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REGULATORY REFORM: AN INTRODUCTION*

By J. ROBERT S. PRICHARD**

In a narrow sense, the thirteen essays included in this two-part symposium were inspired by the release in 1981 of the Economic Council of Canada's report, *Reforming Regulation*.¹ In a broader sense, they were inspired by two almost contradictory observations concerning regulatory reform in Canada. On the one hand, during the past decade regulatory reform has been the focus of intensive academic and political study and debate. Indeed, apart from constitutional reform, it is difficult to identify a subject that has attracted so much attention. On the other hand, despite this attention, we observe an extraordinary absence of change. While there are notable exceptions, it is certainly fair to say that the decade has not been marked by major changes in the structure of regulation in Canada. Furthermore, this absence of political action is accompanied by a sense that, despite the intensity of study, some of the most fundamental issues remain largely untouched.

The essays that follow respond to these observations in two ways. First, they shed light on certain of the fundamental issues that have to date attracted less attention than is warranted by their central role in informed anal-

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* The essays in this symposium were written for a conference on regulatory reform held in October, 1981. The conference was organized by Dean Iacobucci and Professors Janisch, Prichard and Trebilcock of the Law and Economics Programme at the Faculty of Law, University of Toronto and financed by the Liberty Fund whose financial support is gratefully acknowledged. Subsequent to the conference, the essays were revised in light of the discussion at the conference and the suggestions of the organizing committee. The revised manuscripts were then submitted to the Osgoode Hall Law Journal for review and editing.

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¹ Economic Council of Canada, *Reforming Regulation* (Ottawa: Min. of Supply & Services, 1981).

ysis of regulatory reform. Second, both directly and indirectly, they suggest explanations for the relative absence of substantial change in the structure of Canadian regulation.

A brief review of the massive attention regulatory reform has received over the past decade will help to put the symposium essays in perspective.² The origins of recent academic study of government regulation lie in a series of studies commissioned by the Canadian Consumer Council between 1971 and 1974. These studies resulted in the release of the Council's *Report on the Consumer Interest in Regulatory Boards and Agencies*³ in 1973 and the Canadian Research Council's *Report on the Consumer Interest in Marketing Boards*⁴ in 1974. As their sponsors and titles suggest, these reports focused on consumer perspectives on regulation in an attempt to raise awareness about both the widespread impact of regulation on consumers and the possibility—indeed the likelihood—that consumers were systematically under-represented in the regulatory process.⁵

While consumer-oriented critiques of regulation have continued to occupy a prominent place in debates, the focus of concern shifted and broadened in 1976 with the publication of the federal government's working paper, *The Way Ahead: A Framework for Discussion*.⁶ Ironically, this paper originated from the imposition in 1975 of the most massive peace-time intervention in the Canadian economy, the Anti-Inflation Programme. However, the paper's thrust was distinctively market-oriented, stressing that "governments can become too pervasive and oppressive actors in the daily lives of Canadians" and that new policies were needed to serve as "effective alternatives to increasing expenditures and expanding bureaucracies."⁷ Subsequently, the federal government initiated a series of studies which resulted in the Socio-Economic Impact Analysis requirements applicable to all major new regulations in the health, safety and fairness fields.⁸ While these new requirements were restricted in their reach, their imposition reflected a new concern for the impact and costs of regulation and suggested that rigorous cost-benefit analysis could help to avoid needless wasteful regulation.

At the federal level, analysis and debate about regulatory reform received a major political boost in February, 1978. Spurred perhaps by corresponding developments in the United States, a meeting of First Ministers issued a communique which stated in part:

² This review is based in part on portions of Stanbury and Thompson, *The Prospects for Regulatory Reform in Canada: Political Models and the American Experience* (1982), 20 Osgoode Hall L.J. (forthcoming).

³ Ottawa: Can. Consumer Coun., mimeo, 1973.

⁴ Ottawa: Can. Research Coun., 1974.

⁵ The most prominent exposition of this thesis is Trebilcock, *Winners and Losers in the Modern Regulatory State: Must Consumers Always Lose?* (1975), 13 Osgoode Hall L.J. 619.

⁶ Ottawa: Privy Council Office, 1976.

⁷ *Id.* at 7.

⁸ Can., Treasury Board, *Administrative Policy Manual*, Chapter 490 (Ottawa: December, 1979), at 3-4.

The burden of government regulation on the private sector should be reduced and the burden of overlapping federal and provincial jurisdictions should be eliminated. Procedures will be instituted to review the effects of regulatory action on jobs and costs. First Ministers agreed that the whole matter of economic regulation at all levels of government should be referred to the Economic Council for recommendations for action, in consultation with the provinces and the private sector.⁹

The Economic Council of Canada subsequently received the "Regulation Reference" in July, 1978¹⁰ and embarked on a comprehensive study of regulation in Canada.

During the same period, various other organizations and governments sponsored research on regulation. The Law Reform Commission of Canada embarked on its administrative law project;¹¹ the Ontario Economic Council published *Government Regulation*;¹² the Institute for Research on Public Policy recovered from a slow start and produced a flurry of research volumes through its Regulation and Government Intervention Program;¹³ and the Royal Commission on Financial Management and Accountability (the Lambert Commission) included regulatory reform within the sweep of its recommendations.¹⁴

Activity further increased with the election of the Conservative government in 1979. The new government included a Minister of State (Treasury Board) whose primary responsibility included regulatory reform. The Minister in turn established the Office of the Co-ordinator, Regulatory Reform (OCRR). Despite the defeat of the Conservatives in 1980, this initiative within the Treasury Board continued and the OCRR has remained in place with a mandate for co-ordinating regulatory reform.

In May, 1980 the pace of activity increased again with the appointment of the Parliamentary Task Force on Regulatory Reform (the Peterson Committee) which was instructed "to examine and report upon government regulation in order to minimize the burden on the private sector, including: the objectives, effectiveness and economic impact and expanding scope of such regulations; alternative techniques for achieving regulatory objectives; [and] ways by which overlaps of federal and provincial jurisdictions may be eliminated."¹⁵ The Task Force report added its support to proposals for procedural and structural reform emanating from virtually all other sources of study.

The process of study culminated in the release of the Economic Coun-

⁹ Quoted in Economic Council of Canada, *Responsible Regulation* (Ottawa: Min. of Supply & Services, 1979), at xii.

¹⁰ Reproduced in *Responsible Regulation*, *id.* at 119ff.

¹¹ See Law Reform Commission of Canada, *Independent Administrative Agencies*, Working Paper No. 25 (Ottawa: n. pub., 1980).

¹² Toronto: n. pub., 1978.

¹³ See, e.g., Stanbury, ed., *Studies on Regulation in Canada* (Montreal: Inst. for Res. on Pub. Pol'y, 1978).

¹⁴ *Final Report* (Ottawa: Min. of Supply & Services, 1979).

¹⁵ *Can. H. of C. Deb.* May 23, 1980, at 1356.

cil's final report, *Reforming Regulation*,¹⁶ in June, 1981. The report was concerned primarily with substantive regulatory issues since its interim report, *Responsible Regulation*,¹⁷ had focused on procedural issues. The final report included recommendations about railroads, trucking, airlines, telecommunications, agricultural marketing boards, fisheries, environmental pollution, occupational health and safety, and occupational licensing. It offered a mass of advice, suggestions, and recommendations culled from the enormous body of research it had commissioned.

In comparison with this outpouring of research and study, the amount of reform actually accomplished during the same period seems modest indeed. To be fair, there have been changes. Perhaps the most notable are the introduction of socio-economic impact analysis of certain regulations; the modest liberalization of airline regulation; the relaxation of some of the anti-competitive entry regulations under the *Bank Act*;¹⁸ the modification of costs rules applying to proceedings before certain administrative tribunals; the introduction of some competitive aspects to telecommunications regulation; and the passage of freedom of information legislation. However, these changes are the exceptions, not the rule, as the primary forms of regulation appear to have survived a decade of vigorous study. This imbalance between study and change is even more striking when it is recognized that virtually all studies during the past decade have concluded that existing regulatory schemes and structures are badly flawed and that significant reforms are called for.

Many of the essays in this symposium suggest explanations for this imbalance while also offering ideas as to how it might be lessened. The essays are divided into four groups:

I. VALUES AND REGULATORY REFORM

1. Taxation, Regulation and Confiscation
2. Slouching Toward Chicago: Regulatory Reform as Revealed Religion
3. The Value Debate in Regulation
4. Efficiency, Liberty and Equality: Three Ethical Justifications for Regulatory Reform.

II. SCIENCE, TECHNOLOGY AND REGULATORY REFORM

1. Science and the Limits of Administrative Rule-Making: Lessons from the OSHA Cancer Policy
2. Regulation and Scientific Complexity: Decision Rules and Processes in the Occupational Health Arena
3. Information Technology and Public Policy: Regulatory Implications for Canada

¹⁶ *Supra* note 1.

¹⁷ *Supra* note 8.

¹⁸ R.S.C. 1970, c. B-1, as am. by S.C. 1980-81-82, c. 40.

III. POLITICS AND REGULATORY REFORM

1. Regulatory Reform and the Political Process
2. The Prospects for Regulatory Reform in Canada: Political Models and the American Experience.

IV. FEDERALISM AND REGULATORY REFORM

1. An Approach to the Regulation of Banking Institutions in a Federal State
2. Federalism and Telecommunications: Multiplication, Division and Sharing
3. Government Regulation of Business in a Federal State: Allocation of Power Under Deregulation.
4. Regulation and the Location of Jurisdictional Powers: The Fishery

The essays in the first group, concerned with values and regulatory reform, attempt to identify the major competing normative premises that might be invoked in evaluating the worth of existing or proposed regulatory policies. Since the issue posed is that of values and not merely economic efficiency, numerous disciplinary perspectives are necessary. The authors have backgrounds as broad as the subject itself. They include Epstein (law), Evans (economics), Salter (sociology), Quinn (law and economics), and Chapman (philosophy and economics). The essays also seek to demonstrate the implications for reform of adopting a particular normative objective. In doing so, they make clear that regulatory reform is far from a neutral objective; it is inseparable from more general value debates concerning the normative premises of political action and the appropriate role of the state.

A related theme is found in the two essays on politics and regulatory reform. Here the authors, three economists and a lawyer, attempt to analyze the relationships between regulatory reform and reform of the political process generally. Neither essay is optimistic about the prospects for regulatory reform and, in particular, deregulation within existing political structures, but both point the way toward possible avenues and margins of change.

The three essays on complex technology, science, and regulatory reform explore a different area, but one that is no less important for understanding the difficulty of accomplishing reforms. The essays explore the dilemmas associated with attempting to regulate areas characterized by complex scientific facts, great uncertainty, and rapidly evolving technology. Again, the nature of the issue demands multiple disciplinary perspectives and thus the authors are drawn from a broad range of backgrounds: Tuohy from political science and public administration, Jasanoff from technological studies, Janisch from law, and Irwin from economics. While no single or simple conclusion can be drawn from their work collectively, the essays suggest that many of the most demanding regulatory issues lie ahead of us and thus have not yet received the same scrutiny accorded more traditional areas of regulation in the past decade.

The final group of essays addresses the ubiquitous feature of all Cana-

dian policy-making, including regulation: federalism. Despite the repeated claims that the overlap of and conflicts between the regulatory programmes of different levels of governments are a primary source of inefficiency, the interrelationship of federalism and regulatory reform has barely been touched by the past decade of study.¹⁹ At the same time, it is widely recognized that any reform proposal that ignores the constraints of federalism is destined to be irrelevant in the current Canadian political dynamic. The essays in this group offer both theoretical approaches to the issue and applications to particular regulatory settings (banking, communications, and fisheries), again drawing on multiple disciplinary perspectives (economics, political science, and law).

In sum, the thirteen essays arranged around these four subjects—values, complex technology, politics, and federalism—offer insights from law, economics, political science, public administration, sociology, and philosophy on both the fundamental and the frontier issues of regulatory reform. While they offer no easy answers—indeed they argue that there are none—they do offer first-class analysis and stimulating reading. I commend them to you.

¹⁹ For a rewarding exception to this statement, see Schultz, *Federalism and the Regulatory Process* (Montreal: Inst. for Res. on Pub. Pol'y, 1979).