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Agricultural Land Protection in Quebec: A Victim of its Own Success?

*by Lorne Giroux**

After thirteen years the Quebec's agricultural land preservation statute (*An Act to Preserve Agricultural Land*,[1] hereinafter APAL) remains one of the most stringent agricultural land protection regimes in Canada. After a review of the essential features of the statute, this article seeks to draw attention to some unwanted effects of the legislation as implemented since its inception. For the author these effects stem from the centralized character of the regime, its reliance on policy objectives potentially detrimental to the needs of rural communities in outlying regions of the province and its insensitivity to environmental concerns.

An Overview of the Regime

In an agricultural zone established under the Act, the use of a lot[2] for a purpose other than agriculture,[3] subdivision and the parcelling out of a lot while retaining a right of alienation on a contiguous lot are prohibited[4] unless authorized by the Commission de protection du territoire agricole[5] (the Commission). An authorization from the Commission is also required to use a maple bush in an agricultural zone for any other purpose or to fell maple trees therein.[6] In the case of topsoil removal, the Act even requires an operating permit issued by the Commission.[7]

The regime is based on the exercise of administrative discretion. The Commission decides each application on its merits by applying criteria set out in the Act. The first and most important of these criteria is found in s.3, which directs the Commission, as its sole function, "to secure the preservation of the agricultural land of Quebec". All other criteria mentioned in the Act are always viewed by the Commission in light of this essential and only mandate. The

Résumé

Cet article s'intéresse à certains effets néfastes de la législation québécoise sur la protection du territoire agricole après treize ans d'application. Après une brève description du régime l'auteur met en lumière son caractère centralisé, la rigidité de certains critères de décision tout particulièrement en regard des problèmes de l'arrière-pays et l'absence de préoccupations environnementales dans les politiques de protection. L'auteur plaide en faveur d'un réalignement de certains des objectifs poursuivis et suggère quelques modifications législatives pouvant tendre à atténuer les effets indésirables du régime.

purpose of the legislative scheme was explicitly reiterated and applied by the Supreme Court in three landmark cases dealing with the vested rights provisions of the Act.[8] The Court reminded lower court judges that the Act is not only concerned with the protection of cultivated land but also with the reclamation of land having agricultural potential. Therefore, the courts cannot, "without usurping the functions of the Commission, decide that land is unsuited for agriculture and so remove it from the scope of the Act when that land has been expressly included in a designated agricultural region" or an agricultural zone.[9] Given the definition of "agriculture", which includes leaving the land uncropped, "the legislation considers that land is used for agricultural purposes even if it is swampy land, a mossy hill of stone or fallow land".[10]

In 1978 the Quebec government had identified four main problems calling for legislative intervention: the destruction of farms resulting from the abandonment of cultivation, urbanisation, real estate speculation and sale of agricultural lands to non-residents.[11] As measured against those objectives, the Act has been an unqualified success. It did not impose a positive duty to actually farm land situated in an agricultural zone, but it has prevented the dismemberment of agricultural properties to the point where exploitation would become uneconomical, and it has had the effect of preventing the continuation of urban sprawl at the expense of prime agricultural lands, particularly around Montreal. But APAL has also created a number of problems, some of which have been present since its inception, while others have become apparent in recent years.

A Centralized Policy

First and foremost of these problems, agricultural land protection as a planning policy has been kept out of the hands of regional and local planning authorities established under the *Land Use Planning and Development Act*.[12] Unlike the latter, which simply sets out the framework rules of the planning process while leaving to locally elected officials the contents of planning policies, APAL creates a control regime serving a specific single-minded objective and centralizes all powers in a Commission composed of appointed members. Furthermore, the Commission's control over the agricultural zone is absolute, and the Act expressly prevails over any statute applicable to a municipal authority as well as over regional and local plans and planning regulations (s.98). The net result is that regional and local planning authorities have little power over lands situated in an agricultural zone established under APAL. The real significance of this situation is apparent if one notes that, while agricultural zones represent only 2% of the territory of Quebec, they represent 30% of its inhabited territory and more than 36% of the municipally organized territory of regional county municipalities. In some such municipalities, this ratio can exceed 90%.[13]

The failure to harmonize two planning regimes whose principles and processes are so totally different has been the subject of recriminations by municipal authorities since 1979. The author is of the opinion that it is an important impediment to the establishment of effective decentralization policies in Quebec. The very existence of the Commission and its attendant bureaucracy, coupled with the influence of the farmers' unions[14] and their distrust of locally elected officials, are powerful forces working towards maintaining the status quo.

The supremacy of APAL is not limited to local and regional planning matters; it also extends to heritage[15] and environmental legislation. Thus, under s.97, an authorization having the effect of replacing agriculture by another use on a lot situated in an agricultural zone cannot be granted under the *Environment Quality Act*[16] (EQA) unless such use has been previously authorized by the Commission. This paramountcy applies not only to certificates of authorization granted by the Minister of the Environment under the general provision of s.22 EQA, but also to governmental approval for an undertaking or activity subject to an environmental impact assessment and review process under s.31.1 EQA.[17] In the latter case, this means in practice that the Commission's decision on a proposal can be rendered before the public review phase of the assessment process is completed and can thus be binding on Cabinet.

A committee appointed to review Quebec's environmental impact assessment process has concluded that the present situation renders the process ineffective by giving priority to one only of the different factors that should be considered in coming

to a decision. When both regimes apply to the same undertaking, the review committee recommended that Cabinet should seek the advice of the Commission and reserve to itself the final decision. So far this recommendation has not been acted upon.[18]

APAL and the Hinterland

Another problem relates to the long-term effects of agricultural land protection policies on the survival of some rural areas of the province. Recent studies[19] have shown that internal migrations within Quebec have had the effect of depriving the hinterland of the province of its population, especially those in the 10 to 24 age group. Between 1971 and 1981 a majority of rural municipalities suffered a population decrease. These studies have also revealed that this demographic decline has been accompanied by a correlative increase in social problems as measured by a number of socio-economic indicators. While agricultural land protection is not a cause for this decline, it is submitted that some of its policies and practices can hinder the implementation of solutions.[20]

Central to this issue is the avowed policy of the Commission and of the appeal tribunal[21] to preserve the integrity of the agricultural zone against any encroachment by non-agricultural uses, especially residential uses. Among the criteria to be taken into consideration in rendering a decision, the Commission has relied on that of the "homogeneity of the farming community and farming operations"[22] to consider the possible long-term consequences of granting authorizations for non-agricultural uses in an agricultural zone.

In a typical case, the Commission and the appeal tribunal would speculate on the dire consequences that would result from authorizing the establishment of a residence on a parcel of land having no agricultural value. Under this hypothetical scenario, a single authorization could have the effect of opening agricultural zones to non-farmers, who would then demand residential services such as convenience stores, service stations, municipal playgrounds and parks. The vocation of the land would gradually change from agricultural to residential, thereby putting pressure on municipal authorities to regulate agricultural activities and resulting in the demise of agriculture.[23]

The desire to protect the homogeneity of the farming community and farming operations can be justified to preserve agricultural lands in the vicinity of larger urban centres. However, excessive reliance on this consideration in outlying areas, where climate, soil, and economic conditions do not permit survival of a strictly agricultural community, runs counter to other desirable socio-economic objectives. Under s.62 of APAL the homogeneity criterion is listed with other factors which the Commission "shall" take into consideration. It "may" also take into consideration "the socioeconomic conditions necessary for the viability of a rural community where the low density of occupancy of the territory and the isolation of the community within a region justify it"[24]; under current practices, however, this criterion has clearly been considered as subordinate, both by the Commission and the appeal tribunal, and its impact has been limited.

The 1989 Amendments

This problem has been compounded by recent legislative amendments. In 1989, the Act was amended to allow for the identification, on the agricultural zone plan, of an exclusive sector to be carved out of soils having the highest potential, as inventoried in the Canada Land Inventory.[25] The idea was to make sure that these best agricultural lands would receive even greater protection by substantially toughening the decision criteria under the Act. Thus, under s.69.08, in an exclusive sector identified within the agricultural zone, the Commission could not grant an authorization for a proposal subject to its approval unless it were proven "that there is no appropriate area available elsewhere in the territory of the municipal corporation for the purposes contemplated by the application and that the application is compatible with agriculture or will have no effect on the preservation of agricultural land, as regards [certain of the criteria referred to in s.62]."[26]

Transitional provisions of the amending statute[27] provided that an exclusive sector could not be delimited on the agricultural zone plan unless the agricultural zone had itself been the subject of a review. In the meantime, an interim control regime was established to protect those lands that could eventually be retained for identification of an exclusive sector on the agricultural zone

plan. Under the provisions of s.35 of the amending Act, each lot, "the area of which is mainly constituted of soils" holding the requisite classification, is to be considered as if it were included in an exclusive sector. Thus, the tougher criteria apply immediately to all lots meeting the requisite test.[28] In such an instance the Commission cannot even consider factors more favourable to the applicant, such as those relating to the viability of isolated communities.

In December 1989, the Quebec Government declared that the process leading to the establishment of exclusive sectors would be suspended until all agricultural zones had been reviewed for each of the 97 regional county municipalities. This review has now been completed but, as yet, not one exclusive sector has been identified on the agricultural zone plan. It is likely that none will be. The farmers' union, a participant in the process of delimiting exclusive sectors,[29] has a vested interest in maintaining the interim control measures in place, since all lots whose physical characteristics would allow them to be included in an exclusive sector then remain subject to the restrictive provisions of s.35. Those provisions cover lots which, because of their location for instance, would not in practice have been retained in the negotiating process leading to identification of an exclusive sector. The net result is that control measures intended to be only temporary are now becoming the permanent regime, and have a tougher and broader impact than the original scheme as conceived in the 1989 amendments.

Environmental Concerns

Finally, environmental concerns have to be addressed. In Quebec, measures for preserving agricultural land have been concerned primarily with the need to protect it from intrusion by other non-agricultural uses and to prevent its fragmentation. The preservation of agricultural soils from physical degradation, and the development of farming practices less likely to destroy the soil's potential and to contaminate the environment, have never been objectives of the legislative scheme. Indeed, the underlying rationale of the decision criterion relating to "the homogeneity of the farming communities and farming operations" is the fear, on the part of agricultural producers, that the arrival of urban dwellers in the agricultural zone will likely result in litigation and municipal regulatory intervention, having the effect of interfering with farming practices. Not only have the Department of Agriculture and the farmers' union succeeded in having right-to-farm provisions included in APAL[30] but it can fairly be said that, in Quebec, agricultural activities have enjoyed a relative immunity from environmental regulations.[31] Yet, soil degradation and other significant adverse environmental effects from agricultural operations in Quebec have been identified and documented. They include soil compaction, wind and water erosion, degradation of peat bogs and drainage of wetlands. Agricultural practices such as the intensive use of fertilizers and pesticides are one of the most important sources of diffuse pollution. Finally, the concentration of animal breeding activities in certain areas of the province where, existing acreages are not adequate for the disposal of animal waste, has polluted watercourses by increasing levels of organic matter, nutrients and pathogenic micro-organisms.[32]

Conclusion

After more than a decade, it is submitted that there is a need for a review of the policy choices underlying Quebec's agricultural land protection legislation. While there have been periodic amendments to APAL, and even a review of the agricultural zones established under its authority, there has never been a thorough re-examination of its overall effects. There is no question that the Act has been effective in meeting its prime objectives as foreseen in 1978. But this effectiveness has been achieved at the expense of other desirable objectives, such as the need for effective decentralization, the survival of back-country communities and environmental protection.

By placing too much emphasis on the criterion of homogeneity, the Act, the Commission and even the appeal tribunal, have made it more difficult to develop effective social and economic diversification, a prerequisite to the durability of rural populations:

> Pour assurer son avenir et demeurer une partenaire du développement des communautés rurales en difficulté, il faut que l'activité agricole abandonne ses prétentions hégémoniques et accepte la nécessité d'une responsabilité partagée dans une approche globale et intégrée de développement des espaces ruraux dévitalisés, approche qui fait une place tout aussi importante, sinon plus, aux fonctions touristique, industrielle, commerciale, récréative et domiciliaire.[33]

Urban pressures might still justify centralized decision-making to preserve the integrity of agricultural zones around large urban centres – in the Montreal plain for instance. In outlying areas, regional decision makers are in a better position to apply the Act in a manner more in keeping with existing conditions.[34]

In the short term, it is submitted that the Act should be amended to put an end to the transitional regime established in 1989, if there is no intention to determine exclusive sectors within the agricultural zone. Given the jurisprudence of the Commission and of the appeal tribunal, only legislative amendments could bring about a change in attitude. Amendments should be directed at increasing the relative weight of considerations allowing the Commission to take into account the plight of the hinterland. There is nothing to prevent the legislator from directing the Commission to apply different criteria to different regions in Quebec. In any event, any review should be conducted with the objective of reducing confrontational attitudes between agricultural producers and local authorities.[35]

Lastly, it should be recognized that effective land preservation must also take into account environmental concerns. Granted that environmental considerations are outside the ambit of APAL and fall under the responsibility of the Department of the Environment, Quebec's environmental legislation, as applied to the farming sector, can be said to amount to a policy of benevolent neglect. Furthermore, actual practices coupled with right-to-farm provisions of the legislation, could lead to attitudes and policies having the potential effect of creating pollution enclaves out of agricultural zones.

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Notes

1. R.S.Q., c. P-41.1.

2. The definition of "lot" includes any parcel of land whether designated by a separate number on the official plan of the "cadastre" or described in a deed of conveyance by metes and bounds: APAL, s.1(8).

3. "Agriculture" means the cultivation of the soil and plants, leaving land uncropped or using it for forestry purposes, or the raising of livestock, and, for these purposes, the making, construction or utilization of works, structures or buildings, except residences": *id.*, s.1(1).

4. *Id.*, ss. 28, 29 and 55.

5. For the Commission's establishment, see APAL s. 3-21.

6. *Id.*, ss. 1(7) and 27.

7. *Id.*, ss. 70-79.

8. *Veilleux* v. *Québec (C.P.T.A.Q.)*, [1989] 1 S.C.R. 839, 95 N.R. 390; *Gauthier* v. *Québec (C.P.T.A.Q.)*, [1989] 1 S.C.R. 859, 95 N.R. 312; *Venne* v. *Québec (C.P.T.A.Q.)*, [1989] 1 S.C.R. 880, 95 N.R. 335. For reviews, see: Jane M. Glenn, "Real Property - Land Use Control - Protection of Agricultural Land - Vested rights", (1990) 69 *Can. Bar Rev.* 784; L. Giroux, "Les droits acquis de la Loi sur la protection du territoire agricole à la lumière de la jurisprudence de la Cour suprême du Canada et de la Cour d'appel du Québec", (1989) 20 *R.D.U.S.* 27.

9. Beetz J. in *Venne*, *id.*, at 908 S.C.R.

10. *Id.*, at 912-913.

11. Jane M. Glenn, "La protection du territoire agricole au Québec", (1980) 11 *R.G.D.* 209, at 211, cited by Beetz J. in *Gauthier*, *supra*, note 8, at 869. The last problem was dealt with under specific legislation: *An Act Respecting the Acquisition of Farm Land by Non-Residents*, R.S.Q. c. A-4.1.

12. R.S.Q., c. A-19.1. It was enacted after the coming into force of APAL by S.Q. 1979, c. 51.

13. J. Brière, *Rapport du Comité d'étude sur le mécanisme de révision des zones agricoles*, (Québec: November 1989), at 36-37; Commission de protection du territoire agricole du Québec, *Révision de la zone agricole. Bilan final.* (Québec: 1992). After a recent review of the agricultural zone, conducted under ss. 69.1 to 69.4 of APAL, the total area of the agricultural zone was reduced by 3.2% and now covers 6,234,216 hectares. Even if regional county municipalities have participated in that review process, it was not conducted in conjunction with the preparation of their regional development plans: Brière, at 46-48.

14. Confédération de l'Union des producteurs agricoles.

15. *Cultural Property Act*, R.S.Q., c. B-4.

16. *Environment Quality Act*, R.S.Q., c. Q-2.

17. Section 31.1 refers to a project listed under one of the paragraphs of s.2 of the *Regulation Respecting Environmental Impact Assessment and Review*, R.R.Q. 1981, c. Q-2, Reg. 9.

18. *L'évaluation environnementale: une pratique à généraliser, une procédure d'examen à parfaire. Rapport du comité de révision de la procédure d'évaluation et*

d'examen des impacts environnementaux, (Québec, Gouvernement du Québec: décembre 1988).

19. *Deux Québec dans un. Rapport sur le développement social et démographique* (Boucherville, Gaëtan Morin éditeur: 1989); *Tant vaut le village, tant vaut le pays. Les Etats Généraux du monde rural*, in Cahier spécial-Etats généraux, *La Terre de chez nous*, semaine du 28 janvier 1991, 1-5.

20. *Deux Québec dans un, supra*, note 19, 108; Bernard Vachon, "Le développement local en milieu rural ou la mobilisation des forces endogènes, 'Une stratégie pour ne pas disparaitre', *in Points de vue sur le développement rural au Québec*, (Québec, O.P.D.Q.: 1990), 19, at 36.

21. Under APAL a decision or an order of the Commission can be appealed to an administrative appeal tribunal, the Tribunal d'appel en matière de protection du territoire agricole. The appeal tribunal can confirm or quash, in whole or in part, the decision or order of the Commission. It can render the decision which, in its opinion, should have been rendered in the first instance, applying the criteria set out in the Act. The appeal tribunal thus enjoys the same discretion as that of the Commission. The decisions of the appeal tribunal can be appealed, on leave, to the Court of Québec on any question of law or jurisdiction. APAL, ss. 21.0.1. to 21.9.

22. APAL, s. 62, para. 2(6).

23. For a classic example: *Michon* v. *Commission de protection du territoire agricole* [1990] Recueil en matière de protection du territoire agricole [R.P.T.A.] 201, at 203-204 (tribunal d'appel).

24. APAL, s. 62, para. 3(2).

25. "The commission shall identify as an exclusive sector, on the agricultural zone plan, any part of that zone which it determines on the basis of the identification of soils having a soil capability of class 1, 2 or 3 and organic soils, as inventoried on the maps of soil capability for agriculture prepared within the scope of the Canada Land Inventory.

    The organic soils referred to in the first paragraph are soils which enjoy a climate of 2,500 corn-heat units or more." APAL, s. 69.0.1, as enacted by S.Q. 1989, c. 7, s. 25. In force on July 1, 1989.

26. APAL, s. 69.0.8, para. 1, as enacted by S.Q. 1989, c. 7, s. 25. In force on July 1, 1989.

27. S.Q. 1989, c. 7, s. 33, paras. 1, 35. In force on July 1, 1989.

28. *Louiseville (Ville de)* v. *Commission de protection du territoire agricole*, [1990] R.P.T.A. 135 (appeal tribunal).

29. Under s.69.0.3. APAL, the plan of the agricultural zone comprising the exclusive sector, as prepared by the Commission, must be submitted to the local and regional municipalities concerned and to the Confédération de l'Union des producteurs agricoles. Within 60 days, they can transmit their recommendations to the Commission with a view to reaching an agreement which would then be submitted to the government for approval. The statute is silent as to the participation of the farmers' union in the negotiation process set up to review the agricultural zone under ss. 69.1 to 69.4, but, in fact, the Union participated in it: Brière, *supra*, note 13, at 30, 34.

30. APAL, ss. 79.1 to 79.25, as added by S.Q. 1989, c. 7 s. 6 (in force on July 1, 1989) and s. 100. M. Poirier, "Les corporations municipales et la zone agricole: les récents développements législatifs", (1989) 20 *R.D.U.S.* 1, at 17-25.

31. "D'autre part, l'éparpillement et l'éclatement du droit environnemental québécois ne permet pas toujours d'en apprécier globalement la portée. L'observateur qui s'y penche de façon plus systématique et qui intègre l'étude de la réglementation à celle des législations qui le composent ne peut s'empêcher d'en tirer la conclusion que certains secteurs d'activités font l'objet d'exclusions et d'exceptions d'autant plus surprenantes que les activités de ces secteurs ont un impact environmental significatif. Au Québec, c'est le cas en particulier pour le secteur agricole." L. Giroux, "L'approche législative: ses tendances et ses limites selon l'expérience du Québec" (1991) 2 *J.E.L.P.* 55, at 70.

32. Conseil de la conservation et de l'environnement, *Les éléments d'une stratégie québécoise de conservation en vue du développement durable. Avis sur l'agriculture* (Québec: mars 1990), at 17-46; *L'environnement au Québec. Un premier bilan. Document technique* (Québec, Gouvernement du Québec, Ministère de l'Environnement: 1988), 159-172 and 259-276; *Soil at Risk. Report on Soil Conservation by the Standing Committee of Agriculture. Fisheries and Forestry to the Senate of Canada* (Ottawa, Senate of Canada: 1984), at 55-72.

33. B. Vachon, *supra*, note 20, at 36.

34. More so, when lands actually farmed within the agricultural zone represent only 58% of the total area of the zone. Furthermore, about 40% of those areas actually farmed constitute unimproved lands, i.e. wooded lots or natural grazing areas. *Révision de la zone agricole. Bilan final, supra*, note 13, at 19-20.

35. On that aspect, the 1989 amendments have been a failure: M. Poirier, *supra*, note 30, at 25-26.

Marketing Electricity: Alberta Review Raises Key Issues for a Sustainable Energy Policy

*by Janet Keeping and Nigel Bankes**

Background

Most electricity consumed in Alberta is generated by three utilities. Alberta Power serves the northern part of the province and two discrete areas along the Saskatchewan border; Edmonton Power serves the City of Edmonton; and TransAlta Utilities serves southern and much of central Alberta. Since 1982 the generation and transmission costs incurred by these utilities have been equalized through a mechanism implemented by the *Electric Energy Marketing Act*.[1] The primary objective of the scheme was that it yield more uniform electricity rates across the province. Although the program has been substantially successful in this regard, consumers in TransAlta's service area have been increasingly unhappy with equalization because, as was intended, it has caused their electricity rates to rise.

In response, the provincial government has announced a review of what is called the Electric Energy Marketing (EEM) program. A seven-member panel is expected to report by the beginning of this fall. Although the details of the EEM program are unique to Alberta, where the electric utility industry is structured quite differently from the rest of Canada, the issues to which a reconsideration of the concept give rise are basic to contemporary energy debates, not only nationally but, world-wide.

A sustainable energy policy

It is now widely recognized that energy and environmental policy are inextricably connected. The Brundtland Commission faced the issue squarely when it stated "... choosing an energy strategy inevitably means choosing an environmental strategy".[2] One obvious consequence of this connectedness is that the EEM program cannot be meaningfully reviewed in a vacuum; it must be examined within the context of the need to achieve sustainability in all our affairs. What is needed is a vision of what a sustainable Albertan society would look like. Only with a goal of that sort to work towards can suitable energy policy be designed.

To give the provincial government its due, it has recognized that the relevant issues are not narrow. Using the Minister of Energy's own words, "... the Review Panel has broad terms of reference. They will examine whether EEM's original objectives, established in 1982, are valid for the 1990s; whether the act's current implementation is the most effective and fair way to achieve its objectives; and what the alternatives are if EEM's objectives are no longer valid."[3]

But this is as far as directions to the review panel go. It is our view that this kind of guidance is insufficient: it is clear that the appropriate resolution of electric energy marketing issues is crucial to the attainment of a sustainable energy policy, and thus the provincial government must

Résumé

Cet article porte sur l'examen, annoncé dernièrement, du programme albertain de commercialisation de l'énergie électrique, dont les débuts remontent à 1982. En vertu du programme, les coûts d'amont (c'est-à-dire de génération et de transmission) des trois réseaux de distribution d'électricité les plus grands de la province ont été mis en commun, donnant ainsi des tarifs d'électricité à l'échelle de la province plus uniformes qu'ils ne le seraient autrement.

Les auteurs de l'article contestent les assises de tels programmes d'uniformisation des coûts et soutiennent que les tarifs d'électricité devraient plutôt refléter la charge intégrale que pose à la société la production et la consommation d'électricité. La tarification en fonction du coût entier est considérée nécessaire afin d'arriver à des habitudes de consommation d'énergie plus raisonnables; les difficultés qui pourraient résulter de la tarification en fonction du coût entier devraient être compensées par un appui financier plus important aux personnes dans le besoin. Bien que les modalités du programme de commercialisation de l'énergie électrique de la province soient propres à l'Alberta, les auteurs avancent que les questions soulevées par l'examen du programme sont à la base des débats contemporains sur l'énergie qui se livrent non seulement à l'échelle nationale, mais dans le monde entier.

ensure that the environmental ramifications of those issues be fully explored in the present review.

The purpose of this brief note is to suggest an approach to the review of electric energy marketing that would at least begin to ensure that the essential issues are canvassed. Our discussion will focus on six questions: 1) What ought the electric utility industry look like thirty years from now? 2) Does the EEM program facilitate or impede the achievement of this goal? 3) Is rate equalization a desirable policy goal? 4) What ought to be done about the inequities caused by disparate rates? 5) Is there a role for an electric energy marketing agency in an environmentally astute electricity policy? 6) Has the government of Alberta selected the most appropriate vehicle or process for such an important review of provincial energy policy?

What ought the electric utility industry look like thirty years from now?

While there are differences in emphasis and detail, there is a remarkable convergence of opinion in environmental circles on how the electricity supply industry should be changed in order to achieve sustainability. The consensus seems to be that the industry should consist of a decentralized network of small-scale generating sources.[4] Decentralization is thought crucial for a number of reasons. For one thing, decentralized systems tend to be more resilient: problems can develop in one part of the system without total breakdown. For another, they allow for the use of many, smaller-scale generation sources than would be the case under a heavily centralized system. Smaller scale tends to favour the use of renewable technologies that are more environmentally benign, such as wind and solar. Moreover, the risk of incorrect demand predictions is minimized because shorter lead times for construction are required. The problem of "rate shock" when large capital units are brought on-stream is also avoided.[5] Finally, decentralization brings electricity generation closer to the consumer: the wind farm on the outskirts of town is more understandable and thus better appreciated than the huge coal burning plant many kilometres out in the prairie (which is far out of sight and nearly always out of mind).

Does the EEM program facilitate or impede the achievement of this goal?

We are in no position to answer this question definitively, and our primary objective here is to raise, not answer, the questions pertinent to a review of the EEM program in Alberta. But it would appear that the EEM program tends to discourage development of the kind of system described above. The program would seem to militate against decentralization of the electric energy industry. In fact the program can be seen as creating the opposite – one big electricity-generating utility. At a minimum, it is difficult to see anything in the EEM program that encourages decentralization. It is possible that this is not a necessary consequence of the EEM approach, but is only the result of the way in which it has been operated to date. Thus the EEM program might favour decentralization if EEM were able to purchase from a range of energy producers rather than just the three regulated utilities, a point which we discuss in more detail below.

Another aspect to be investigated is whether the EEM program encourages or discourages the development of large-scale, and thus high-risk, projects. Our suspicions are that the pooling of generating and transmission costs tends to insulate the proposing utility from risk and therefore promotes over-building.

Is rate equalization a desirable policy goal?

While a 1981 news release announcing the establishment of the EEM scheme lists five objectives for the program, the first of these was the one with which the provincial government was the most concerned, and is the only one which was actively pursued by the agency set up to carry out the mandate – the Electric Energy Marketing Agency[6] (EEMA). That goal was to "establish 'fair and equal' wholesale electric power rates for Albertans".[7] What "fair" might mean in this context apart from "equal" is not easy to discern, but that problem aside, as noted above, the program was successful in narrowing the range of consumer rates throughout most of the province through the imposition of a common wholesale rate. The following paper transaction achieved this result: the three major electric utilities were required to sell their electricity to the EEMA (at a price for each that was determined by the Public Utilities Board using the usual rate-making principles), whereupon the EEMA promptly

sold the energy back to them at the average of the three prices. While reasonably simple to state, the process is fairly complex in its details, but they are not important here.

What **is** important is to assess whether it is appropriate to try to equalize electricity rates through the province. This will be one of the major issues before the EEM Review Panel, and while it is a difficult one, we suggest that ultimately it should be answered in the negative. The better view is that electricity rates should reflect the full burden that electricity production and consumption imposes on society. This burden includes environmental costs, such as those associated with sulphurous emissions or flooding for hydroelectric reservoirs. It also includes the costs of generation and transmission, which are pooled under the current EEM program in Alberta.

There are at least three strong arguments in favour of full-cost pricing of electricity. First, full-cost pricing should make money available to remedy damage caused by electricity generation and use, or to compensate injured parties where a remedy is not possible. Second, such rates give consumers, as it is sometimes put, the "correct pricing signals". Third, the burden of full-cost pricing will fall more heavily upon conventional sources and less heavily upon alternative sources which produce less pollution. As a result these alternative sources will be made more economically attractive.

Many argue, sensibly we think, that we cannot expect people to adopt sustainable energy practices without charging full costs. Thus, any attempt to "fudge" electricity rates – for example, to smooth out differences in costs as is done in the EEM program – thwarts efforts to achieve these goals. If these goals are worthwhile, as we think they are, then the central point of the EEM program is ill-conceived.

Finally, we should not forget that when the EEMA program was first introduced, the government of the day considered it expedient to provide a subsidy to TransAlta's customers to cushion the effect of equalization. Subsidies, which send the wrong pricing signals and encourage energy consumption, are not an appropriate part of a sustainable energy policy.

What about the inequities caused by disparate rates?

Of course, if no effort is made to even out rates across the province, then significant disparities may exist. In the absence of EEM there would be greater disparities than currently exist; in the future these could be exacerbated. What about the inequities caused by disparate rates? None of the above discussion is intended to suggest that the provincial government ought not to assist those in need. Indeed, it should. Lower-income households may well require substantially increased support to cope with changes that moves toward sustainability may entail. Similarly, it may be appropriate for the provincial government to support worthy economic development with financial assistance. What is seriously wrongheaded is the continued across-the-board subsidization of energy costs, whether through the general failure to recognize social, and in particular environmental, costs of energy or through specific cost-suppressing initiatives such as the EEM program.

Is there a role for an electric energy marketing agency in an environmentally astute energy policy?

There may well be, and this is a crucial issue for the Review Panel. Many would say that it is essential not only to move to the decentralized, small-scale generation model referred to above, but also to break up the monopolistic generating utilities. The circumstances that dictated their formation – the need for large, centralized plant requiring huge financial investment – are gone. The justification for distribution monopolies may well remain, but it ought to be possible to separate the functions of generation and transmission from the local distribution function. If the generation side of the industry becomes truly competitive there could be a need for an agency to coordinate sales to the distributing utilities.[8] As we noted above, the problem may not be with the EEM idea itself, it may just be with the way in which it has been implemented to date.

Arguably the disintegration of the generating utilities' monopoly has already begun in Canada. The giant electricity utilities (for example, B.C. Hydro and Ontario Hydro) are now committed to buying from non-utility sources – for example, co-generators – to meet much of the expected new demand. In Alberta, the process has also begun. The Small Power Producers program

allocates a total of 125 MW of capacity to independent producers and requires that the utilities buy that power at a price specified by regulation.[9] But it may make much sense to go further than merely encouraging or even requiring the utilities to buy from independent sources.

Why not a market in electricity at the wholesale level? The question needs to be answered by the EEM Review Panel, and there are experiments underway in other jurisdictions from which much can be learned. For example, California has taken significant steps to implement a more open electricity system,[10] and some of the steps taken to restructure the British electricity industry might also be instructive.[11]

Has the government of Alberta selected the most appropriate vehicle or process for such an important review of provincial energy policy?

Mr. Orman, the Minister of Energy for the province, has elected to have this review conducted by an ad hoc panel constituted by ministerial order. The panel is to operate in an informal manner. Alberta already has two expert tribunals in the form of the Public Utilities Board and the Energy Resources Conservation Board, both of which are accustomed to dealing with matters of provincial energy policy. In the past these Boards have been invited to conduct joint reviews on important issues of provincial energy policy.[12] Both boards are independent tribunals equipped with the usual powers of formal quasi-judicial bodies to collect all information necessary for their inquiries. In addition, the Public Utilities Board (and to a lesser extent the ERCB) has long exercised a jurisdiction to award costs to intervenors that assist the Board in reaching its conclusion.

By electing to use an informal process for this review, the Minister has denied members of the public the opportunity to ensure the production of all relevant information from both the utilities and government itself. Lest we be thought to be "crying wolf" on this point, the sceptical reader need look no further than the background review paper on the EEM program prepared for the Minister by Govier Consultants[13] and DataMetrics Ltd., which refers at several points to confidential documents which cannot be referenced. In our view, the EEM review raises important questions about Alberta's energy policy. It is vital that the debate on these issues be conducted in as open and informed a way as possible. It is not clear to us that an ad hoc panel is the best vehicle to achieve this goal.

Conclusions

The main purpose of this article has been to indicate how we think a useful review of the EEM program in Alberta should be focused. We have argued that the EEM program review be set in its wider energy and social context, that it should be evaluated in light of an articulated and agreed upon energy future. We have suggested that the characteristics of that future include a more decentralized, small-scale electricity generating industry and that the EEM program as currently implemented may hinder the achievement of that goal. We have also argued for full-cost electricity pricing. However, noting that energy and social policy are interdependent, we have pointed out that substantial income support for lower-income rate-payers may be a necessary corollary of that approach. Similarly, financial assistance may be appropriate for desirable economic development projects as well. Obviously, full-cost pricing would result in discontinuation of the EEM program. Nevertheless, we have indicated that there may be a role for an electric energy marketing agency in a restructured electricity industry that includes a truly competitive generating sector.

It is readily seen that the EEM program review gives rise to several fundamental energy, economic and social policy issues. These must not be shirked if the review is to move Alberta, as it should, closer to a sustainably better future.

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Notes

1. S.A. 1981, c. E-4.1.

2. World Commission on Environment and Development *Our Common Future* (New York, Oxford University Press: 1987), at 168.

3. Government of Alberta News Release "Province Seeks Public Input on Electric Energy Marketing Act Review", March 2, 1992. For greater clarity, we have used "EEM" or "EEM program" where the Release speaks of "EEMA".

4. See for example, David B. Brooks, *Zero Energy Growth for Canada*, (Toronto: 1981), and P. S. Elder *Soft is Hard: Barriers and Incentives in*

Canadian Energy Policy (Calgary, Detselig Enterprises Ltd.: 1984).

5. See *Alberta Power Limited et al.* v. *Alberta Public Utilities Board* (1990), 72 Alta.L.R.(2d) 129 (C.A.).

6. The Electric Energy Marketing Agency ceased to function in 1991. Since then, its duties have been carried out by the provincial Department of Energy.

7. See *Review of the Alberta Energy Marketing Program*, prepared for the Hon. Rick Orman, by Govier Consulting Services and DataMetrics Limited, at 5.

8. Observers of the gas and telecommunications industries will have noted similar trends towards the deregulation of elements of these regulated industries.

9. *Small Power Research and Development Act*, S.A. 1988, c. S-13.75 as am. and *Small Power Research and Development Regulation*, Alta. Reg. 336/88.

10. See Jane Summerton and Ted K. Bradshaw "Towards a dispersed electrical system: Challenges to the grid", *Energy Policy* (January/February 1991) 24.

11. Much of the commentary on changes to Britain's electricity industry has focused on privatization. See for example, C. Graham and T. Prosser, "Privatizing Nationalized Industries: Constitutional Issues and New Legal Techniques" (1987), 50 *Mod. L. Rev.* 16, but work that more closely examines the restructuring of the industry includes the criticism that the break up of the old monopolies has not gone far enough. See Ian Fells, "The Power Politics of British Energy", *The Independent on Sunday*, 14 October 1990, 48.

12. See for example the joint reports on the *Small Power Inquiry*, PUB Report E88001 and ERCB Report 88A, and on the *Gas Supply and Transportation Service Inquiry*, PUB Report E87128 and ERCB Report 87C.

13. *Supra*, note 7. Dr. Govier has also been appointed as a member of the panel.

Institute News

Contract Law Course

The Institute recently held a Contract Law Course for employees of Canadian Occidental Petroleum Ltd. This was the 21st offering of this highly successful course.

The two-day course is designed for non-lawyers in the oil and gas sector who deal extensively with contracts. The course examines such issues as how a contract is formed and terminated, judicial approaches to the interpretation of contracts, and the calculation of damages. In addition, a number of clauses commonly found in petroleum industry contracts are scrutinized (including *force majeure*, independent contractor, choice of laws, liability and indemnity, and confidential information).

Materials prepared for the course draw upon Canadian cases and problems involving the petroleum industry. The course is conducted by Professor Nicholas Rafferty of The University of Calgary Law School, and Susan Blackman, Research Associate of the Institute. The course may be offered publicly, or in-house to oil company employees.

For more information about the Contract Law Course please contact Pat Albrecht at (403) 220-3974.

Recent Institute Publications

Resource Development and Aboriginal Land Rights, by Richard Bartlett. 1991. 122 pages. $25.00.

Managing Interjurisdictional Waters in Canada: A Constitutional Analysis, by Steven Kennett. 1991. 238 pages. $26.00.

Security of Title in Canadian Water Rights, by Alastair R. Lucas. 1990. 102 pages. $22.00.

The Legal Challenge of Sustainable Development, Essays from the Fourth Institute Conference on Natural Resources Law, Ottawa, Ontario, edited by J. Owen Saunders. 1989. 404 pages. $75.00.

The Inuvialuit Final Agreement, by Janet Keeping. 1989. 160 pages. $14.40.

The Offshore Petroleum Regimes of Canada and Australia, by Constance D. Hunt. 1989. 169 pages. $14.40.

To order publications please send a cheque payable to "The University of Calgary". Orders from within Canada, please add 7% GST. Orders from outside Canada please add $2.00 per book. Please send orders to: Canadian Institute of Resources Law 430 Bio-Sciences Building, The University of Calgary, Calgary, Alberta T2N 1N4; Telephone (403) 220-3200 Facsimile (403) 282-6182

Recent Visitors

Robin Handley, Faculty of Law, University of Wollongong, New South Wales, Australia

Scott Sibary, Coordinator, Canadian Studies Program, California State University, Chico

Paul Painchaud, Directeur, Groupe d'études et de recherches sur les politiques environnementales (GERPE), Faculté des sciences sociales, Université Laval, Québec

Executive Director Awarded Inaugural Willoughby Prize

The Institute's Executive Director, Owen Saunders was presented with the inaugural Willoughby Prize in Washington, D.C. on April 5 by Nicholas Halton, the Executive Trustee of the Petroleum and Mineral Law Education Trust.

In memory of the late Geoffrey D. Willoughby, one of the leading contributors to the development of United Kingdom oil and gas law, Mr. Willoughby's partners in the London firm of Herbert Smith, together with the Trustees of the Petroleum and Mineral Law Education Trust, have created a fund for the award of the Prize. The Prize, to the value of £750, is awarded each year to the author or authors of an article of outstanding merit published during the year in the International Bar Association's *Journal of Energy & Natural Resources Law.*

Professor Saunders was awarded the Prize for his article in Volume 8, No. 1 of the *Journal*, entitled "Energy, Natural Resources and the Canada-United States Free Trade Agreement". This article discusses the Agreement in the multiple contexts of the general trade law of the GATT, Canadian and US political attitudes, and the pre-existing pattern of Canadian-US natural resources trade and regulation.

Upcoming Seminar

Lorne Giroux, the 1992 holder of the Chair of Natural Resources Law will be presenting a seminar on May 14 from 1:30 to 4:30 in the Moot Court Room, 5th Floor, Biological Sciences Building, The University of Calgary.

The seminar, co-sponsored by the Institute and the Faculty of Law at the University of Calgary, is entitled **Threshold Issues in Environmental Impact Assessment**. The goal of the seminar is to provide an analysis and a discussion of the legal issues relating to triggering mechanisms in environmental impact assessment processes. The seminar will examine how different jurisdictions have dealt with the crucial initial question in environmental impact assessment policies: What proposals, undertakings and activities have to be assessed?

The seminar will focus on the following aspects:

- An overview of the different legal techniques developed to solve the threshold question, as provided by an analysis of selected environmental impact assessment regimes.

- The identification and analysis of legal issues likely to arise in conjunction with the different techniques discussed.

- The environmental impact provisions of the proposed *Alberta Environmental Protection and Enhancement Act* and Draft Regulations, and of the proposed *Canadian Environmental Assessment Act* will be analyzed.

There is no registration fee for the seminar; however participants should register with Pat Albrecht at 220-3974.

Resources
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