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TITLE OF THESIS..... THE REGULATORY FUNCTION OF GOVERNMENT:
..... THE NATIONAL ENERGY BOARD
.....
UNIVERSITY..... CARLETON UNIVERSITY
DEGREE FOR WHICH THESIS WAS PRESENTED..... M.A.
YEAR THIS DEGREE GRANTED..... 1972

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THE REGULATORY FUNCTION
OF GOVERNMENT:
THE NATIONAL ENERGY BOARD

by

Robert R. Foulkes

A thesis submitted to Carleton University
in partial fulfillment of the requirements
for the degree of Master of Arts in
Public Administration

School of Public Administration
Carleton University
Ottawa, Canada

April, 1972

The undersigned recommend to the Faculty of
Graduate Studies acceptance of the thesis

"The Regulatory Function of Government: The
National Energy Board"

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ABSTRACT

The thesis first surveys and assesses the ways in which regulation by government may be examined, and of the criticisms made of independent regulatory commissions. An independent regulatory commission, the National Energy Board, is examined in terms of the historical life-cycle theory as described by M. H. Bernstein, in terms of its degree of independence, in terms of its relation to concepts of administrative justice, and in terms of its broader political and policy role, using some of the theoretical categories of Theodore Lowi. This latter political and policy role is emphasized in the thesis. Concluding observations are made both about the role of the National Energy Board and of the approaches used in examining the regulatory function in government.

FOREWORD

I wish to express my gratitude to Dr. G. Bruce Doern, Acting Director of the School of Public Administration for so ably guiding the development of this thesis. I would also like to commend my fellow students in the School for creating what has been to me an intellectually enlightening year. Finally, I wish to thank my wife, Elaine, for contributing so much to the development of this thesis. As a typist, as a never-ending source of morale and encouragement, as a perceptive critic; she was much more than just a wife but a true friend.

Bob Foulkes
Carleton University
March 12, 1972

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CHAPTER I

INTRODUCTION AND A BRIEF DESCRIPTION OF THE N.E.B.

Of all of the Canadian governmental institutions, the one type we know the least about is the independent regulatory agency. Governments, burdened with more complex and voluminous tasks, have increasingly passed much of their work on to these agencies, boards and tribunals. This paper is an attempt to examine one of these bodies.

The National Energy Board is perhaps one of Canada's less well-known regulatory agencies. Such boards as the Canadian Transport Commission and the Canadian Radio-Television Commission are certainly more publicized and affect the individual more directly. Yet the National Energy Board, in carrying out its mandate, has at least as much power to drastically change our way of life, although in a less direct and obvious way. It does after all have regulative control over one of the most important (for now and for the future) fields, the regulation of non-renewable energy resources of oil, natural gas and their products; as well as control over the transmission of electrical power. This is especially important given the amazing rate that Canadians use energy and the fundamental necessity of abundant energy

for Canada's survival as a nation.¹

With energy and energy utilization being so fundamental, attention must be given to the regulative body that controls the industries providing these sources of energy.

One word of caution must be given at the outset. This paper is only very indirectly concerned with the substance of energy policy and energy related matters. To be able to pass a more complete judgment on the Energy Board one would have to be extremely knowledgeable about all facets of the energy field -- something which would require years of intensive study. Thus alternative, but equally important, methods of assessment had to be chosen, primarily centred on the processes and structures of regulatory activity. As well, the regulatory focus is not easily based on existing literature which tends to look at the regulatory function and regulative agencies in a vacuum and from various specialized viewpoints.

The main objective of this paper is to attempt to look at one major independent regulatory commission from a broader perspective. It is hoped that a greater understanding will be developed, not only of the N.E.B. itself but perhaps of other independent regulatory tribunals in Canada, as well.

¹Canada is the second largest per capita consumer of energy in the world. Given the need for fuel for heat and for long-distance transportation, adequate resources of energy are fundamentally important. "Canada's Role in the North American Gas Play", Speech to Mid-Pacific Gas Marketing Conference, May 7, 1971, Honolulu, Hawaii, by D. M. Fraser, Vice-Chairman, N.E.B.

The remainder of this chapter deals with the National Energy Board; its makeup, powers, duties, etc.. The main objective will be to give the reader an initial clear description of the legislative framework of the Board. As well a survey of some of the duties of the Board will be given.

The second chapter will discuss regulation and attempt to answer some of the following questions. Why was the specific vehicle of an independent regulative board chosen to deal with the energy sector? Where did such an idea come from? To what extent does the regulative function as carried out by the N.E.B. exist within the total governmental framework? Can one distinguish between the regulative function and the specific regulative mechanism of the independent regulatory commission?

A third chapter will attempt to outline some of the criticisms of the independent commission form of regulation. Many of these criticisms, although mostly levelled at American boards and commissions, seem equally applicable to Canadian commissions. The criticisms are also considered universal; problems are found which transcend the individual commission and become problematical for all independent commissions which attempt to regulate sectors of private industry.

A second section will consist of three particular areas of concern which are especially important to Canadian commissions. Various critics have concluded that the American commission ages and outlives its usefulness; one should wonder

whether the younger Canadian commissions will follow the same process. The particular nature of the independent regulative commission in the overall governmental policy process raises questions as to its role in that process. Finally the nature of control of such a body, which has been created to be independent of control, is an interesting one.

Preparation and research for the paper have come from three sources; private confidential interviews with people associated with the Energy Board, primary sources such as the Annual Reports of the Board and special government publications relating to the Board, and secondary and tertiary sources relating to regulative theories and general energy matters. The sources and a list of interviews are noted in the bibliography.

Finally, the focus of this paper is broad. The available existing literature does not present an adequate framework to develop a case study method of analysis. Thus this thesis deals somewhat secondarily with the particular case of the National Energy Board; rather it attempts to develop a broad method of analyzing regulatory boards by the use of the N.E.B. as an example. With such a broad focus one always hazards the charge of superficiality; however, it was felt to be necessary to the development of a universally applicable method of analysis.

The National Energy Board came into being by the proclamation of the National Energy Board Act on November 2, 1959.² The Act, as presently amended and developed, gives the Board broad powers and authority to act in relation to the construction and operation of oil and natural gas pipe lines and electrical power lines; the regulation of rates, tariffs, and tolls of these lines; and the regulation of export and import of oil, natural gas, oil and gas products and electrical power. The National Energy Board, in its 1970 Annual Report, outlines its duty generally as being "to assure to Canadians the best use of energy resources".³ More specifically it considers itself responsible for:

Adjudicating upon applications for licences to export and to import natural gas, applications to construct and operate interprovincial and international pipe lines for the transportation of petroleum and its products and of natural gas, and applications for licences to export electrical power and energy and for certificates to construct and operate international power lines, . . . regulating the rates, tolls and tariffs of oil and gas pipe lines under its jurisdiction.⁴

The Board also has an advisory role set out in the Statute. The Act states:

22(1). The Board shall study and keep under review matters over which the Parliament of Canada has jurisdiction relating to the exploration for, production, recovery, manufacture . . . exchange

²Canada, National Energy Board Act, R.S.C., 1959, c. 46.

³Canada, N.E.B., Annual Report, Ottawa, Information Canada, 1970, p. 1.

⁴Canada, N.E.B., Annual Report, ibid., pp. 1-2.

and disposal of energy and sources of energy . . . shall report thereon from time to time to the Minister and shall recommend . . . such measures . . . it considers necessary or advisable in the public interest.⁵

The Board may also be directed to prepare studies and reports at the request of the Minister (of Energy, Mines and Resources)⁶ and may also initiate hearings on any matters that it feels necessary.

The National Energy Board however does not really deal with these matters in a total vacuum. The Act sets out the guidelines that are to be followed in the exercise of the discretion of its powers. With reference to export or import license applications the Board must satisfy itself that the quantity to be exported does not exceed reserves after allowance has been made for "the reasonably foreseeable requirements for use in Canada".⁷ The price charged for the export item must be "just and reasonable in relation to the public interest" and more generally the Board must take into account "all the considerations that appear to it to be relevant".⁸

⁵Canada, N.E.B. Act, op. cit., Section 22(1), all quotes come from an updated but unofficial office consolidation of the Act - Feb. 1971.

⁶Canada, N.E.B. Act, ibid., Section 22(2).

⁷Canada, N.E.B. Act, ibid., Section 20(3).

⁸Canada, N.E.B. Act, ibid., Section 83. While most of the provision has been paraphrased it is felt that the exact wording of key phrases must be used.

In considering applications for the construction and operation of interprovincial and international pipe lines and power lines, the Statute directs the Board to the following:

. . . the line is and will be required by present and future public convenience and necessity and in considering an application for a certificate, the Board shall take into account all such matters as to it appear to be relevant . . . the Board may have regard to the following:

- a) the availability of oil or gas to the pipe line or power to the international power line . . . ;
- b) the existence of markets, actual or potential;
- c) the economic feasibility of the pipe line or international power line;
- d) the financial responsibility and financial structure of the applicant, the methods of financing the line and the extent to which Canadians will have an opportunity of participating in the financing, engineering, and construction of the line; and
- e) any public interest that in the Board's opinion may be affected by the granting or refusing of the application.⁹

In relation to the regulation of rates, tolls and tariffs of lines under its jurisdiction, the Act directs that:

All tolls shall be just and reasonable and shall under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route be charged equally to all persons at the same rate.¹⁰

The Board is also bound by the policy statements and directives of the Governor-in-Council and the Minister of Energy, Mines and Resources. It is the chief administrator of such policy directives as the National Oil Policy as stated by

⁹Canada, N.E.B. Act, ibid., Section 44.

¹⁰Canada, N.E.B. Act, ibid., Section 52.

Hon. George Hees in 1961 and is charged with supervising the carrying out of such policy statements.¹¹

It must be noted that the National Energy Board, although directed by the above noted qualifications in its Act, still has a wide discretionary power in determining "the public interest", "reasonable foreseeable requirements", and "just and reasonable" rates and applying these guides to the facts of a particular situation. Such guides are by their very nature discretionary and subject to very wide interpretative judgments. It is just this discretionary power that gives the Board its independence.

To deal with such discretionary guidelines in some semblance of equality and impartiality, the National Energy Board Act clarifies many of the procedures to be followed in hearing applications, directs the submission of necessary information for consideration and gives the Board wide powers of investigation. The Board is also delegated many powers. It can make regulations governing its sittings, applications, representations, complaints, hearings and interventions as well as having the power to carry out all the internal affairs of the Board.¹²

¹¹See R. D. Howland, "Canada's National Oil Policy", Speech to Annual Meeting of the Canadian Institute of Mining and Metallurgy, Quebec City, April 25-27, 1966, for the Board's part in administering the N.O.P..

¹²Canada, N.E.B. Act, ibid., passim, especially Sections 7, 10, Part III, IV and VI.

In its internal organization, the Board has developed its staff into six separate branches to provide support and information for evaluating submissions and interventions within the framework of its mandate. An Administration branch is responsible for coordination or work and general housekeeping functions of the Board. An Economics Branch provides statistics, analysis and advice on economic matters relating to submissions, interventions and decisions before the Board. The Engineering branch deals with aspects of assessment of reserves, production standards and verification of data in submissions. An Operations Research branch deals with the application of computers to the Board's work, the development of data methods and technology to solve problems and the projection of reserves, supply and demand. A Legal branch advises the Board on its statutory powers, prepares amendments and develops new regulations for its rules, deals with appeals against decisions, works actively in hearings and generally handles all legal aspects of the Board's duties. Finally, a Finance branch advises the Board on rates regulation, tolls, tariffs, accounting matters, and the financial responsibility of submissions.¹³ Total support staff at the end of 1970 numbered one hundred sixty-seven.¹⁴

¹³For a fuller description see D. M. Fraser's "The Work of the National Energy Board", Speech to Annual Meeting of Public Utility Commissioners, Montreal, June 13, 1966.

¹⁴Canada, N.E.B. Annual Report, op. cit., p. 4.

In dealing with such complex matters as the applications for certificates of public convenience (pipe line applications) the Board must make frequent use of all of its six branches to evaluate such proposals. To make such considerations and evaluations much easier, the Board has used its regulation-making power to call for the submission of extensive, concise and accurate supporting data with all applications. The Board has also developed a relatively concise adjudicative system of dealing with applications. By allowing interventions and counter-submissions the extensive labour of verifying this body of data is given to opponents of applications. As well the openness of the hearings allows for a fuller consideration of all aspects of a submission or application¹⁵ and all supporting documents must be exchanged among all participants. A hearing, then, becomes quite complex and must be increasingly formalized to allow the applicant to make his submission, document it, substantiate it, and support it against opposition. Intervenor may include consumers groups opposing exports, supplying groups, provincial governments and authorities, private business organizations, interest groups such as the Canadian Petroleum Association, and private citizens.

¹⁵Indeed the N.E.B. must hold open hearings "with regard to the issue, revocation or suspension of certificates or of licences for the exportation of gas or power or the importation of gas or for leave to abandon the operation of a pipe line or international power line", N.E.B., Act, op. cit., Section 20(1).

The Board that must hear these submissions, arguments and counterproposals consists of seven members; a chairman, a vice-chairman, an associate vice-chairman and four standing members. All are appointed for full-time seven-year terms by the Governor-in-Council and all are eligible for reappointment until age seventy.¹⁶ At least three members must sit for each hearing.¹⁷ Board members may be removed only on address by Governor-in-Council to both the Senate and the House of Commons adequately assuring their independence.¹⁸

The decisions of the National Energy Board are considered as final. All decisions must be approved by the Governor-in-Council before coming into effect. Appeals are allowed only on questions of law or questions of jurisdiction and are made to the Federal Court of Appeals of the new Federal Court.¹⁹ As well, the National Energy Board is given all the powers of a superior court of record and in specific cases has all the power of commissioners under Part I of the Inquiries Act.²⁰

¹⁶Canada, N.E.B. Act, op. cit., Section 3.

¹⁷Canada, N.E.B. Act, ibid., Section 6(2).

¹⁸Canada, N.E.B. Act, loc. cit., Section 3.

¹⁹Canada, Federal Court Act, Statutes of Canada, Chapter 1, subsection 64(3).

²⁰Canada, N.E.B. Act, Section 10, Section 24.

The National Energy Board then acts as a regulatory body for Parliament. It has been delegated the power to decide on the certification of pipe lines and power lines and the granting of licences for export and import within the broad mandate that was created for it. It is broadly directed as to what to consider in making its decisions, how to carry out the process of deciding, and how to implement its decisions. It can also set standards, make regulations, develop procedures and make recommendations to better carry out its mandate. Thus the National Energy Board is first and foremost a regulatory body.

Before going further into the functions of the National Energy Board one must know what being a regulatory agency of government entails. The next chapter puts the regulatory agency in an overall government policy-making framework.

CHAPTER II

REGULATION AND REGULATORY AGENCIES:

A METHOD OF ANALYSIS

This chapter will attempt to put forward a method of looking at regulation as a function of government and independent regulatory commissions as a specific mechanism for carrying out this function. Thus there will be two objectives: to outline the growth of, and need for, government regulation; and to account for the use of the independent regulatory commission as one of many alternative vehicles that government uses to regulate. Regulation by licencing and certification is but one method that governments have of sanctioning, or rewarding, a desirable type of behaviour. Independent regulatory commissions are but one type of vehicle for this method of government regulation.¹ The independent regulatory commission, although in wide use in Canada and the United States, is virtually unknown in other countries such as Britain. An attempt will be made to account for government's use of this particular device in Canada.

¹See President's Advisory Council on Executive Organization, A New Regulatory Framework, Washington, United States Printing Office, 1971, pp. 13-27, which concludes that the independent regulatory commission, in its current form, is least suitable for this task.

One can examine the regulatory framework on two levels then; on the functional level, attempting to show the *raison d'être* of government regulation and the position that regulation has in the total policy orientation; and on a mechanistic level, attempting to describe and explain the specific regulatory mechanism that fulfills the function.

Theodore Lowi, in attempting to analyze government policies by the analysis of policy outputs, sets out a framework for looking at the regulatory function. First, to Lowi, government is ultimately based on legitimized coercion:

The most important dynamic concept tying together all of the structural variables is coercion. Inevitably there is an element of coercion in collective life. . . . Institutions are means of moralizing coercion. Administration is a means of routinizing coercion. Government is a means of legitimizing it.²

Policy-making and policy outputs, given their basis in coercion, can be broken down into three categories according to the output (effect). Distributive policies are:

. . . characterized by the ease with which they can be disaggregated and dispensed unit by small unit, each unit more or less in isolation from other units and from any general rule . . . the indulged and the deprived, the loser and the recipient need never come into direct confrontation.³

Regulative policies are

²Theodore Lowi, "Decision-Making vs Policy-Making: Toward an Antidote for Technology", Public Administration Review, May-June 1970, p. 314.

³Theodore Lowi, "American Business, Public Policies, Case Studies and Political Theory", World Politics, Vol. 16, 1964, p. 690.

distinguishable from distributive in that in the short run the regulatory decision involves a direct choice as to who will be indulged and who deprived . . . the impact of the regulatory decisions is clearly one of directly raising costs and/or reducing or expanding the alternatives of private individuals.⁴

Finally, redistributive policies are

like regulatory policies in the sense that relations among broad categories of private individuals are involved but . . . the categories of impact are much broader, approaching social classes.⁵

In a few short words then, policy outputs and their corresponding structures may be distinguished from each other by the amount and divisibility of the resources, by the level or size of the groups affected, and by the groups' interactions. Regulation, in a functional sense, becomes necessary for government when the distributive policies become more and more interrelated among groups so that winners and losers are visible to each other. Regulative outputs transcend the "pork barrel" or patronage style that is indicative of distributive policy and are a result of conflict and competition for "public" goods or scarce resources.⁶

⁴Lowi, ibid., pp. 690-691.

⁵Lowi, ibid., p. 691.

⁶Lowi, ibid., pp. 695-703. Lowi uses the example of allocation of T.V. channels as a regulative policy output, one that is distributed and regulated through the mechanism of the independent regulatory commission in both Canada and the U.S..

Regulation in the Lowi sense came to be necessary only when the conflict between consumers and producers of services grew to aggregate sectoral level, resulting in a level of conflict too great for government to ignore or deal with by policies that resulted in a "mutual non-interference" of the various groups that were seeking government aid.

While admitting some empirical difficulties in precisely applying Lowi's typology, most authors lend credence to his analysis that regulative policies logically grow out of distributive policies. However, regulative policies are not just distributive policies writ large. Certainly they are on a grander scale and involve scarce resources but the need for public scrutiny past the point of distribution is an equally important consideration. Government, in distributing resources, has initial authority to determine who gets what and then a responsibility to direct the utilization of the resource after it is distributed. Regulative policy outputs differ from distributive policy outputs in the sectoral level involved and in the scarcity and divisibility of the resources but they also differ in the kinds of sanctions and means of securing compliance in the utilization of these scarce public goods.

In discussing the growth of government interference in the laissez-faire economic system, it is clear that regulation of various private sectors grew out of an attempt by government to protect the public as a consumer against the

abuses of monopoly,⁷ both before the fact and after. The concept of "public utility" grew as much out of the crucial nature of the resource as it did out of the scarcity of the resources. Regulation then, and regulative policy outputs, imply not only distribution of a scarce collective public good, but also the utilization of sanctions to "coerce" the trustee of these goods into acting in a prescribed manner.⁸

How government manages regulative policies is not examined by Lowi, except that he states that

individual decisions must be made by the application of a general rule and therefore become inter-related within the broader standards of the law.⁹

Regulation then, to Lowi, is accommodated in the political system by a reliance on law as a legitimizer much in the same way that administration and institutions moralize and routinize it. The main point however is that regulation is a difficult problem of policy-making and government.

James Q. Wilson in examining regulative agencies (generally, as opposed to the specific independent regulative commission) stated part of the reason for the great amount of

⁷See J. A. Corry, "The Genesis and Nature of Boards", in Willis (ed.), Canadian Boards at Work (Toronto: Macmillan, 1941), preface pp. 17-37.

⁸Emery Troxel makes this point when describing the development of the concept of public utility and the need of government control, after the fact, over what was in effect a franchised monopoly. See Troxel, The Economics of Public Utilities (New York: Rhinehart & Co., 1947), pp. 8-10.

⁹Lowi, "American Business Public Policies...", loc. cit., p. 691.

criticism of their work:

. . . in substantial part it is a problem of the nature of the tasks which we have given the agencies. These tasks probably could not be performed well even in theory. . . .¹⁰

It follows that one of the prime reasons for creating a regulative agency is that it is an ad hoc solution to a difficult regulative problem which exists in a constant conflict situation. It is a problem where the visibility of winners and losers make government or government agency solutions difficult to handle. In simplest terms it is a "hot potato" with no satisfactory resolution.

Bernstein alludes to such a situation when he analyzes the decline of independent regulative commissions; he states that commissions cannot, in all their strength and independence, exist in a constant conflict situation "in the storm's eye" and tend, as a result, over a period of time to resolve the conflict through the only available means -- succumbing to the demands of the regulated interests.¹¹ Government in much the same way must remove itself from the direct conflict situation:

. . . Congress can ill afford to perpetuate the acrid animosities and scars of political battle. Senators and representatives hesitate to remain identified as champions of public control of business except in

¹⁰James Q. Wilson, "The Dead Hand of Regulation", The Public Interest, Fall, 1971, p. 49.

¹¹M. H. Bernstein, Regulating Business by Independent Commission (Princeton: Princeton University Press, 1955), pp. 263-279.

periods when support for such control is overwhelming in their constituencies. Divisions within each major party are aggravated by regulatory controversies, and each party is anxious to heal the wounds to party unity and finally, the cohesiveness of industrial groups cannot be matched by the inchoate, relatively unorganized (and frequently disorganized) public.¹²

As Lowi has stated, regulative policies have visible winners and losers much in line with the pluralist conception of politics, and on a major sectoral level.¹³ Government cannot afford to be in the centre of such a sustained conflict situation especially between major sectors and so tends to parcel the problem off to an agency, disassociating itself from it.

Given the nature of the regulative function on a political and policy output level, it seems now necessary to examine the reasons for the choice of the specific vehicle of the independent regulatory commission. Government has many methods at its disposal, which may implicitly or explicitly be chosen because of many aspects which make it more acceptable or "legitimate" to the public and to the regulated group.

Coercion in its negative sense is not the only alternative. Bernstein notes two methods; regulation and

¹²Bernstein, ibid., p. 83. See also Mark S. Massel, "The Regulatory Process", Law and Contemporary Problems, Vol. 26, 1961, p. 189.

¹³Lowi, "American Business Public Policies...", op. cit., pp. 695-703.

promotion.¹⁴ Thus government may offer incentives to promote acceptable behaviour as well as impose sanctions against reprehensible behaviour.¹⁵

One of the most complete analyses of the possible methods of government control of "primary private activity" is found in an unpublished work by H. Hart and A. Sacks.¹⁶ Governments have many options open to them from governmental hands-off (which is as much an alternative of control/non-control as any other) to total government enterprise.

Regulation may be self-applying, individualized to a specific concern or covering total sectors. It may consist of prerequisite controls (the requirement of a licence before operation), post requisite controls (free entry but allowing sanctions to be imposed after the fact on digressions), individualized (strictly an ad hoc application of discretionary regulations), an exaction (requiring a monetary service or property commitment) or a criminal sanction.¹⁷ As well, sanctions may be positive with inducements to private firms to act in accordance with government proposals. Posi-

¹⁴M. H. Bernstein, "The Regulatory Process. A Framework for Analysis", Law and Contemporary Problems, Vol. 26, 1961, pp. 333-334.

¹⁵This does not counter Lowi's idea of coercion and regulative policy outputs since incentives and promotion are generally at the expense of other sectors and involve a winner-loser conflict.

¹⁶H. Hart and A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (1958), pp. 870-888, Courtesy Department of Law, Carleton University, Ottawa.

¹⁷Ibid., pp. 870-878.

tive inducements may consist of persuasion, pecuniary rewards such as subsidies, or the use of indirect government coercion such as contracts and hiring policy, etc.¹⁸ What is important to note in the outline is that governments have a total range or sanctions, or means of coercion both positive and negative, of which the method of licencing is only one. As well, licencing, though not discussed by Hart and Sacks, can be accomplished by many different alternatives. With such a wide range of alternatives licencing need not be assigned to a commission, the commission need not be independent, nor must regulation-making be a specific attribute of independent regulatory commissions.¹⁹

First it is important to note that the independent commission is more a copy of an American, rather than a British institution:

. . . the British North America Act has given us a constitution similar in principle to that of the United Kingdom, when socially, economically and culturally we are almost a part of the United States. In terms of administrative law, we have inherited from England the principles of ministerial responsibility and the common law of judicial review, but we have borrowed the institution of the 'independent regulatory commission' and many of the matters regulated from the United States and have modified them to suit our own peculiar conditions.²⁰

¹⁸Ibid., pp. 878-882.

¹⁹See Mark Massel, op. cit., passim, Canada, House of Commons, Special Committee on Statutory Instruments, Third Report, Ottawa, Queen's Printer, 1969, for instance, considered a whole range of bodies under the head of Statutory Instruments.

²⁰John Willis, "Administrative Law in Canada", Canadian Bar Review, Vol. 39, 1961, p. 254. Emphasis is mine.

Similar statements regarding the similarity of Canadian and American methods of regulating private action and of the sectors of private activity under regulation are numerous.²¹

The Hoover Task Force on Independent Regulatory Commissions reported in 1949 that the independent regulatory commission was necessary and should be continued for the following reasons:

1. the nature of the areas under regulation are too complex to be codified in statutes, too changing and developing to be straitjacketed by legislation and too detailed to be legislated above. Congress could supply broad standards and direction but could not prescribe detailed rules which would be understandable and self-enforcing;
2. only an independent body could impartially decide matters free of partisan political pressure and interest group lobbying;
3. a group of commissioners would be better able to decide and would make a better decision than a single person;
4. the commission method allowed expertise to be

²¹See S. A. deSmith, Judicial Review of Administrative Action (London: Stevens and Sons, 1968), pp. 4-12; J. M. Hendry, "Some Problems on Canadian Administrative Law", Ottawa Law Review, Vol. 2, 1967, pp. 71-87; H. W. R. Wade, Administrative Law, (Oxford: Clarendon Press, 1971), pp. 254-276.

a fundamental criteria of decision-making. The commissioners and their staff would be best able to be experts in their field and familiar with the specifics of their jurisdiction;

5. the commission method with long and/or overlapping terms of office of commissioners allowed a continuity of policy which would otherwise be lost.²²

The reasons given for the use of independent commissions as regulative agencies then were; independence from partisan influence, better decision by a collegial body, expertise, continuity and flexibility to act and react quickly to complicated circumstances.

On the other hand, the Franks Committee in Britain, investigating the nature of tribunal regulation there, stated that:

Tribunals have certain characteristics which often give them advantages. . . . These are cheapness, accessibility, freedom from (judicial) technicality, expedition, and expert knowledge of their particular subject.²³

In Canada, the Special Parliamentary Committee on Statutory Instruments reported that the delegation of Parliament's rule-making authority to "various Boards and Commis-

²²U.S. Task Force on Independent Regulatory Commissions, Commission on the Organization of the Executive Branch of the Government, Report, Washington, U.S. Government Printing Office, 1949, passim.

²³Great Britain, Committee on Administrative Tribunals and Enquiries, Report, London, H.M. Stationery Office, 1957, p. 9.

sions often called administrative tribunals"²⁴ among other agencies was necessitated by:

- i) lack of parliamentary time;
- ii) lack of parliamentary knowledge on technical matters;
- iii) the necessity of rapid decision in cases of emergency;
- iv) the need to experiment with legislation, especially in a new field;
- v) the need for flexibility in the application of laws; and
- vi) unforeseen contingencies which may arise during the introduction of new and complex pieces of legislation.²⁵

These reasons, when compared with reason given for administrative tribunals in the United States and Britain, are surprisingly similar, especially when it is noted that the British method of dealing with regulation is quite different from that used in the United States and Canada. The primary similarities found in all three are a felt need for expertise in decision-making which the legislature and judiciary could not provide, the inability of legislative techniques to handle the intricacies of the regulation, and the need for freedom from standardized legal-judicial methods of solving regulatory problems.

The felt needs then, for Canada to draw from the American experience and not the British, are to be found

²⁴Canada, Special Parliamentary Committee on Statutory Instruments, Third Report, Ottawa, Queen's Printer, 1969, p. 2.

²⁵Ibid., p. 4.

elsewhere and cannot be adequately explained by the above. One of the first methods of explaining the adoption by Canada of the American experience is an historical one. The first major independent regulatory commission, described by A. W. Currie as "the oldest but by far the most important administrative board in Canada",²⁶ was established in 1905 as the Board of Railway Commissioners (now the Canadian Transport Commission). A special group, required to examine alternatives of regulating railroads,

. . . carefully studied the experience of the Interstate Commerce Commission and of railway boards of the American States, of the Railway Tribunal in Britain and the Railway Committee of the Privy Council (Cabinet) in Canada.²⁷

It is most important to note that this group proposed, and Parliament approved of, a scheme which followed that of the American I.C.C. -- a direct choice over the British example. Thus Canada almost since Confederation has relied on and followed the American model of the independent regulative commission.

Many of the reasons for Canada's adoption of the American example are a result of Canada's need for regulation and the similarity of American and Canadian problems and possibilities. Regulation has long been an accepted method

²⁶A. W. Currie, "The Board of Transport Commissioners as an Administrative Body", C.J.E.P.S., Vol. 11, p. 351.

²⁷Ibid., p. 352.

of pursuing national goals in Canada:

The reason may be that Canada has never been, is not, and never could be a laissez-faire state; it depends for its continued national existence on governmental action and Canadians have had to accept government regulation as one of the facts of life.²⁸

The problems solved by the uniting of private and public action in the development of a national railroad and the subsequent need to regulate such a special creation is an example worth bearing in mind.

The problems that faced Canada as a national state were similar to those faced by the Americans, and they were faced at roughly the same point in time. Thus when Canadian governments faced a problem such as the need to control railroads or a more recent need to control communications, they looked to the United States for a current example rather than to Britain, which offered little in the way of workable solutions.²⁹ Problems of distance, the distinct political problems of federalism, the similarity of geography and the coordinate development of situations into problems which had to be met by governmental solutions, are all considerations which verify the statement that "above all Canadians are influenced by the way in which the Americans meet problems that are similar to theirs".³⁰ There are, then, outstanding reasons;

²⁸J. Willis, "Administrative Law in Canada", op. cit., p. 253.

²⁹J. M. Hendry, op. cit., pp. 71-87; see also John Willis, "Administrative Decisions and the Law", University of Toronto Law Journal, Vol. 13, 1959, pp. 45-47.

³⁰J. Willis, Canadian Boards at Work, op. cit., p. vii.

historical, social, political, geographical and economical, for a heavy Canadian reliance on the American example of regulating private activity by the method of independent regulatory commissions.

However, there are other reasons which are not distinctly related to the above. One of the reasons given for the establishment of an independent body rather than an in-government agency is found in the Montesquieuian concept of separation of powers. The legislative body, in many areas, fears the placing of overwhelming powers to regulate a sector in the hands of the executive body. It would rather, it seems, see the creation of an independent body which though less subject to legislative control is also less subject to executive control.³¹ A related aspect is the general attitude of the public to the gradual (or not so gradual) accretion of powers to executive government:

Canadians are not yet convinced that government activity has come to stay and ad hoc commissions have a pleasant temporary and 'in government but not of it' appearance; Canadians have a horror of 'politics' and the independence of a commission helps to preserve the illusion that questions of policy can be kept out of politics.³²

This coupled with a basic (though unfounded to Willis) lack of trust in the civil service gives the independence of separation from government an importance that is necessary.

³¹Mark Massel, op. cit., p. 191.

³²Willis, Canadian Boards at Work, loc. cit., p. vii.

Parliament and the public still tend to look upon the growth of executive government as a necessary evil. The independent regulatory commission is a half-way house that seems to fill the need for governmental control but does not create the antipathy that executive control does.

The creation of independent regulatory commissions also allows an individual mechanism to be created that can be ideally fitted to the problem without formal restraints on form and structure that would restrict in-government agencies. Such independent agencies are much easier to mold to the specific needs of the problem solution than are in-house governmental bodies. The Glassco Commission, discussing administrative tribunals, was "struck by the lack of any consistency in the status, form and procedures of the tribunals examined".³³ However, to the government seeking a solution to a problem this is a positive rather than a negative (as perceived by the Glassco Commission) point.

Perhaps most difficult to substantiate but necessarily valid in discussing the reasons for use of independent regulative commissions over other methods is the adjudicative nature of the commission form. Boards have been castigated for their lack of adoption of basic judicial conventions,³⁴

³³Canada, Royal Commission on Government Organization, Report, Ottawa, Queen's Printer, 1964, Vol. 5, p. 75.

³⁴R. F. Reid, "Administrative Tribunals and Their Function in a Legal System", Paper presented to the Second Commonwealth and Empire Law Conference, Ottawa, 1960.

but when one considers the adjudicative nature of most boards in relation to the arbitrary appearance of a decision-making process involving an individual administrator, the similarity of the independent regulatory commission to the courts is, in many ways, comforting.

Finally, and perhaps most important, is the independence aspect of the commission. Although the regulatory commission in Canada is not as independent as one would expect, it does appear to decide issues independent of government control. Mark Massel commented:

As a matter of fact, frequently the reluctance to spell out policy stems from Congress. Often Congress avoids policy problems by passing vague statutes. Such a practise may be followed, on occasion, in order to permit the regulatory agency and the courts to implement the general provisions. However, it may also be employed in order to avoid tough political decision, 'passing the buck' to the agency.³⁵

This is the essence of the need for independent regulatory commissions when looked at in a more policy-oriented framework. Governments may handle distributive policies without conflict while redistributive policy battles are based on ideological (almost class) lines. Regulative policy outputs however require a choice of one sector over another, resulting in more visible winners and losers. If these losers are powerful enough, the government is itself in jeopardy. The problem can, however, be neatly parcelled out to an

³⁵Mark Massel, op. cit., p. 189.

'independent' regulatory commission which allows government to stand outside the arena of conflict accepting no direct responsibility for the regulative decisions.

In the context stated above it is necessary to look at the independent regulatory commission as an important body in the total policy-making/policy-output process. The role of the N.E.B. in the formulation of and administration of policy objectives is discussed in a later chapter but it must be noted now that the regulative body and specifically the independent regulatory commission has an important, though not well understood or visible, impact on the process of policy-making. One of the reasons that the Glassco Commission, the only study of governmental bodies in Canada, refused to deal with the commission was their recognition "that questions of legislative policy were involved",³⁶ putting the commissions outside of their mandate.

A major U.S. report commissioned by President Nixon recognized the policy importance of the independent regulatory commissions.³⁷ In the letter of transmittal Roy Ash, Chairman of the Council, stated:

For the future, effective regulation depends on recognizing that the national economy involves an increasingly interrelated set of activities,

³⁶Canada, Royal Commission on Government Organization, loc. cit., p. 75.

³⁷U.S., The President's Advisory Council on Executive Organization, A New Regulatory Framework, Washington, U.S. Printing Office, January, 1971.

demanding a greater degree of coordination, consistency of policy, and cooperation between the public and private sectors of the economy.³⁸

The Council advocated the increased integration of the independent regulative commission into the governmental policy-making process going against the substance of most of the major criticisms of the independent regulative commission. Most critical comments have been centred on the independence (or lack of it) and the judicialization (or need for it) aspects of independent regulative commissions. Yet the Council felt that independence was a fault rather than a positive point for the commission form of regulation and that increased judicialism had destroyed the major reasons for creating the commissions. Thus the criticisms of independent regulative commissions have seemingly been displaced by the critical need for integration and the recognition of the commissions' impact on policy.³⁹

With this new direction in mind it seems necessary to review some of the criticisms of the independent regulative commissions and also to distinguish some of the particular differences between the Canadian commission and its American counterpart.

³⁸Ibid., preface, p. vi.

³⁹It is interesting to note that one of the members of the Council was John B. Conally, now Secretary of the Treasury, giving the report an added weight as the manual for government steps in the regulatory field. However, a method of dealing with the economic crisis of summer/fall 1971 was the creation of a Pay Board and a Price Board which contradicted much of the substance of the report.

CHAPTER III

CRITICISMS OF THE INDEPENDENT REGULATORY COMMISSION

It is doubtful whether there has been any method of exercising government power that has been the object of as much criticism as the independent regulatory commission.

Traditionally, critics have concentrated on two aspects of the independent regulatory commission, the independence (or lack of it) of the commission, and the extent to which the commission follows (or does not follow) the canons of traditional judicial procedure. Although these two areas of criticism are important in discussing the commission method it must be noted that both are structure-oriented. They tend to ignore the equally or perhaps even more important policy and political role that an independent regulatory commission performs. An attempt will be made to examine some of the criticisms in these two (and other) areas, hopefully to show that, although such criticisms may be valid, they are less fundamental in that they do not fully address themselves to the political and policy function of commission regulation.

First, it seems necessary to look at the state of the art with respect to administrative law. F. R. Scott noted in 1948 that not a single book had ever been written on

administrative law in Canada to that date.¹ John Willis postulated that because regulation by government bodies was fundamental to Canada's existence as a national state, Canadians accepted the role of government intervention and had little interest in the development of administrative law.² A very recent article concluded that a wholesale dependence on English common law especially in relation to administrative law has been less than satisfying; consequently Canadian administrative law is in but an embryo stage of development.³ F. R. Scott again noting the problems that lawyers had in dealing with administration exhorted his fellows to accept that:

. . . it is true that administrative tribunals also are on the increase. Obviously they fulfill a vital social function, and mere diatribes against them, larded with quotations from Magna Carta, are of no avail.⁴

Thus the 'state of the art' of dealing with judicial aspects (review, control, etc.) of administrative law generally is still in a state of development. With respect to independent regulatory agencies, the 'state of the art' is even less

¹F. R. Scott, "Administrative Law 1923-1947", Canadian Bar Review, Vol. 26, p. 269.

²John Willis, "Administrative Law in Canada", Canadian Bar Review, Vol. 39, 1961, p. 252.

³J. M. Hendry, "Some Problems on Canadian Administrative Law", Ottawa Law Review, Vol. 2, No. 1, 1967, pp. 71-87.

⁴F. R. Scott, op. cit., p. 276.

developed since Canada's reliance on British common law gives it little clue as to how to deal with independent regulatory commissions. S. A. deSmith noted the differences between the U.S. method of dealing with administrative law and the British method:

The sophisticated and relative coherence of federal administrative law in the United States is partly attributable to the fact that a typical instrument of government is the regulatory administrative agency, an institution which has not evolved in Britain.⁵

On the other hand:

. . . the dearth of coherent principles of administrative law in England is mainly attributable to the absence of a separate system of higher administrative courts . . . in place of integrated coherence we have an asymmetrical hotchpotch, developed pragmatically by legislation and judicial decisions . . . blending fitfully with private law and magisterial law.⁶

The primary reason for this development is the strict adherence to Dicey's Rule of Law and his strong misconception of the consequences of administrative law as a developing separate and distinct law. Canada, found somewhere in the middle, has adopted the independent regulatory commission from the United States but not the coherent system of law, relying instead on the English developments in common law. However, in administrative law it has found that "except in a very general way and at a fairly high level of abstraction, English ways are

⁵S. A. deSmith, Judicial Review of Administrative Action (2nd ed.) (London: Stevens and Sons Ltd., 1968), p. 8.

⁶Ibid., p. 4.

not our ways. . . ."7

Thus Canadian developments in administrative law especially respecting independent regulatory commissions are far from clear and settled at least on a general level.⁸ However there are many more specific criticisms of independent regulatory commissions.

A primary focal point for criticism is, and has been, the relationship of the independent regulatory commission to the larger legal-judicial framework. The independent regulatory commission by its very nature combines the policy-making function of a legislative body, the rule-making and administrative function of an executive body and the adjudicative function of a judicial body, thereby existing contrary to the fundamental doctrine of separation of powers of the United States and the rule of law of Great Britain and Canada.⁹ The legal community has always, it seems, opposed the growth of

⁷John Willis, "Administrative Decisions and the Law: The Canadian Implications of the Franks Report", University of Toronto Law Journal, Vol. 13, 1959, p. 45.

⁸One may look at the development of the new Federal Court of Canada, which now has first jurisdiction over federal regulatory agencies, as a clearing up of some of the general points relating regulatory agencies to administrative law; but such a development only scratches the surface in the study of administrative law and regulatory boards.

⁹See James M. Landis, The Administrative Process (New Haven: Yale University Press, 1938), pp. 1-11. Willis points out that the rule of law and separation of powers doctrine have melted into one another in Canada so that there seems to be an implicit separation of powers doctrine. John Willis, "Three Approaches to Administrative Law", University of Toronto Law Journal, pp. 69-75. See also, Scott, Administrative Law, op. cit., p. 272, and Hendry, op. cit., pp. 71-87.

administrative agencies for this reason but there are numerous other very different aspects to their opposition.

Beginning with Hewart's The New Despotism¹⁰ in the late 1920's in England, and in the United States with writings by Pound¹¹ and Dickinson,¹² the most notable legal personages have vociferously attacked the growth of administration in general and regulative agencies and administrative tribunals in particular:

That government officials should assume the traditional function of courts of law, and be permitted to determine the rights of individuals is a development so far out of line with the supposed path of our legal growth as to challenge renewed attention to certain underlying principles of our jurisprudence.¹³

Adjudication by anything less than the courts of law, who were considered the only bodies able to protect the private rights of the individual, was tantamount to the destruction of civilized life. Since that time legal scholars and jurists have mellowed somewhat and concerned themselves primarily with accepting and accommodating the need for regulation and administrative tribunals. It has been shown that there was a

¹⁰Rt. Hon. Lord Hewart, The New Despotism (London: Ernest Ben Ltd., 1929). This book was written while Lord Hewart was Lord Chief Justice of England.

¹¹Roscoe Pound, The Administrative Application of Legal Standards, Report to the 42nd Annual Meeting of the American Bar Association, Boston, Mass., 1919.

¹²John Dickinson, Administrative Justice and the Supremacy of Law in the United States (Cambridge: Harvard University Press, 1927).

¹³Dickinson, ibid., p. 1.

felt need for regulation that the courts could not handle (especially in economic matters) and for speedy, cheap and numerous decisions of a minor nature which would extensively burden the traditional courts.

Thus neither the United States 'separation of powers' doctrine nor the rule of law of Dicey in England could develop to meet the needs of the people. A 'headless fourth branch of government' was developed outside of Montesquieu's doctrine; and Dicey's rule of law was shown to be necessarily adapted to accommodate developing conditions.¹⁴

There are other considerations which tend to infuriate the legal community, or at least throw suspicion on the independent regulatory agency as a bona fide extension of government. Of primary importance is the regulative agency's power to make regulations, act as prosecutor, and then adjudicate on the rights of individuals with respect to these regulations. As Hendry shows, Canadian law is developing to meet a felt need.

Somehow the concepts of freedom, justice and equality must be preserved . . . in the sense that no one man, official or government agency is above the law.¹⁵

Thus the legal community's duty is to develop the law, or adapt it to provide

¹⁴M. Friedman, "Judges, Politics and the Law", C.B.R., Vol. 29, pp. 822-825.

¹⁵Hendry, op. cit., pp. 71-72.

. . . various legal and judicial remedies to ensure that parties appearing before the commissions would receive ample notice, a fair hearing, an opportunity for review, and the other elements of due process.¹⁶

Of perhaps more importance is the strange environment, quite unsimilar to the courtroom, that the lawyer is thrown into when he deals with a regulatory agency. Kenneth C. Davis points out this in his treatise;¹⁷ and it is implicit in other articles and studies. The major premise on which a commission form of regulation is based is that it is created specifically for one job, and thus there are no principles, forms, or procedures which are uniform to all administrative agencies; each tribunal is a separate entity created by a separate statute and governed by a separate and distinct set of rules and procedures.¹⁸

It is perhaps this heterogeneity of form and procedure and lack of judicialization that is most perplexing to the lawyer. R. F. Reid strongly made this point when he discussed administrative tribunals as a part of the legal system:

. . . surely a disconnected and formless group; unrelated to one another; lacking any clear relationship either to Parliament or the law courts;

¹⁶James G. Wilson, "The Dead Hand of Regulation", The Public Interest, No. 25, Fall, 1971, p. 41.

¹⁷Kenneth C. Davis, Administrative Law Treatise (St. Paul, Minn.: West Publishing Co., 1958), Ch. 1.06, pp. 44-49.

¹⁸Canada, Royal Commission on Government Organization, Report, Ottawa, Queen's Printer, 1964, Vol. 5, pp. 72-75.

proceeding according to no group or even individual pattern; having widely varying constitutions and powers; a heterogeneous mass of individual entities cannot reasonably be called a system.¹⁹

Thus tribunals (independent regulatory commissions) were the direct antithesis of the court system. Such lack of homogeneity never ceases to amaze and perplex the practitioner. To some extent this problem has been reconciled in the United States by the development of a Federal Administrative Procedure Act which specifies uniform procedures for all commissions and boards, especially with respect to hearing procedures and methods.

However the increased pressure of lawyers to make administrative tribunals more like judicial courts has created problems and ignored the essence of the need for independent regulatory commissions. First, judicialization of procedure has become a straitjacket rather than a guarantor of just treatment.²⁰ Thus the legal critics have been labouring under a misconception; that boards, to dispense justice, must follow the canons of judicial action in all cases.²¹

It would seem that of late this over-concern with the

¹⁹R. F. Reid, Administrative Tribunals and Their Function in a Legal System, Paper presented to Second Commonwealth and Empire Law Conference, Ottawa, Sept. 14-21, 1960, p. 409.

²⁰See U.S., The President's Advisory Council on Executive Organization, A New Regulatory Framework, Washington, U.S. Government Printing Office, 1971, pp. 37-39, 47-56.

²¹B. Laskin (now Justice of S.C.C.), "Certiorari to Labour Boards", C.B.R., Vol. 30, pp. 986-1003.

legality and judicialization of the specialized non-judicial or quasi-judicial methods of the independent regulatory commissions has been moderated. The Special Parliamentary Committee on Statutory Instruments adopted a framework of analysis that attempted to ignore the separation of powers and judicial arguments against commissions but instead accepted the following:

The real argument is not whether the Executive, for example, is exercising legislative or judicial powers which properly belong to Parliament or the courts (for no kind of power belongs to any particular authority) but whether the power is being exercised by the authority best suited to exercise it and whether the exercise is sufficiently controlled by political and legal action.²²

Thus there is no legal-judicial absolute to be achieved by each commission and board, but instead a subjective test to see if the controls created are sufficient for the particular example.

An area of complaint that is perhaps more substantiated and less fraught with legal/judicial opinions and orientations is the effect of regulation on the industry which is regulated. Economists have noted, studied and presented a well-substantiated case which seems to point to the conclusion that the independent regulatory commission has not successfully accomplished its mandate of regulating the private sector in the public interest.

²²Third Report, op. cit., quoting Griffith and Street, Principle of Administrative Law (2nd ed.), 1963, p. 16.

The basic problem seems not to be back of high quality leadership in the regulatory commissions or the lack of commission activity, but rather that the methods of regulation themselves cause inefficient operations in the public utility industries.

. . . regulation has imposed considerable costs on public utility companies without providing compensatory benefits.²³

The crisis is not in regulation, but rather of the need for regulation as it now exists in comparison with totally new techniques or no regulation at all.²⁴

The evidence to support these contentions is substantial, well-documented and impressive for the United States, though there is little documentation in Canada. Felix Frankfurter and Henry Hart showed in 1934 that there was great difficulty in setting rates of public utilities, a fundamental requirement to reasonable regulation. The determination of 'just and reasonable' rates in the 'public interest' must be balanced with the needs of the regulated industries for returns; but the necessity of establishing a proper procedure was shown to be so fraught with difficulties as to destroy the efficacy of any rate regulation scheme.²⁵

Richard Posner pointed out that rate of return regulation could be and would be evaded or subverted by the regulated agencies resulting in little positive benefit from the

²³Paul W. MacAvoy, The Crisis of the Regulatory Commissions (New York: Norton, 1970), p. vii.

²⁴Ibid., p. vii.

²⁵Frankfurter and Hart, "Rate Regulation", in MacAvoy, ibid., pp. 1-17.

imposition of regulation.²⁶ Stigler and Friedland showed that, in state regulated electrical utilities, there was little difference between regulated and unregulated utilities in consumer prices, distribution, and rates of return for investors.²⁷ It is not only that it is shown that regulation by commission is not an ideal solution to monopoly situations but that regulation by independent commission because of its imbalances, slowness, procedures, and special problems, is imposing a cost on the public: ". . . prices would be lower to the consumer if they (public utilities) were not regulated".²⁸ Studies have even shown that the effects of the imposition of regulation on an industry, though based on some tenuous and debatable assumptions are startling.²⁹ The President's Council of Economic Advisers recommended in 1966 that

. . . if the Interstate Commerce Commission (I.C.C.) allowed rates to be appropriately geared to costs
. . . on railroad transportation alone savings from possible rate reductions would come to more than four hundred million dollars a year.³⁰

²⁶Richard Posner, "National Monopoly and Its Regulations", in MacAvoy, ibid., pp. 30-38.

²⁷George Stigler and Claire Friedland, "What Can Regulators Regulate? The Case of Electricity", in MacAvoy, ibid., pp. 39-52.

²⁸James Q. Wilson, op. cit., p. 44.

²⁹Merton Peck, "Competitive Policy for Transportation?", in MacAvoy, op. cit., pp. 72-92. Also R. E. Caves, "Performance Structure and the Goals of Civil Aeronautics Regulation", in MacAvoy, pp. 131-151; and Louis M. Kohlmeier, The Regulators (New York: Harper and Row, 1969), Ch. 8.

³⁰Kohlmeier, ibid., p. 128.

On a larger scale, it has been fairly conclusively shown that the creation of an independent regulatory commission, while supposedly restricting monopoly conditions, in fact can and has promoted them in the industry regulated.³¹ Such a consequent lack of competition and its effects on the regulated but protected, uncompeting and uncompetitive industries has hypothetically disastrous results which are difficult to substantiate. On the one hand, regulation, especially in the public utilities fields which require high capital investment, must condone a large amount of monopoly since competition results in the expensive duplication of services and consequent higher costs. On the other hand, given the private initiative base of economic philosophy, regulation should not inhibit competition to such an extent that there are resultant costs to the consumer due to unchecked inefficiency.

One of the prime factors which can be used to gauge the competitiveness of an industry or lack of it is the development of technology and innovation in the regulated area. It seems quite obvious that, given a virtual monopoly in a regulated field, as some industries in regulated areas are, that "the protected positions of regulated firms creates

³¹Kohlmeier, ibid., Ch. 6, 7, 8. Also, U.S., J. M. Landis, Report on Regulatory Agencies to the President-Elect, Washington, U.S. Government Printing Office, 1960, pp. 13-16, 69-72.

passive 'satisficing' behaviour".³² Some attempts have been made (on a very academic level and on a set of firm intellectual underpinnings) to deal with the performance of regulated industries in developing new technology and innovations. A conference was recently held at the Brookings Institute, of the most notable students of regulation, resulting in some startling conclusions. Although little could be said that would be applicable to all industries regulated by independent commissions, the conference concluded that "the performance of regulated industries falls far short of the ideal and even of a reasonable target for public policy".³³ However the inefficiencies and inadequacies could not be adequately measured, first because there was no absolute or unregulated industry in an area to use as a basis for comparison; and second because the monopoly situation prior to regulation would cause distortion in before-after comparisons. In certain areas it was shown that the Averch-Johnson effect³⁴ resulted in inequities and that the regulated industries were able to subvert types of regulation and utilize them for their own benefit. An example was the use of Research and Development

³²W. M. Capron (ed.), Technological Change in Regulated Industries (Washington: The Brookings Institute, 1971), p. 198.

³³Ibid., p. 221.

³⁴H. Averch and L. L. Johnson, "Behaviour of the Firm Under Regulatory Constraint", American Economic Review, Vol. 52, Dec., 1962, pp. 1052-1069. See also William Capron, ibid., pp. 4-5 for an explanation.

to develop capital-intensive and system integral equipment that would allow a larger return on investment and greater growth (while subsidizing the growth rates in other areas".³⁵ Implicit in the conclusions (regarding the use or misuse of technological changes to circumvent the regulation of the industry by commission) is that the commission is not totally "independent" but is creating a special climate which will foster the growth of the regulated industry.

Conferees at the Brookings conference preferred to call this identification of the regulators with the regulated, "crawling in bed with the industry". The problem of who regulates whom has been a fiery one since the inception of the commission. An accusation such as this is difficult to substantiate at the best of times and since the independent commission has neither the protection of a judicial appearance nor the partisanship of a legislative body its decisions are sure to be attacked by some group. Bernard Schwartz has documented what he considers to be the rampant corruption that dictates regulatory agencies decisions.³⁶ M. H. Bernstein proposes a life cycle, at the end of which the agency is completely captured by an influential interest group³⁷ and

³⁵William Capron, ibid., Chapter 7.

³⁶Bernard Schwartz, The Professor and the Commissions (New York: Alfred A. Knopf, 1959).

³⁷M. H. Bernstein, Regulating Business by Independent Commission (Princeton, N.J.: Princeton University Press, 1955).

completely subverted from its goal of regulating the industry; instead becoming the institutional protector of the industries' interests. The cases are well documented and almost every independent regulatory agency in the United States has been the victim of an exposé of corruption and industry control. An institution that is created to be completely independent of any control can be shown to be bent, twisted and influenced by any number of groups:

The politics of regulation rarely is the partisan politics of Democrats versus Republicans. Rather it is the politics of patronage and privilege. The Regulators have played because they owe their jobs to political appointment. White House aides and members of Congress have played because regulated companies are important constituents. The Regulated play because they cannot afford not to .³⁸ the only outsiders seem to be the consumers.³⁸

Similarly in Canada, the independent regulatory commission is seen to be far from independent. Reid points out that "many people still believe that the tribunals' decisions are made by the Cabinet".³⁹ Even as late as 1971, one of the most respected men in the oil and gas industry charged that the Cabinet had interfered with, and had directly made a decision for, the National Energy Board.⁴⁰ The discussion of the independence, or lack of it has been somewhat onesided.

³⁸See Kohlmeier, op. cit., Ch. 3-6, Quote p. 35.

³⁹R. F. Reid, op. cit., p. 415; see also pp. 414-416.

⁴⁰Toronto Globe and Mail, Nov. 20, 1971. The charge was made by Carl Nickle, a man of high standing in the oil community.

To take this jaundiced view of independent regulatory commissions and of the men who occupy the positions of commissioners is to somewhat ignore the realities of the situation. As Wilson points out, for every friend-of-the-industry commission one might use as an example, there is a commission that is quite patently not a friend of the industry. 41

A much better explanation is that

. . . the agencies are not so much industry oriented or consumer oriented as regulation oriented. They are in the regulation business and regulate they will, with or without a rationale. 42

The problem of commission independence is a difficult one depending to a great extent on the nature of the commission, the problem area it is dealing with, and the extent to which it is necessary to integrate the commission's decisions into the total policy-making process. It must be pointed out that the need for protection of the independence of a commission is not a panacea for the problems encountered by commissions; rather the commission must be independent (in the same way it must be judicialized) to the extent which is required by the particular situation. More important than insulating and isolating the independent regulatory commission from the policy process is the need for coordination and integration. The latest President's Commission report 43

⁴¹Wilson, "The Dead Hand of Regulation", op. cit., pp. 46-47.

⁴²Ibid., p. 48.

⁴³United States President's Advisory Council on

concluded that independence was a problem not a panacea:

The Congress has found no effective way of supervising them, they cannot be controlled by the President, and they are answerable to the courts only in respect to the legality of their activities. . . . The independent commissions persist more from inertia than from an analysis of how regulatory bodies should properly function within the context of a comprehensive political and economic system.⁴⁴

The problem of independence is not one which is as hotly disputed in Canada as it is in the United States, for whereas the relationship of the commission to the American Congress and the President is not completely settled, the relationship between the independent regulative commission and the Canadian Cabinet is more firmly established.⁴⁵ The difference between the two systems of government also implies some major differences in these relationships. The independent commission's role in policy formation in Canada is set down more exactly than is the role of the independent commissions in formulating its own policy in the United States.

Thus the problem of the independence and the judicial nature of the commission are essentially problems of structure. The independent regulatory commission is important however in a broader functional role vis-à-vis the total political and policy process. It has seemingly been assumed

Executive Organization, op. cit., p. 27, footnote 7 notes that there has been at least one report on independent regulatory commissions developed for each President since Eisenhower.

⁴⁴Ibid., p. 19.

⁴⁵This will be discussed later in Chapter 6.

by many that independence equalled impartiality and that judicialization equalled fairness; both assumptions have been often proven wrong. What is also of crucial importance is the total relationship of the commission with the political system, rather than just the structural problems of the commission taken in isolation.

The recommendations of the President's Advisory Council then are of utmost importance for they reverse the trend of criticism away from independence and judicialization toward integration into the total political/economic system and coordination with function groups.⁴⁶

The other problems that have been brought up are indeed important and crucial. But it seems that they can be discussed more in the context of the difficulty of the problem rather than in the failure of the independent commission.⁴⁷

This is not of course to explain away the criticisms of independent regulatory commissions as either "barking up the wrong tree" or as outlines of already granted problem-solving difficulties. However a critique is only constructive if it offers an alternative.

While there are many directions . . . in which greater effectiveness in administrative performance

⁴⁶President's Advisory Council on Executive Organization, op. cit., passim. In this sense they are clearly influenced by recent exhortations to think in systemic policy-oriented terms.

⁴⁷See pp. 18, quoting James Q. Wilson, loc. cit., p. 49.

may appropriately be sought, no promising alternative to the independent regulatory commission has emerged, and there is every likelihood that loss rather than gain would result from altering their underlying structure.⁴⁸

Most of the criticisms of the independent regulatory commission method of dealing with regulative problems have advocated only the independence and judicialization aspects as solutions. One of the primary examples of these critiques is Regulating Business by Independent Commission by M. H. Bernstein, which is notable for the life-cycle it analyzes for the independent commission method of regulation. An attempt will be made first to examine the evolution of the National Energy Board in the framework of Bernstein's critique and in relation to the criticisms of regulative commissions given above.

⁴⁸I. L. Sharfin, "Industrial Organization: Public Regulation of Business", American Economic Review, Dec., 1955, p. 1010.

SECTION II

SELECTED PROBLEMS OF REGULATORY BODIES

The three chapters in this section deal with three areas which seem to be characteristic of all regulatory bodies. The first deals in more detail with the life cycle theory of commissions promulgated by M. H. Bernstein. Although the concept is based on American study, the proposal, that the eventual capture of a regulatory commission by its regulated group is an inevitable process, is of fundamental importance. The second area, that of discerning the role of the N.E.B. as an important decision-maker on broad overall policy matters, also needs analysis. With the increasing complexity of energy related problems and the wider scope of interrelationships of interested government and private bodies it seems to be of fundamental importance that policy directions be coordinated and distinguished. Lastly, the problem of control of regulatory bodies is a fundamental issue. Parliament has created the regulatory body as an adjunct to itself to regulate areas which are beyond the expertise and time limitations of Parliament. Such a delegation of power implies a co-ordinate need for supervisions and control.

CHAPTER IV

THE LIFE CYCLE OF A REGULATORY AGENCY

Perhaps the most far-reaching analysis of the commission form of government regulation is M. H. Bernstein's Regulating Business by Independent Commission¹ primarily because he does not deal with the problems superficially but attempts

. . . to develop a more realistic concept of the process of government regulation--

in which

government regulation of economic life is viewed as a highly political process embracing some of the most controversial areas of public policy . . . a public activity that raises fundamental questions concerning the role of government in modern society.²

A first portion of Bernstein's book attempts to show that the development of regulation by independent commission is 'one of the most significant phenomena in the evolution of American political institutions in the last 100 years': but has grown pragmatically in a country noted for its commitment to the establishment of philosophical rationale for government. Bernstein also examines specific problems of commissions but the most important part of his book is his

¹M. H. Bernstein, Regulating Business by Independent Commission (Princeton: Princeton University Press, 1955).

²Ibid., p. 7.

development of a life-cycle model for the analysis of independent regulatory commissions.³ This framework can be used to put the criticisms, faults and problems attributed to the independent commissions into a useful framework. Such a life-cycle model leads to interesting conclusions; for if the model is verified, independent commissions should regulate a sector of the economy only for a limited period of time then be discarded for other alternatives.

The purpose of this chapter is to attempt to apply Bernstein's life-cycle model to the development of the N.E.B. and to note any parallels. From this one can possibly assess the role of the N.E.B., including an assessment of its possible future direction. However, one must be cautioned in applying this model too closely. First, Bernstein examined the seven large American commissions in forming his model, one of which was formed in the 1880's; all of which were established prior to 1940. The N.E.B. has only been in existence for 12 years. Second, the problem of adapting the model to a Canadian situation must also be taken into account, particularly with respect to the cabinet system of government.

In describing his life-cycle model, Bernstein states:

The life-cycle of an independent commission can be divided into four periods: gestation, youth, maturity and old age. The length of each phase varies from one commission to another. . . .⁴

³Ibid., Chapter 3, pp. 74-102.

⁴Ibid., p. 72.

Bernstein examines each phase and characterizes it more fully. Each phase in Bernstein's model will be explained and compared to the development of the N.E.B..

A. Gestation

Gestation is the word Bernstein uses to characterize the period up to and including the establishment of an independent regulatory commission.⁵ This period may take up to twenty years or more, including a period of slowly mounting distress over the problem the commission is eventually formed to solve. In many cases a solution is reached quickly by well-organized pressure groups or by an associated scandal. The demands are generally pragmatic -- a solution to some evil which is not being adequately handled by existing mechanisms. Little is discussed in terms of the broader philosophical notions of government regulation, etc.. The enactment of the regulative agency statute "represents the culmination of study of what has come to be recognized as an acute public problem". Yet the statute is likely already insufficient on many grounds; since it is generally a compromise solution not giving full power to the regulatory authorities, lacks clarity and is usually short-sighted. The statute, not the regulatory goals and long-range policies of the once-established authority, is what is considered important.

⁵This phase is explained in ibid., pp. 74-79, which is paraphrased extensively.

The events leading to the creation of the National Energy Board seem to fit quite well in this framework. There was the distinct and recognizable problem of the regulation of energy transfers outside the country. The problem of energy export and its resulting commitment was recognized as early as 1910 when the Conservation Commission under Sir Clifford Sifton declared that:

Should power be exported to the United States, the vested interests it would create there would prevent its subsequent withdrawal to meet the future need of Canadian industry.⁶

Decisions regarding such export were Cabinet decisions under the Electricity and Fluids Exportation Act of 1907.⁷ Indeed, it was during the debate of this act that the first mention of an independent commission surfaced. R. L. Borden, Leader of the Opposition, proposed that rather than Governor-in-Council control of exportation permits, such power should be lodged in an independent board because of the special needs of expertness, consistency of policy and lack of political interference.⁸

From that time until the late 1940's there was little difficulty in handling the problems and needs of power exports

⁶Conservation Commission, Second Annual Report, Montreal, 1911, p. 114, as quoted in Royal Commission on Canada's Economic Prospects, Final Report, Ottawa, Queen's Printer, Nov., 1957.

⁷R.S.C., 1952, Ch. 93. See Canada, House of Commons Debates, March 19, 1907, p. 4970.

⁸Canada, House of Commons Debates, March 19, 1907, pp. 4946-47.

by the techniques of ministerial discretion (under the Minister of Trade and Commerce). Since the consistent policy had been to refuse to export power "so that these great reserves of energy may be utilized in building up the Dominion"⁹ there were few demands to test the system of government control. However with the growth and development of western Canadian oil and gas fields came greater demands. The improvement of pipe line technology, growing demands for power and the need to dispose of gas supplies brought new forces into play requiring government intervention, which resulted in the Pipelines Act of 1949.¹⁰ This act allowed pipe line companies to be incorporated under special acts of Parliament¹¹ and established the Board of Transport Commissioners as a regulating agency.¹² Much of the legislation appeared in many ways unable to meet the new and growing developments. In 1953, for example, special legislation had to be quickly developed to cover a gap in the existing law covering imports into Canada.¹³

⁹Rt. Hon. W. L. MacKenzie King, Prime Minister of Canada, Canada, House of Commons Debates, March 13, 1928, 1294.

¹⁰Pipelines Act, R.S.C., 1952, C. 211.

¹¹These special acts were private members' bills not Government bills although they took on some of the characteristics of them; see W. Kilbourn, Pipeline (Toronto: Clarke Irwin and Co., 1970), p. 33; and J. E. Britten, The Creation of the National Energy Board, unpublished M.A. Thesis, Carleton University, 1966, pp. 23-24.

¹²Pipelines Act, op. cit., p. 42.

¹³W. Kilbourn, Pipeline, op. cit., p. 42.

Revisions to the original Electricity and Fluids Exportation Act in 1955 resulted in the Exportation of Power and Fluids and Importation of Gas Act which gave full control to the Governor-in-Council, and especially the Minister of Trade and Commerce, to regulate all exports and imports.

Although consensus on the nature of pipe line policy had been reached early as stated by C. D. Howe, Minister of Trade and Commerce, in 1953¹⁴ there was little agreement over the methods of incorporating pipe lines or over the discretionary power of the Governor-in-Council under various acts¹⁵ nor was there unanimity over the direction Canada should take in overall energy policy. In 1955, the Royal Commission on Canada's Economic Prospects was created in part:

to study and report on:

- a) development in the supply of raw materials and energy sources.¹⁶

The Pipeline debate, perhaps the foremost event in Canadian parliamentary history, was a result of the commitment of the Liberal government and particularly C. D. Howe to an all-Canadian pipe line and Ontario consumption of Canadian gas. These commitments however necessitated some form of government support. The Northern Ontario Pipe Line Crown

¹⁴C. D. Howe, Canada, House of Commons Debates, March 13, 1953, pp. 2927-2933; see also H. G. Thorburn, "Parliament and Policy-Making", C.J.E.P.S., Vol. 23, 1957, pp. 57

¹⁵See Kilbourn, pp. 29, 32-34.

¹⁶Order in Council, P.C. 1955-909, June 17, 1955.

Corporation Act was the needed government support; however the urgency of it, the use of government closure and the manipulations needed to create a viable pipe line company of such magnitude (with all the necessary permits) resulted in unforeseen consequences, one of which was the fall of the Liberal government. The combination of events surrounding the creation of the pipe line are well documented in Kilbourn's Pipeline; the events of the debate are documented and examined elsewhere.¹⁷

What is noteworthy to this paper is that the established system of government control and supervision was shown to be inadequate. The Governor-in-Council control over pipe lines and export was thrown into disrepute. The scandal of stock profits, the subsidized export of gas to westcoast U.S., the charges of favouritism, the granting of permits almost on demand by the Minister, the charges of manipulation; all were charges which showed the system to be inadequate, leaving Parliament to rubberstamp the final outcome without knowing anything of it:

The pipe line posed the sort of problem that demands protracted and secret discussion. These Parliament cannot provide and the Government can. Parliament can state a general outline of policy to guide both the government and the country. But it cannot do much more than consider an agreement, once made, as a fait accompli and given party discipline pass it after the Government has answered all reasonable questions.¹⁸

¹⁷See Eugene Forsey and J. R. Mallory, "Parliament and Pipeline", Canadian Bar Review, Vol. 34, 1956, pp. 714-730, 880-885.

¹⁸H. G. Thorburn, "Parliament and Policy-Making", C.J.E.P.S., Vol. 23, 1957, p. 526.

In retrospect it seems that the limits of secrecy and the acceptability of the dominant position of the government party were violated by the pipe line debate. An alternative method of dealing with pipe lines, energy export applications, and related fields had to be developed. The existing forms of government control under the Pipelines Act and the Exportation of Power and Fluids and Importation of Gas Act had to be replaced by some other legislative mandate. To this end the new Conservative Government appointed a Royal Commission on Oct. 15, 1957, only one day after it had taken office.

The Royal Commission was established, it seemed, for two purposes; one to find some factual basis on which to judge many of the accusations made during the Pipeline debate,¹⁹ the other to report on energy policy in general. In this last respect two assumptions of the Diefenbaker government molded the direction of the commission. The first assumption was that regulation was necessary. The commission was mandated to assess

. . . the problems involved in and the policies which ought to be applied to the regulation of the transmission of oil and natural gas . . . the regulation of prices of rates to be charged or paid.²⁰

The second assumption was that an independent regulatory body was the best alternative. The commission was to consider:

¹⁹For instance, it was required to report on the nature of the relationship between Trans-Canada Pipelines and the Northern Ontario Pipeline Crown Corporation, Order in Council P.C. 1957-1386 (d).

²⁰Order in Council P.C. 1957-1386 (b) and (c)

. . . the extent of authority that might best be conferred on a National Energy Board to administer . . . such aspects of energy policy . . . as it may be desirable to entrust to such a Board.²⁰

The choice of Henry Borden, of Brazilian Light and Traction, also indicated that energy industries would be treated as public utilities.²¹

The establishment of a Royal Commission was a direct turnabout, for the Conservatives had previously argued for public ownership of the pipe line companies.²² Public ownership as an alternative was promoted only by the C.C.F. after the Conservatives came to power.

The suggestion for a regulatory commission, bandied about since 1907 and brought up many times in 1955-1957 during the Pipeline Debate as one alternative, seemed now to be the only alternative. The commission idea received further impetus by the Final Report of the Royal Commission on Canada's Economic Prospects. The Commission concluded that Canadian producers were at a disadvantage because of the lack of a parallel to the Federal Power Commission of the United States, which used its regulative position to protect the American consumer and allowed agreements for import only after

²¹The choice of commissioners and the structuring of their terms of reference to predetermine results is now almost an accepted fact. See V. S. Wilson, 'The Role of Royal Commissions and Task Forces', in G. B. Doern and P. Aucoin, The Structure of Policy-Making in Canada (Toronto: Macmillan, 1971). See also M. J. Coldwell, Canada, House of Commons Debates, Dec. 10, 1957, pp. 2139-2140.

²²Canada, House of Commons Debates, Hazen Argue, pp. 3792-3793, May 19, 1959. Indeed there was even a motion to

the best possible terms had been negotiated.²³ It concluded that:

The present system of export licensing by the Canadian government would seem to be an inadequate counterweight to this bargaining advantage held by United States companies wanting to purchase Canadian gas; and in our opinion, the bargaining position of Canadian suppliers might well be strengthened by stronger institutional arrangements within the Canadian government.²⁴

These institutional arrangements included the establishment of a National Energy Authority to be responsible for:

- a) advising the federal government . . . on all matters connected with the long-term requirements for energy . . .; methods of promoting the best uses of energy sources from a long-term point of view, export policy including such questions as the further refining of oil and gas in Canada and the disposal of by-products, coal subsidies, etc.
- b) approving or recommending for approval, all contracts or proposals respecting the export of oil, gas and electric power by pipe line or transmission wire; including where necessary the holding of public hearings in connection therewith.²⁵

The Royal Commission on Energy, speeded on by the need for government action and the overwhelming mandate given to Diefenbaker, prepared an interim report which dealt with the National Energy Board proposal. The Royal Commission

put the pipe line under public ownership; Hansard, June 4, 1956, p. 4673, by George Drew, then Leader of the Opposition Conservative Party.

²³Canada, Royal Commission on Canada's Economic Prospects, Final Report, Ottawa, Queen's Printer, Nov., 1957, p. 135.

²⁴Ibid., p. 135.

²⁵Ibid., p. 146.

recommended the establishment of a National Energy Board to act as an independent²⁶ commission²⁷ for the purposes of licencing the interprovincial and exportation transfer of oil, gas and any other energy sources designated by the Governor-in-Council, studying Canadian needs and supply of energy, recommending on energy policy, assisting other associated agencies²⁸ and relating to the International Joint Commission and Federal Power Commission.²⁹ However the Royal Commission also recommended that the powers to licence and the powers to regulate rates be distinctly separated between the N.E.B. and the Board of Transport Commissioners respectively.³⁰ It also set out some of the criteria which it felt the N.E.B. should use as rules-of-thumb in granting licences.³¹

The interim report was released Oct. 25, 1958. The Speech from the Throne of Jan. 15, 1959, was the first statement of intent to act upon the report:

. . . you will be invited to authorize the establishment of a national energy board to ensure . . . that Canada's energy resources are used effectively and prudently. . . .³²

²⁶Canada, Royal Commission on Energy, First Report, Ottawa, Queen's Printer, 1958, recommendation 3-11, p. 46.

²⁷Ibid., recommendation 3-10, p. 46.

²⁸Ibid., recommendation 3-8, pp. 44-45.

²⁹Ibid., recommendation 3-16, 3-17, p. 47.

³⁰Ibid., p. 29.

³¹Ibid., recommendation 3-9, p. 46.

³²Canada, House of Commons Debates, Jan. 15, 1959, p. 3.

It was not however until April 23 that a resolution to that effect was put forward in the House³³ and not until May 18 that the government earnestly moved to get the legislation passed.

Although all three parties agreed to the general principle that there was a distinct need for a national energy board, the characteristics, makeup, authority, and duties of such a board were subject to much dispute. Since Parliament is seldom the place for compromise to be worked out "on the floor of the House" during passage as is the case in the United States House and Senate, the bill debated was already established as a compromise and subsequently much weaker for that compromise.

Consideration had to be given to the problems of "investment" as put forward in briefs by the affected groups³⁴ to the Conservative Government before they formed the bill. On the other side, the forces calling for stringent public control and public ownership had to be reconciled. The resulting bill was a consolidation of the two existing Acts, and seemed based heavily on the Gordon Commission's Report (and a study done for the Gordon Commission by John Davis, Canadian Energy Prospects) rather than that of the Borden Royal

³³Canada, House of Commons Debates, April 23, 1959, p. 2965.

³⁴See Speech by Hon. Gordon Churchill (Minister of Trade and Commerce) Hansard pp. 3767-3768, May 18, 1957, and A. Dumas pp. 3771-3774. The content of two briefs submitted to the P.M. by the Canadian Petroleum Association and the Investment Dealers Association has never been disclosed.

Commission on Energy. The N.E.B. as set out in the Act differed strongly from the proposals of the Borden Commission. The recommendations for liaison with I.J.C. and F.P.C. were ignored; the recommendation of separation of function between the advisory and licencing powers of the N.E.B. and regulative powers of B.T.C. were ignored and the functions were united under the N.E.B.; a recommendation for mandatory rate regulation on a base undetermined; regulatory and licencing powers granted to the Board were limited severely from those recommended in the Borden Report. Indeed most of the major recommendations of the Borden Report were either altered or discarded in the formation of the new act,³⁵ leaving the impression that the soon-to-be-regulated groups succeeded in their attacks on the Borden Report. Charges were also laid that proof given by the Borden Report of excessive profits by entrepreneurs was being ~~disregarded~~ in that no attempt was made to legislate against such from happening again.³⁶

The N.E.B. was a compromise solution on a major philosophical scale and on an operational scale. The first compromise was one between complete private sector freedom and the continuance of the status quo, and the imposition of full public control and public ownership of a sector of the industry. The compromise was however considered the best possible

³⁵See Gordon Churchill, Hansard pp. 3923-3930, May 22, 1959 and H. J. Robechaud, Hansard pp. 3946-3948, May 22, 1959.

³⁶Hazen Argue, Hansard pp. 3939-3942, May 26, 1959.

method of adequately protecting the public interest.³⁷ Second and perhaps most important were the compromises in the nature of the Board. The restrictions on rate regulation power, the less than complete independence of the Board from the Governor-in-Council, the lack of regard for many recommendations of the Borden Commission because of the pressure put on the government but such groups as the Canadian Petroleum Association and the Investment Dealers Association, are all examples of the compromise required to create the regulative agency.

Thus far, then, the creation of the N.E.B. coincides quite well with the general characteristics of the genesis stage of the regulative life-cycle. The problem of energy generally and pipe lines, export and import, specifically became especially acute in the mid-'50's. The resultant debate, scandal, charge and countercharge pointed out the need for a new method of accommodation. The chosen method, regulation by an independent commission, was an idea which had been around since 1907 but was developed only when the problem became acute and the forces supporting it became overwhelming. The establishment of the Board was the panacea; little discussion took place on the principles and regulatory goals guiding the established board. These were generally unclear, or at least not fully clarified. The statute was restrictive

³⁷Rt. Hon. J. G. Diefenbaker, Canada, House of Commons Debates, May 26, 1959, pp. 4016-4018.

in many ways, limiting the jurisdiction of the Board, its power to regulate completely, and its independence of action.

B. Youth

The youthful stage to Bernstein is the flowering of the regulatory agency.

The agency ordinarily begins its administrative career in an aggressive crusading spirit. It may resolve to meet the opposition of the regulated with firmness in order to promote the public interest.³⁸

. . . the agency is pioneering; new paths must be constantly broken. The newness of the tasks and the absence of familiar patterns force the agency and its staff to draw constantly on their own resourcefulness.³⁹

This is also the time for the commission to define its role in expansive terms, to set its limits widely and act aggressively. This is so because the commission, on establishment, faces a myriad of problems. First:

. . . it lacks administrative experience, its policy and objectives are vague and unformed, its legal powers are unclear and untested, and its relations with (government) are uncertain.⁴⁰

Second, it must act quickly before the support gathered to create it wanes:

Standards for conduct of private enterprise, guiding standards for the administrative agency, and the position of the agency may be established

³⁸Bernstein, op. cit., p. 80.

³⁹C. Ken. Davis, Administrative Law (St. Paul: West Publishing Co., 1958), p. 164.

⁴⁰Bernstein, p. 79.

before the political force behind the agency's directive is spent and the dissident groups have found ways of moderating or checkmating the new program.⁴¹

The waning support is a result of many causes; public support, having been raised to a peak to pass legislation, naturally wanes; issues are not as clear and/or interesting; regulated groups tend to develop a propaganda battle against the commission; the political arm cannot afford to perpetuate a constant battle between interests; and finally, the regulated groups remain cohesive while the public mass tends to fragment.

Thus the youthful stage is a most important time for a commission: "They have embarked on the regulatory task with some exuberance and with a desire to clarify goals and mark out basic policies".⁴²

. . . It must function here not in accordance with thin vague concepts but in terms of concrete situations where the real content of the public interest must be extricated from a maze of technical detail.⁴³

The commission must accomplish this in the face of persistent attack from the regulated groups and at the same time attempt to establish itself firmly in new areas.

The National Energy Board Act was passed on July 18,

⁴¹C. Redford Emmette, Administration of National Economic Control (New York: Macmillan, 1952), p. 386.

⁴²Bernstein, op. cit., p. 84.

⁴³Bernstein, ibid., p. 79, quoting from E. P. Herring, Public Administration and the Public Interest (New York: McGraw Hill Co., 1936), p. 183.

1959.⁴⁴ The members of the Board were chosen and announced on August 10, 1959.⁴⁵ From this time until the N.E.B. was brought into being on November 2, 1959, the members attempted to deal with the fundamentals of establishing the Board as something more than a piece of legislation. This involved meeting the complex and multi-faceted needs of the Board such as staffing, accommodation, etc., as well as the more important tasks of developing, with little as a guideline, a complex set of regulations that would give the obscure goals of the Board some "real content". As well, the Board had to establish a records systems (borrowing heavily from the existing system of the Board of Transport Commissioners), develop a code of rules of practise and procedure for hearings, clarify the mechanics of submission-making to the Board, and prepare certificates for those operations which were already in existence before the Board was established.⁴⁶ All this was to be accomplished in the space of a few short months, while the Borden Commission was preparing a second report (which conceivably could have greatly affected the powers and duties of the Board). Commentators were speculating on the Commission's and the Board's developments and a hostile industry wounded by the

⁴⁴Canada, House of Commons Debates, July 18, 1959, p. 6414.

⁴⁵Canada, Order in Council P.C. pp. 1959-2012. See Ottawa Citizen, Aug. 10, 1959. The members of the Board will be expanded on in a note at the end of this chapter.

⁴⁶See N.E.B. Annual Report, 1959, Ottawa, Queen's Printer.

establishment of a Board in the first place was ready to cry foul at the first sign of a disputable regulation.⁴⁷

The Board, needless to say, made it through the initial part of its youthful stage. Since, it has developed quickly, efficiently and with great forethought in many previously untouched areas, and "with a fair measure of daring and inventiveness". Considering the problem of recruiting staff for available positions,⁴⁸ the Board's handling of its initial establishment was phenomenal.

The Board in its regulative functions has developed procedures to meet the needs of regulation and supervision and has developed to meet with the growing task of proceedings and the growing scope of duties in its legislative mandate. Cases involving the issuance of certificates, orders, permits and licences have constantly increased from 1959 to 1967 (one way of measuring its workload). By the Board's own admission, these cases are becoming increasingly complex and varied.⁴⁹

⁴⁷R. M. Baiden, "Borden Calculates the Odds", Saturday Night, Sept. 26, 1959, pp. 22, 23, 26.

⁴⁸For example, at year's end 1959, the Board had only 20 staff of which four were professionals. See references to problems of staffing in N.E.B. reports 1959, p. 2; 1960, p. 12; 1961, p. 18; 1966, p. 23; 1967, p. 3; and J. E. Britten, The Creation of the National Energy Board, op. cit., pp. 99-105.

⁴⁹N.E.B. Annual Report, 1969, p. 17; 1970, pp. 30-31; see Appendix I. While the amount of issuance decreased in 1968 and 1969, the decrease was mostly in special orders which are mechanical and do not require much time; the Board's workload still increased.

However, issuance of certificates, licences, permits and orders are but the 'tip of the iceberg', for the Board has had to develop an adequate resource of knowledge to deal with the applications.

In 1959, there was already a backlog of cases and with little to base its decisions on (and in the light of its advisory duties as well), the N.E.B. had to be "both a judge and a prophet",⁵⁰ on complex cases involving millions of dollars and the commitment of billions of cubic feet of gas.⁵¹ To help deal with these and future applications for certificates and licences the Board immediately initiated internal studies of reserves of oil and gas, production, potential recoverability, consumption and future trends of discovery, as well as developing a more useful set of statistics for recording historical information in conjunction with the Dominion Bureau of Statistics. These developments were entirely new, filling a vacuum explored and charted by the Royal Commission on Energy but never filled until the N.E.B. moved to establish such studies and data collection. This study of energy needs and supply has become increasingly sophisticated since the establishment of an Operations Research Branch in 1964⁵² which has subsequently developed computer programs for project evaluation, rating pro-

⁵⁰Ottawa Journal, January 6, 1960, Editorial on N.E.B..

⁵¹Britten, op. cit., pp. 105-106.

⁵²National Energy Board Annual Report, 1964.

cedure, optimization models for pipe lines as well as sophisticated models for dealing with sector regional demand and supply analysis, investment and electrical supply and demand.

All these developments were innovations for the Board's better determination of applications for licences and certificates.

Although the Board has been empowered to deal with rates of traffic, tolls and tariffs by the National Energy Board Act, it has never applied its powers but has moved to prepare itself for the time when such regulation is necessary. In 1959-1960 a uniform classification of accounts system was worked out with the industry; it was adopted by the industry for a trial period in 1961 and developed to a Uniform Classification of Accounts for Gas Pipeline and Oil Pipeline Companies (Section 88 of the N.E.B. Act). Relying heavily on the experience of the Federal Power Commission and Interstate Commerce Commission and the experience of various provincial boards in rate cases,⁵³ the Board attempted to develop a complete set of accounts, rate base determinant and supervised systems across the industry. These were supervised by spot field checks beginning in 1963⁵⁴ mainly to test the accuracy of information received by the Board, compliance with the System of Accounts and to satisfy a need for specialized

⁵³Speech given by D. M. Fraser to Annual Meeting of Public Utility Commissioners, June 13, 1966.

⁵⁴N.E.B. Annual Report, 1963, p. 8.

information on certain aspects of the company's operation. The Board however had a stated policy on not implementing the rate system:

The Board stands ready however, either upon reasonable complaint or upon our own motion, to investigate any appearance of unjust discrimination or improper exploitation of the quasi-monopoly position which a pipe line by its nature enjoys. The mere existence of the Board's regulatory powers is a reminder to the pipe lines that their situation as public utilities, or something very like them, requires them to behave like Caesar's wife, not only virtuously but above all suspicion.⁵⁵

One of the other reasons for not imposing rate regulation immediately was the deficiency of staff that was evident and would have been aggravated by the increased volume of rate casework.

Another of the Board's mandatory duties which was lacking at the time of its creation was the need for the development of safety standards and supervision of construction and testing of lines. The Board, in the years 1960 to 1967, developed with the Canadian Standards Association a code of standards for gas and oil pipe lines⁵⁶ and electrical power lines and facilities. The Board developed in the early stages tests for leave-to-open orders and provided supervision for construction changes. The

⁵⁵Speech by D. M. Fraser, June 13, 1966, op. cit., p. 26. It is interesting to note that the first rate case involving Trans-Canada Pipe Lines was to grant an increase rather than as a result of high rates perhaps showing the self-supervision of the industry in maintaining low rates to avoid as long as possible the imposition of rate regulation. See Montreal Gazette, Jan. 12, 1972, p. 22.

⁵⁶N.E.B. Annual Report, 1967, pp. 18-19.

Board also investigated any reports of pipe line breaks, leaks or malfunctions as to cause, and insured the restoration of a safe line.

The Board has been responsible for the supervision and monitoring of the development of The National Oil Policy (N.O.P.) as stated by Hon. George Hees on Feb. 1, 1961⁵⁷ and the National Power Policy (N.P.P.) as stated by Hon. Mitchell Sharp on Oct. 8, 1963.⁵⁸ The Board had to develop methods to deal with and create operational plans for the implementation of these major policy shifts of government. Again the Board chose, with government, to develop these policies by voluntary compliance rather than by strict supervision and regulation and as a result could report that "thanks to the cooperation of the industry, the success of the National Oil Policy has so far been achieved without formal regulation".⁵⁹

Perhaps the broadest, most nebulous, but in many ways most important duty that the Board has been required to carry out has been its duty to advise the government. This has involved the Board in numerous interdepartmental, intergovernmental, and international studies that have had a great effect on the shape of the industry. The Board worked from 1964 to

⁵⁷See Speech by R. Howland, Canada's National Oil Policy, Quebec City, April 25, 1966.

⁵⁸Canada, House of Commons Debates, Oct. 8, 1963, pp. 3299-3304. See also N.E.B. Annual Report, 1962, pp. 10-13.

⁵⁹N.E.B. Annual Report, 1965, p. 8.

1969 on a long-term energy forecast which was published⁶⁰ and has been the Canadian government's liaison with various bodies such as a special N.A.T.O. committee on energy, the O.E.C.D., and the Emergency Measures Organization. It has developed important relationships with other agencies and departments (to be discussed in the next chapter) and has completed important studies for these groups. More important, on advice from the N.E.B., an Energy Counsellor was established at the Canadian Embassy in the United States in 1960, and the N.E.B. has established liaison with the F.P.C. and I.C.C. in the United States. Various problems have been delineated and attacked on a coordinated basis due to the suggestion of the N.E.B..

The Energy Board then has moved creatively and actively to develop its bounds, establish its horizons and set a firm base for its operations. In most cases it has been surprisingly innovative; its O.R. section has led the industry and pointed the way to new developments. At the same time it has developed a solid data base both for the present and for the future.

C. Maturity: The Process of Devitalization

The maturity phase of the commission life cycle, as developed by Bernstein, has few of the typical positive

⁶⁰Canada. N.E.B., Energy Supply and Demand in Canada 1966-1990, Ottawa, Queen's Printer, 1969.

connotations usually associated with the word. Maturity in the commission is typified by its increased cooptation by its regulated group.

The commission becomes more concerned with the general health of the industry and tries to prevent changes which adversely affect it . . . it becomes part of the status quo and thinks in terms of the protection of its own system and its own existence and power against substantial change.⁶¹

The commission tends to become passive, relying on precedent rather than innovation and compromise rather than strong stands. It desires to avoid conflict and enjoy harmonious relations with its regulated groups, mainly because the power base that resulted in its formation has largely been disbanded, and government tends to leave it to fight its own battles, giving it little effective direction, leadership or support. Maturity is also characterized by a heavy reliance on precedent, an increased judicialization, an increased spirit of professionalism that divides the staff of the commission, and an increased backlog of cases that tend to focus the commission's work on the past allowing them little time to plan for the future.⁶² Maturity ends on an even more sour note:

Politically isolated, lacking a firm base of public support, lethargic in attitude and approach, bowed down by precedent and backlog, unsupported in its demand for more staff and money, the commission finally becomes a captive of the regulated groups.⁶³

⁶¹Bernstein, op. cit., p. 87.

⁶²Ibid., pp. 86-90.

⁶³Ibid., p. 90.

The development of the N.E.B. along the lines predicted by Bernstein is not in any way as clear as it was in the first two stages. On the one hand the Board seems to be increasingly concerned in the past few years with the health of the industry. The Board, it is true, is required by statute to assure the best use of energy resources in Canada, inexorably linking it to monitoring the health of the industry. However, the annual reports have increasingly taken a wider view of the industry's health and statements such as, "The Canadian oil industry had another excellent year"⁶⁴ are to be found increasingly often in the Board's Annual Reports. Indeed a large portion of a Report reads like a company prospectus. The Board has also developed programs which benefit the companies under regulation. The Board's development of an optimal model for gas pipe line construction has been reported to have saved the pipe line industry a great deal of money.⁶⁵ The Board has also been thought of as having been a major promoter of exports of oil. Such developments do not however carry the connotation of evil that Bernstein seems to attribute to them for in these cases the interests of the industry and the assistance it has received from the Board have not been at the expense of the public interest.

⁶⁴N.E.B. Annual Report, 1969, p. 8.

⁶⁵Much of what is asserted in this section is the result of private confidential interviews and thus cannot be directly attributed in footnotes.

It can be said to some extent that the National Energy Board is not in the eye of the hurricane any more, thus it does not have the support of the public and various groups which offset the power of the regulated interests in the Board's formative years. Little reporting of the Board's activities are found except by a reading of the financial pages of the newspapers. However, it can also be said that the animosity of the regulated groups has also mellowed some in the past years and offset somewhat by consumers groups whose needs and desires are often directly opposed to the needs and desires of the producers. As well, the developing importance of energy and energy policy has put the Board in a more publicized position of late.

Other aspects of this stage of Bernstein's model do not hold up well at all. There is no massive backlog of cases that have built up over the years. The Board has been quite efficient in dealing with cases, applications, and hearings as they have arisen; it has done quite well in attempting to keep abreast of current developments (especially in evaluating reserves altered by new discoveries and developments such as the Athabasca Tar Sands⁶⁶) and also in future needs and developments with its long-range forecast to 1990. Given the increased complexity of the new cases (such as the recent case dealing with whether there were sufficient reserves for future requirements in the face of several gas export licence

⁶⁶N.E.B. Annual Reports, esp. 1969 and 1970.

applications which for the first time disallowed hearings on further exports due to lack of supply⁶⁷), the Board has done surprisingly well, especially with only incremental increases in staff.

Increased judicialization of procedure and reliance on precedent are also not in evidence at this point. If legal staff is any index of judicialization of procedure, the Board has indeed not evolved into the maturity state. It now has only two members on its legal staff with one position for clerical support staff.⁶⁸

The Board it seems has not shrunk either in attempts to avoid conflict with its regulated groups. The recent denial of gas export licences by reason of the assessment of inadequate gas reserves provoked a furor among the oil and gas industry that resembles little the passive, even apathetic, mature regulative commission Bernstein predicts.

D. Old Age: Debility and Decline

Old age is but a continuation of the processes developed in maturation. Procedural patterns harden into sanctified rules, passivity deepens into debility and the judicialization of procedure develops even stronger methods and unalterable guides.⁶⁹ Even worse:

⁶⁷See Calgary Herald, Nov. 20, 1971; Montreal Gazette, Nov. 20, 1971; Toronto Globe and Mail, Nov. 23, 1971, Editorial on N.E.B.

⁶⁸Interviews with legal staff of National Energy Board.

⁶⁹Bernstein, op. cit., pp. 91-95.

. . . they tend to relate their goals and objectives to the demands of dominant interest groups in the economy. . . . The institutionalization of favouritism towards the dominant groups in the regulated industries is fostered by the narrow jurisdiction of the commission.⁷⁰

This debility is further increased by a cut-back in budgetary allocations from government because of lack of faith, leaving the commission even more dependent on the regulated industries.

With advancing age they tend to become the servants rather than the governors of the industries which they regulate and attain a sort of dignified stability far from the objectives which they originally sought.⁷¹

Such a commission exists in this state indefinitely until the process comes full circle (usually as a result of some emergency or scandal) and a new method or type of regulative pattern is developed.

Although one can perhaps legitimately claim that the National Energy Board has of late tended to favour the dominant interest groups in its field (e.g. its policy and the government's policy of not protecting the Montreal Market with the Ottawa Valley Line policy can be said to favour the large international oil firms over the smaller independent Western Canadian oil companies), it still seems overwhelmingly obvious that the N.E.B. has not reached the state of infirmity and debility predicted by Bernstein's model.

⁷⁰Ibid., p. 92.

⁷¹Ibid., pp. 93-94.

There are several possible reasons which can be given for the lack of adherence of the N.E.B. to the life-cycle model as proposed by Bernstein. Many are related to large differences between the American and the Canadian commissions. Others can be taken as faults in Bernstein's model.

First, the N.E.B. in relation to the American independent regulatory commission has had a very short life. The I.C.C. referred to constantly by Bernstein was established in the 1880's; in comparison the N.E.B. is a youngster in the field. Thus the jury may in effect still be out; it may be too soon to judge.

Second, the sheer size and scope of the commission's work in the U.S. far exceeds its counterpart in Canada. The commission is responsible for a vast field which requires intricate and complex regulation and adjudication.⁷² It must hear tens of thousands of cases every year and deal on a level infinitely more complex; in comparison the total number of licences, orders, certificates, etc. granted by the N.E.B. has just barely exceeded one thousand.

This complexity, when considered with another phenomenon peculiar to the American commission "judicial due process-itis", accounts for the tremendous time lag for case hearings and the backlog noticeable in the U.S.. This time lag and backlog is not so prevalent in Canada, nor is the

⁷²See Ken Davis, Administrative Law Treatise (St. Paul: West Publishing Co., 1958), pp. 11-12.

"due process-itis". The U.S. commission is governed under the Federal Administrative Procedure Act (see Chapter 6) which requires in part that independent hearing examiners hear a case initially with appeals going to single commissioners or groups of commissioners in important matters. It also requires an extremely judicialized (at least by Canadian standards) procedure for hearings. In contrast, the N.E.B. hears but a few major cases every year, the rest being very routine changes in existing certificates and orders. Thus it has had the opportunity to develop in a more unhurried, and unharried, way than the reaction-accommodation style of the U.S. commissions. Consequently it is less susceptible to attack through appeal and criticisms of delay.

Thirdly, the methods of attacking commissions, the development of judicial appeal and review as a method of stalemating commission activity, the development of excessively judicialized, impartial procedures and the cultivation of public opinion against regulative agencies have not been widely used or successful in Canada. Thus capture by interest groups is not as widespread or as quick a process as Bernstein's theory would lead one to believe.

Finally, the position of the independent regulatory commission in the total government structure is quite different in Canada. In most ways, given the separation of function and balance of powers by checks and balances, the U.S. independent regulatory commission is more independent. It makes its own

policy and carries out its duties through a much looser mandate. Yet this is what makes it more susceptible to manipulation. The balancing of forces among President, Congress and the Judiciary generally allows for more manipulation by the regulated groups.⁷³ Canada's commissions, with comparatively less visible independence, are more immune to manipulation since in reality they must answer only to Cabinet. As well they are less free to develop policy on their own, without Cabinet's approval of Board decisions or adoption of their advice. Therefore interest groups see the independent commission less as the focal point for the application of pressure than to their American counterparts.

One can, on the other hand, criticize Bernstein's model itself. Bernstein's model relies heavily on opinions from a group of like-minded political scientists; there is little real tangible evidence that his life-cycle is all that he states it to be, even less that there is any better alternative in a difficult situation.⁷⁴ Perhaps a most potent criticism is that the life-cycle is to be found not just in the independent regulatory commissions but in all organizations, which by processes too complex to be fully understood, go through

⁷³See U.S. President's Advisory Council on Executive Organization, A New Regulatory Framework, Washington, U.S. Government Printing Office, 1971, Chapter 1.

⁷⁴See Ken Davis, op. cit., pp. 16-20, and I. L. Sharfin, review of Bernstein's book in American Economic Review, Dec., 1955, pp. 1008-1010.

cycles of birth, youth, maturation and decline.⁷⁵

Regardless of the faults of the model, it allows one to gain an historical perspective of the growth and development of an independent regulatory commission such as the National Energy Board. However, it must be noted also that like the critics who focus on the independence and judicialization aspects of the commission, Bernstein fails to distinguish between the regulatory function and the regulatory mechanism, concentrating on the faults, real or imaginary of the mechanism.

A Note on Commissioners

Board members or commissioners are an important part of any regulatory agency. It is they on whom the responsibility of applying policy and making decisions ultimately falls and it is they who are responsible for the development of their specific Board or commission. It is the commissioner who must withstand the pressure of the regulated groups, decide the "public interest" in a sterile environment and answer for the decisions made in this capacity. Bernstein was not the first to notice the importance of commissioners when he stated,

. . . most analysis of administrative and policy problems of commissions conclude with the observation that regulative success hinges more on the quality of the commissioners than on any other single factor.⁷⁶

⁷⁵The textbooks on goal displacement, goal succession, etc., follow a similar line when dealing with organizations in theory.

⁷⁶Bernstein, op. cit., p. 103.

E. P. Herring, in what is now a landmark study of commissioners in American Federal regulative agencies, concluded that, "There are no officials of more importance to American industry than those who man our federal regulatory commissions".⁷⁷ Even in 1936 when Herring was conducting his study, the criticism of commissioners was widespread as was the feeling the commissions were failing because of the inability of government to attract the best men to the commissions. Indeed, part of Herring's goal was to find out what the word "best" included.

The problem of commissions and their commissioners has grown rather than decreased. Fundamental to Bernstein's life-cycle is the position of the commissioners and the changes in status and quality of commissioners over time. Bernstein concluded that, "Evidence is overwhelming that many of the men appointed to the various commissions have tended to be mediocre and lacking in relevant training and experience".⁷⁸

In discussing commissioners in relation to his life-cycle theory he concluded that,

There is a greater likelihood of outstanding Presidential appointments during the early years of a commission; conversely, once the commission has achieved maturity the competence of its leaders is likely to decline.⁷⁹

⁷⁷E. P. Herring, Federal Commissioners. A Study of Their Careers and Qualifications (Cambridge, Mass.: Harvard University Press, 1936), p. 1.

⁷⁸Bernstein, op. cit., p. 104.

⁷⁹Ibid., p. 106.

This decline in the standard of commissioners chosen is inexorably linked to the life-cycle in many ways. Primarily, the regulated industries as soon as they become regulated tend to look at the appointment of commissioners as a primary target of their possible influence. The regulated group

. . . attempts immediately and persistently to get sound men appointed to the independent commission. . . . Some commissioners so win the confidence of industry that industry weans then away from the public service into its own employ. Commissioners who prove difficult are subject to constant attack on the floor of Congress itself; and their reappointment is bitterly opposed.⁸⁰

Other factors are difficult to document but of primary importance. The waning reputation of a constantly beleaguered commission is reason enough for an intelligent career-minded man to avoid appointments. The commission appointment has in many instances been used as a stepping-stone to a high position in the industry which the commissioner was regulating; indeed, it must, since the average term of commissioners on independent regulative boards was only three to three and one-half years.⁸¹ A commissioner who is faced with the possibility and probability of searching for a new position in four years will perhaps tend to deal less objectively with the industry in which he is most likely to find a position. Of importance also is the chance of patronage appointments to less than the best possible people. Herring in 1936 noted the power of the President to

⁸⁰Bernstein, ibid., p. 82.

⁸¹Ibid., p. 105.

appoint commission members was being abused.⁸² As well, cases of Congressional and interest group interference in the matter of appointment has resulted in less than the best men serving on the Boards.

In two recent books inquiring into the process of regulation by independent commission the importance of the commissioner was also noted; as was the failure of the commissioner form of regulation. Kohlmeier, in a journalistic exposé of regulation, examines the three vital areas of commissioner relationship and concludes that there has been ample documentation and proof that commissioners have failed to provide the leadership necessary for workable commission regulation.⁸³ Mainly, this proof comes from a documentation of the manipulation of appointment by the President, the manipulation of the commissioner's decisions by force brought to bear on him from the President, Congress and the regulated groups, and by the cooption that comes from having to deal on a day-to-day basis with regulated groups.

A more recent analysis and one that may have a more lasting effect on the independent commission form of regulation is the Report on Selected Independent Regulatory Agencies commissioned by President Nixon.⁸⁴ The study group that produced

⁸²Herring, op. cit., Chapter VII, pp. 71-89.

⁸⁴President's Advisory Council on Executive Organization, Report, Washington, U.S. Printing Office, 1971.

⁸³Kohlmeier, The Regulators (New York: Harper and Row, 1969), Chapters 4-7.

the report included John Conally, one of the President's closest advisers. The Commission asserted that there was ample evidence that the original reasons for creating the commission form of regulation had not been developed and also that the commission form was actually a detracting influence on regulation. It concluded that the position of the commission member vis-à-vis the commission (and the total Presidential-Congressional-Regulated Industry framework) was ineffectual and detractive.⁸⁵ It proposed that the commission form of regulation be abolished and replaced by a single-headed administrative agency appointed by, and responsible to, the President. Although not stated in strong language such a recommendation implicitly attacks the position of the commissioner, his expertise, his work and his decisions.

The commissioner is the most important determinant of the commission form of regulation and a prime determining factor in the extent and rapidity with which a commission moves through the life-cycle proposed by Bernstein. The commissioner in Canada, both in his position vis-à-vis the political and structural pattern and as an individual, is cut from a surprisingly different mold. It is the success of the commissioner that, in the case of the M.E.B., explains in large measure why

⁸⁵Ibid., pp. 14-20.

the N.E.B. has not followed Bernstein's life-cycle model.

It is possible to evaluate the position of the commissioner in several ways. First, the commissioner is generally considered to be an expert in his field. He must at least be knowledgeable enough to deal with the technicalities of submissions and analyze the content of proposals to determine their ramifications. In this respect the National Energy Board has found superior people to fill the role of commissioner.⁸⁶

The Chairman of the N.E.B. from its inception until July 1968, has dealt with oil and gas conservation since he was appointed assistant Deputy Minister of Lands and Mines in Alberta in 1947 and Chairman of the Alberta Oil and Gas Conservation Board in 1948. As Chairman of the Alberta Board, the first developed in Canada, Ian McKinnon dealt with all aspects of the exploration and development of oil and gas in Alberta and was an integral participant in the decisions establishing the Trans-Canada pipe line. This prior knowledge of the conditions of the oil and gas industry and of the problems of conservation and regulation developed over twelve years of dealing with oil and gas policy was one of the fundamental reasons for the success of the N.E.B., especially in its early years.

⁸⁶The material from this section comes from two sources; Biographical sketches courtesy of the N.E.B., and personal, confidential interviews with various people on, or related to, the N.E.B..

R. D. Howland was Vice-Chairman of the N.E.B. from its inception until July 1, 1968, and has been Chairman of the Board to the present. With a doctorate in Economics from the London School of Economics and experience in government service since 1943 (which included Secretaryship to the Royal Commission on Coal 1946, economist for the Gordon Commission 1957, and Member of the Borden Commission 1959) he was adequately prepared to deal with the problems of energy regulation.

Similarly the other members have careers with a variety of backgrounds which have prepared them to deal with their duties as members of the Board. Douglas Fraser, an economist and political scientist, has a long background as a consulting economist and as a public servant with the Department of Trade and Commerce (again, he was involved in the development of the Trans-Canada pipe line⁸⁷). H. L. Briggs served with two provincial power commissions from 1928 to the present and is acknowledged as one of Canada's foremost men in the electric power field. Maurice Royer had a wide experience as a consulting engineer before coming to the Board.⁸⁸ J. G. Stabback served with the Oil and Gas Conservation Board in Alberta from 1949 to 1964, as well as serving as chief Engineer with the

⁸⁷Kilbourn, Pipeline, op. cit., pp. 107-108.

⁸⁸Although not an original member of the Board, Royer was appointed in 1960.

N.E.B. from 1964 up to his appointment as a member in 1968. The recent additions to the Board, A. Cossette Trudel, who has an outstanding background in private industry and provincial regulation; C. G. Edge, a private industry economist, statistician and management scientist; and N. J. Stewart, a private lawyer and executive of a private oil company; do not seem in any way to be decreasing in quality of expertness and qualifications, as Bernstein's theory would propose. Indeed, the Board can be noted for the depth of background and knowledge which each member brings to the Board as well as the variety of industry, government, academic and specific field orientations that give a balanced wholeness to the Board.

However, expertise is not considered an end in itself, nor is expertise all that is considered necessary for a good commissioner. Indeed, as Bernstein points out:

. . . the specialized training and ability of the recognized administrative expert equip him to deal not necessarily with broad considerations of public policy but rather with the application of settled policy to delicate, complex situations.⁸⁹

Thus the expert, because of his expertness, cannot see the generality of the public interest considerations. Such is not the case in the N.E.B.. The balance of backgrounds, in expert technical fields as opposed to the definite legal orientation of the American commissioners,⁹⁰ tends to give the Board

⁸⁹Bernstein, op. cit., p. 114.

⁹⁰Herring, op. cit., pp. 33-43 stated that the predominant area of expertise for American Commissioners is legal;

a multidisciplinary approach to the regulative problems. The ability to see other sides of a situation is of primary importance to a good board member, almost to the point of overshadowing his expertise. It is this ability to see all sides of a situation that has given the N.E.B. such a good reputation in one informant's opinion. To look at Bernstein's statement in another way, the American commissioner is much more independent in his formation of policy than is his Canadian counterpart. To this extent his expertise is a restraining factor rather than a help. The Canadian commissioner in dealing with regulatory problems is much more served by his expertise supplemented in a majority of the members' cases with broad experience of serving on Boards or dealing with them. Thus the Board has to this point combined an adequate base of expertise in each commissioner, a wide range of backgrounds and areas of expertise as well as a general ability to see the far-reaching consequences and externalities. A prime example of such a combination was the Great Lakes case in 1968.⁹¹

The nature of the interrelationships of commissioners, staff and regulated groups is also an area of much interest. In the U.S., commissioners have been accused by various critics

Bernstein, *ibid.*, p. 106 notes that two out of three commissioners have been either lawyers or law school professors.

⁹¹Kilbourn, Pipeline, *op. cit.*, *passim*. The case involved a crucial decision as to whether to continue the all-Canada route policy for pipe lines or allow part to be constructed through the U.S.. The Board considered the technical details but outlined some of the larger considerations to be dealt with at the Cabinet level.

of a whole range of indiscretions and abuses of power and position. Much of the problem is structural and has thus been avoided in Canada. Commissioners in the U.S. have tended to become representative of a specific area or interest group so that if a position on a commission becomes vacant it must be filled by a person satisfying the same requirements. American commissioners are accepted as having a partisan orientation hence the requirement that most commissions be bipartisan.⁹² Commissioners in the U.S. have staffs who work directly for the individual commissioner giving a larger amount of freedom to formulate his own stands and back them up. Coupled with this is the freedom of commissioners in the U.S. to make dissenting judgments. Such freedom to dissent generally weakens the commission majority's stand⁹³ and tends to increase the differentiation of commissioners into visible representatives of specific interests with the power to promote those interests. These structural considerations tend to make the commissioner more subject to interest group domination than the commissioner in Canada.

The Canadian commissioner is weaker as an individual. He has no private staff to develop his own personal resource of knowledge, the decisions of the N.E.B. have always been

⁹²See Bernstein, op. cit., pp. 9-11, 104.

⁹³As was the case in the Westcoast application 1968, where a dissenting opinion was given on the in-line policy of the F.P.C. which weakened the policy so much that it was later rejected by a strengthened position of the N.E.B. (who opposed the policy).

unanimous allowing a problem to be worked out in private and a subsequent unified stand to be taken behind the decision.

There is little partisan consideration in terms of the direct avowed political affiliation in the U.S. and there seems to be no orientation of commission positions to specific areas or interest groups. The Board member is also assigned to cases by the Chairman giving him the power to deal with Board members who publicly attempt to destroy any unanimity (although such has never happened). All in all, the N.E.B., by dealing as a cohesive unit, is able to better withstand the public pressure that could be exerted on an individual by the interest groups.

A final point must be examined. The U.S. experience has been that the commissioner tends to be recruited from the industry regulated and tends to, when his term is up, return to the industry he was formerly regulating, bringing up a question of conflict of interest.⁹⁴ It has been well-documented that staff and commissioners tend to return to their regulated industry in the U.S.. However in Canada, due to the lack of turn-over in commissioners on the N.E.B. (because of seven-year terms and the short twelve-year life-span of the Board), the jury is, in effect, still out on this point. However, the charge of bias on these grounds is still open to discussion since it is felt by informants that the Board has been impartial

⁹⁴See Bernstein, op. cit., pp. 184-185.

in all respects.⁹⁵

⁹⁵This does not mean that there has been no criticism of the members. However, such criticism is generally aimed at the criteria they use for evaluation rather than the decision and the commissioners' private integrity.

CHAPTER V

THE NATIONAL ENERGY BOARD AS A POLICY BODY

To state that the National Energy Board is a policy body requires explanation. Members of the Board certainly do not consider one of the functions of the Board to be the formulation of policy. The Board's stand on its policy-making function can best be summarized by:

We would like to point out that energy policy as such is formulated by the government. The Board's function is basically two-fold, namely, regulatory and advisory.¹

However, the line between regulation and policy formation and between advice and policy formation is a nebulous one, and the development of the Board can be examined from a close examination of its policy-making power.

First, one must attempt to delineate what is actually meant by policy-making. Certainly one cannot say that the Board makes authoritative policy statements similar to the National Oil Policy Statement of the Minister of Trade and Commerce or the National Power Policy Statement by Mitchell Sharp. But it seems quite obvious that between this function and the "pure" adjudicative function (which many feel to be loaded also with policy-type statements) there is a gray area

¹Private correspondence with R. A. Stead, Secretary of the N.E.B., 17 May, 1971.

of regulation-making, adjudication, hearing, and advice that has great effects on the development of policy and as such can be considered as policy-making.

Regulation has generally been conceived to be a narrow self-contained process, more or less separable from the main drift of national economic policies. This insular conceptions of regulation has been paid continuing lip service despite increasing recognition that some regulatory policies should be closely integrated with other government programs in order to maximize their effectiveness.²

Thus regulation of a vital area of policy cannot be determined while considered as a self-contained unit having no effect on overall government policies. Indeed, this is the basic point in some criticisms:

. . . its (the regulatory commission's) independence in its particular field has made the integration of national economic policies essential in view of the intertwining relations among regulatory programs, all but impossible to achieve.³

While Schwartz was really concentrating on the independence aspect of the commission, the underlying point is the intertwining of regulative decisions with overall government policy. In the U.S. the integration of policy aspect has resulted to the detriment of the commission -- for the need for integration has become so great that the appointment of commissioners has become the accepted way of controlling the

²M. H. Bernstein, "The Regulatory Process: A Framework for Analysis", Law and Contemporary Problems, Vol. XXVI, 1961, p. 333.

³Bernard Schwartz, Book Review, Harvard Law Review, Vol. 69, 1956, p. 962.

direction of the regulative commission, rather than the imposition of policy statements.⁴

Now, however, the need for policy integration, the coordination of policy arising out of regulative decisions with the policy directives of departments, has become foremost in the minds of critics. What results is a total reorientation of thinking about regulatory agencies giving rise to three new aspects:

. . . first it is inherently a political activity that is a substantial element in modern economics; second the regulatory functions are too intertwined with a host of other government activities to be set as a class apart; and third, while procedural problems are important, they are subsidiary to the objectives and accomplishment of the regulatory functions.⁵

These three points have been widely ignored, still, in the analysis of the independent regulatory commission except in a recent important study. The President's Advisory Council on Executive Organization Report noted the importance of regulatory agencies in the overall policy-making framework and proposed sweeping changes to integrate regulation with other executive actions in a coordinated way. The Council concluded that the independent commissions, each with a separate sector responsibility, formulated policy by individual case-by-case

⁴M. H. Bernstein, Regulating Business by Independent Commission (Princeton: Princeton University Press, 1955), pp. 164-168.

⁵Mark S. Massel, "The Regulatory Process", Law and Contemporary Problems, Vol. XXVI, 1961, p. 181.

determinations, leaving policy generally "narrow, after the fact, and at times inconsistent".⁶ They also found that the various mandates overlapped in jurisdictional areas giving inconsistent policy orientations and impeding the formulation of a broad policy.⁷

The Council suggested the redevelopment of functional agencies which would integrate policy development. But most important the Council implicitly recognized and accepted as a given fact that the regulative agency had as much an effect on policy determination as the departmental agency, that the regulative agencies and the promotional policies of the departmental agencies were of foremost importance, and that the overall policy objectives were more important than the exact mechanics through which they were achieved.

The National Energy Board then must be looked at as an agency that has great policy-making potential. When it sets a regulation, the ramifications of that regulation determine in some way the policy orientation of the Board and thus of the government. When the N.E.B. decides upon a method of calculating natural gas reserves it is making basically a decision which has great economic and political implications. When it decides upon the maximum amount of reserves that must be available for Canada's future requirements whether it be a

⁶President's Advisory Council on Executive Organization, A New Regulatory Framework, Washington, U.S. Government Printing Office, 1971, p. 34.

⁷Ibid., pp. 3-5.

ten-year reserve requirement or a twenty-five-year reserve requirement, it is making a decision which affects the basis and position of the oil and gas industry. The National Energy Board then when it states that it does not make policy is perhaps truthful in relation to large dynamic policy developments but the N.E.B. in its regulative process has a long-term and massive effect on the whole development, future and health of the energy field, putting it in one of the foremost important positions as a policy-maker.

The N.E.B. as adviser to the government has an even greater potential for influencing policy decisions. The N.E.B. is empowered by part II of its Act:

1. study and keep under review matters over which Parliament has jurisdiction;
2. advise the Minister of measures it considers necessary in the public interest;
3. prepare studies at the request of the Minister.⁸

This advisory power gives the N.E.B. the right to report directly to the Minister responsible for the Board and to develop into areas which are not directly associated with its regulatory functions. The primary reason for combining this regulatory function with an advisory function was stated by D. M. Fraser, now Vice-Chairman to the N.E.B.:

There was a great deal of technical expertise, knowledge of industry and general practical sense that was embodied in the regulatory agencies but

⁸N.E.B. Act, Part II.

rarely brought to bear on the development of new policies. It was an attempt to make full use of whatever talents might be attracted to the Energy Board that provision was made for its application to policy problems. Hence many of our efforts at the Board are directed to questions which may never result in any public pronouncement or development, but which in some cases do eventually become reflected in an aspect of policy.⁹

Fraser went on to state that in the case of the two major policy developments, the National Oil Policy and the National Power Policy, the Board had "some part to play in the developmental stages".¹⁰ A reading between the lines of a speech by the now chairman of the N.E.B., Robert Howland, shows to what extent the Board helped to formulate such policies.¹¹

Thus the Board in reality has two major inputs into policy direction and formulation. One is the method of regulative adjudication, rule-making and administration; the other is through the power of advice.

These policy inputs however cannot be examined in a vacuum either; they must be looked at in relation to the developments in the industry, changes in the governmental decision-making mechanism, changes in the philosophy of government decision-making and the increasing complexity of energy related problems.

⁹D. M. Fraser, The Work of the National Energy Board, Speech delivered to Annual Meeting of Public Utility Commissioners, Montreal, June 13, 1966, pp. 16-17.

¹⁰Ibid., p. 17.

¹¹R. D. Howland, Canada's National Oil Policy, Quebec City, April 25-27, 1966.

In 1959, when the National Energy Board was created, governmental decision-making regarding energy and energy-related problems existed in a near vacuum. The problems of resources and utilization were of course known but there was no continuing source of data and knowledge which could be relied on by Cabinet-level decision-makers. The N.E.B. was in part a response to this need; thus its advisory duties and its knowledge and data-gathering duties initially had equal status with its regulative functions. However, various developments have in many ways changed this original concept and the N.E.B. has reacted and responded accordingly.

Originally the N.E.B. reported to the Minister of Trade and Commerce, reflecting both the production and export orientation of the government and the importance of Trade and Commerce in the growth, industrial and developmental, of the new field. The N.E.B. did not concern itself much with coal as an energy resource, since coal was not a dynamic field at the time and since the responsibility for supervising coal was directed to the Dominion Coal Board. As well the N.E.B. was effectively precluded from Atomic Energy since the Atomic Energy Control Board had been established since 1946. At this time in the formation of government policy, the Department of Mines and Technical Surveys was quite undeveloped in that capability (especially when compared to the present). Thus in 1961, when George Hees stated the National Oil Policy, the N.E.B. could realistically state later, in retrospect,

that they had "the opportunity of studying the oil situation in Canada and, eventually, of participating in the formulation and administration of what is now generally called the National Oil Policy".¹² The situation was such that only the N.E.B. had the data and capability to be able to advise on such a policy determination.

It was at this time also that the Board developed a large number of external commitments for research. Having filled the vacuum of regulation and served as really the only policy adviser to the government, the Board also involved itself in a large number of energy-related and external studies. These studies had the dual effect of providing the staff with challenge and increasing the data and knowledge base on which the Board could make its regulative and advisory decisions, and staking claims to energy-related areas for the Board.

1966 is looked upon as the watershed of the National Energy Board in its policy determination role. In 1966 the restructuring on the energy-oriented agencies on a departmental level resulted in the creation of a new Department of Energy, Mines and Resources which, although it took over the mines, surveys and mapping responsibilities of its predecessor, was looked upon, and looked upon itself, as the coordinator of energy matters and the formulator of energy policy. The

¹²R. D. Howland, ibid., p. 1.

N.E.B. was placed under the department, but still reported directly to the Minister. The new department developed components which corresponded to the policy advisory role of the N.E.B.. Part of this development was the changing philosophy of government decision-making which looked upon policies as the result of a combined information feeding system of various agencies. The development of a Cabinet secretariat on resource issues, the development of the P.C.O. and the P.M.O. as screening agencies and the promotion of alternate sources of information have had massive effects on the role of N.E.B. in the energy policy field.¹³

Other considerations have forced the N.E.B. into a less important policy role. It was estimated by one informant that since 1966 the amount of time and work that has to be put into hearing procedures and adjudicative matters connected with the Board's regulatory role has increased four-fold. The Board is becoming increasingly weighed down also by the complexity of matters which require the increased use of support staff in evaluation of the complexities of applications.

Energy and energy-related matters require a much wider scope now than in the early 1960's. The relationships between exports and costs, reserves and supply, and especially one form of energy to another require a coordination of complex

¹³G. B. Doern, "The Development of Policy Organization in the Executive Arena", in Doern and Aucoin, The Structure of Policy-Making in Canada (Toronto: Macmillan, 1971).

data that simply cannot be provided by one agency. As well, boundaries have been set which preclude one agency from being the overall knowledge repository of energy. Recent developments in such areas as the Athabasca Tar Sands, off-shore drilling and the movement of government into the Panarctic consortium (bringing in constitutional and northern territorial questions) open facets of the energy problem which do not necessarily require the specialized expertise that the Board has on hand, but does require specialized knowledge from other areas; constitutional law from Justice and international relations from External Affairs. As well, the Departments of Trade and Commerce and Finance are becoming increasingly important sources of advice on energy matters. The National Energy Board's role in the total energy policy framework has not decreased any in the specific areas of expertise but the expertise required has become only a part of the larger considerations involved.¹⁴

Thus the National Energy Board, in working within its mandate as a regulatory agency of government and as an adviser to government, had tended to become only one of many inputs into the decision-making process. Generally in the case of N.E.B. much of the coordination that is usually developed

¹⁴Two speeches stress these points; the now famous Denver speech by Joe Greene, Minister of Energy, Mines and Resources, May 12, 1970, and "Petroleum and the Public Interest" to Annual Meeting of Canadian Petroleum Association, Calgary, April 6, 1971, by Jack Austin, Deputy Minister of Energy, Mines and Resources.

within E.M.R. is by-passed and done by the P.C.O./P.M.O. at a Cabinet level, giving the N.E.B. a still strong input into the decision-making process. In addition, the N.E.B. is still a most, and probably the most, important source of data and information on oil, gas and electricity aspects of the energy situation. The quote above by D. M. Fraser is still valid, the Board has a great amount of expertise, knowledge of the industry and current practical sense of trends which will always give it a significant advisory role in the energy policy machinery.

However, the role changes and loss of some real power have resulted in many adaptations and responses from the Board. As Doern pointed out, power in the policy role when put in the bureaucratic-leadership framework comes from two known sources, a compatibility of backgrounds and orientations of bureaucratic personnel which are similar to those of the political elite and a personal influence of strong individuals in agencies.¹⁵ The Board has gained much of its power from a dynamic leadership; one of the constant comments resulting in private interviews was of the strength of the Chairman of the Board in interpersonal considerations. As well, both Ian McKinnon and R. D. Howland have outstanding qualifications in energy-related matters; this resulting knowledge stands them well in the expert area of energy matters. Both have been strong leaders

¹⁵G. B. Doern, "The Budgetary Process and the Policy Role of the Federal Bureaucracy", in Doern and Aucoin (eds.), op. cit., pp. 100-101.

who have not hesitated to go to the limits of their power and persuasive ability to promote the advice they considered important. Thus the N.E.B. has been perpetuated in its strong policy advisory role because of the strength of its members (and the resulting power and completeness of its advice).

While skirting the issue of what sort of policy outputs the Board is concerned with and what relation it has to various aspects of different policies, it is important to bring the concept of positional policies into the assessment. As described by Aucoin:

Positional as opposed to allocative policies refer to those outputs which affect the structuring of influence in the conversion system. A good deal of policy activity by individuals and groups is related not so much to securing (at least in the short-run) an allocation of desired values but rather the attainment of desired positions vis-à-vis other individuals or groups.¹⁶

Important to the promotion of policies and of the power to promote policies is simply being in a position of influence with the ultimate decision-maker.

The changes described above can be considered primarily in terms of the positional policies. It is difficult to evaluate whether bodies such as the Energy Board desire to promote a specific policy (allocative) although each knowledge source is said to tend to look at decisions through different coloured lenses (which the P.C.O. attempts to balance or

¹⁶P. Aucoin, "Theory and Research in the Study of Policy-Making", in Döern and Aucoin, op. cit., p. 25.

"screen" out) but what is important is their relationship to the other advisers and the decision-makers. The Board then is overall, not as interested in specific policy decisions as it is in maintaining its position as chief policy adviser to the Cabinet in broad energy-related matters.

Two examples perhaps serve to point out this assertion. Although the policy advisory sections of E.M.R. have been operational since 1966-1967, they have not developed into the area of policy advice to the point where they can be considered as equals. There has been a constant competition, with a resulting friction between N.E.B. and E.M.R., over who has the ear of the Minister and thus of Cabinet. The Energy Board, it seems, has maintained a superior position as chief policy adviser, which it established prior to the creation of an E.M.R. policy advisory unit. As well, the interpersonal relationships between the Chairman of the Board and the Minister of E.M.R. have been good. However, the superior position of N.E.B. is waning. The weight of its regulative duties, the increasing time-consuming functions of on-going duties and the developing complexity of energy resource utilization with respect to very broad national goals are all working against the continuation of N.E.B. as the chief policy adviser.

The developments in Canada's north have also raised questions which affect the relationship of the N.E.B. vis-à-vis other agencies. In effect, the National Energy Board has lost

the battle of supremacy with Indian Affairs and Northern Developments (IAandND) over which is to supervise the developments of the oil and gas industry in the north. The position of the N.E.B. has been subordinated to that of I.A. and N.D. in that with respect to oil and gas pipe line development prior authorization as to questions of environment and native peoples must be given by I.A. and N.D. before the development can take place. I.A. and N.D. has asserted its authority over a jurisdictional area which the N.E.B. had at least some chance of establishing its authority. This is not to say that I.A. and N.D. "defeated" the N.E.B.; other considerations besides those of the two agencies' jurisdictional claims were considered. However, what is important is that the N.E.B. has to some extent suffered from the decision in its position vis-à-vis the other department.

In both of these examples the N.E.B. is an actual or a potential loser; its power to advise and exercise jurisdiction over sectors is on the wane. Its position is what is important, as opposed to the advice or regulations it would have given it if had the position to give them. Thus these "battles" are matters of positional policy which greatly affect the total energy policy formation framework.

How the Board reacts to such developments is also interesting. In many cases the Board must accept gracefully the superior position of another agency. Then its power seems to lie in the area of knowledge and expertise. The Board has

moved quickly to engage staff studies of various aspects of northern energy development.¹⁷ Thus the Board has attempted to maintain its position, at least with I.A. and N.D., as a necessary consultant on energy-related problems. The Board has also developed much better relations with E.M.R. and has developed almost day-to-day consultations with the departmental staff. Again the Board seems to have concluded that it must base its power to give policy advice on the expertise that it has accumulated since 1959. Another interesting facet of this expert advice facility is the increased growth of energy-related, but not energy-fundamental, studies that the Board has done for other departments.¹⁸ In other areas the Board has stated claims which have remained solidly entrenched as a part of the Board's jurisdiction. Studies for the O.E.C.D. and N.A.T.O. have remained with the Board; the Board has retained its pipe-line-safety supervisory powers; it has retained its expertise and data collection power with the maintenance of its Operations Research section and its data collection functions.

The power of the Board to advise on policy may have waned slightly but its powers to regulate have been significantly increased, especially over liquified natural gas

¹⁷N.E.B. Annual Report, 1968, pp. 4-5; 1969, pp. 5-6; 1970, pp. 38-39.

¹⁸An example is a totally unrelated-to-energy study done for the Department of Transport, N.E.B. Annual Report, 1969, p. 28.

imports and, most important, over exports and imports of oil, put under Section 87 of the N.E.B. Act.¹⁹ As well the changes and developments of energy will soon bring the power of the Board to regulate rates into fruition. Thus the Board's power generally seems to be shifting from the policy adviser of government to one of many expert and important policy advisers. This change has come with an increase in the Board's regulative functions, perhaps making up for some of the loss of policy advisory power.

In conclusion, the N.E.B. has a definite role in policy-making in the energy field. This role stems from its regulative function and from its advisory function. In carrying out its regulative functions the Board has certainly influenced the development of the oil, gas and electrical field, directly molding and shaping the field within the broad mandate granted to it. Its regulative function has increased and all in all been handled well. In addition the Board has been given the responsibility of operationalizing the National Oil Policy and National Power Policy, both of which it has done successfully. Regulation, however, tends to be restricted in its policy formation and direction functions. Regulation is generally a matter of after-the-fact policy suffering from much that the adjudicative function suffers in its role as a policy-maker.²⁰

¹⁹N.E.B. Annual Report, 1970, pp. 2-3.

²⁰See Bernstein and Massel, articles in Law and Contemporary Problems, Vol. XXVI, 1961.

The policy advisory role however has not been one of steady accretion of power. The Board's role had been effectively limited to advice on oil, gas and electricity, with the prior existence of the Dominion Coal Board and the Atomic Energy Control Board. This advisory power has also suffered from restraints developed over the years, particularly given the policy philosophy of the present government and its preference for divergent and multiple sources of policy advice, the increased complexity of the energy field and its wide-ranging implications, and the development of competing policy advisory units. As well, other considerations have taken precedence over the regulative one allowing especially Indian Affairs and Northern Development to assert its authority over Northern Canada's Energy Development. In response the N.E.B. has had to fight a rear guard action of developing its expertise and knowledge base and firming up its public relations with other agencies.

CHAPTER VI

CONTROL OF REGULATIVE AGENCIES

The National Energy Board, at the interface of government, interest groups, the public interest, and the law, is constantly balanced on a delicate line between independence and impartiality in its decisions; and coordination and subordination of its regulative functions to the overall government policy objectives. This raises the crucial question of control. To what extent can the Board be allowed to develop the public interest in its own way? What regulations may the Board make before it exceeds its jurisdiction? When must Cabinet, Parliament and the judiciary be allowed to violate the 'independence' of the Board? To what extent should the Board act as an adjudicator rather than an administrator? These crucial questions can be answered only by an examination of the extent to which the N.E.B. is controlled -- by Parliament, by the Executive, by the Judiciary, and by the people.

Perhaps the crux of the problem of control is the situation where the Board has to act at one and the same time as legislator, administrator and judge; violating the Montesquieuan doctrine of separation of function.¹ It legislates

¹See J. M. Hendry, "Some Problems on Canadian Administrative Law", Ottawa Law Review, Vol. 2, 1971, pp. 71-86.

in that it creates the regulations under which it operates; it adjudicates in that it decides much as a judge would do between opposing interests; it administers broad policy directives of government. Besides this, the Board must be maintained in a position of some independence free from partisan, political or interest group interference. Thus the extent to which the Board is free to operate, or controlled from malpractice in its operations, is a crucial one.

One may look at control of an independent regulative commission from many points of view. First, one may look at the extent to which the Executive controls the Board. As was shown in Chapter Five, the Board as a regulator and an adviser is an important policy actor. The extent to which it is controlled and coordinated with broad government policy is also important. Second, Parliament as the supreme legislator must control the body to which it has delegated part of its legislation-making function. Third, the Judiciary must look upon the Board with a suspicious eye for any agency that can be a judge in its own cause is in a position of great power and quite able to abuse its power easily and with little restraint. Finally, on a broader scale one may look at the Board from the public eye and examine the means that the public in general has in making its wishes known before the Board. Each of these focus on different aspects of the Board and tend to develop in different directions.

A. Executive Control

The Board is established as an independent regulative agency under the Minister of Energy, Mines and Resources; however, the Minister himself has very little control over the regulative functions and the ultimate decisions of the Board. His only actual power as stated in the Board's Act is his power to commission "studies and reports on any matter relating to energy and sources of energy"² and to require an annual report to be submitted to him (to be transmitted to Parliament).³ While the Board is not within the traditional departmental structure and fights to maintain its autonomy outside it,⁴ the Minister answers questions in Parliament directed at the Board's work. In the traditional sense of ministerial responsibility the Minister is definitely not responsible for the actions of the Board:⁵

All that can be historically or logically deduced from our present arrangements is that Parliament does not provide for Ministers to be responsible to the Legislature where it has made arrangements for the relevant question to be argued before and decided by some other body.⁶

²N.E.B. Act, Part II - 22 (2).

³N.E.B. Act, Section 91.

⁴H. L. Lafromboise, "Portfolio Structure and Ministry System: A Model for the Canadian Federal Service", Optimum, Vol. 1, No. 1, pp. 33-34.

⁵For a discussion of ministerial responsibility see M. J. Chisholm, The Problem of Administrative Secrecy in Canada, M.A. Research Essay, Carleton University, 1971, pp. 33-37.

⁶Geoffrey Marshall, "Ministerial Responsibility", Political Quarterly, Vol. 34, 1963, p. 258.

Although this creates some genuinely distressing administrative and functional problems in the traditional "congeries" or department structure,⁷ it is crucial to the independence of the Board. Thus the Minister of Energy, Mines and Resources is important to the Board on a policy and perhaps a functional level, but he has little power to exercise control over the scope of the National Energy Board's actions.

The Minister, when assembled with his colleagues as the Governor-in-Council, probably exercises more control over the actions of the Board than any other group. The Governor-in-Council, first and foremost, has the power of appointment of members; members are also removable "at any time by Governor-in-Council upon address of the Senate and House of Commons". As well they must depend upon the Governor-in-Council for reappointment after expiry of their seven-year terms, for salary, for the appointment of Chairman and vice-Chairman, and for the provision of advisory staff.⁸

The Governor-in-Council also had the power to extend the power of the Board to deal with oil⁹ and may at its discretion limit the Board's functions to "any class of oil or oil products or any area from the operation of all or of the provision" of Part VI.¹⁰ As well, and even more important,

⁷Laframboise, op. cit., pp. 31-32.

⁸All listed in N.E.B. Act, Part I.

⁹N.E.B. Act, Section 87, as was done May 7, 1970 by proclamation.

¹⁰N.E.B. Act, Section 87 (3).

the Governor-in-Council must give final approval validating any Board decision regarding export licence approvals, revocations, or suspensions;¹¹ granting, altering or revoking of certificates of public convenience and necessity;¹² making regulations for safety¹³ and making of orders altering any certificate or licence.¹⁴ There is perhaps only one limitation on the powers of the Governor-in-Council in this respect; if a licence application is denied by the Board it cannot be considered by the Governor-in-Council.¹⁵ Generally the power that the Cabinet has in altering or reconsidering the decisions of the Energy Board to grant or alter licences has been abrogated by lack of use, there has never been a case where the Governor-in-Council has altered an order from the Board. The Governor-in-Council then can statutorily act quite strongly in imposing his will on a Board such as the N.E.B.. As well, by his ever present power of altering decisions made by the Board, the Governor-in-Council acts as an effective restraint on any decisions by the Board which might be contrary to government policy or its perceptions of the public interest.

¹¹N.E.B. Act, Section 87 (1).

¹²N.E.B. Act, Section 44 (1); 47 (1).

¹³N.E.B. Act, Section 39 (2).

¹⁴N.E.B. Act, Section 17 (2), (3).

¹⁵Such was the case in the recent gas reserves hearing. When the Board found that there were insufficient reserves for Canada's future needs and subsequently denied export licence applications the Governor-in-Council was unable to reverse the decision. See Canada, House of Commons Debates, Nov. 22, 1971, p. 9758, by Rt. Hon. P. E. Trudeau, reaffirmed Nov. 25, 1971, p. 9873.

B. Parliamentary Control

Perhaps the most important interface of control is the relationship between Parliament and the independent regulative agency. Although it is traditionally considered that ministerial responsibility and the dreaded question-period in the House are Parliament's most potent weapons in its control of administration,¹⁶ that conception is difficult to support now, for it has been adequately shown that the Minister cannot be held responsible for the workings of a large department,¹⁷ nor has he followed the traditional method of resigning when his department has been found lacking.¹⁸ The conception of Ministerial responsibility is even less effective when independent agencies are concerned (see footnote 6). Thus Parliament has little effective control over regulative agencies through the power of public embarrassment of Ministers.

Since the power to make regulations or delegated legislation is generally what concerns Parliament, the most important focal point of interest is the public statement of these

¹⁶See for example, Sir Cecil Carr, Parliamentary Control of Delegated Legislation (London: Steven and Sons, 1956), p. 202.

¹⁷R. Middleton, "The Problems and Consequences of Parliamentary Government", Parliamentary Affairs, 1969, p. 58, in Chisholm, op. cit., p. 34.

¹⁸S. E. Finer, "The Individual Responsibility of Ministers", Public Administration, Winter, 1956, p. 393, in Chisholm, ibid., p. 34.

regulations and their affirmation by Parliament. Parliament has always recognized this duty: "The grant of general power, however justified, implies a responsibility for close legislative attention to the course of administration".¹⁹

In the development of Standing Parliamentary Committees in 1965 there was strong pressure to establish a Standing Committee of the House of Commons on Regulative Bodies and Delegated Legislation.²⁰ This was only forestalled by the promise in the 1965 Speech from the Throne that there would be a Royal Commission Inquiry on Adjudicative and Regulative Bodies.²¹ The Royal Commission never came into being however, and instead a Special Parliamentary Committee of the House of Commons was struck to inquire into delegated legislation and control of regulative agencies in Canada.

The report equated Parliamentary control with full public knowledge of governmental activities, especially delegated legislation and regulation-making since the committee at the beginning limited itself to the investigation of delegated legislation.²² While noting the growth of delegated legislation

¹⁹L. L. Jaffe, Judicial Control of Administrative Action (Boston: Little, Brown, 1965), p. 41, quoted in Canada, House of Commons, Parliamentary Committee on Statutory Instruments, Third Report, p. 67.

²⁰Canada, House of Commons Debates, May 19, 1965, p. 1481.

²¹Canada, House of Commons Debates, April 5, 1965, p. 3.

²²Third Report of Special Committee on Statutory Instruments, in #198 Votes and Proceedings, House of Commons, Oct. 22, 1969; also pp. 1410-1504 found at preface, the Report will now be cited as Third Report.

and the increasing scope of government regulation by such delegated legislation, the Committee ignored the traditional Montesquieuean separation of powers and decided that the real quideline was:

. . . whether the power is being exercised by the authority best suited to exercise it and whether the exercise is sufficiently controlled by political and legal action.²³

In attempting to probe the exact state of regulation-making and the extent to which the power that this regulation-making authority was used the Committee circulated a questionnaire to all government departments and agencies having the power to make delegated legislation.²⁴ The answers to the questions were submitted in part by Donald MacDonald, then House Leader,²⁵ and by the particular agency or department.²⁶ The extent of regulation-making by the Board and the statutory requirements of disclosure are summarized below.

The N.E.B. makes regulations defined by the Regulations Act 1952 under its Act in Section 39 (2), 42 and 88 (1). However, it makes various rules and orders which do not have to

²³Third Report, p. 6, quoting Griffith and Street, Principles of Administrative Law, 2nd edition.

²⁴Appendix C, Third Report of Special Committee, Tabled in House of Commons Votes and Proceedings, April 22, 1969, pp. 46-47. In this paper see Appendix IIA.

²⁵Letter from Donald MacDonald to Mark MacGuigan, Chairman of Special Committee. See Appendix IIC.

²⁶The reply by the N.E.B. to the Committee was sent to me by the Committee, in personal correspondence. See Appendix IIB.

be included in terms of the Regulations Act such as:

- a) Rules of Practice and Procedure before the Board
(Section 7)
- b) hearing orders for applications
- c) orders approving documents
- d) orders prescribing testing procedures
- e) orders exempting pipe lines from certain provisions
of the Act
- f) orders regarding sale, transfer, etc. of a pipe line
- g) orders respecting construction near mines
- h) orders regarding payment for compensation damages
- i) orders granting authority to take certain lands without
the consent of the owner
- j) orders granting leave to construct across utilities or
pipe lines (total in 1968 of all of these was 1,100).²⁷

These orders are not required to be tabled in Parliament or published in the Canada Gazette; the Board's position was that such orders were "of an administrative nature and do not affect the public generally but only one or a few parties".²⁸ Indeed such a requirement would serve no "useful purpose" resulting only in delays. The Board also felt that annulment of regulations by Parliament within a time limit would "create substantial difficulties in the administration and . . . create

²⁷N.E.B. reply to question 1 (d).

²⁸N.E.B. reply to question 3.

uncertainty in form and effect"²⁹ and that scrutiny by a Parliamentary Committee would also involve delay and difficulty. The Board went on to explain that in any statements, outlines of procedure or content or hearing "all interested parties" were informed. Any regulations that are formed are made by the Legal staff and sent to the Privy Council for approval.³⁰ However, the Board felt that it satisfied the necessary requirement of publication by making all its regulations as a part of the Board's proceedings (the Board is a Court of Record). All in all, the Board considered that its regulation-making authority was neither excessive nor lacking, that publicity and the right-to-know were being adequately provided for considering the technical nature of the orders, the limited interests of the general public and the administrative resources available.

The Committee in its Third Report noted the problems that came with attempting to define which decisions were regulations and which were in-house orders or documents not defined as regulations and therefore not needing publication, tabling and prior authorization. Also there was a difficulty in determining a legislative act from an administrative act. Indeed the decision as to what was a regulation and what wasn't was up to the particular agency.³¹ The Committee felt that

²⁹N.E.B. reply to question 5.

³⁰N.E.B. reply to questions 14 and 15.

³¹Third Report, op. cit., pp. 1420-1440, in Canada, House of Commons, Votes and Proceedings, No. 198.

such should not be the case and proposed that the definition of what was a regulation be defined more adequately and that the Governor-in-Council or the Minister of Justice should decide on the authenticity of and the definition of a regulation.³² As well it set out principles or guidelines all of which seem to be followed by the N.E.B..³³

The requirement of advance consultation³⁴ that the Committee felt was necessary has been followed extensively by the Board, especially with respect to Pipeline Safety Regulation (Section 39 (2)) and Uniform Accounting Regulations. The Board consulted extensively with the industries affected before these regulations were brought into effect. Thus, the Committee's recommendation that

. . . before making regulations, regulation-making authorities should engage in the widest feasible consultation not only with the most directly affected persons, but also with the public at large . . . ,³⁵

was already a standard rule of thumb for the Board.

Most interviewees felt that the Board's approach in its regulation-making power and regulation publication procedures were quite effective, especially when compared with those of

³²Third Report, ibid., pp. 1440-1444.

³³Ibid., pp. 1446-1455.

³⁴Ibid., Chapter 3.

³⁵Ibid., p. 1461. The "public at large" in this instance consisted of interested related oil companies, pipe line companies, manufacturers, etc. It is not known whether "interest groups" such as pollution control groups had any substantial input in the consultations.

other departments. Because the Board is a Court of Record and has developed a quasi-judicial adjudicative procedure it has concerned itself more than other agencies and departments with the proper publication of rules, orders and regulation.

Parliament's specific power in relation to the National Energy Board and the publication and control of regulations made by subordinate authorities is quite limited. The Committee recommended:

. . . that Parliament should continue to provide, where appropriate in individual statutes, for a procedure by way of affirmative or negative resolution.³⁶

However, Parliament has only a small scope of power to affirm or negate the actions of the N.E.B.. It seems concerned more with the alteration of the power of the N.E.B. by the Governor-in-Council³⁷ rather than by the N.E.B. itself.

Parliament has one other method of control. The N.E.B. must file an annual report to Parliament.³⁸ As well the N.E.B. must depend on Parliament, like all other government agencies, for its allocation of funds and staff at budget time. However, given the real nature of budgetary debates and their effects on

³⁶Third Report, p. 1503.

³⁷N.E.B. Act, Section 87 (4).

³⁸N.E.B. Act, Section 91. "The Board shall within three months after the 31st day of December in each year submit to the Minister a report on the activities of the Board under this Act for that year, and the Minister shall cause the report to be laid before Parliament within fifteen days after the receipt thereof or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting".

allocation of funds Parliament has little control over the N.E.B. by these devices. At this point in time Parliament has no Standing Committee of the House such as the Select Committee on Statutory Rules and Orders (Scrutiny Committee) established in 1944 in Great Britain,³⁹ later changed to the Statutory Instruments Committee. The one recommended by the Canadian Committee in its Third Report⁴⁰ has not been established yet although a new Regulation Act was enacted in 1971⁴¹ following the recommendations of the Report.

In summation, Parliament has of late been increasingly aware of the fact that it is responsible for the regulation-making authority of its subordinate bodies. It has recognized that there is a need for delegated legislation and regulative agencies. However, it recognizes also that these delegates are given much power over the public and must be controlled. The main methods of control it has suggested are similar to those offered by D. C. Rowatt in How Much Administrative Secrecy?⁴² that there should be more openness and publicity of government operations, and more specifically that there be:

³⁹H. W. R. Wade, Administrative Law, 3rd edition (Oxford: Clarendon Press, 1971), pp. 332-333.

⁴⁰Third Report, op. cit., pp. 1489-1496.

⁴¹R.S.C. 1971, see Canada, House of Commons Debates, May 19, 1971, p. 5980.

⁴²Canadian Journal of Economics and Political Science, Vol. 31, November, 1965, pp. 479-498.

. . . full consultation with the public and with parliamentary Standing Committees before the making of regulations, the extension of the ambit of the present internal scrutiny of regulations by the Privy Council Office and the Department of Justice during the making of regulations, and full publication of regulations after they have been made.⁴³

Parliament as an actual control mechanism over the National Energy Board then has little power. It does have the power of public disclosure which perhaps overall causes the Board to have second thoughts before it attempts to violate its regulation-making power -- a negative approach since the Board seems quite satisfied with the existing situation and has made conscious attempts to inform all interested parties. Indeed it has very explicit and detailed regulations regarding exchange of information among parties and disclosure of information. As well, as a Court of Record, the Board must ensure that all interested parties are informed of all regulations, rules and orders necessary for their cases. It is however up to the Board to determine, in the first instance, what groups this "all interested parties" includes. If publicity brings the Board's work to the attention of outside groups, the Board is honour-bound to include them also.

C. Judicial Control

The extent to which the Judicial system can control the action of administrative agencies and regulative bodies of government is a complex and difficult one. To attempt to

⁴³Third Report, Preface p. 1412.

describe the processes of Judicial control, the extent and limitations of the action of the Board would be difficult in a major book much less in a few short pages of this paper.⁴⁴

However, two points will be presented for examination; the stated position of the courts in the Act and a proposal for a Canadian Administrative Procedure Act. The N.E.B. states that:

18 (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal upon a question of law or a question of jurisdiction, upon leave therefor being obtained from that Court. . . .

(2) No appeal lies after leave therefor has been obtained under subsection (1) unless it is entered in the Federal Court of Appeal within sixty days from the making of the order granting leave to appeal.⁴⁵

19 (1) Except as provided in this Act, every decision or order of the Board is final and conclusive.⁴⁶

While the extent to which the Court controls the N.E.B. may appear clear, even a skimming of the administrative law literature dealing with what a question of law or a question of jurisdiction entails or what is really final and conclusive, will show the extent to which these phrases are not self-evident. The question of administrative law, delegated legislation and boards and

⁴⁴See: U.S.A., Ken C. Davis, Administrative Law Text (St. Paul: West Publishing Co., 1958); England, S. A. deSmith, Judicial Control of Administrative Action, 2nd edition (London: Stevens and Sons Ltd., 1968); Canada, R. F. Reid, Administrative Law and Practise (Toronto: Bullerworth, 1971).

⁴⁵Federal Court Act, R.S.C. 1970, Chapter 1, Schedule B, subsection 64 (3) altered the previously existing N.E.B. Act.

⁴⁶N.E.B. Act, op. cit., Section 19 (1).

tribunals are still unclear because they are a curious combination of American institutions and British law.⁴⁷ Canadian law dealing with administrative tribunals, particularly such agencies as the independent regulatory tribunal, is developing along its own lines; and, as Willis points out, neither British nor American examples seem to offer much direction.

One proposal for the development of a method of judicial control has been the proposal for a Canadian Administrative Procedure Act. Arnold Englander and Robert Morantz at the 1965 Annual Meeting of the Canadian Bar Association proposed the adoption of an Administrative Procedure Act in Canada modelled somewhat on the lines of Britain's Council on Tribunals and the U.S. Federal Administrative Procedure Act (A.P.A.).⁴⁸

The A.P.A. fundamentally is legislation requiring adherence to certain basic procedures and provision of certain rights to all parties appearing before Boards and tribunals. In England the Council on Tribunals is a council established in 1958⁴⁹ to develop a set of standards for each individual Board and Tribunal under its jurisdiction and to monitor the adherence of the Boards to the standards. A result of the Frank's

⁴⁷See John Willis, "Administrative Decisions and the Law: The Canadian Implication", University of Toronto Law Journal, Vol. 13, 1959, pp. 45-55; J. M. Hendry, "Some Problems on Canadian Administrative Law", Ottawa Law Review, Vol. 2, 1971, pp. 71-86; and R. F. Reid, Administrative Law and Practice, op. cit., pp. xi-xiii.

⁴⁸Tribunals and Enquiries Act, 1958.

⁴⁹In Papers presented to Annual Meeting, C.B.A., Toronto, 1965, pp. 8-20.

Committee Report, the Council was to "supervise tribunals with a view to seeing that they operate in accordance with the principles enumerated in the Franks Committee Report"⁵⁰ the principles of openness, fairness and impartiality. The American A.P.A. on the other hand is an act that establishes procedures to be followed by all Boards and Tribunals. The point of primary importance in the American A.P.A. is the establishment of an independent (from the Boards) group of hearing examiners that hear and decide on the great majority of cases, allowing the Board's staff to act as an advocate in its own cause.

Englander and Morantz opt for neither the British or American system totally but propose that some scheme could be developed which would provide certain guidelines which must be adhered to by all Boards and Tribunals. These minimum safeguards should be:

1. notice to the parties
2. conference procedure
3. subpoena power
4. right to legal representation
5. safeguards on admission of evidence
6. right to cross-examine
7. that the decision of the tribunal be based on the transcript of the evidence of the proceedings

⁵⁰Rt. Hon. Lord Pearson, Address to Canadian Bar Association in Canadian Bar Association Papers, 1965, p. 5.

8. that the decision of the tribunal be supported by reasons.⁵¹

Although Englander and Morantz state that adherence to such principles would not destroy the reasons for tribunals (expeditiousness, expertise and low cost) or rigidify them into courts, it seems difficult to see how this could not happen. Although the N.E.B. in practise adheres to these principles to a great extent, one can present a strong case against the proposal for a Canadian A.P.A.. Willis points out that the Franks Report, on which the Council of Tribunals is based, has little application in Canada -- putting into question the Council on Tribunals' idea.⁵² He also states that the American A.P.A. has had little success in achieving the principles stated above.⁵³ A. G. Cooper at the C.B.A. conference attacked the idea on two grounds: first, there was no complete knowledge of the extent, use and powers of administrative tribunal (as pointed out in the Glassco Report) giving a poor knowledge base on which to develop an act; second, such an act would destroy the reasons for commissions and tribunals, their expeditiousness, expertise and reasonable cost.⁵⁴ Perhaps the most biting condemnation of the American A.P.A. comes from James Q. Wilson:

⁵¹Englander and Morantz, op. cit., p. 11.

⁵²Willis, "Administrative Decisions and the Law...", op. cit., pp. 45-48.

⁵³Ibid., p. 49.

⁵⁴A. G. Cooper, Papers presented to Annual Meeting C.B.A., 1965, op. cit., pp. 21-22.

In the opinion of most observers, the influence of the Act (A.P.A.) was marginal and such effect as it did have was generally in the direction of making regulation slow and more costly rather than fairer.⁵⁵

Control then doesn't result from guidelines or uniformity.

The key to control of administrative tribunals by the courts is effectively one of supervision of the actions of the tribunals to see that they act fairly and within their jurisdiction.

D. Control in the Public Interest

Given the problems that Parliament and the courts have found in exercising satisfactory control over an independent Board such as the N.E.B., what chance has the individual citizen in influencing (or controlling) a decision of the Board? The answer is, simply, very little. The man in the street has very little direct contact with a Board such as the N.E.B., very little of the specialized knowledge required to understand a Board's area of concern, little knowledge of the rules and procedures of practice before such Boards, and little knowledge even of the extent to which an adverse decision of such a Board can affect his life.

A constant criticism of Boards and Tribunals, and it is certainly one that can be levelled at the N.E.B., is that it tends to deal only with its clientele group, living in a sterile environment in which the man-in-the-street has a miniscule input. Making submissions to such a specialized Board requires

⁵⁵James Q. Wilson, "The Dead Hand of Regulation", The Public Interest, Vol. 25, Fall, 1971, p. 41.

an expertise that only a few possess. Even small independent oil companies have criticized the Board for their own inability to deal as equals against the large oil companies. The Board is required to interpret the "public interest" in an environment where little is heard from the public or representatives of a broad cross-section of the public. Individuals seldom make submissions or interventions to the Board. Organized interest groups that are only peripherally interested in the Board's activities (a prime example is Pollution Probe) have great difficulty in gathering the data, expertise and organization to make a respectable submission. Such groups are also treated condescendingly by the Board. In such an environment then it would seem that the Board will suffer from very specialized groups' submissions which attempt to interpret the "public interest" to their own best interest.

Other developments to some extent have eased this one-sided input of information. The Board's decisions frequently involve a conflict between Eastern consumers and Western producers. This point is especially noticeable in recent cases.⁵⁶ Thus with two diametrically opposed positions being presented, the public interest can be more accurately portrayed. The Board has also been very open in allowing submissions and

⁵⁶The recent N.E.B. decision (Nov. 20, 1971) that Canada did not have sufficient reserves of gas to justify greater exports was seen by Western producers as a limiting of Western Canadian gas exports to serve future consumer needs in Eastern Canada, see Calgary Herald, Nov. 20, 1971.

interventions. To what extent the public generally follows up on this openness perhaps leaves some of the blame on the shoulders of the public for not taking advantage of possibilities such openness allows. This must be balanced off, of course, against the real restraints on these possibilities (such as lack of finances, data, knowledge, etc.). As well, governments, mostly on the municipal and provincial level, have been involved in interventions, and as representatives of their constituents, have tended to give a broader spectrum of points-of-view as to what the "public interest" is.

Two alternative methods have been suggested to allow the public to be represented more actively in the Board's deliberations. One has been the ombudsman proposal well outlined by D. C. Rowat,⁵⁷ which could be adequately used to supervise the abuses of administrative power for the interests of those sectors of the public (who for a variety of reasons cannot and are not represented). Another is the idea of the Consumer advocate/representative who would act for unrepresented groups by providing the expertise, knowledge, data and familiarity of procedures that would provide a vehicle for submissions by groups who do not have the resources to provide such for themselves.

The whole concept of "public interest" and group representativeness is a many-sided one which every regulative

⁵⁷See D. C. Rowat (ed.), The Ombudsman (Toronto: University of Toronto Press, 1965), for a full explanation of ombudsman proposals.

agency is forced to deal with. It seems basic that a better and wider knowledge of the needs and desires of groups allows a better determination of the "public interest".

On the whole it would seem that the four major areas of agency control, the Executive, Parliament, the Judiciary, and the Public have, when combined, a realistic amount of control over the decisions of the N.E.B.. Control, however, also finally rests on the concept of self-control in the agency itself:

'We wish to emphasize that, whatever our recommendations . . . may be, ~~nothing~~ can make up for a wrong approach to administrative activity by the administration's servants'. . . . what really counts is a fair mind in the men who run the system.⁵⁸

On the whole, and considering the difficult task given to the National Energy Board, it is hard to be overly critical of their self-control.

⁵⁸John Willis, "Administrative Decisions and the Law", op. cit., p. 49.

CHAPTER VII

CONCLUDING OBSERVATIONS

Several traditional methods have been developed for examining the structure and functions of the independent regulatory commission in the total governmental framework. This paper has explored these approaches by relating them to the National Energy Board in a broad general fashion. Because of the breadth of the approach, an approach necessitated by the absence of Canadian analysis of the topic, any conclusions must be very tentative. This applies especially to judgments one can make of the efficiency or efficacy of the National Energy Board, and even of independent regulatory commissions in general. Nor is it possible to make any specific recommendations, structural or otherwise, to develop a better functioning system. However, in an area of study that has been woefully deficient of much analysis, it is hoped that by showing the inadequacies of traditional methods of viewing the independent regulatory commission and by offering a broader approach, this study will make a contribution to further study and understanding of this aspect of government.

The method of looking at independent commissions, by comparing them with the legal-judicial system, tends to limit analysis at the expense of other considerations which are

equally, and perhaps more, important. In a constant search for the maximum amount of fairness, openness and impartiality in the procedures of the independent regulatory commission (a nirvana even the traditional court system has failed to achieve), the legal framework tends to mold the commission into a court-like body, not noticing that in the process it has destroyed the *raison d'être* of the commission. Due process-itis, quasi-judicialitis, call it what you will, can and perhaps already has become a deadening straitjacket rather than a key to fairness, openness, and impartiality. The problem of judicialization of the commission is two-fold. First:

. . . it is clear that administrative law in Canada today is in a sorry state. No proof of this is needed beyond the judgments themselves . . . reveals contradictions on virtually every issue and general disorder in the law.¹

The law then has been found woefully inadequate in dealing with administration on a general plane by the only Canadian to write a definitive text on Canadian administrative law. Surely more of the same is not an answer to the problems of regulation. The second point is that the strict adherence of administrative tribunals generally to legal norms will effectively destroy their reasons for existing.² This is especially true of independent regulatory commissions:

¹R. F. Reid, Administrative Law and Practise (Toronto: Butterworth, 1971), p. 461.

²See John Willis, "Lawyers' Values and Civil Servants' Values", University of Toronto Law Journal, Vol. 18, 1968, pp. 351-360.

Administrative tribunals in Canada . . . which once suffered from too little control, are about to suffer too much of it. . . . The results, though different, might be just as damaging in the long-run.³

Reid concludes by stating: "All this adds up to judicial over-kill of the tribunals".⁴

The same criticism may be raised against those who consider greater independence for the independent regulatory commission as a cure-all for the problems of these commissions. Although independence of decision and freedom from political manipulation were initial needs satisfied by the independent regulatory commission, it has not been realized until of late that the problems of independent regulatory commissions cannot be solved by an increased independence that becomes, over time, isolation.

Regulative decisions are important. These decisions cannot be made, nor can they be expected to be made, in a sterile, though quite independent, environment. It is hoped that one can reasonably conclude that independence of the commission is not a panacea. What is needed is more integration of the independent regulatory commission into the governmental policy-making process rather than more separation.

The life-cycle theory described by Bernstein epitomizes the judicialism-independence orientation discussed above.

³Reid, op. cit., p. 463.

⁴Reid, op. cit., p. 465.

Bernstein's model suffers from basically the same flaws that have been noted above. Bernstein's model was a fruitful regulated group method of examining the need for and the historical evolution of the independent regulatory commission. What one can draw from Bernstein's model must be gathered from careful between-the-lines reading. First, Bernstein concentrates on the independent regulatory commission as a mechanism only. He fails to note the function of regulation but separates the regulatory structure from the functional aspect of regulation, the position of it in the total policy process, and the substance of the regulation. It is here that economic critics have pointed the way, for they tend to take the regulative mechanism as a given and examine the effects of the outputs of that mechanism on the regulated field. Thus the economist is most interested in the function of regulation rather than the mechanism. His comments and criticisms seek to alter the mechanism to better the function while Bernstein seeks to alter the mechanism for the unrelated, nebulous goals of independence and judicial concepts, irregardless of how they will affect the total function. Wilson points out that fairness (as a judicial style doctrine developed by the American Federal Communications Commission), while altruistic, is quite unrealistic and quite self-defeating.⁵

The point is then that regulation and independent

⁵James Q. Wilson, "The Dead Hand of Regulation", The Public Interest, No. 25, Fall, 1970, pp. 39-58.

regulatory commissions cannot be examined in a vacuum. Nor can their processes be looked at in simplistic models such as "interest group capture". It is quite obvious that the relationship between independent regulatory commissions and their regulated groups vary a great deal, both through time and in different political systems. Lowi offers a method of looking at commissions, regulation and regulatory policies that expands the horizons somewhat and allows one to look at the broader setting. Thus, once one has established a method of viewing the regulatory function by way of the Lowi concept, it is quite reasonable to look at the regulatory commission as a policy-maker (something even the N.E.B. will not itself admit). It also allows one to look at independence and judicialism in this broader functional context. As well, one can look at control of the independent regulatory commission not from the narrow viewpoint of legal control but with a view to the role of the independent regulatory commission in the overall political-policy process. Control becomes not so much an end in itself, as it would from the juristic viewpoint, but instead becomes a means of ensuring a proper integration of the independent regulatory commission into the total process. It seems vitally important that the independent regulatory commission be considered in this broader light especially when the scope of powers of such commissions are noted.

One of the underlying attempts in this paper has been

to provide a view of the role of the N.E.B. in the total energy policy field, for we can no longer overlook the importance of such a board in this field. It quite literally has the power to allow the sale of resources which are critical to the future existence of Canada. Great amounts of energy have always been available to serve Canada's needs, but such a situation will not exist forever. Choices must, and are, being made. What is important is that a full and knowledgeable debate take place in full public view and with broad public participation over the allocation of these non-renewable resources. The National Energy Board as an integral participant needs to be placed in the limelight (as has recently been the case) and must be viewed from a realistic analytical framework by an interested, aware public. The consequences of decisions taken without this public debate are not small.⁶ It is hoped that at least a suitable framework has been established from which the N.E.B. may be viewed as a participant in the energy policy process. The scope of this thesis effectively precludes an in-depth analysis of a particular aspect of the Board.

Finally, this study is in many ways a response to the challenge of the Glassco Commission, and a reiteration of that challenge. The Commission noted that there did not exist in Canada even so much as a definition of an independent regulatory

⁶See James Laxer, The Energy Poker Game (Toronto: New Press, 1971) for a less than establishment analysis of government energy policy directions.

commission,⁷ much less an analysis of its role in government.

They concluded:

Nothing comparable (to the Franks Report in the U.K. or the Hoover Report in the U.S.) has occurred in Canada and the limited findings of your commissioners suggest the need for a comprehensive study of this important field.⁸

This paper is a response to that challenge, hence the broad general scope of the text. It is patently not the last word in such a complex area. Government has been noticeably reticent in commissioning a study of such an area, even though one was promised.⁹ Academics have skirted the topic because of its position at the interface of such disciplines as law, politics, public administration and the technical fields subject to regulation. Thus the independent regulatory commission is the unstudied government body. It is hoped that this thesis plus studies that have been developed elsewhere will provide some jumping-off point for other research.

Many fruitful areas for discussion have been passed off in a word in this thesis. The idea of consumer advocate representing the public interest before boards was mentioned as was the ombudsman proposal. The relationship between the N.E.B. and other agencies was touched upon. The relationship

⁷Canada, Royal Commission on Government Organization, Final Report, Vol. 5, p. 72.

⁸Ibid., p. 75.

⁹Canada, House of Commons Debates, Speech from the Throne, April 5, 1965, p. 3.

of interest groups with commissions has not been adequately research in Canada. Lowi's analysis could be examined in greater depth. Clearly this thesis, necessarily broad, has left much room for further analysis that desperately needs analysis. Thus this thesis is both a response to and a reiteration of Glassco's challenge.

DRAWING NO. - 1076-M

NATIONAL ENERGY BOARD, FEBRUARY 9, 1971

From Appendix XVI National Energy Board Annual Report, 1970.

APPENDIX IIA
QUESTIONNAIRE
FOR
SPECIAL COMMITTEE ON
STATUTORY INSTRUMENTS

1. With reference to the different types of subordinate legislation which come under the Administration of your Department or Agency

(a) Does your Department issue regulations as defined by the Regulations Act R.S.C. 1952 c. 235, which are approved by the Governor in Council on the recommendations of your Minister? If so, about how many, including amendments, were issued during 1968?

(b) Does your Department issue regulations, as defined by the Regulations Act R.S.C. 1952 c. 235, which are made on the direct authority of your Minister? If so, about how many, including amendments, were issued during 1968?

(c) Does your Department issue regulations which are exempted from publication in the Canada Gazette by the Regulations under Section 9 of the Act SOR-54-569? If so, about how many, including amendments, were issued during 1968?

(d) Does your Department issue other rules, orders, instructions, not included within the terms of the Regulations Act-- which affect the public? If so, about how many, including amendments, were issued during 1968?

(e) Does your Department issue other rules, orders or instructions, not included within the terms of the Regulations Act, which affect only your own Department? If so, about how many, including amendments, were issued during 1968?

In each case please list the statutory provisions (by title of statute, citation and section number) which confer power to make such subordinate legislation.

2. To what extent has the statutory power to make regulations conferred by legislation administered by your Department or Agency actually been used? Specifically, are there any such powers which have not been used or implemented? If so, please specify.

3. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the

work of your Department or Agency is concerned) of a statutory requirement that no regulations made under legislation administered by your Department or Agency would become law until:

(a) published in the Canada Gazette; or

(b) thirty days after publication in the Canada Gazette.

4. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that no regulations made under legislation administered by your Department or Agency would become law until approved by an affirmative resolution of the House of Commons within thirty days of being laid before the House--assuming, for the purpose of your answer, that the regulation is laid within fifteen days of being published?

5. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that regulations made under legislation administered by your Department or Agency would become law when made but would be subject to being annulled by a resolution of the House of Commons within forty days of being laid before the House--assuming them to be laid within fifteen days of being made?

6. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that regulations made under legislation administered by your Department or Agency would be subject to scrutiny by a parliamentary committee which did not have the power to amend them?

NOTE: It is appreciated that all regulations do not stand on the same footing as far as answering questions 3, 4, 5 and 6 are concerned. Therefore, it is expected that the answer will refer to particular enabling sections and actual regulations.

7. Are there any regulations made under legislation administered by your Department or Agency which are of such a long-standing or durable nature that their terms could be inserted into the enabling statute? Are there any such regulations which, for any reason, in your view, should have been enacted as part of the statute?

8. Are there any provisions in legislation administered by your Department or Agency enabling regulations to be made which, in your view, are too broad, in the sense that the nature and scope of your authority to make regulations thereunder is ill-defined or uncertain or that insufficient standards or guidelines are set forth therein? If so, please specify.

9. Are there any provisions in statutes administered by your Department or Agency enabling regulations to be made which, in your view, are too narrow, in the sense that they do not provide enough scope to make regulations to deal effectively with the problems in the areas affected? If so, please specify.
10. Does your Department or Agency issue documents in the nature of policy statements or position papers which are used by your Department or Agency to implement policies under legislation administered by it? If so, please specify, If so, what steps are taken to bring such documents to the attention of interested or affected persons?
11. Does your Department or Agency consult interested or affected persons when preparing regulations so as to obtain their views with respect to the scope and content of the regulations? If so, please advise as to the procedures used, formal or otherwise, for obtaining or implementing this consultation.
12. Are parliamentary committees ever consulted in the formulation of your regulations?
13. Who specifically within your Department or Agency formulates the policies found in your regulations?
14. Who drafts your regulations--a departmental solicitor, a Department of Justice solicitor, a departmental officer who is legally trained, or some other person? If there are variations in the practice in this respect under different statutes, please specify.
15. Are your regulations drafted initially in French or in English--or simultaneously in both languages? If they are drafted first in one language at what point in the drafting process is the translation made to put them into the other language? How much delay results from the necessity of translation?
16. What circumstances do you envisage would make it necessary to extend the time for publication of a regulation under section 6(2) of the Regulations Act, R.S.C. 1952, c. 235?
17. Is there any reason why regulations could not be published within fifteen days of being made?
18. What circumstances would, in your view, justify the exemption from publication of a regulation?
19. Please list the titles, indicating briefly the subject matter thereof, of all regulations made under legislation administered by your Department or Agency which have not been transmitted to the Clerk of the Privy Council, recorded by him,

published in the Canada Gazette or laid before the House in accordance with Regulations Act, *Supra*,--or have not been subjected to any one of these four processes?

20. Have any steps been taken to index or tabulate the regulations referred to in question 19, to publish them in some place other than the Canada Gazette, or to advise interested or affected persons, or the public, of their existence? If so, please specify the steps taken with respect to each such regulation.

21. How would a person, both inside and outside of your Department or Agency, satisfy himself as to the authenticity of a regulation not transmitted, recorded, published or laid before the House in accordance with the Regulations Act, *supra*?

22. How would you prove the authenticity of such a regulation in a court of law, should this be necessary?

23. Please advise as to any suggestions or submissions which you may have respecting the improvement of the mode or process of conferring the power to make regulations and the preparation and bringing into effect of regulations.

(From Appendix C, Special Committee on Statutory Instruments, Third Report, Ottawa, Queen's Printer, 1969.)

APPENDIX IIB

NATIONAL ENERGY BOARD
EXHIBIT NO. Q2

QUESTIONNAIRE
FOR
SPECIAL COMMITTEE ON
STATUTORY INSTRUMENTS

1. (a) Yes.

(National Energy Board Act, Statutes of
Canada 1959, Chapter 46, Sections 39(2),
42 and 88(1))

In addition the National Energy Board Act empowers
the Governor in Council himself to make Regulations
under the following sections: 85, 87(3) and 89.

During 1968 Regulations were made pursuant to
subsection (1) of section 88 in the form of amendments
to the Oil Pipe Line Uniform Accounting Regulations.

(b) The National Energy Board is itself empowered to
make Regulations but no direct authority is required
from the Minister of Energy, Mines and Resources
through whom the Board reports to Parliament.

(National Energy Board Act, Statutes of
Canada 1959, Chapter 46, Sections 58(1)
and 59(1))

No Regulations, including amendments, in this
category were made during 1968.

(c) No - because no Regulations of the National Energy
Board have been exempted pursuant to section 9 of the
Regulations Act.

(d) Yes - the Board has issued

(i) Rules of Practice and Procedure
respecting the conduct of proceedings
before it, (National Energy Board Act,
section 7),

(ii) hearing orders in respect to applications
for certificates of public convenience
and necessity and for licences to export
and import gas and electrical power,
(section 7),

(iii) orders approving documents of various
kinds, (section 12),

- (iv) orders prescribing testing procedures, (sections 38 and 39),
- (v) orders exempting pipe lines from certain provisions of the Act, (section 49),
- (vi) orders granting leave to sell, convey or lease to or purchase or lease from any person all or part of the pipe line, to enter into an agreement for amalgamation with any other company or to abandon the operation of a pipe line, (section 63),
- (vii) orders granting authority to locate or construct a pipe line or part thereof in the vicinity of certain mining property, (section 68),
- (viii) orders granting leave to work or prospect for mines or minerals in the vicinity of a pipe line, (section 70),
- (ix) orders granting permission to enter certain mining properties, (section 71),
- (x) orders fixing and ordering payment of compensation in respect of certain mining properties, (section 72),
- (xi) orders granting authority to take certain lands without the consent of the owner, (section 74),
- (xii) orders granting leave to carry a pipe line across certain utilities, (section 76), and
- (xiii) orders granting leave to carry certain utilities across, along, upon or under a pipe line, (section 77).

(National Energy Board Act, Statutes of Canada 1959, Chapter 46, Sections 7, 12, 14, 29, 35, 36, 37, 38, 39, 47, 49, 50, 53, 54, 58, 59(2), 60, 63, 68, 70, 71, 72, 74, 76, 77, 84 and 97)

During 1968 the number of orders issued in the above described categories numbered about 1,100.

- (e) From time to time administrative instructions with respect to travel, internal procedures, etc., are

promulgated within the Board for the guidance and compliance of its staff.

(National Energy Board Act, Statutes of
Canada 1959, Chapter 46, Section 7(d))

During 1968 approximately 20 circular letters in this category were issued.

2. The statutory power to make Regulations has been used in a relatively modest way to the extent considered necessary to enable the Board to function particularly with respect to its regulatory powers. Certain sections of the Act enable Regulations to be made either by the Board alone or by the Board with the approval of the Governor in Council and in the following cases this power has not been exercised:

Section 39(2) respecting Regulations providing for the protection of property and the safety of the public and the company's employees in the operation of a pipe line;

Section 58(1) concerning Regulations respecting hydrocarbon transmission contracts purporting to impair, restrict or limit a pipe line company's liability in respect to the transmission of hydrocarbons;

Section 59(1) respecting exemption of oil pipe lines from the requirement of acting as a common carrier;

Section 87 empowers the Governor in Council to extend the application of Part VI of the National Energy Board Act to oil and subsection (3) of the section enables the Governor in Council to exempt by Regulation any class of oil or oil products or any area from the operation of all or any of the provisions of this Part. As the application of the Act has not, as of this date, been extended to oil, no Regulations as above described have been made by the Governor in Council.

3. As evident from the types of Regulations enumerated in the answer to paragraph (d) of Question 1, most of the

Board's orders are of an administrative nature and do not affect the public generally but only one or a few parties. This being so it would seem that no useful purpose would be accomplished by providing in all cases for publication. Again, many of the Board's orders relate, in one form or another, to the construction and operation of pipe lines and because the construction season in Canada is relatively short, delays in obtaining various regulatory approvals arising under, for example, the 30-day requirement set forth in paragraph (b) of the question might unduly inhibit construction where such construction is dependent upon order approvals. There are safety and import and export orders to which the same considerations would apply.

4. The requirement contemplated by Question 4 unquestionably would result in further delays referred to in Answer 3. Also Parliamentary scrutiny of Regulations of an administrative or housekeeping nature and applicable to one person or a few people only, would not appear to accomplish a useful purpose. There is merit to a concept whereby those Regulations, for example, the breach of which involves penal consequences, would receive the scrutiny of Parliament within 30 days of being laid before the House.
5. The proposed requirement of Question 5 would create substantial difficulties in the administration of the National Energy Board Act for the reasons set forth in Answers 3 and 4. It would also create uncertainty in formulation and effect.

In considering the merits of implementing the requirements contemplated in Questions 3, 4, 5 and 6, it is submitted that it should be borne in mind that the National Energy Board is not similar to a normal government department in that the Board is a Court of Record and part of its functions are of a judicial or quasi-judicial nature. Provision is made in the National Energy Board Act for appeals from decisions and orders of the Board to the Supreme Court of Canada on questions of law or of jurisdiction.

6. Many of the orders made by the National Energy Board with respect to pipe line construction, etc., are of a highly technical nature and do not lend themselves readily to explanation in a relatively brief period of time. On

the other hand, Regulations such as, for example, the Board's Rules of Practice and Procedure and its informational requirements in respect of hearings to issue certificates of public convenience and necessity or export and import licences, could be quite easily explained to a Parliamentary committee. In the latter case, the only probable effect would be that the staff of the National Energy Board would be required to spend more time in the explanation of Regulations than is at present the case.

7. No - it is considered that none of the provisions contained in the Regulations of this Board are so durable that they should be included in the enabling statute.
8. No.
9. No.
10. Yes - the Board has issued a Memorandum of Guidance in applying for the Issue of a Certificate of Public Convenience and Necessity under Part III or an Order pursuant to Section 49 of the National Energy Board Act in respect of a Pipe Line, dated 12 December, 1963, to be used as a guide by industry in making applications for approval of different types of pipe line construction. It is distributed to all interested parties by the Board,
11. Yes - generally an outline of the matters proposed to be regulated is distributed to all parties interested. This is usually done by correspondence and personal meetings but public hearings have been undertaken to obtain outside views before the implementation of the proposed Regulations.
12. No.
14. Legally trained staff members.

15. The Regulations are drafted originally in English and those falling under the Regulations Act receive the approval of the Legal Adviser to the Privy Council. They are then translated and copies of the French translation accompany the English version to the Privy Council for approval and promulgation.

The delay attributable to the necessity of translation has been up to six weeks in the case of a complex set of regulations (Oil Pipe Line Uniform Accounting Regulations).

19. See answer to paragraph (d) of Question 1.

20. Besides the usual care taken to distribute copies of Regulations referred to in Question 19 to all interested parties, the documents are part of the public record of the Board (a Court of Record) and available for all to see. Requests for copies are invariably granted. Also the Board would supply a certified copy of the Board's minute authorizing the Regulation to an interested party on request.

APPENDIX IIC

Answer to

Question 13: The Minister of other regulation-making authority formulates the policy found in Regulations with such assistance and advice as he or it regards as necessary.

Question 16: This question was answered in the general context of the letter under Question 23 not reproduced here.

Answer to

Question 17: Regulations could be published within 15 days provided all the necessary personnel and facilities were available. This would involve considerable additional expense both to the Departments and Agencies involved and for the central Agencies. The current inhibiting factors are purely administrative.

Answer to

Question 18: Extension of the time normally allowed for publication of a regulation under s. 6(1) of the Regulations Act, R.S.C. 1952, Chapter 235 and exemption from publication of a regulation may from time to time be justified in the following circumstances:

- (a) where notification or other form of communication would be more appropriate;
- (b) where the safety and security of the country or part of it might be adversely affected;
- (c) where information might be disseminated which could deleteriously affect Canada's foreign relations;
- (d) where the regulation involves the distribution of information which might adversely affect the relations of the provinces inter se;
- (e) where the regulations are of limited application and involve the granting of privileges or the relaxation of rules;
- (f) where other conditions from time to time necessitate that a regulation should be exempt from publication or that its publication be postponed provided that the provisions of the Regulations Act are complied with;

- (g) an extension of the time normally allowed for the publication of a regulation may be necessitated where the matter is one of urgency.

Question 21: This question was answered in the general context of the letter under Question 23 not reproduced here.

Answer to

Question 22: Resort might be made to section 21 of the Canada Evidence Act which provides for the production of certified copies as the means of proving a proclamation, order, regulation or appointment made by or under the authority of the Governor in Council or of a Minister of the Crown or the Head of a Department.

(Note: Letter submitted to Mark MacGuigan, Chairman, Special Committee on Statutory Instruments from Donald MacDonald, Government House Leader.)

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