REGULATORY AND POLICY DEVELOPMENTS

NEW TELECOMMUNICATIONS LEGISLATION

By: John F. Blakney
Fraser & Beatty, Ottawa

The federal government has elected to modernize its telecommunications regulatory legislation in two modest steps. The first step was taken on October 19, 1989, when the federal government tabled amendments to the *Railway Act* to make that legislation apply to telephone companies that are crown agents. This brief amending legislation is designed only to deal with the anomaly created by the Supreme Court of Canada's decision in the AGT Case (reported in the September 1989 *CCPR*) whereby the three prairie telephone companies were confirmed to be subject to exclusive federal regulatory jurisdiction but existing federal regulatory law was found not to apply to these companies as they were provincial crown agents.

Subsequent to the AGT decision the telephone companies operating in the four Atlantic provinces have suborned to the CRTC's jurisdiction by filing tariffs with the CRTC. The CRTC has approved these tariffs and has also ordered that any past failure to obtain CRTC approval has been corrected by that approval.

The Minister of Communications, Marcel Masse has, in a number of speaking engagements, outlined very modest goals for the stage two legislation including modernization and consolidation of existing federal legislation; Canadian ownership requirements for telecommunications enterprises owning and operating their own facilities and offering basic services to the public (so called Type 1 carriers); Governor-in-Council power to issue binding directions to the CRTC in telecommunication matters; and a CRTC power to cease regulating once competition sufficient to provide just and reasonable rates exists.

None of these measures is new or radical. In two bills tabled prior to the last federal election, the federal government attempted to enact Cabinet direction powers and to provide for deregulation on a selective basis. A Canadian ownership policy for Type 1 telecommunications enterprises was announced by the federal government prior to the *Free Trade Agreement* in order to take advantage of that *Agreement's* grandfathering of existing restrictive investment policies. To date there has been no suggestion that the only foreign-controlled Type 1 carrier (BC Tel) would not be grandfathered under the new rules. It's worth noting that the United States has a 25% foreign investment limit in FCC-regulated communications carriers. The *Teleglobe Canada Act*, passed when that company was privatized in early 1987, already contained Cabinet direction, foreign ownership and deregulation of competitive service provision.

Absent from current ministerial statements on the Phase II legislation is any discussion of elaborate institutional arrangements which had been examined for the last several years for jurisdiction-sharing between federal and provincial boards having regulatory powers over specific companies. It would appear that the federal government may finally have realized that two regulatory bodies having power over one telephone company could be a formula for less effective but more costly regulation, and greater uncertainty for business and consumers. It would appear that the current federal preference is to contain all jurisdiction within the CRTC and to find a way of institutionalizing provincial interests within that agency; possibly by appointing Commissioners on the understanding that they represent a certain regional perspective and requiring regional Commissioners to participate in decisions affecting Atlantic and Prairie telephone companies, and by requiring the CRTC to conduct more of its business outside the National Capital Region.

The prairie premiers and their crown telcos have mounted a high profile lobbying campaign

against C-41 arguing that federal regulation would result in higher local rates. The principal goal of this effort appears to be delegation of some regulatory powers by the federal government back to these provinces. C-41 is presently awaiting Second Reading debate.

NEW BROADCASTING LEGISLATION TABLED

By: John F. Blakney
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On October 12, 1989, First Reading was given to a revised federal *Broadcasting Act* (Bill C-40) The legislation in most respects is the same as the *Broadcasting Act* revisions introduced by the federal government in the summer of 1988. Retained intact from the previous version of the bill, and consistent with the scheme of the original 1968 *Broadcasting Act*, are the following basic building blocks of Canadian broadcasting regulation:

1. licensing of franchises, with detailed performance-based conditions of licence granted by an independent regulatory agency (the CRTC);

2. implementation by that agency of an elaborate statutory broadcasting policy;

3. mandating CRTC to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the statutory broadcasting policy;

4. wide powers to make regulations affecting the broadcasting system and its participants as a whole; and

5. narrowly defined conditions for Executive (Cabinet) intervention into CRTC decision-making.

Like its predecessor, Bill C-40 confirms the right of cable companies to create programming, adopts a new definition of broadcasting that is intended to be technologically neutral, explicitly recognizes the special nature of the French broadcasting environment in Canada, and encourages increased Canadian content and output with special emphasis on cultural promotion and addressing the needs of visible minority groups.

Innovations of Bill C-40 include:

Binding Regulatory Policy

A statutory statement of regulatory policy to be applied by the CRTC states that the broadcasting system should be regulated and supervised in a flexible manner that, among other things, is sensitive to the administrative burden that may be imposed by regulation on broadcasting undertakings, does not inhibit the development of information technologies, is readily adaptable to the different characteristics of English and French language broadcasting, and is readily adaptable to scientific and technological change among other factors.

Policy Directions

The *Act* provides the three different types of policy direction by the Governor-in-Council (i.e. Cabinet). First, the *Act* allows the Governor-in-Council by order to issue to the Commission directions of "general application on broad policy matters" with respect to the objectives of the statutory broadcasting or regulatory policies. No such order may be made with respect to the issuance of a licence to a particular person or with respect to the amendment, renewal, suspension or removal of a particular licence. Such a direction cannot apply to a licensing matter where the period for filing interventions in the matter has expired unless that period expired more than a year before the coming into force of the Order. Proposed orders must be published in the *Canada Gazette* and laid before each House of Parliament at least 40 sitting days before the effective date. The Governor-in-Council may also issue regulatory

directions with respect to the number of channels or frequencies that may be issued to licensees within a geographical area, to the reservation of channels or frequencies by the CBC or for any special purpose designated by the Govenor-in-Council, classes of applicants to whom licences may not be issued or to whom licensing amendments and renewals may not be granted (a power found in the current legislation), and to the description of circumstances under which the Commission may issue licences to applicants that are agents of the province or which are otherwise ineligible to hold a licence. As statutory prerequisites to the making of this second class of direction, the direction must be published in the *Canada Gazette* and laid before Parliament 15 days after making the order.

The Governor-in-Council was also empowered to issue directions with respect to implementation of the provisions of the *Canada-U.S. Free Trade Agreement* relating to program substitution and commercial substitution and pre-prohibition of transmission of certain programming content and advertisements.

Power to Set Aside and Refer Back

The power of the Governor-in-Council to refer a CRTC decision for rehearing has been narrowed by requiring the Governor-in-Council first to be satisfied that the decision "derogates from the attainment of the objectives of the Broadcasting Policy" of the *Act*. The Govenor-in-Council is now permitted to set out in the referral of the decision to the CRTC the details of any matter that, in his opinion, may be material to the reconsideration and hearing of the matter. Petitions to the Govenor-in-Council requesting rehearings are to be maintained by the CRTC in a public register and forwarded to all persons who are heard or made in the oral representation in connection with the original CRTC hearing.

On December 15, 1989, Bill C-40 was referred to Legislative Committee following Second Reading in the House.

PROGRESS REPORT ON BILL C-38, "AN ACT TO AMEND THE FEDERAL COURT ACT"

By: Brenda Swick-Martin
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Bill C-38, *An Act to Amend the Federal Court Act* (the bill), has passed Second Reading in the House of Commons and has been referred to a legislative committee. The bill introduces several changes to the judicial review jurisdiction of the Federal Court of Canada. Some of the more important changes are discussed in the following paragraphs.

The Bill changes the Federal Court's judicial review jurisdiction over federal boards, commissions and tribunals. At present, the *Federal Court Act* provides for a division of judicial review jurisdiction between the Trial Division and the Court of Appeal. The bill grants the Trial Division exclusive original jurisdiction over the judicial review of federal boards and tribunals, except as otherwise provided by federal legislation. The Court of Appeal retains judicial review jurisdiction only over the following federal tribunals, specifically enumerated in the bill: the Tax Court of Canada, the Canadian Radio-Television and Telecommunications Commission (CRTC), the Pension Appeal Board, the National Energy Board, the Competition Tribunal, the Immigration Appeal Division of the Immigration and Refugee Board, the Board of Arbitration and Review Tribunal established by the *Canadian Agricultural Products Act*, the Canadian International Trade Tribunal and umpires under the *Unemployment Insurance Act*. The decisions and actions of all other tribunals will be reviewed by the Trial Division.

Bill C-38 sets forth the specific grounds for challenging the decision or action of a federal tribunal. The Trial Division may grant relief if the federal tribunal acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction; failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe; erred in law in making a decision or order, whether or not the

error appears on the face of the record; based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner, or without regard for the material before it; acted, or failed to act, by reason of fraud or perjured evidence; or acted in any other way that was contrary to law.

The type of relief which the Trial Division may grant is also specified in Bill C-38. The Court may order the federal tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or declare invalid or unlawful or quash, set aside, refer back, prohibit or restrain a decision or act of the federal tribunal.

In addition, once an application for judicial review has been filed, the bill specifies that "the Trial Division may make such interim orders as it considers appropriate pending the final disposition of the application." This provision includes the power to stay an order of a federal tribunal pending disposition of an application for judicial review.

Another significant change made by Bill C-38 is the proposal that the Federal Court's jurisdiction over civil suits against the federal government be made concurrent with the appropriate provincial courts. This proposed provision removes the Federal Court's present exclusive jurisdiction over actions against the federal government and enables plaintiffs to sue the federal government in provincial court rather than just in the Federal Court.

The government is hoping to pass Bill C-38 through Third Reading before Parliament recesses in June 1990.

AUDITOR GENERAL REVIEWS FEDERAL REGULATORY PROCESS

By: John F. Blakney
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The *1988/89 Annual Report* of the Auditor General of Canada released on October 24, 1989 includes a review of the administrative measures adopted by the federal government in 1986 (following recommendations of the Nielson Task Force), to improve the management of making new regulations.

The 1986 measures included the establishment of a small central agency, the Regulatory Affairs Branch of the Office of Privatization and Regulatory Affairs, to oversee the new federal regulatory process. The process involves publication of an Annual Regulatory Plan classifying each department's expected regulatory initiatives, prepublication of all new regulations in the *Canada Gazette* together with an impact assessment, improved public consultation, and more clearly defined ministerial accountability and responsibility in the making of new regulations.

The Auditor General's report examines the extent to which four government departments have complied with this process. The bodies examined are the Environmental Protection Directorate of Environment Canada, the Canadian Coast Guard (part of Transport Canada), the Occupational Safety and Health Branch of Labour Canada, and the Bureau of Radiation and Medical Devices of Health and Welfare Canada.

The Auditor General concludes that the 1986 policy identifies and supports essential principles of public and Ministerial accountability but that there was, within the four departments studied, some evidence of a failure to live up to the improved consultation and impact assessment elements of the policy. Further, the Auditor General emphasized that there needed to be more effort to evaluate existing regulatory programs in addition to evaluating regulatory increments. The Auditor General also strongly endorsed the continuing work of the Standing Joint Committee for Scrutiny of Regulations.

The case studies in the Auditor General's report suggest that there is a continued need by departments for guidance on the appropriate design and conduct of a Regulatory Impact Assessment, particularly with respect to the identification and evaluation of all alternatives to regulation and in public disclosure of anticipated costs and benefits to the private sector. Different departments have used different approaches to identifying and quantifying the

benefits and costs of regulation. This lack of consistency can make some regulations appear to have higher benefits than are warranted and increases the difficulty of allocating resources among competing departmental uses or competing instruments to implement and enforce regulations.

The Auditor General was somewhat critical of the Environmental Protection Directorate for not having disclosed data in a timely fashion and having inconsistent and unequal opportunities for consultation on regulations, particularly with respect to public interest groups. The Canadian Coast Guard was criticized for incomplete reporting of information pertaining to amendments to Arctic Shipping Pollution Prevention Regulations. Ministers had not been provided with information on the costs to government or the commercial benefits of amendments to the *Arctic Waters Pollution Prevention Act.*

FEDERAL ENVIRONMENTAL ASSESSMENT AND REVIEW PROCESS: AFTERMATH OF THE RAFFERTY DAM DECISION

By: N.J. Schultz
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On June 22, 1989, the Federal Court of Appeal affirmed an April 10, 1989 decision of the Trial Division setting aside a licence issued by the Minister of the Environment under the *International River Improvements Act.*[1] The licence was necessary for the Rafferty Dam Project in Saskatchewan to proceed. The licence was set aside because of the failure of the Minister of the Environment to comply with the Environmental Assessment and Review Process Guidelines Order.

The EARP Guidelines Order derives its authority from Section 6 of the *Department of the Environment Act.* That section authorizes the Minister of the Environment to establish by regulation environmental guidelines for use in federal government decision-making. The Court rejected the argument that the EARP Guidelines Order is not mandatory and could not, in any event, conflict with the exercise of the Minister's authority under the *International River Improvements Act.* The Federal Court of Appeal stated clearly that if the Minister is obliged to follow the guidelines then the guidelines would have the same force as any other law of general application. The Court concluded that the guidelines were binding on the Minister and that the Minister had failed to comply with the guidelines in issuing the licence.

This was the first case to put teeth into the EARP Guidelines.

The situation was muddied somewhat by an August 11, 1989 oral judgment of the Trial Division. That case involved the Old Man River Dam in Alberta.[2] In that case, the Minister of Transport had given an authorization necessary to the construction of the dam under the *Navigable Waters Protection Act.* The applicants sought to set aside that decision on the ground that the Minister had failed to comply with the EARP Guidelines Order. In addition, *mandamus* was sought against the Minister of Fisheries and Oceans on the ground that that Minister was also required to comply with the Guidelines Order. The application was dismissed. The Court distinguished the *Rafferty Dam* decision. Chief among the distinctions was the fact that the *Rafferty Dam* case involved federal lands whereas the Old Man River Dam did not. The Court also noted that the project had gone through a lengthy and public provincial review process and that the Court would not have been inclined to exercise its discretion in granting the relief requested. However, the judgment is confusing in that the Court appears to have accepted an argument that the Guidelines Order could not apply to the Minister of Transport in the exercise of the Minister's responsibilities under the *Navigable Waters Protection Act.* This was the very argument rejected by the Court of Appeal in *Rafferty Dam.* The Court in *Old Man River* takes comfort from the fact that in *Rafferty Dam* it was the Minister of the Environment who was responsible for the Guidelines Order and also responsible for issuing the licence under the *International River Improvements Act.* This difference is, with great respect, a difference without a distinction in light of the rationale enunciated by the Court of Appeal. Nevertheless, in a short space of time there have

been two Judgments of the Federal Court tending in opposite directions and this leaves the status of the Guidelines Order unclear.

The Federal Environmental Assessment and Review Office has been seeking to clarify environmental assessment at the federal level for some time. Legislation has been planned but has been slow in coming as policy-makers debate the scope of environmental assessment. In the meantime, the application of the EARP Guidelines Order will continue to be litigated. On December 29, 1989 the Federal Court, Trial Division ordered the Minister of the Environment to refer the Rafferty Dam Project to a full public review by an Environmental Assessment ReviewPanel.[3] The Minister, after the Federal Court of Appeal judgment, had conducted an initial evaluation of the project and issued a licence without reasons. The court was unable to find that the material before the Minister supported such a decision and, as a result, the next step in the review process was required, namely a full review by an independent panel.

Notes

1. *Saskatchewan Water Corporation v. Canadian Wildlife Federation Inc. et al.*, Federal Court of Appeal File No. A-228-89 affirming *Canadian Wildlife Federation Inc. et al.* v. *Minister of the Environment et al.*, Federal Court Trial Division File No. T-80-89.

2. *Friends of the Old Man River Society* v. *Minister of Transport et al.*, Federal Court, Trial Division File No. T-865-89.

3. *Canadian Wildlife Federation Inc. et al.* v. *Minister of the Environment et al.*, Federal Court Trial Division File No. T-2102-89.

THE SALE OF SELKIRK COMMUNICATIONS LIMITED - SOME CRTC APPROVALS, SOME CRTC DENIALS

By: Andrée Wylie
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On 28 September 1989, the Canadian Radio-television and Telecommunications Commission (the Commission) issued a number of decisions disposing of a complex package of related applications for approval of the transfer of control of Selkirk Communications Limited to Maclean Hunter Limited and for approval of the immediate sale of most of the broadcasting undertakings thereby acquired by Maclean Hunter to Western International Communications Limited of Vancouver, Rogers Broadcasting Limited of Toronto and the Blackburn Group Inc. of London, Ontario.

The dozens of Selkirk-Maclean Hunter applications heard by the Commission in May 1989 involved more than 20 television, radio and cable undertakings in many parts of Canada, from Montreal to Vancouver. The prospective transferees, especially Maclean Hunter, Rogers and Western, are among the major players in the broadcasting and communications industry in Canada, both in terms of audience reached and of revenues achieved. Together, they provide radio, television, cable and telecommunications services in most regions of Canada as well as, in the case of Maclean Hunter, daily newspapers in a number of communities and several publications, including magazines and trade journals.

The sale of Selkirk, therefore, raised a number of regulatory issues, including concentration of ownership in the broadcast media, common ownership of media outlets in the same market, cross-ownership of media, trading in broadcast licences and the integrity of the broadcasting licensing process. The applications heard also put in question whether the process used by Selkirk and Maclean Hunter to complete the sale would allow the Commission the opportunity to apply to the series of proposed transactions brought before it, the significant benefits test it has developed to assess whether the approval of a particular ownership application is in the public interest. This test has been used by the Commission to measure the benefits that would flow from a proposed transaction to the public served by the broadcasting undertakings involved and to the Canadian broadcasting system as a whole.

In Phase I of the May, 1989 hearing, Selkirk requested approval of the sale of all of its voting shares to Maclean Hunter. Selkirk's non-voting

shares, representing the overwhelming majority of Selkirk's assets, had already been purchased unconditionally. In Phase II, Maclean Hunter requested permission to divest itself immediately of all the broadcasting undertakings acquired through Phase I, except for an FM radio station in Brampton, Ontario and cable systems serving part of Ottawa and Pembroke, Ontario. Maclean Hunter argued at the hearing that it would control the majority of the undertakings acquired from Selkirk "only for a moment in time".

From a regulatory perspective, it soon became apparent that the application of the CRTC significant benefits test to Phase I of the Selkirk transfer, the sale by Selkirk to Maclean Hunter for subsequent transfer to third parties, would require some imagination. Selkirk was transferring control of the undertakings for which it held broadcasting licences in the normal course of business. It was not, for example, saving them from bankruptcy or possible closure. It was therefore difficult to identify what possible benefits could accrue to the public served from approval of the transaction. Moreover, unless the Commission approved all the applications involved in Phase II, what possible benefits could accrue to the public served or to the Canadian broadcasting system as a whole from a company controlling for more than "a moment in time" a licensed broadcasting undertaking it had stated on the public record it did not want to own or operate.

The Commission approved the sale of Selkirk to Maclean Hunter. It also approved the subsequent transfer of most of the individual broadcasting undertakings thus acquired by Maclean Hunter to third parties. It denied, however, approval of the transfer to Western of the AM and FM radio stations serving Edmonton, Alberta, CJCA and CIRK-FM. It also denied approval of the transfer to the Blackburn Group of CHCH-TV, the independent television station serving Hamilton, Ontario.

In its decision on Phase I, the Commission did not focus on its significant benefits test as much as it concentrated on the circumstances of the transaction between Selkirk and Maclean Hunter and on the extent to which the shareholders of Maclean Hunter may have stood to benefit from the immediate resale of the majority of the licensed undertakings acquired from Selkirk at prices which, in the aggregate, would leave Maclean Hunter with assets whose value was greater than the costs incurred for their acquisition.

The Commission stated in its decision that it accepted Maclean Hunter's arguments that Selkirk's major shareholder had precluded any interested party from seeking out others to form a consortium to bid for the Selkirk shares. The Commission also noted that Maclean Hunter had been obliged to make a public offer to purchase all the shares of Selkirk in order to comply with the Ontario Securities Commission requirement with regard to publicly-traded companies. It noted further that Maclean Hunter had made public its intention to sell certain assets to third parties and that Maclean Hunter's negotiations with third parties had been conducted at arm's length.

The second issue, whether a proper valuation of the assets purchased by Maclean Hunter, and the price at which the majority of them had been purchased from Maclean Hunter by third parties, amounted to "trafficking" or trading in broadcasting licences, was more thorny. It required an assessment of the price paid by Maclean Hunter for the Selkirk shares, measured against the value of the assets held by Selkirk, as well as of the price received by Maclean Hunter for the resale of most of the Selkirk assets acquired, measured against the value of the assets retained. Did the value of the assets retained by Maclean Hunter exceed the costs incurred by Maclean Hunter to acquire them when the price received from the sale of the assets disposed of was taken into consideration?

After consideration of valuations performed by independent parties and a review of the costs to Maclean Hunter that the Commission was prepared to include in the purchase price, the Commission concluded that, on the basis of the evidence before it, its approval would result in Maclean Hunter achieving a financial gain by acquiring assets with a value of some $21,200,000. in excess of the price paid by it for the Selkirk shares. This windfall, the Commission ruled, was to be devoted to achieving the greatest possible benefit for the Canadian broadcasting system as a whole. Maclean Hunter was directed to invest, within three months of the decision, a minimum

of $21,200,000. for the creation of a permanent capital fund administered by a Board of Trustees, the majority of whom are to be independent of Maclean Hunter or Maclean Hunter-related companies or parties. It would serve to endow "new, worthy and effective broadcast initiatives" or to extend financial support to existing projects. The Commission would examine Maclean Hunter's proposals and pronounce on their acceptability. This fund would be in addition to the commitments in excess of $29,000,000 made by Maclean Hunter for expenditures aimed at benefiting the broadcasting system if it were allowed to purchase the Selkirk shares. The largest single initiative involved as part of these commitments was the creation of a Drama Series Endowment Fund, a permanent capital fund to be administered by a private foundation.

In the second phase of its decisions, the subsequent sale of the broadcasting undertakings acquired by Maclean Hunter, the Commission examined each proposed transaction on its merits in the light of the benefits package put forward by the prospective transferee and of the public interest in general. As noted, the Commission denied the application to transfer control of CHCH-TV Hamilton to the Blackburn Group and directed Maclean Hunter to submit for Commission approval, within six months of the decision, its own proposals for a benefits package and a business plan for CHCH-TV or a new application for the transfer of CHCH-TV to a third party. The Commission also denied the application for transfer of CJCA and CIRK-FM Edmonton to Western. Those denials had the effect of leaving Maclean Hunter in Edmonton with ownership of two radio stations, the Edmonton daily newspaper, the Edmonton Sun, and a 27.5 interest in two other radio stations. The Commission concluded that it would be in the public interest for Maclean Hunter to divest itself of CJCA and CIRK-FM. It directed Maclean Hunter, in keeping with an undertaking made at the hearing, to submit applications within six months of the decision for the transfer of effective control of CJCA and CIRK-FM to a third party.

In a dissenting opinion, CRTC Commissioner Paul McRae expressed the reasons why, in his view, approval of the applications filed with the Commission by Selkirk and Maclean Hunter were not in the public interest. They included:

- The fact that approval of the applications, by allowing a net reduction in the number of major players in Canadian broadcasting would hasten the drift toward fewer but more powerful broadcasting voices.

- The undue concentration of media interests and of editorial power that would flow from the Commission's decisions, particularly in the Toronto/Hamilton market, and especially if Maclean Hunter were to retain ownership of CHCH-TV.

  The procedure used by the applicants which amounted to Selkirk bringing before the Commission an application to approve the transfer of control of broadcasting entities to Maclean Hunter when it was the stated intention of the transferee, before approval of the initial transaction, to divest itself of the vast majority of those entities, thus bringing to the Commission a *fait accompli* leaving little room for the exercise of its discretion in an unfettered manner.

NEB APPROVES ARCTIC GAS EXPORTS

By: N.J. Schultz
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On October 19, 1989, Canada's natural gas frontier was opened for business. The National Energy Board (NEB) approved export licence applications by Esso Resources Canada Ltd., Gulf Canada Resources Ltd., and Shell Canada Ltd. for the export of 9.2 Tcf of natural gas to the United States for a 20-year period beginning as early as November 1, 1996. Licences will not be issued until the Governor in Council has approved the NEB decision.

The first business generated by the decision were applications by the nationalist Council of Canadians (COC) to the NEB seeking a review of the decision and by the Canadian Environmental

Law Association (CELA) to the Cabinet asking that approval of the NEB decision be denied. The Council of Canadians, led by anti-free trader, Maude Barlow, argues that the NEB has failed to perceive that the export is a threat to Canada's energy security. CELA argues that the NEB erred in deferring environmental issues until hearings are conducted on the construction of a pipeline. CELA argues, among other things, that the export of natural gas raises global environmental issues which must be considered at the time the export is approved. There are newspaper reports that native groups, principally the Dene-Metis Negotiations Secretariat will also seek a review of the NEB decision on the basis that the NEB should have placed conditions on the licences regarding the socio-economic benefits to be derived by Northerners from the project.

This decision shows the extent to which market-oriented thinking has changed the approach to frontier development. In a February, 1979 report on Canadian Natural Gas Supply and Requirements, the NEB refused to include frontier reserves as a component of the supply available to meet Canadian and export demand. The NEB stated that it would include frontier gas only when the necessary transportation link had been approved and the Board was satisfied that the necessary means of transportation would be constructed. Ten years later the NEB has accepted that applications for licences are the necessary first step in a lengthy process before frontier gas begins to flow to market.

The most significant conditions on the export licences imposed by the NEB relate to the availability of gas to Canadians. Final sales contracts have yet to be entered into by the export applicants with U.S. buyers. The NEB has required the applicants to advise potential Canadian buyers who have declared an interest in buying gas from the Mackenzie Delta of the quantities available for sale and to give them an opportunity to purchase the gas on terms and conditions, including price, similar to those under which the gas would be exported. Potential Canadian buyers must be prepared to negotiate in the same timeframe as U.S. purchasers. This condition is intended to provide equal, but not preferential, treatment to Canadians who may have an interest in buying some of this gas. The NEB will require executed gas export sales contracts to be filed for review by the NEB as well as interested parties. This would provide an opportunity for potential Canadian buyers to complain. These conditions meet the concerns expressed at the export hearing by Canadian local distribution companies such as Consumers' Gas.

The NEB found that the applicants would have sufficient supply to meet their export requirements. In addition, the NEB found that construction of a pipeline into the Mackenzie Delta region would undoubtedly stimulate exploration and development of the undiscovered gas potential of the region. Even a conservative realization of undiscovered potential would keep gas flowing for many years beyond the export period. The NEB decision indicates that there would still remain 36.6 Tcf of discovered and undiscovered gas resources in parts of the region which could be economically reached by the pipeline. The stimulus which the export would provide to development of the region's gas resources was referred to by the NEB as a factor in dismissing the Council of Canadians' concerns for Canada's energy security. The NEB found that a restriction on exports as suggested by the COC could well delay delivery of Mackenzie Delta gas to Southern Canada and would not be in the public interest.

Foothills Pipe Lines Ltd. intervened in the hearing to protect its interest in constructing the Canadian portion of the Alaska Natural Gas Transmission System (ANGTS). The NEB declined to impose conditions on the licences which made reference to the Canada/U.S. Treaty on the ANGTS. The NEB stated that granting the export licences would not be inconsistent with the commitments of Canada and the United States in that Treaty. The NEB also declined to recognize any specific pipeline route in the licences. The decision, therefore, leaves the question of pipeline route open. Foothills is promoting the extension of the Canadian "prebuilt" segment of the ANGTS from Caroline, Alberta to Boundary Lake on the Alberta/British Columbia border with its own line up the Mackenzie Valley to the Delta. The Polar Gas consortium of TransCanada PipeLines and Tenneco also continue to pursue their

Mackenzie Valley pipeline proposal. Interprovincial Pipeline Limited is rumoured to be waiting in the wings with a third proposal. The NEB will not deal with a pipeline proposal until sales and transportation contracts are in place.

The Dene-Metis failed to persuade the NEB that granting the export licences would prejudice the conclusion of the settlement of the Dene-Metis land claim. The NEB also declined to include a condition in the licences requiring the applicants to address socio-economic matters such as training programs and employment. The NEB encouraged the applicants to work with government agencies, communities and associations at an early stage in the project to ensure that everyone involved would be well-informed during the development process and as a result able to optimize their participation. The NEB was satisfied that the project's net benefits would be sufficiently large to cover all socio-economic costs but stated that the NEB does not have the power to determine who will pay those costs. The NEB stated that environmental and socio-economic matters related to the pipeline

CELA, in its application to the Governor in Council, argues that the NEB was required to take into account environmental impacts as part of the export licence hearing process by virtue of the Environmental Assessment Review Guidelines Order issued under the *Department of the Environment Act*. Among the impacts which CELA argues the NEB failed to consider were the consequences of increased fossil fuel consumption resulting from the export on global warming.

The NEB has invited comments from interested parties on the review application by the COC.

In a related development, the NEB staff have issued a study dated September 1989 indicating that frontier development will be required by the turn of the century if Canada is to meet expected domestic and export natural gas demand.