulation of activities within provinces.

Provincial Natural Resource Management

Provincial policy advisors have considered the possibility that the *Crown Zellerbach* case opens a back door for federal regulation of provincial natural resource development and management. If, as *Crown Zellerbach*

suggests, federal environmental protection jurisdiction under POGG extends to contaminant source control and even includes emissions that do not necessarily cause direct harm, this provincial concern may prove to be well-founded. The federal technique could be the establishment of emission standard and permit systems that would effectively govern the scale, timing and production processes for provincial natural resource developments.

This problem is summed up by La Forest J. in *Crown Zellerbach* as follows:

> It must be remembered that the peace, order and good government clause may compromise not only prohibitions, like criminal law, but regulation. Regulation to control pollution, which is incidently only part of the even larger global problem of managing the environment, could arguably include not only emission standards but the control of the substances used in manufacture, as well as the techniques of production generally, insofar as these may have an impact on pollution. This has profound implications for the federal-provincial balance mandated by the Constitution.[11]

The spectre is raised that this POGG jurisdiction could neutralize, or at least compromise, the provincial natural resources jurisdiction won under section 92A, the 1982 Resources Amendment to Canada's Constitution. The provincial "living room" identified by Premier Peter Lougheed in his October 3, 1980 speech to Albertans in response to the National Energy Program may again be threatened, this time from an unexpected direction.

Alastair R. Lucas is a Professor in The University of Calgary Faculty of Law, and a Director of The Institute.

Notes

1. "Wilson urges safeguarding of Third World environments", *The Globe and Mail*, Tuesday, September 27, 1988, p.13-23.
2. (1988), 84 N.R.1.
3. S.C. 1974-75-76, c.55, now Part VI of the *Canadian Environmental Protection Act*, s.c. 1988, c.22.
4. *Supra*, note 2, at pp. 41-42.
5. Signed by Canada December 29, 1972: (1972) 11 International Legal Materials, 1291.
6. *Supra*, note 2, at p.57.
7. *Id.*, at p.68.
8. *Id,*. at p.58.
9. *Supra*, note 3.
10. Eg. OECD, Minimum Pre-Marketing Set of Data in the Assessment of Chemicals (MPD), Decision of the Council, December 8, 1982, Document C(32) 196 (Final).
11. *Supra*, note 2, at p.54.

Institute News

New Board Member

W. James Hope-Ross was recently appointed to the Institute's Board of Directors as the representative of The Canadian Petroleum Law Foundation. Mr. Hope-Ross is Associate General Counsel, Resources, Petro-Canada Inc. He was a founding director of the Environmental Law Centre of Alberta. He was Secretary of The Canadian Petroleum Law Foundation for several years. Mr. Hope-Ross is the current President of that Foundation.

His appointment to the Institute's Board commences December 5, 1988.

Mining Law Project Sponsors

Angus McClellan & Rubenstein and Northgate Exploration Limited recently become sponsors of the Institute's Canadian Mining Law Project. The two-year $143,000 research project will result in a one-volume manuscript on mining law, focusing on mineral title.

The following is a complete list of project sponsors to date: American Barrick Resources Corporation, Angus McClellan and Rubenstein, BP Canada, Cominco Ltd., Davis and Company, Falconbridge Limited, Fasken Martineau Walker, Hudson Bay Mining and Smelting, International Corona Resources Ltd., LAC Minerals Ltd., Lawson Lundell Lawson & MacIntosh, Noranda Minerals Inc., Northgate Exploration Limited, James Wade Engineering Ltd., the Foundation for Legal Research, the Rocky Mountain Mineral Law Foundation, and the law foundations of Alberta, British Columbia, New Brunswick, the Northwest Territories, Ontario, and Saskatchewan. Additional sponsors will be announced in future issues of *Resources*.

Essay Prize Awarded

The Institute recently awarded its annual essay prize, in the amount of $1,000, to Mr. David E. Hardy for his paper entitled "Surrounding Circumstances and Custom: Extrinsic Evidence in the Interpretation of Oil and Gas Industry Agreements in Alberta". The Institute will publish the paper.

Mr. Hardy received an LL.B. from The University of Calgary in 1988. His previous awards include: Louise McKinney Post-Secondary Scholarship (1985) in recognition of exceptional academic achievement, Carswell Company Book Prize (1986) for overall understanding and ability in first year law, and Canadian Petroleum Tax Society Faculty of Law Prize (1988) for outstanding performance in Advanced Oil and Gas Law at the U. of C. He and his wife, Carol, have a son, Dexter, who was born in May, 1988. He is currently articling in Calgary with the law firm of Ballem, McDill, MacInnes and Eden.

Mr. Hardy's paper was one of ten essays submitted to a Selection Committee comprised of Ann Broughton of the Alberta Energy Resources Conservation Board (Chairperson); P. Donald Kennedy, Q.C., a lawyer with the firm Reed Donahue & Company; and Professor Nick Rafferty, Associate Dean of The University of Calgary Faculty of Law.

Students wishing to submit an entry for the 1989 Essay Prize should contact their Dean of Law for an application form. The deadline for submission of essays is June 30, 1989.

Recent Visitors

Peter Crabbe, Faculty of Law, MacQuarrie University, Australia

Geoffery Feasey, Senior Project Manager, Policy Division, Ministry of Energy, Government of New Zealand

Bill Nielson, Dean of Law, University of Victoria, B.C.

Resources
No. 24 Fall 1988

Resources is the newsletter of the Canadian Institute of Resources Law. Published quarterly, the newletter's purpose is to provide timely comments on current resources law issues and to give information about Institute publications and programs. The opinions presented are those of the authors and do not necessarily reflect the views of the Institute. Resources is mailed free of charge to more than 6,000 subscribers throughout the world. (International Standard Serial Number 0714-5918) *Editor:* Theresa Goulet

Canadian Institute of Resources Law
Executive Director: Constance D. Hunt
The Canadian Institute of Resources Law was established in 1979 to undertake research, education, and publication on the law relating to Canada's renewable and non-renewable resources. Funding for the Institute is provided by the Government of Alberta, the Government of Canada, the Alberta Law Foundation, the Donner Canadian Foundation, and the private sector. Donations to the Resources Law Endowment Fund are gratefully accepted.

Canadian Institute of Resources Law
430 Bio Sciences Building
The University of Calgary
2500 University Drive N.W.
Calgary, Alberta T2N 1N4
Telephone (403) 220-3200
Facsimile (403) 282-8325

Board of Directors
Francis M. Saville, Q.C. *(Chairman)*
E. Hugh Gaudet *(Vice-Chairman)*
Nigel Bankes
W. Gordon Brown
Don D. Detomasi
J. Gerald Godsoe, Q.C.
Karl J.C. Harries
Rowland J. Harrison
John L. Howard, Q.C.
Margaret E. Hughes
Constance D. Hunt
Louis D. Hyndman, Q.C.
John W. Ivany
Alastair R. Lucas
Peter A. Manson
William M. Mustard, Q.C.
David R. Percy
The Hon John Roberts, P.C.
Pierrette Sinclair
Maurice E. Taschereau