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BOOK REVIEW

Making Disclosure: Ideas and Interests in Ontario Securities Regulation

BY MARY CONDON

(Toronto: University of Toronto Press, 1998) 353 pages.[1]

I. INTRODUCTION

This is a good book, about interests, ideas, policies, and law. Essentially a case study of securities regulation in Ontario from 1945 to 1978, Condon uses a number of texts, both legal and non-legal, to explain how new laws and policies come to be. Although empirically focussed on the emergence of the Ontario Securities Commission (OSC) as a major player in the regulation of the stock market exchange, the theoretical and methodological implications go well beyond this. Condon's aim is no less than the formation of an alternative theory of regulation, one that avoids "the overdetermination of structural models" and the "underdetermination of individualistic" ones.[2] Her central claim is that regulation is a process of "dynamic interaction" between interests and ideas, where ideas shape which interest positions are seen as plausible, and interests "debate the meaning to be attributed to" key regulatory concepts.[3] (If this sounds opaque, it is, but most of the book is not.) Discovering, interpreting, and understanding the connections among interests, ideas, and discourses, and tracing these interactions through policy and regulatory decision making forms the nub of the book.

Condon begins with a (very selective!) critique of theories of regulation she sees as most influential; these are primarily empirical studies from economists and political scientists based in the United States. She reduces this literature to two kinds of studies: those that examine whether regulatory agencies have achieved their statutory goals; and those that describe how regulatory agencies behave, primarily through theories of life cycle and capture. As Condon shows, this literature is problematic. The goals of agencies are not easily discovered, the concept of interests employed is simplistic, the unrelenting focus on regulatory outcomes is

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[1] [hereinafter *Making Disclosure*].

[2] *Ibid.* at 7.

[3] *Ibid.* at ix.

problematic, and translating these concepts into quantifiable indicators may achieve measurability at the expense of validity. The distinction between private and public spheres and interests, for example, is complex, not obvious. The drive to create empirically reproducible data, deemed essential to measure the results of regulatory decisions, has meant that non-quantifiable but central concepts such as cultures of regulation, the development and interpretation of regulatory ideas, and the role of texts—statutes, regulations, policies, and decisions—have been insufficiently explored. Condon seeks to remedy these omissions. Using documentary methodology, she examines how various legal and extra-legal texts come to act as resources for regulatory action, how ideas are invested with particular meanings, and how ideas and interests shape regulatory cultures. Her primary "data" consists of decisions made by the OSC, public inquiry and commission reports, coupled with policy statements, briefs, and submissions to public bodies. Condon asserts, then shows throughout the book, that ideas, statutes, and laws always have several plausible interpretations, so lawyers and judges, legislators, and regulators are always engaged in the process of making law rather than simply un- or dis-covering it. The values of the actors, the cultural and legal contexts of decision making, and the legal principles set out in precedent and text ("black-letter law") are the primary tools employed to create meaning. She concludes that neither interest-only nor idea-only frameworks adequately explain regulation. Ideas—here disclosure and self-regulation—"come to have currency,"[4] and this limits the positions that can be taken by the powerful. She calls for analyses which "de-centre" interest-based theorizing in favour of "fluid and dynamic" approaches.[5]

II. SUMMARY

The book begins by examining the origins of securities law and its primary regulator in Ontario (and therefore in Canada), the OSC. Regulation began with a whimper, not a bang, apparently coming out of one of the endless series of royal commissions on the mining industry that punctuated twentieth-century Canada. Condon identifies the 1945 *Securities Act*,[6] which required all parties raising capital by offering stock to the public

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[4] Ibid. at 229.

[5] Ibid. at 228.

[6] [hereinafter *Act*].

to register with the OSC and file a prospectus disclosing all relevant material facts, as her starting point. The *Act* exempted many trades and securities, and put the onus on the OSC to grant registration to all "suitable" applicants, refusing registration only when it was "clearly" in the public interest to do so. Securities regulation, she shows, was intended to help the mining industry raise needed capital by generating greater public confidence in the market. This quest to develop the natural resources of Ontario was seen as beneficial to all. Condon points out that "taking a flyer on penny stocks" was practically a patriotic duty for privileged Canadians at the time. Nor were legislators trying to make investment risk-free; a certain amount of risk was seen as natural and necessary. But government was not to act alone; it was to go hand-in-hand with self-regulation, as the passage of the *Broker-Dealers Association Act* in 1947 makes clear. Chapter two looks at the construction and evolution of concepts such as disclosure, discretion, public interest, and public protection, tracing the influence of these ideas on OSC decision making in the 1950s.

Chapter three looks at the "new" *Securities Act* of 1966 and its genesis in the reports of three royal commissions and a provincial inquiry. After setting out the social, political, and economic conditions of the early 1960s, Condon traces how two public scandals—the royal commission inquiry into fraudulent mining claims involving the Windfall Company in 1964 and the collapse of Atlantic Acceptance Finance Company—resulted in the 1966 *Act*. She shows how ideas about self-regulation, the debate over the role of the OSC in protecting investors and the public, concerns about liquidity, and public confidence, were interpreted to create policy. External and internal factors were also important, because Canada's financial system, banks, and economy were undergoing rapid change. Condon shows how notions of the investor changed, from the "autonomous and patriotic risk-taker" of the 1950s to the "prudent saver who had to be coaxed" into the stock market of the 1960s.[7] Condon devotes considerable attention to explaining why recommendations to increase the amount and detail of mandatory disclosure, demanded in many of the inquiries and reports, did not translate into clear, unambiguous statutory requirements in the 1966 *Act*.

Chapter four continues this focus on disclosure, examining how "ideas voiced and given substance at the political and legislative level"[8]

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[7] *Ibid.* at 97.

[8] *Ibid.* at 99.

came to shape OSC policy and decision making. Regulatory activities before and after the 1966 *Act* are contrasted. Four animating ideas—equity/fairness, investor protection, concern for industry interests, and self-regulation—are argued as pivotal, and each is traced first though its impact on OSC policy and then on OSC decisions. Condon concludes that the OSC received new languages, ideas, and powers from the public and legislative debates of the 1960s. From this emerged its new stated principle—the need to maintain public confidence through disclosure—operationalized through the concept of investor protection. Although the OSC gained expanded powers from this process, it was forced to "articulate [these] in the language of investor protection," which set limits on its expansion and scope. Here and elsewhere, Condon insists private interests were not victorious either, a result she attributes, in part, to the "multiplicity of contenders"[9] and their competing agendas.

The focus in chapters five and six shifts to the 1970s and the ideas, languages, and policy debates that culminated in the 1978 *Act*. Chapter five examines the relations between the OSC and one of its pivotal "interest constituencies," the Toronto Stock Exchange (TSE) particularly the arguments over whether legal or economic principles should form the basis of regulatory activity . The key empirical issue here was the debate over whether brokerage commission rates should be fixed or not. (The United States, through the Securities and Exchange Commission, freed rates in 1975; the OSC in 1976 decided to retain them, though it reversed this in 1982.) As in previous chapters, Condon sets out the chronology of events and the economic context of the debate before describing the position of the TSE, the OSC, and the ensuing debate. She shows how the languages of equity and reasonableness (languages of law) contrasted with languages of efficiency and competition (languages of economics). Although the TSE basically got the rate scheme it wanted, Condon resists an interest-theory interpretation, arguing that a "more subtle" position is necessary because the TSE's interests were "various, contradictory and the product of constant negotiation and change."[10] In addition, she sees the TSE as successful *only* because it incorporated arguments about equity into economic discourses on competition.

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[9] *Ibid.* at 137.

[10] *Ibid.* at 168.

Chapter six examines the struggle from 1966 to 1978 to update securities legislation and establish "a new regulatory blueprint."[11] Major ideas underpinning this debate included the need for already listed companies to file supplementary information whenever the company experienced significant change in circumstances, the obligations of issuers of securities (how much information they must provide), and the problem of exemptions (particularly the loopholes surrounding transfers in ownership and control, or take-over offers where only large shareholders were approached). Condon traces the compromises negotiated and the laws that emerged.

Securities lawyers came into their own at this time, developing into a "distinctive interest"[12] according to Condon, largely because the regulatory statutes passed were so complex, specialized, and technical that non-lawyers could not understand them. Disclosure continued its rise to pre-eminence, enshrining its position as a "symbol of responsible regulation"[13] and as a used and useful control strategy. On interests, Condon again insists that, because the various business interests did not speak with one voice (splits between small and controlling shareholders, for example, were ongoing), and because strategic interest groups such as the TSE won some battles but lost others, a simplistic interest theory position is untenable. Moreover, she points out that even the most powerful interests had to present their cases in language incorporating discourses of equality and participation. This forced them to focus on more than naked corporate interest (or, I would argue, to disguise it creatively). The book concludes with a cursory attempt to highlight the most significant developments in exchange regulation since 1978. (As Condon points out, to do this adequately would require another book.)

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[11] *Ibid.* at 219.

[12] *Ibid.* at 220.

[13] *Ibid.* at 221.

III. EVALUATION AND DISCUSSION

This is an interesting and important book. No one would claim it was a laugh-a-minute; the dry, technical, and abstract nature of the debates that form its core make that impossible. Considering that both legal and post-modern languages are used, and that neither is known for the clarity, brevity, or wit of its prose, the book is very well-written. And while the issues discussed are complex and the analysis is pursued on several levels simultaneously, the line of argument is generally easy to follow. Condon never sacrifices complexity, however, to achieve clarity.

Switching from style to substance, does the book make important contributions? It certainly does. On the methodological level, rather than mouth fashionable rhetoric about how regulation works (or, more to the point here, how it does not work to automatically further the agendas of interest groups), Condon *shows*, carefully and skillfully, piece by piece, how languages changed and how certain ideas and interpretations were repeated, developed, and adopted as law and practice, while other equally tenable interpretations disappeared. Thus the reader can see, often in painful detail, exactly how legal ideas are "remade in argument,"[14] how an initial "multiplicity of readings" come to coalesce around one dominant meaning. Because Condon's "close reading" is superb, her reconstruction of events is convincing. At the theoretical level the book makes the important point that ideas can limit interests, through language. In Condon's terms, language had "an effect on the positions that could be mobilized by interests."[15] In this arena, interests exerted influence, or lost it, through the discourse of equality and investor protection. In other arenas, different languages hold sway—victims' rights and the discourse of risk, for example, define the debate over the punishment of "criminals."

In one way, however, this close reading, this attention to the empirical detail found in policy papers and debates, is responsible for the book's (sole) weak spot. In looking at how regulation occurs, Condon forgets to ask why. Any position or interest that does not appear in the textual record is not present in the analysis. Thus the book never probes "deep structure." It never asks why certain ideas are not only not heard, but why they never even make it into the realm of plausible, and therefore debatable, alternatives. Condon is thus unable to interrogate the massive,

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[14] *Ibid.* at 12.

[15] *Ibid.* at 223.

unquestioned acceptance by all the major players, in government and business, that the job of the state is to ensure the wealth of private investors and the prosperity of corporations. Hence regulation, and the OSC itself, was shaped by the prerogatives of interest groups—but not at a level accessible through textual analysis. Theoretical concepts such as hegemony are necessary to understand and situate these forces, and probe the silences in the debate.

Because Condon does not probe the origins of interests, or trace them to structural roots—she claims there is no plausible explanation of origins; interests are "formed and shaped by the sets of ideas that are subject to interpretation," they are not "pre-legal entities"[16]—the book leaves the impression that all interests are equal. Therefore all ideas are equally likely to be generated, and have influence in policy debates. Indeed this is why she sees the process as "inherently unpredictable."[17] This makes it possible to equate the interests of a provincial regulatory agency in increasing its power with that of major corporate actors,[18] or to attribute the failure of small stockholders to have their interests heard to their absence from the policy table (their voices, she claims, had to be heard through the positions proclaimed by the OSC). Such arguments are not necessarily wrong, but they are incomplete. Condon is correct in pointing out that the process is complex—the specifics of the debate, the form the arguments will take, and the ways in which interests and ideas will coalesce to produce a particular policy outcome cannot be foreseen in advance. They are, as she says, "the result of a dynamic and open-ended negotiation."[19] But only certain outcomes can be thought, let alone negotiated. The overall shape of the process, the form the debate will take, the "prevailing discourses" that "shift,"[20] the ideas that will or will not have legs, the general arena within which compromises will be negotiated, is not nearly as fickle or whimsical as Condon would have us believe. A structurally informed interpretation would ask why the range of ideas under debate was so narrow, why equity among investors rather than equality among citizens drove the debates, why the need to make Canada safe for

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[16] *Ibid.* at 14.

[17] *Ibid.* at 233 *ff.*

[18] *Ibid.* at 97–98 *ff.*

[19] *Ibid.* at 223.

[20] *Ibid.* at 14.

corporations, and stock markets safe for speculators, was paramount, and how these facts limited and restricted the regulatory debate in ways that were, indeed, predictable.

This, then, is a book about stock market regulation that does not discuss class or privilege, one that minimizes the role and significance of economic interests. Because the only voices allowed into the debate came from a similar, privileged place, the only significant conflicts of interests appearing in the texts and debates were over the most appropriate means to an end—the end being the promotion and preservation of private market exchange. In this arena, corporate interests may appear as just another set of players, competing among themselves, making arguments through lawyers and stockbrokers. Their enormous national and international clout, their collective ability to destroy Canada's economy, create a run on its currency, double unemployment, and ruin the election chances of political parties, are all rendered invisible. This happens both because the language of law individualizes and depoliticizes debate, as many have noted, and because all the players in the game Condon is analyzing were "inside the tent." But to mistake invisibility for impotence is unwarranted. Stock markets, stock market regulation, and the legal structures that make exchange possible, predictable and orderly are absolutely central to capitalism. Billions of dollars, not to mention the careers, prestige, and life chances of the most powerful individuals and organizations in the world, are involved. The Ontario Government and OSC officials, even in the 1960s and 1970s, were well aware of these realities of economic life under capitalism. Corporate interests, therefore, cannot be accepted analytically as "just another interest group." Their hegemonic role in shaping ideas, their influence on how stock market regulation is conceptualized, and who it is for, are all the more important *because* they are invisible. These priorities were not cited in legislative debates or legal texts-they did not need to be-they were part of the ground rules that shaped the minds, agendas and priorities of the players. Condon's relentless, microscopic adherence to the empirical record, her meticulous and intelligent analysis of what is on the table, prevents her from seeing its shape, and from noting, let alone analyzing, its precipitous tilt to the right. Or, to continue the tent analogy, she is so busy documenting the activities of those inside the tent that the voices outside it are inaudible and the legions outside it, as well as the ground on which it is pitched, are invisible. Thus, Condon can note that some interests are excluded while others have privileged access to

regulatory discourse,[21] but there is simply no place she can incorporate such ideas into the analysis.

In sum, this is a well-written, well-argued book which amply repays the effort it demands of the reader. While its most immediate relevance may appear to be to the student of regulation, the book makes theoretical and methodological contributions well beyond this. It would be a better book, in my opinion, if it did not pretend economic structures had disappeared—it is possible to avoid the pitfalls of conspiratorial 1970s structural theory without ignoring them altogether, and it is particularly ironic to do this in a book on stock market regulation! Nevertheless, I learned much from this book and I suspect others will also.

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[21] *Ibid.* at 230.