The Prospects for Regulatory Reform in Canada: Political Models and the American Experience

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THE PROSPECTS FOR REGULATORY REFORM IN CANADA: POLITICAL MODELS AND THE AMERICAN EXPERIENCE

By W.T. STANBURY* AND FRED THOMPSON**

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I. INTRODUCTION

A. Focus of the Paper

This paper examines the prospects for regulatory reform in Canada. The particular concern is with the prospects for the elimination or liberalization of direct regulation in such industries as telecommunications, airlines, trucking, and agriculture.1 In an earlier paper, it was estimated that about 29% of Canada's Gross Domestic Product (GDP) at factor cost is subject to some type of direct regulation by one or more levels of government.2

Within the field of direct regulation analysis was further narrowed to the role of the federal government as regulator. This was done for two reasons. First, it is easier to analyse the prospects of regulatory reform for one government than it is for 10 or 11. Second, in many directly regulated industries, the federal government has exclusive jurisdiction (for example, airlines) or is the leading regulatory authority (for example, telecommunications).3

In this paper, the term regulatory reform is used to refer to (i) outright deregulation of industry-specific controls over price or entry/output, or (ii) substantial liberalization of a regime of direct regulation that results in significantly greater reliance on competition.

B. Background

Although the process of regulatory reform has been underway for at least five years very few substantive or procedural changes have been achieved.4 With respect to procedural matters one can point to the federal Socio-Economic Impact Analysis requirement which came into effect in August 1978.5 As for substantive reform, the following changes come to mind: the liberalization of regulation of government policy toward the airlines;6 the new

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1 We follow the definition of direct or industry-specific regulation provided by the Economic Council of Canada [hereinafter ECC] in Responsible Regulation (Ottawa: Minister of Supply and Services Canada, 1979) at 44. Typically, direct regulation involves government control over one or more of the following: price (rate structure), rate of return, entry, exit, or output.


3 Telecommunications has been the subject of a jurisdictional dispute between the federal and provincial governments for some years now. The issues are discussed in the papers in telecommunications Regulation and the Constitution (Montreal: The Inst. for Research on Pub. Pol'y, 1982).

4 A far more detailed discussion is given in Stanbury and Thompson, Regulatory Reform in Canada (Montreal: The Inst. for Research on Pub. Pol'y, 1982).


6 See Reschenthaler and Stanbury, Canadian Airlines and the Visible Hand (manuscript in preparation for The Inst. for Research on Pub. Pol'y mimeo, 1982).
Bank Act effective in December 1980; and the federal Access to Information Act which was enacted, albeit in a weak form, in June 1982.

The great bulk of reform efforts has consisted of studies of the regulatory process, including regulatory agencies, and official inquiries initiated by the federal and provincial governments, notably Ontario. Studies of the regulatory process and of the efforts of various types of government regulation have been conducted for the Law Reform Commission, the Institute for Research on Public Policy, the Ontario Economic Council, the Economic Council of Canada and the Canadian Consumer Council. Official inquiries

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12 Ontario Economic Council (OEC), Government Regulation (Toronto: OEC, 1978). The volume included papers on markets for regulation (Trebilcock et al.), the Ontario Milk Marketing Board (Broadwith, Hughes and Assoc.), highway trucking regulation (Bonsor), and an inventory of Ontario’s agencies, boards, commissions and advisory bodies (Bresner et al.).


include the Ontario Professional Organizations Committee and Commission on Freedom of Information and Individual Privacy,\textsuperscript{15} the Regulation Reference of the Economic Council of Canada,\textsuperscript{16} the Parliamentary Task Force on Regulatory Reform (the Peterson Committee),\textsuperscript{17} and the Lambert Commission.\textsuperscript{18} All have offered considered and specific recommendations for improving procedures and process.

The various studies are largely in agreement as to what should be done: ex ante review of proposed regulations using cost-benefit analysis; earlier and more extensive consultation; creation of a regulatory agenda; periodic ex post review of existing regulatory programmes; the replacement of appeals to cabinet by government policy directives; clearer regulatory mandates in statutes and regulations; closer scrutiny of proposed new regulations and evaluation of existing ones by the legislature; and improved access and funding of "public interest groups". While critics such as Courville describe such proposals as "the regulation of regulation",\textsuperscript{19} the support for their adoption includes the Ontario Economic Council, the Economic Council of Canada, the Law Reform Commission, the Lambert Commission, the Peterson Committee and a number of academics who have written extensively on regulation. The point is that a respectable body of opinion is saying essentially the same thing.

The federal and provincial governments have done almost nothing to institutionalize regulatory reform. For a short time, British Columbia established a Ministry of Deregulation\textsuperscript{20} but it was eliminated after having been allowed to accomplish nothing of any substance while serving as a very useful political symbol. Ontario appointed an Associate Secretary to Cabinet to push and co-ordinate the cutting of red tape, better service to the public and deregulation. A few modest changes resulted.\textsuperscript{21} It might be noted that the support of the business community was underwhelming. In Nova Scotia a Task Force on Deregulation and Paperburden prepared two thoughtful and pragmatic reports.\textsuperscript{22} Nothing was done. The federal government created the Office of the

\textsuperscript{15}See The Report of the Professional Organizations Committee, supra note 9.
\textsuperscript{17}The Committee received 89 written submissions and heard more than 50 witnesses. See Special Committee on Regulatory Reform, Report (Ottawa: Min. of Supply and Services Can., 1981) at 45-50.
\textsuperscript{21}See Gordon, supra note 9.
\textsuperscript{22}Nova Scotia, Premier's Task Force on Deregulation and Paperburden, Interim Report (Halifax: n. pub., 1981) and Final Report (Halifax: n. pub., 1981). We might note that in New Brunswick where the Department of the Attorney General passed the word that all items of subordinate legislation would be carefully scrutinized by its officials, the volume of new regulations coming forward declined very noticeably.
Coordinator, Regulatory Reform (OCRR) in the fall of 1979. Two years later its total complement is fewer than a dozen. Moreover, OCRR's mandate was scheduled to expire in June 1982. It appears to have been extended to March 31, 1983.

The studies of direct regulation, while not as numerous as those of the regulatory process, also come to essentially the same conclusion; namely that economic efficiency would be improved by outright deregulation or by a much less restrictive regulatory regime. This conclusion applies to airlines, railroads—which are already far less stringently regulated, agricultural marketing boards—particularly the supply management type, telecommunications, trucking, and the local regulation of taxi cabs. Fortunately, almost every critic recognizes the political power of entrenched interests that now benefit from direct regulation and the need to offer a realistic plan of how to "get from here to there," for example, through gradualism, by paying compensation and by only partial deregulation.

While the amount of regulatory reform has been very small, and in some cases only tangentially related to mainstream efforts, there overhangs the political market a considerable body of official and academic literature recommending regulatory reform. In general, politicians profess immunity from such literature—unless, of course, it becomes expedient to recognize its utility in order to support a decision already made. Yet we are reminded of Keynes' remark that politicians may be captive of the ideas of an academic scribbler of some years past.

In what was perhaps the Economic Council's most vigorous stand on public policy in nearly a decade, it recently recommended the elimination or relaxation of direct regulation in industries such as telecommunications, airlines, taxis, trucking, and agriculture. (The Council's major recommendations concerning direct regulation are reproduced in Appendix A.) What is the probability that these recommendations will be accepted and enacted into law?

It is highly unlikely that the present Cabinet will seek to promote comprehensive regulatory reform or even the dismantling of direct regulation in a few industries. The Prime Minister's attentions are otherwise engaged (his

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23 The role of OCRR, to be held to "a very small operation," the present Minister (Donald Johnston) emphasized, was described as follows: "On the whole, specific proposals for change will come from my colleagues who are responsible, by statute, for various regulatory activities. My role will be to encourage ministers and their officials to consider regulatory change and to support them in their efforts." Mr. Johnston described the activities of OCRR as including the elimination of unused, ineffective and undesirable laws; the improvement of consultation with the private sector early in the process of regulation; consideration of extending the application of SEIA; application of the Controller-General's programme evaluation work to regulatory programmes; exploration of greater use of the consensus process to develop regulatory standards; and coordination of the implementation of the Cabinet's decision on records retention by business. See "Notes for an Address by the Hon. Donald J. Johnston, President of the Treasury Board of Canada to the Advisory Committee of the Canadian Manufacturers' Association," Toronto, Jan. 22, 1981 at 4, 5-9.

24 See Reforming Regulation 1981, supra note 13. For an analysis of the reaction to this report, see Stanbury and Thompson, supra note 4.
retirement, national unity, North-South dialogue and now the weakness of the economy despite the Budgets of November 1981 and June 1982). Many, if not most, Liberal Cabinet Ministers appear to believe that more government is better than less.\textsuperscript{25} Further, this belief is very likely shared by a majority of their constituents. Consequently, it is hardly surprising that the major thrust of the Trudeau government is in the direction of greater, more comprehensive intervention in the economy, not less.\textsuperscript{26} It seems to us that even pragmatic, worthwhile proposals such as those offered by the Economic Council (Appendix A) that run counter to this trend are unlikely to meet with a positive response from the current government.\textsuperscript{27} We would, of course, be very pleased to be wrong.

C. \textit{Organization of the Paper}

The main body of the paper is divided into two main parts. Section II reviews interest group theory as it has been applied to regulation. It is found that the deregulation, in varying degrees, of airlines, natural gas, telecommunications, trucking, railroads and banking in the United States would not be predicted by such theory. We then offer an alternative explanation of American deregulation based on three exogenous and three endogenous factors.

Section III examines the prospects for regulatory reform in Canada. The same three exogenous factors, that is, condition of the economy, technological change and the power of ideas are reviewed. The first two are found to be similar to those in the United States. We then assess the consequences of three different endogenous factors in the Canadian case. The legislative process, the failure of party politics and the importance of the bureaucracy all militate against the dismantling of direct regulation in Canada.

In Section IV we briefly draw our conclusions and offer two recommendations.

\textsuperscript{25} Even the allegedly "watered-down" federal government document: Can., \textit{Economic Development for Canada in the 1980s} (Ottawa: Nov., 1981.).

\textsuperscript{26} One has only to recall the following examples in the past few years:

(i) the creation of Petro-Canada in 1975;
(ii) the establishment of the National Energy Program in October 1980;
(iii) the assistance given to Chrysler Canada and Massey Ferguson;
(iv) efforts by the federal government to gain policy control of the Canada Development Corporation in 1981;
(v) the creation of an Office of Industrial and Regional Benefits in response to the \textit{Report of Major Projects Task Force} (the Blair-Carr report, 1981);
(vi) creation of Canadian Industrial Renewal Board to coordinate the federal government's industrial adjustment programmes in the clothing, textile and footwear sectors;
(vii) the Kirby task force (Jan., 1982) to recommend what actions the federal government should take regarding the severely depressed Atlantic fisheries;
(viii) Agricultural Minister Eugene Whelan's proposal to create a new Crown corporation, Canagrex, to help increase exports of agricultural products (Jan., 1982); and
(ix) the six and five per cent wage and price guidelines in the June 1982 budget.
II. INTEREST GROUP THEORY AND AMERICAN REGULATORY REFORM

There is now a large set of prescriptions in the Canadian literature on regulatory reform waiting to be applied. The remaining obstacles to change are largely political. Hence, the initial question "What are the prospects for regulatory reform in Canada?" may be restated as "What is the likelihood that the political obstacles to change will be overcome?" or, perhaps, "How can these obstacles be overcome?"

To answer these questions, Canadians tend to turn instinctively to the United States. The regulatory issues are similar; so too are many of the political obstacles to change. Canadians ought, therefore, to be able to learn from American experience. Furthermore, the United States has produced a prolific literature on political and administrative processes that may be of use in answering questions of political feasibility. In making use of it, however, one must be careful to take account of the differences in political institutions and culture between the United States and Canada.

Nevertheless, it is submitted that many of the scholars who have expounded the politics of regulatory reform in Canada, ourselves included, have relied far too uncritically on American political theory, especially interest group theory, and too little on American political experience. In making this observation, interest group theory is not rejected, nor even American interest group theory. Interest groups play an undeniable role in policy formulation and implementation in Canada. But it is an error to treat interest group politics as if it were the only politics. It is not. In many cases it is not even the dominant politics.

A. Interest Group Politics and Regulation

According to the interest group theory of politics, the role of government in general, and of regulation in particular, has always been and must inevitably

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be that of arbiter among competing economic claimants.\textsuperscript{31} Hence, regulatory policies are simply a "fulcrum upon which contending interests seek to exercise leverage in their pursuit of wealth."\textsuperscript{32} Policy outcomes may be explained by "a theory of the optimum size of political coalition . . ."\textsuperscript{33} In this theory, the demand for regulation is a function of the benefits to be derived from the use of government power to increase the wealth of group members and the cost of organization.\textsuperscript{34} The supply of regulation is a function of the level of opposition to the group's demands and the rules that govern collective decision-making. According to Peltzman, for example:

The essential commodity being transacted in the political market is a transfer of wealth, with constituents on the demand side and their political representatives on the supply side. Viewed in this way, the markets here, as elsewhere, will distribute more of the good to those whose effective demand is highest.\textsuperscript{35}

In other words, regulatory outcomes are predictable consequences of personal tastes and capabilities working through the political and administrative processes by which policy is formulated.\textsuperscript{36} Furthermore, this view implies that regulatory initiatives that have survived the keen competition for votes must represent relatively efficient means of redistributing resources.\textsuperscript{37} Consequently, carried to its logical extreme, this view implies that, under existing political


\textsuperscript{32} Peltzman, \textit{Toward a More General Theory of Regulation} (1976), 19 J.L. \& Econ. 211 at 212.

\textsuperscript{33} \textit{Id.}


\textsuperscript{35} Peltzman, \textit{supra} note 32, at 212.

\textsuperscript{36} Becker, \textit{Comment} [on Peltzman] (1976), 19 J.L. \& Econ. 245.

\textsuperscript{37} \textit{Id.} at 247. See also Becker, \textit{supra} note 34.
rules—and given information and transaction costs—the existing pattern of regulation is “optimal”. 38

Optimal is, of course, not used here in the normative sense of that word. Not at least if one is willing to admit the possibility of political market failures 39 analogous to economic market failures. 40 In this case, “political market failure” occurs because efficiency, as opposed to income redistribution, is a public good in the technical sense. 41 In Canada, this perspective is most forcefully elaborated by Trebilcock, et al. 42 and by Hartle, 43 who clearly imply that the principal purpose of regulation is the redistribution of income to specific groups. 44 They further imply that the gains from regulation will tend to go to a small fraction of the community, that most others will be excluded from these gains, and that the gains will come at the expense of

38 To be fair, three points should be made. First, this conclusion is Becker’s (id.) and is not necessarily shared by his peers. Furthermore, it is intended as a statement of positive, not normative economics. Second, Peltzman insists that the American political process will seldom, if ever, produce policies benefitting only producers (or consumers). He has recently explained that the necessary conditions for legislative action in this area will usually comprehend “a potential market failure that makes it credible for a coalition of producers and consumers . . . to seek regulation.” His point is that regulation can and very likely will be made to serve a producer interest at the same time it corrects a potential market failure, thereby enlarging the supporting coalition to minimum winning size and enhancing the political survival value of the regulatory institutions (Peltzman, “Current Developments in the Economics of Regulation,” in Gary Fromm, ed., Studies in Public Regulation (Cambridge, Mass.: M.I.T. Press, 1981) at 375). Third, this model is not merely about regulation. Stigler, for example, has proposed “that it will be found useful . . . to explain tariffs, controls over energy industries, minimum wage laws, environmental controls, OSHA, and the structure of the tax system” (“Comment on Joskow and Noll,” in Fromm, id. at 74). Indeed, viewed as a partial, positive theory of legislative decision making, the “economic theory of regulation” clearly improves upon traditional interest group theory and its power to explain political outcomes. It is an improvement in rigour, clarity and subtlety. We freely grant its potential utility—in its proper sphere.


40 For example, natural monopolies, externalities, common property resources, imperfect information/uncertainty, “destructive” competition. Wolf would include certain income distributions as a form of market failure. See, supra note 39, at 110-12.


42 Trebilcock et al., supra note 39.


44 This view was commonly associated with Stigler, supra note 34, at 3 who has said “as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.” The ECC’s Interim Report, supra note 1, at 49-52, notes that regulation has been used for such distributive objectives as constraining monopoly profits, preventing “unjust” price discrimination, reducing the impact of economic change and to engage in cross-subsidization. More generally, see Mitnick, The Political Economy of Regulation (New York: Columbia U. Press, 1980) at ch. III.
economic efficiency. In turn, these arguments rest on the belief that special (that is, narrowly focused) economic interests are at an advantage in dealing with the free rider problem that militates against interest group formation. They also rest on the assumption that only the losers or potential losers in competitive private market transactions are likely to seek redress in the political arena.

It is not sufficient to refute such claims as incompatible with the facts of political conflict, which by its very nature involves a broader segment of the public in the determination of outcomes and not merely that portion of the public having a direct or immediate interest in them. This is, in part, because exclusive special interests can triumph by disguising themselves in such a way as to obtain the support of the broader public.

Those who would deny the political feasibility of regulatory reform, imply that, in this instance, income redistribution has succeeded in its disguise. In particular, they hold that such purported benefits of regulation as the promotion of a sense of national identity, among others are successful masquerades by which special interests are held to be in "the public interest". Furthermore, they hold that the growth of regulatory activities in Canada has occurred because this masquerade has reached new levels of sophistication and effectiveness.

The importance of interest groups in determining the prospects for regulatory reform has also been emphasized in the press. Columnist Gwyn, for example, commenting on the Economic Council’s recommendations, said:

The ideal of regulatory reform, therefore, comes acropper upon the hard practicality that in politics, the particular interest always defeats the general interest. Consumers, of whom there are about 24 million, are numerous all right. But they are unorganized and their interests are diffuse.

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46 We need hardly stress the utility of cloaking oneself in the flag, likening one’s interests to motherhood and, in the Canadian context, speaking of “maintaining national unity while recognizing our rich diversity” and at all times exhibiting exemplary “fairness”. On the power of political symbolism see Edelman, The Symbolic Uses of Politics (Urbana, Ill.: U. of Illinois Press, 1967) and Hartle, supra note 43, at ch. 4.

47 See, e.g., Migué in Nationalistic Policies in Canada: An Economic Approach (Montreal: C.D. Howe Research Inst. 1979) at 71 who states that: “Because of the imperfections of [the representative government’s] operation the political process is often dominated by a series of minorities who exploit the population as a whole to their advantage.” On the economics of interest group politics generally, see Migué, at 56-61.

48 See Migué, id. On the other hand, Ostry, Government Intervention: Canada and the United States Compared (1980), 1 Pol’y Options 30, offers a sympathetic view of intervention for cultural objectives. She describes Canada as a “marginal society” and Canadians as “traditionally . . . willing to accept a more active public role than might be agreeable to their southern neighbours.”
Regulated industries or professions... are few in numbers, but are superbly organized and their interest, which is self-interest, is precise and is potent.49

A noted financial columnist argued that “deregulation is doomed from the start” because the airlines, truckers, taxi owners, professional groups and farmers will lobby hard against it, and consumers, those who stand to gain, “seem incapable of putting up a fight for anything.” (There are, of course, technical reasons such as the “free rider” problem why this is the case.) With respect to agricultural supply management schemes he noted that “whoever has the economics [of quotas] right, the farm federation has the politics right...”50

B. Anomalies

In applying conventional interest group theory to American regulatory policy, one is struck by some rather serious anomalies. Many of the regulatory reforms that have taken place in the United States are inconsistent with the predictions of the interest group model. Air freight has been completely deregulated.51 Airline prices and routes have been almost totally decontrolled.52 The legalized fixing of brokers' commissions in the securities industry has been abolished.53 Federal legislation permitting state ‘fair trade’ (resale price maintenance) laws has been repealed.54 Controls on broadcasting and cable television have been relaxed.55 So too, controls on the well-head price and the allocation of natural gas and oil have been mitigated or eliminated altogether.56 Trucking and railroad regulations have been liberalized, although the final result remains uncertain.57 Entry conditions into the telecommunications industry have been made relatively easy and other changes have been made to facilitate competition.58 Weighed against the overall scope and domain of government regulation of economic activity in the United

49 “Report headed for the shelf”, The Citizen (Ottawa), June 16, 1981 at 6, col. 3. A more comprehensive analysis of interest group reactions to the Council’s recommendations is given in Stanbury and Thompson, supra note 4 at ch. 4.
50 “It seems deregulation’s headed down the tubes”, The Citizen (Ottawa), June 12, 1981 at 13, col. 1.
53 See the Securities Act Amendments of 1975 15 USC, 1975 § 78; enacted June 4, 1975. It abolished fixed commission rates and minimum commissions. The results are described in Eisenach and Miller, Price Competition on the NYSE (1981), 5 Regulation 16.
54 See the Consumer Goods Pricing Act of 1975, 15 USC § 1 effectively repealed the Miller-Tydings Act of 1937 and the McGuire Act of 1952. The new legislation said that enactment of laws by any state which permitted producers to set minimum prices for brand name products at the retail level would be in violation of federal antitrust laws. (Note—in Canada resale price maintenance (and refusal to deal) was made illegal in December 1951, per the Combines Investigation Act, R.S.C. 1927 c.26 as amended by R.S. 1951 c. 30.
States, these reforms may not be overwhelming. But weighed against the predictions of the interest group theory of regulation they are very surprising.\[^{59}\]


\[^{59}\]This point is made with great clarity by Weingast, *Regulation, Reregulation, and Deregulation: the Political Foundations of Agency Clientele Relationships* (1981), 44 Law & Contemp. Prob. 147; and Levine, *Revisionism Revised? Airline Deregulation and the Public Interest* (1981), 44 Law & Contemp. Prob. 179. One might also argue that efforts to deregulate natural gas failed, despite the fact that distributional consequences of deregulation would have tended to favor the few, while the costs would have been borne by the many. This outcome may also be interpreted as contrary to the predictions of what we have called the interest group model of politics. Examples, consistent with interest group politics, are provided by Levine, \[^{10}\] at 180. See also Ackerman and Hassler, *Clean Coal/Dirty Air* (New Haven, Conn.: Yale U. Press, 1981).
In drawing attention to these anomalies, it is not the authors' intention to discredit interest group theory, but merely to indicate that it has definite limits. Clearly, American interest group theory is a powerful tool of political analysis. It is powerful precisely because the everyday politics of Congress is interest group politics. Indeed, the general utility of the interest group theory of congressional politics is so palpable that students of the legislative process seldom ask why it is that legislators are so responsive to interest group demands.

C. Party Politics, Efficiency and Macro-economic Performance

Yet, on reflection, it should be equally clear that the responsiveness of legislators to interest group demands is somewhat problematic. Interest group theorists generally begin with the assumption that legislators are vote maximizers (that is, they behave as if the first rule of politics were to get elected and the second were to be re-elected). Interest group politics, however, is a selective process. Perhaps 90 percent of the electorate is outside of the interest group system. It should be stressed that interest groups are concerned with issues and policies. Yet most voters pay no attention to, have no knowledge of, and are unaware of the consequences of particular policies. Consequently, at

60 One-variable theories of the world are attractive in their simplicity, but often limited in their range of applicability under closer inspection.

61 Ladd argues that “At present the U.S. is doing a simply dreadful job of responding to special-interest pressures. A structure is in place that guarantees that narrow factional claims regularly receive preferred treatments over broad public interests.” This is the result of weak political parties, direct legislator-voter contact via television, the large staffs provided to individual legislators, and the “proliferation of the number of largely autonomous subcommittees so that virtually every member of the majority could have his own show.” The result is an iron triangle composed of the interest group, the subcommittee and the relevant federal agency. Ladd concludes that the remedy is to strengthen political parties that can present “reasonably coherent programs” to the electorate. See Ladd, “How to Tame the Special-Interest Groups”, Fortune, 20 Oct. 1980 at 66-68, 72, 76, 80. But see Weaver, Regulation, social policy and class conflict (1978), 50 The Pub. Interest 45, for a different view of the “iron triangle” associated with regulation.


63 The two classic studies of the American voter [Berelson, Lazarsfeld and McPhee, Voting: A Study of Opinion Formation in a Presidential Campaign (Chicago: Chicago U. Press, 1954); and Campbell et al., The American Voter (New York: Wiley, 1960)] agree on very little else. On this point, however, there is no debate. Consider the following example of the level of voter knowledge. Opinion Research Corporation, on behalf of LTV Corporation, polled 1003 people between May 14-17, 1981, and asked “How much have you heard or read about the size and condition of the United States merchant shipping fleet?” The results: 3% had heard or read “a great deal,” 13% “a fair amount,” 45% “a little,” 38% “nothing at all,” and 1% “don’t know.” Direct federal subsidies to the industry amount to about $400 million per year. Of the 61% who know “a great deal, a fair amount or a little,” 62% favoured federal subsidies and 72% thought the defence of the country was in some way dependent on the merchant fleet. See “Should America continue to subsidize its merchant fleet? Two top economists disagree”, Business Week 17 Aug. 1981 at 66-67.
the macro level, national elections—congressional and presidential—appear to amount to referenda on the management of the economy. The inference one might draw from this is that the self-interested legislator ought to be concerned with the effective management of the economy in general and the efficient performance of government in particular.

That American legislators are quite tolerant of inefficiency in government, on the one hand, and responsive to interest group demands, on the other, is a well-documented fact. Kramer argued that:

If the performance of the incumbent party is 'satisfactory' according to some simple standard, the voter votes to retain the incumbent party in office to enable it to continue its present policies; while if the incumbent's performance is not 'satisfactory', the voter votes against the incumbent . . . (at 134).

More correctly, Kramer's hypothesis is that election are referenda on the economic performance of the governing party, which implies that voter expectations about future performance are positively correlated with recent performance. Niskanen, "Economic and Fiscal Effects on the Popular Vote for the President," in Rae and Elsmeler, eds., Public Policy and Public Choice (Los Angeles: Sage, 1979) 93, has provided a more rigorous formulation of the incumbency hypothesis in which voting is characterized as utility-maximizing behaviour under binary-choice conditions and the individual voter has a utility function of the following form:

\[ U = a(Y - tX)^b X^c \]

in which "Y" is total real family income, "X" is total real federal expenditures, and "t" is the family share of the present (and future) taxes necessary to finance current federal expenditures. He will vote for the incumbent, if:

\[ \frac{U}{U - 1} \geq R \]

where "R" is a satisfaction threshold. As Niskanen explains, these two equations "define a boundary of Y and X values in the election year that are just sufficient to induce him to vote for the candidate of the incumbent party. Other terms in these boundary functions include values of Y and X in some prior year, . . . and the value of R." (at 97-99).

These and other studies (see Lepper, Voting Behavior and Aggregate Policy Targets (1974), 18 Pub. Choice 67 and Tuft, Determinants of the Outcomes of Midterm Congressional Elections (1975), 69 Amer. Pol. Sci. Rev. 812) consistently show that the most powerful predictor of electoral success is the change in real per capita net national income. These results are not now seriously questioned. However, the interpretation of these results is still being debated. Stiger, General Economic Conditions and National Elections (1973), 63 Amer. Econ. Rev. 160, rejects the macro-economic explanation of political behaviour, and asserts that "the economic basis for political affiliation must be sought in the area of income redistribution," (at 167). However, he has not presented empirical support for this assertion. Furthermore, Niskanen tested Stiger's proposition and found no evidence of a distributional effect on the popular vote for the President. Indeed, Niskanen suggests that standard cost-benefit analysis ought to be a sufficient guide for most decisions made by a president seeking re-election and that it should be, "sufficient to explain most decisions of the Presidency, except when other groups, such as Congress, on which the President is dependent are concerned about [distributional] effects" (at 110).

Mann "Elections and Change in Congress," in Mann and Ornstein, eds., The New Congress (Washington, D.C.: American Enterprise Inst., 1981) 32. The author rejects the notion of an economically rational voter, but, citing Jacobson and Kernell in sup-
other, is largely explained by the system of geographic representation. Furthermore, the consequences of geographic representation are reflected in and reinforced by the internal organization and decision-making rules of Congress.

Geographic representation results in an orientation toward the specific interests of constituents. One factor is that particular types of economic activity are geographically concentrated rather than evenly diffused throughout the nation. Since activities on behalf of efficiency generally produce benefits that are widely diffused, the direct benefit accruing to the individual legislator concerning such activities tends to be small. That is, the individual legislator cannot hope to influence the welfare of his constituents in any significant way by improving the performance of government and the economy in general. What that person can do is secure benefits for identifiable groups of constituents, reward supporters, and trade favours with lobbyists. Not surprisingly, that is for the most part what is done by rational legislators. Indeed, inefficiency in government offers the enterprising legislator extensive opportunities to provide highly valued services to influential constituents, by cutting through “red tape” or obtaining relief from niggling, arbitrary rules or regulations.

In addition, there are certain characteristics of the American legislative process that reinforce the legislators’ propensity to respond to interest group demands. First, party discipline is practically non-existent. On most issues the norm in Congress is every man (or woman) for himself. Second, legislative

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65 See, e.g., Arnold, “The Local Roots of Domestic Policy,” in Mann and Ornstein, eds., supra note 64, at 250 and Fenno, Congressmen in Committees (Boston: Little, Brown, 1973); Fiorina, Representatives, Roll Calls, and Constituencies (Lexington, Mass.: Lexington Books, 1974); Fiorina, Congress: Keystone of the Washington Establishment (New Haven: Yale U. Press, 1977); and Weingast, supra note 59, especially 150-52. Weingast argues that: Committees and subcommittees dominate the policy-making process. These institutions limit the political choice possibilities, and thus play a crucial role in determining the political allocation of resources. . . . [T]he committee system divides the legislative responsibilities into separate policy jurisdictions. Within its policy area, a committee and its members wield disproportionate influence over policy. This includes a number of special powers such as control over proposals for new legislation and agency policy oversight. . . . committee membership is primarily a self-selection mechanism. Congressmen typically gain influence over policy of direct interest to their district. Because of their differential influence over policy in a given area, these members exploit their greater influence over the fate of relevant interest groups in return for electoral support (at 150).

decision-making is highly decentralized. The everyday business of Congress takes place in the more than 200 committees and subcommittees, where log-rolling and vote-trading is highly visible to attentive publics. This means that the individual legislator can take personal credit for grants made to identifiable groups by his committee or sub-committee(s). At the same time, it is equally difficult for legislators to avoid individual responsibility for denying grants to special interests. Furthermore, as Shepsle has demonstrated, there is a nearly perfect match between legislators' preferences and committee assignments; their preferences presumably reflect the special interests of their constituents. Specialization in Congress, therefore, tends to promote special interest legislation. Third, with some obvious exceptions, ideological commitments are either weak or widely shared by members of Congress. This means that most issues are viewed as negotiable.

Hence, the granting of favours to special interests, in exchange for political support, is a characteristic of most legislation. The value of the favours conferred by regulation, however, is unusually high. If so, this may be attributable to the haste with which so much of the regulatory legislation was enacted. This is a particular characteristic of the new social regulation.

In the case of direct regulation, it is due to the large amount of discretion usually granted the regulators. It may also be due to the fact that, where grants are provided to special interests through regulation, Congress cannot easily or gracefully withdraw them simply by not appropriating funds to support everything promised in the authorizing legislation.


68 E.g., it has been suggested that long-serving Congressman Van Deerlin was defeated in 1980 by the extra funding provided to his Republican opponent by broadcasting interests who were unhappy with the fact that Van Deerlin allowed his broadcasting deregulation bill out of his subcommittee.


71 In Canada, e.g., Brinkman, Farm Incomes in Canada (Ottawa: ECC and Inst. for Research on Pub. Pol'y, 1981), who estimates the value of agricultural products quoted sold through supply management schemes to be about $3 billion in 1980.

In any case, congressional politics is usually interest group politics and interest group politics is inimical to regulatory reform. The Carter Administration's efforts on behalf of deregulation and regulatory reform, however, should remind us that the President and the bureaucracy may act on behalf of the unorganizable many. Furthermore, if the President leads, Congress may follow. Indeed, when the President is undertaking initiatives that will increase real output per capita, it is nearly always in the interest of a majority of Congress to follow. Of course, Congress must be persuaded that the President is, in fact, doing so.

The point is that Presidential politics is party politics. Ultimately, the perceived performance of government is what party politics is all about. To the extent that the President is interested in re-election and in the success of his party, and to the extent that he is oriented toward national elections, he ought to be interested in promoting allocative efficiency through government action. As Schattschneider observed some time ago, interest group politics serves us well only when it is subordinated to and disciplined by the broader politics of the party. It is not and ought not to be treated as if it were the only, or even the most important, politics. Unfortunately, this point is frequently lost on those who are caught up in the day-to-day (interest group) politics of "business as usual".

The observation that the President has an interest in promoting efficiency or that executive leadership may overcome interest group politics does not, however, explain why it is that the Carter Administration promoted deregulation so zealously. Nor does it explain why it was, in several instances, ultimately successful. And these questions must be answered before we can say whether the American experience with deregulation is germane to the question of the political feasibility of regulatory reform in Canada.

D. Explaining American Deregulation

How then does one explain the deregulatory successes in the United States. It appears that the necessary and sufficient conditions for the success of the Carter Administration's reform efforts include three factors exogenous to the political process and three endogenous to it. Based upon Kahn's survey of the lessons learned from deregulation, the three exogenous factors are the condition of the economy, technological change, and the resurgence of pro-market ideas.

73 See Jones, "Congress and the Presidency," in Mann and Ornstein, eds., supra note 64, at 223.
74 The reported behaviour of Richard Nixon's Committee for the Re-election of the President in 1976 suggests these were not coincident.
1. Exogenous Factors

a) Condition of the Economy

The dominant, intractible economic problem of recent years has been "stagflation", that is, inflation combined with slow growth. Regrettably, economists do not agree on how best to fight inflation. Indeed, their recommendations are frequently in direct conflict. Yet because the problem is so salient, government is compelled to take some action or at least be seen to be taking some action. And even if all economists are not persuaded that regulatory reform will reduce inflation, they generally agree that such reform will make most people better off. Hence, the American government has chosen to fight inflation by fighting regulation. As Kahn observes:

It was obviously not a coincidence that the deregulations of the last few years reversed legislation in 1933, 1934, 1935, and 1938—the Banking, Communications, Motor Carrier and Civil Aviation Acts. Both the governing statutes and the regulatory philosophy shaping these industries, more or less consistently, for the following forty-five years were forged during, and by, the Great Depression. Nor was it a mere coincidence that these deregulations were effected in an era of stagflation.

Kahn's point is that, as a result of stagflation, we have rediscovered the economics of scarcity. In turn, this has promoted "the application of more rigorous tests and more efficient techniques to regulatory interventions, as well as subjecting regulations that suppress competition to much more careful scrutiny."

b) Technological Change

According to Kahn, the second exogenous factor that must be considered if we are to understand the changing climate for regulatory reform is the role of technology. Of course, the first response to technological change is to try to contain it by extending the scope and coverage of existing regulation. (McKie, called this propensity the "tar baby" effect.) But technological change may not be contained indefinitely without subjecting a substantial proportion of the economy to direct government control.

81 Kahn, supra note 77.
82 Id. See also Thompson, supra note 2, and Thompson, "More and Better Analysis? The Case of Health, Safety and Environmental Regulation," in Stanbury, ed., supra note 2, at 239.
The power of technology to erode regulatory boundaries is, perhaps, best illustrated by the communications industry, where it has rendered obsolete the distinctions drawn by legislators between written and voice communications, cable and satellite, video and telephone, data processing and communicators.84

c) The Power of Ideas

According to Kahn the third factor deserving our attention is a change in the American conception of what constitutes "good public policy". Obviously, in Kahn's view, the condition of the economy and governing economic philosophies interact very closely. Yet, the recent rediscovery of the virtues of the market, certainly deserves special mention.85 Were not a good many American decision-makers predisposed toward competitive market mechanisms, recognition of the drawbacks and problems associated with regulation of business might not have resulted in deregulation. Instead, government decision-makers might have decided that outright public ownership was the best alternative to present regulations. Indeed, the argument that public ownership is the only system in which the incompatibility between profit and 'public-values' is resolved is not unheard in the United States.86 It simply is not taken very seriously.

2. Endogenous Conditions

The factors mentioned so far may promote a predisposition to regulatory reform. They do not guarantee it, however. Otherwise the Carter Administration's successes would have far outweighed its failures in this area. They did not. Recognition that the Carter Administration had both successes and


85 One has only to think of the increasing currency of the growing output of the American Enterprise Inst., the influence of George Gilder, the Hoover Inst., the Heritage Foundation and the whole body of neo-conservative writing. See Where Do We Go From Here? Directions from Stage Right a symposium with Wolfe et al., in (1981), 3 Public Opinion 45; Kristol, Confessions of a True, Self-Confessed—Perhaps the Only—'Neoconservative' (1979), 2 Public Opinion 50.

failures leads one to ask what factors account for these different outcomes. Here, three factors endogenous to the political process appear to be particularly significant: presidential leadership, the attention of Congress, and compelling evidence that regulatory reform is in the public interest.

a) Presidential Leadership

Someone must initiate the process of regulatory reform, and Congress cannot and will not. On the other hand, we have also claimed the President has an interest in promoting economic efficiency—and good macro-economic performance—in general. Under appropriate circumstances, that interest implies a particular interest in regulatory reform.

It is not sufficient, however, for the President to announce that he is in favour of regulatory reform, to order the bureaucracy to regulate better, more smartly, or to shrink in size. Nor is it enough to "twist a few arms", or "reason together", on behalf of regulatory reform legislation. Effective leadership must ultimately be aimed at the lawmakers in Congress. The President must adopt a plan of attack, including a list of targets and their priority, and a plan of persuasion. So far as the Carter Administration was successful, its success reflects a sequential attack on a limited number of targets, for example, airline deregulation and then trucking. Its failures reflect, to a degree,

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88 See especially Weingast, supra note 59. The President proposes; the Congress disposes. It has been argued that Jimmy Carter sought a direct link with the American people. See Polsby, "Interest Groups and the Presidency: Trends in Political Intermediation in America" in Burnham and Weinburg, eds., American Politics and Public Policy (Cambridge, Mass.: MIT Press, 1978) 41. Polsby states at 44:

The main vehicle by which presidents bypass interest groups and reach the people "directly" is the medium of television, supplemented by the major wire services, news magazines, and other national news publications. Ample experience, however, as well as the formal findings of research, has shown that these news media are anything but neutral transmission belts. Rather, obeying their own organizational imperatives, craft norms, fashions, and accepted practices, the news media select and transform events. Politicians gain and lose from these processes of selection and transformation.

89 Wildavsky and Knott, "Jimmy Carter's Theory of Governing," in Burnham and Weinberg, eds., id. 55 at 60 provide evidence for the conclusion that:

Part of Carter's political theory, then, is to change everything at once. Comprehensive change enables one both to identify the public interest by considering the merits of opposing claims and to serve that interest by making opponents fight on all fronts simultaneously, thus diluting their forces while concentrating one's own. The bigger the change, the greater the public attention—and the more likely it becomes that the public interest will prevail over private interests.
an inability to concentrate the resources of the Presidency on a limited number of high priority issues or to maintain a consistent definition of what he wanted done.90

One of the main lessons to be learned from the successes and failures of the Carter Administration is that appointments to regulatory bodies matter a great deal. If the President appoints advocates of special interests—business, labour, consumers, the environment, to name a few—to senior policy-making positions in regulatory agencies, the agency in question will protect those interests. Economists, on the other hand, are advocates of efficiency. Consequently, where the President wants efficiency, he should probably appoint economists91—they are the "shock troops" with which to fight the battles of deregulation.

Close scrutiny of the role played by Kahn92 and Bailey93 in achieving airline deregulation, or Gaskins94 in promoting greater competition in the surface freight industry, leads us to conclude that their major accomplishments lay in stimulating Congress to take legislative action.95

b) Getting The Attention of Congress

In the case of both airline and trucking deregulation a substantial number of legislators and particularly legislative leaders became sufficiently interested in understanding the issue to pay attention to the arguments made on both

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90 In the case of natural gas and deregulation, President Carter apparently changed his mind as to what he wanted done. See Malbin, supra note 56.

91 Note that this is not because economists are wiser or smarter than other people. Quite the contrary, economists are valuable in this context precisely because they have an intense, often irrational commitment to market mechanisms and to efficiency. Their faith may not be naive, but it is certainly touching.


94 See Graymer and Thompson, "Conclusion," in Graymer and Thompson eds., supra note 72.

95 We should emphasize that the body of research on airline regulation (including the work of Caves, Jordan, Levine, Keeler, Miller and Douglas—see note 100, infra) prior to the Kennedy Committee hearings in 1975 was most helpful in convincing Congress to pass the Airline Deregulation Act of 1978, 49 USC § 1301. Such research provided much useful ammunition for the advocates of reform. A useful history of the process of reform can be found in Behrman, supra note 93 at 91. See also Ellion, Deregulation: The U.S. Airline Experience (Ottawa: unpublished paper on the Regulation Reference, EEC, 1980); and Bailey, supra note 93.
sides. Where the issue remained relegated to a handful of committee members and their staff (for example, the 1977 Clean Air Act Amendments), legislative outcomes were dominated by business as usual, interest group politics. As noted above, this meant that substantive reform was very unlikely. The results were as expected (that is, special interest legislation favouring the Eastern producers of dirty coal).

Given that it is a scarce and valuable commodity, how did Kahn and his people at the Civil Aeronautics Board (CAB), and later Gaskins at the Interstate Commerce Commission (ICC), get the attention of Congress? They started by making the deregulation issue politically visible. They did this by promoting competition (price and entry) to the extent permitted by the most liberal interpretation of their legislative charter. The statutes governing direct regulation usually permit a large amount of discretion. In the case of the CAB, all fare proposals, within a "zone of reasonableness", were automatically accepted. In addition, airlines were freely granted access to new routes and given the authority to drop existing ones. This not only captured the attention of the press, but also indicated to potential supporters the kind of magnitude of benefits that would flow from airline deregulation. By interesting the press and, perhaps, by over-reaching his statutory authority, thereby challenging Congress, Kahn and the CAB, and later Gaskins and the ICC, captured the attention of the legislators.

See Levine, supra note 59 at 193-94:
In the executive and administrative contexts, Robson and the Ford administration began the process of educating Congress and the public to theills produced by airline regulation and to the potential benefits of deregulation. Senator Kennedy gave the process major impetus in the Senate through the 1975 hearings before his subcommittee on Administrative Practice and Procedure. Certainly the industry opposed deregulation, as did many members of Congress and the public, and this opposition was reflected in the timidity of the CAB's early efforts as well as in the restrained tone of early legislative proposals. But at least some of the industry and public opposition, and much of the congressional skepticism, stemmed from uncertainty about the effects of dismantling a system that had produced at least minimally satisfactory results for forty years. . . . [T]he demonstrable price and service benefits of California and Texas intrastate experiments with competition were indispensable to the task of persuading skeptics that the apparently satisfactory CAB-regulated system, in fact, was not functioning in the public interest.

But the telling fact for our purposes is that this initially doubtful congressional faction (including Senator Cannon, the powerful chairman of both the Aviation Subcommittee and the full Commerce Committee) ultimately helped control the legislative process in favour of deregulation, which by then was perceived to be in the public interest. And it did so in the face of diehard opposition by factions (including the industry) whose positions were undermined by the ultimate transparency of the degree to which their positions were motivated by purely private, rather than "public interest" considerations of gain and loss. And, on the administrative side, even conceding that Chairman Kahn and his chief staff aides had relatively little to lose by the diminution of CAB power, these changes were supported by an initially skeptical but ultimately convinced career staff and by members of the Board who were prepared to see their own power diminished for the benefit of the public.

See Ackerman and Hassler, supra note 59.

See, e.g., the Transcontinental Low-Fare Route Proceeding; Chicago-Midway Low-Fare Route Proceeding and the Oakland Service Case. These are described in Behrman, supra note 93 and Bailey, supra note 93.
c) **Compelling Evidence that Reform was in the Public Interest**

Having obtained the attention of Congress, it was then necessary for Kahn and Gaskins to persuade Congress to deregulate. How did they do it? Here the story of airline deregulation is particularly instructive.

First, staff economists in the administration and "on the hill" were able, on the basis of a substantial body of empirical research, to show the adverse effects of regulation and to characterize the consequences of deregulation in such a way as to strengthen the political coalition in its favour. Supporters of airline deregulation, for example, repeatedly explained that price and entry regulation in the domestic airline industry had raised consumer prices well above what they would have been had price and entry been determined by the market and as Breyer has observed, "lower prices" are far more arresting than "more efficient use of aircraft." Furthermore, this explanation was supported by highly plausible evidence. According to Wilson:

> If there was a single fact that was of crucial significance in making persuasive the argument that price and entry regulation had adverse effects on consumers, it was the comparison of rates charged by unregulated airlines (for example, those linking San Francisco and Los Angeles) with those charged by regulated interstate airlines (for example, those connecting Boston and Washington, D.C.). Even so it was necessary to look carefully for other factors besides regulation that might have affected prices (there were some, but they were not decisive).

The apparent value of this further research should also be stressed. It was needed to explain both the original justification for regulating the industry and the objective it came to serve; to understand the position of the major actors associated with industry and the effects deregulation would have on their positions, that is, to identify winners and losers; and, because "the detailed investigation [was] itself necessary, to convince others that the proponents of reform [were] serious, thorough, and [had] made their case." This last point reflects one of the key tenets of the rhetoric of persuasion.

The fact is that people are seldom persuaded by others they persuade themselves. But before they can persuade themselves, they must first hear


102 Breyer, *supra* note 100 at 4:

103 Eastern Airlines has recently taken out full page ads in *Business Week* (cf. 22 June 1981) in which its president Frank Borman states, "When Congress wanted to deregulate the airlines, I wasn’t sure Eastern could survive. I was wrong. Because I underestimated the people of Eastern . . . There may be more competition, but we’re a much better airline than before."
the argument. An argument is much more likely to be heard if it is presented by a serious, competent, considerate, and reliable source. Often the best way to be heard is to listen. The best way to discover what it will take to persuade someone is to ask. That the supporters of airline deregulation were willing and able to pursue each new challenge as it was raised showed that they were listening. In time this meant that they were to be taken seriously and that their arguments were eventually found to be credible.

Last, it was necessary for the advocates of reform to do more than show that regulation was inefficient. Proponents of deregulation had to develop a plan that appeared “practical and fair to allow a transition from the regulated regime to the new system.”

In contrast, one would observe that reform of the new social regulations has not attracted the attention of the press or of Congress. It is probably true that increased efficiency and regulation in general, are not, in the abstract, very scintillating issues. Perhaps proponents of incentive mechanisms ought to pay more attention to characterizing the consequences of reform in

104 Breyer, supra note 101, at 7. Potential “losers” (small cities who lost service and employees who lost their jobs) were provided with a “safety net” in the form of a direct subsidy programme. To date, the amounts expended have been far less than anticipated.

attention-grabbing terms, for example, saving the American auto industry. More important is the fact that, unlike Kahn or Gaskins, policy-makers in the social regulatory agencies have not, so far, sought by their actions to direct the attention of Congress to issues of substantive reform.

Even if they could get the attention of Congress, however, it is not obvious that the proponents of incentive mechanisms are prepared to persuade Congress to follow their advice. To a considerable degree the kind of hard, credible evidence available for use by the advocates of airline deregulation, for example, is not available to those who wish to redirect the new social regulation. To cite examples of effective alternatives to existing regulatory regimes, the proponents of incentive mechanisms must draw on examples from outside the United States; from Great Britain or Scandinavia, as critics of the Food and Drug Administration do; from Canada, as supporters of accident taxes can; or from Europe, as supporters of effluent fees must. Unfortunately, these examples are by the very fact of their foreignness unfamiliar and suspect to Americans. Finally, supporters of alternatives to current methods of regulation are not now able to put forward detailed, practical implementation plans. Faced with the costs of change and uncertain benefits, most people, including legislators, prefer to stay with the devil they know.


107 See, e.g., the useful discussion by Bardach, “Reason, Responsibility, and the New Social Regulation,” in Burnham and Weinberg, eds., supra note 88, at 364. A valuable review of the Reagan administration’s actions on the regulatory reform front is contained in Hennigan, “Politics of Regulatory Analysis,” paper delivered at the Annual Meeting of the American Political Sci. Assoc., New York (September 4, 1981). One of President Reagan’s first official acts was to establish the Task Force on Regulatory Relief chaired by the Vice President. He also issued Executive Order 12291 on February 17, 1981 designed to centralize review of all major regulations in the Executive Office of the President. See the analysis in (1981), 5 Regulation 15.


111 These words are taken from the Communiqué of the First Ministers following their conference on the economy Feb. 15-16, 1978. See Responsible Regulation, supra note 1 at xii.
III. THE PROSPECTS FOR REGULATORY REFORM IN CANADA

In this section of the paper we propose to apply Kahn's model of regulatory reform to Canada. In doing so the important differences in governmental structure, values, and history between Canada and the United States are taken into account.

A. *Exogenous Factors*

1. **Condition of the Economy**

   In our view, the concerns expressed in Canada about "the burden of government regulation on the private sector . . . and the burden of overlapping federal and provincial jurisdictions . . . [in terms of its effects] on jobs and costs . . ." is not simply an expression of concern for the size and scope or the growth of government. Rather it seems to be a response to "stagflation" in the Canadian economy. When the rate of real growth per capita declines and the conventional levers of monetary and fiscal policy have not been effective, the search for the "villains" and potential remedies is widened. Therefore, we interpret the Canadian expressions of concern about regulation by politicians as an effort (albeit largely symbolic) to economize on government in the face of poor macro-economic performance.

   We would emphasize that neither the absolute level of macro performance, nor even Canada's performance compared to other Western industrialized nations, is the central question. What matters is performance in relation to the expectations held by the public. To a considerable degree, politicians, particularly those at the federal level, have created high expectations. It is far more than a matter of "a chicken in every pot". Wants have become needs; subsequently elevated to rights. The expectation of a continually rising standard of living (in terms of real consumption) has become almost universal.

   This expectation was not met in the late 1970s in Canada. In 1978, 1979 and 1980 real wages fell by 3.0, 1.6 and 1.1% respectively. Indeed, over the entire period 1974-80 real wages increased at an average rate of only 1.0%. The

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112 The ECC points out that between 1971 and 1975 expenditures by all levels of government amounted to 45.1% of GNP. In the next five year period (1976-80) the fraction increased to 49.5%. See *Eighteenth Annual Review 1981: Room for Manoeuvre* (Ottawa: Min. of Supply and Services Can., 1981) at 22. "Tax expenditures" have also grown enormously so that by 1979 the value of federal personal income tax expenditure benefits, $13.8 billion, is only slightly smaller than the amount actually collected, $17.0 billion. (Department of Finance, *Analysis of Federal Tax Expenditures for Individuals* (Ottawa: n. pub., 1981), Table 1). Vining and Botterell indicate that 48% of the 233 provincial corporations in existence in 1980 were created since 1970 and 76% were established since 1960. The assets of such corporations amount to $62.3 billion as compared to $50.7 billion for federal Crown corporations. (Vining and Botterell, "An Overview of the Origins, Growth, Size, and Functions of Provincial Crown Corporations," in Prichard, ed., *Crown Corporations in Canada: The Calculus of Instrument Choice* (Toronto: Butterworths, forthcoming).

113 A very useful brief discussion of Canada's economic performance in the 1970's can be found in the *Eighteenth Annual Review, supra* note 113, at ch. 1. Recall also that the federal Budget of November 1981 was withdrawn and replaced by another one in June 1982. At that time the federal deficit for 1982/83 was estimated to be $19.6 billion, up from $10 billion seven months earlier.
Consumer Price Index (CPI) over the same period increased at a rate of 9.3% per year.¹¹⁴ Canada’s unemployment rate between 1973 and 1980 averaged 7.0%. Even in the United Kingdom, no paragon of macro-economic management, the comparable rate was 5.0%. We must note, however, that Canada’s performance on the inflation dimension over the same period (9.3%) was far better than that of the United Kingdom (15.1%) and Italy (16.0%) and only slightly worse than that of the United States (9.1%). Between 1974 and 1980 the “Discomfort Index” in Canada (the sum of the unemployment rate and the CPI) fell below 16% in only one year (1976) and in 1978 and 1980 it was 17.3% and 17.7% respectively.

Between 1973 and 1980 real GNP grew at 3.3% per year—a rate exceeded only by Japan in the six countries compared. However, much of this growth was directly attributable to the high rate of growth of the labour force. Total employment increased at an average annual rate of 3.1% as compared with -0.4% in Germany for example. Canadian productivity was the lowest among the seven countries compared. It was 0.2% as compared with 3.1% in Germany, 2.7% in France and even 2.2% in Italy. We note the fact that in 1974, 1975, 1979 and 1980 Canadian productivity was negative.

2. Technological Change

At the present time, it appears that technological change as a “deregulator” is most applicable in the telecommunications (including broadcasting) sector. Technological change may ultimately render futile attempts by the Canadian Radio-Television and Telecommunications Commission to regulate Canadian exposure to non-Canadian content.¹¹⁵ In the era of broadcasting satellite transmissions and cheap, individual home signal recovery, it will be as difficult to preserve national boundaries as it is to preserve artifical boundaries between kinds of communications.¹¹⁶

In a country in which a wide variety of types of protectionism flourishes it is heartening to see a major regulated enterprise advocate a reduction in the scope of regulation. B.C. Tel has recently proposed to the CRTC that:

In the case of multi-line business equipment... all activities beyond the demarcation point of the local switched telephone network are appropriately attributable to and the responsibility of the owner or competitive supplier of each specific installation. In the case of the single-line business and residential equipment... in a setting of a new monopoly boundary the ultimate degree of competition should be the same as multi-line equipment.¹¹⁷

¹¹⁴ These data and those cited in the following three paragraphs were obtained from Department of Finance, The Current Economic Situation and Prospects for the Canadian Economy in the Short and Medium Term (Ottawa, n. pub., 1981) at 4, 5, 16, 18.

¹¹⁵ See, for example, Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, Telecommunications and Canada (Ottawa: Min. of Supply and Services Can., 1979) and Committee on Extension of Service to Northern and Remote Communities, The 1980s: A Decade of Diversity, Broadcasting, Satellites and Pay-T. V. (Ottawa: CRTC, Min. of Supply and Services Can., 1980).

¹¹⁶ See note 84, supra.

¹¹⁷ “Argument of British Columbia Telephone Company” in proceedings before the CRTC with respect to the attachment of subscriber-provided terminal equipment, filed Jan. 18, 1982, mimeo at 6-7.
B.C. Tel has argued that with terminal interconnection, "price regulation must be limited to the monopoly services" and that the telephone companies must be allowed to compete under the same rules applicable to all competitors.\textsuperscript{118} The company also argues that with the silicon chip and more than a decade of experience in the United States interconnecting companies will be able to offer innovation and competition with the telephone companies. In particular, B.C. Tel is concerned that its competitors will have competitive flexibility while it will be subject to regulatory constraints in the provision of non-monopoly services.\textsuperscript{119}

A kind of "demonstration effect" spillover may also operate where the United States deregulates and Canada does not. For example, whether the Canada Transport Commission deregulates commercial air travel or not, Air Canada and CP Air must respond to competitive pressure from American airlines.\textsuperscript{120} It will be extremely difficult for Air Canada to maintain a fare of $106.00 between Toronto and New York when Peoples Express Airlines charges $U.S. 23.00, off peak or $U.S. 35.00 during the week to fly between Buffalo and New York or a fare of $302.00 between Vancouver and New York when Continental’s ASAP fare from Seattle is $178.00.\textsuperscript{121}

There is no doubt that the process of deregulating the United States’ airlines put substantial pressure on Canadian regulators, carriers and government policy-makers.\textsuperscript{122} The demonstrated benefits of deregulation in the United States gave ammunition to the advocates of less regulation in Canada.

The liberalization of trucking and railway regulations in the United States has led industry observers to believe that there will be a new environment for transborder transportation. American trucks will seek to enter the Canadian market and offer intermodal truck-rail service. Canadian shippers could use trucks to get their goods to American border cities and then establish contract agreements with American railroads to ship their goods east or west. At the same time, efficient Canadian trucking firms will seek to enter the United States market, for example, by eliminating American "bridging" carriers and offering through service from major Canadian cities to major American centres.\textsuperscript{123}

3. The Power of Ideas

There are important differences between the attitudes of Canadians and Americans toward the role of government in the economy. Presthus, who has

\textsuperscript{118} "Evidence-in-Chief of British Columbia Telephone Company" submitted to the CRTC in the Bell Canada—Attachment of Subscriber-Provided Terminal Equipment, June 5, 1981, mimeo at 66.

\textsuperscript{119} Id. at 67, 68.

\textsuperscript{120} The importance of transborder operations to Canadian carriers is described in Jordan, \textit{Performance of Regulated Canadian Airlines in Domestic and Transborder Operations}\ (a study prepared for the Bureau of Competition Policy, Department of Consumer and Corporate Affairs, July 1981, mimeo).


\textsuperscript{122} See Reschenthaler and Stanbury, \textit{supra} note 6.

studied the political culture of several nations, describes elements of Canada’s attitude in the following terms: “a pragmatic appreciation of government’s role in the economy; an underlying corporatist theory of societal life; traditional and deferential patterns of authority; and a quasi-participative political culture insofar as the ordinary citizen is concerned.”\textsuperscript{124} Presthus defines “pragmatic” as “an essentially utilitarian conception of government which provides a justification for its use to support economic development and to cushion the shocks of the marketplace.”\textsuperscript{125} He stresses that in English Canada, a “radical spirit of \textit{laissez faire} or fear of government which might have been assumed to characterize . . . most of those engaged in commerce and industry, rarely seems to have taken hold . . .”.\textsuperscript{126} In contrast, the United States’ political culture emphasizes individualism, the institutionalized dispersion of power—including that held by governments, pluralism, and participation in public life.

Contrast between the recent directions of Canadian and American policies is provided by a Harris survey released late in March 1981 and by Canadian pollster Goldfarb’s recent soundings of public opinion. Harris found strong support for the Reagan Administration’s proposition that Americans want less government. Harris found a significant shift in the responses to the statement, “the best government is the government that governs least.”\textsuperscript{127}

<table>
<thead>
<tr>
<th>Year</th>
<th>Agree</th>
<th>Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>59%</td>
<td>35%</td>
</tr>
<tr>
<td>1976</td>
<td>38%</td>
<td>48%</td>
</tr>
<tr>
<td>1973</td>
<td>32%</td>
<td>58%</td>
</tr>
</tbody>
</table>

Martin Goldfarb’s survey of Canadian public opinion has revealed that most people believe government is too big and too powerful. There is significant sensitivity to expenditures. “They think taxes are too high . . .”.\textsuperscript{128} At the same time, Goldfarb emphasizes, “It is naive to think, however, that citizens will do with less service. They do not want less medicare, less education, less police protection, or slower service from External Affairs. They only want less service for others, but not for them. If restraint ends up meaning less service to the middle class, citizens will tilt and reject.”\textsuperscript{129} So while Americans say they want to cut back on government in a number of dimensions, Canadians want to change its direction, says Goldfarb. They want government spending brought under control but they also want “more government involvement as a means of providing a better life.” In summary, “the reality is that all economic regions of the country and all political perspectives endorse big government.”\textsuperscript{130} People want better government, to deal with real problems.

\textsuperscript{124} Presthus, \textit{Elite Accommodation in Canadian Politics} (Toronto: Macmillan, 1973) at 20.
\textsuperscript{125} Id. at 21.
\textsuperscript{126} Id.
\textsuperscript{127} As quoted in Keene, \textit{Snapshots} (1981), 4 Pub. Opinion 58 at 60.
\textsuperscript{129} Id. at 70.
\textsuperscript{130} Id. at 71.
Even Canadian conservatives strive to distinguish themselves from American neo-conservatism. For example, a senior advisor to the premier of Ontario has recently argued that:

conservatism should stand not just for freedom but also for responsibility—personal and economic—for the rest of society. In our nation, the Tory mainstream embraces the pragmatic vision of the first prime minister we ever had, Sir John A. Macdonald and the humanity and social compassion of the best prime minister we never had in the Hon. Robert Stanfield. It has resisted pressures to limit its breadth or be reduced to a mere carbon copy of the American Conservative stream, which is sporadically both overstocked and overfished.\(^1\)

He went on to say that he had little use for U.S. neo-conservatism as expounded by “theologians and ideologues” such as Kristol and Friedman. “Those who intellectualize greed and selfishness as self-proclaimed prophets of the new conservatism in the States, do the best of American conservatism and the traditions which span both Lincoln and Eisenhower a great disservice.”\(^2\)

Despite economic adversity Canadians have not swung to the political right. In fact, a survey of 3000 Canadians in the fall of 1981 indicates that “the Canadian people have a deep commitment to liberal [human rights] policies.”\(^3\) Ninety percent agreed with a woman’s right to equal pay for equal work; 69 percent supported affirmative action hiring programs for women and minorities “to make up for their lack of opportunities in the past”; 97 percent agreed (11 percent with some qualifications) to legislation to protect the rights of the disabled, while almost two-thirds agreed there should be protection of homosexuals from discrimination in employment.\(^4\)

If by regulatory reform it is meant that the existing amount of government action by way of regulation is to be reduced or even that the rate of growth of regulatory initiatives is to be reduced, it seems clear that such a change would be, in historical terms, uncharacteristic of Canadians. Compared to Americans, for example, Canadians have more frequently looked to their governments to take a strong role in economic development through the use of subsidies, taxes, and the direct provision of goods and services,\(^5\) to maintain a sense of cultural or national identity in the face of fundamental economic forces that contradict such desires,\(^6\) to restrict market forces


\(^{132}\) Id.


\(^{134}\) At the same time, almost 60% of the sample wanted to keep film censorship boards and 62% supported retention of the War Measures Act R.S.C. 1970 c. W-2 invoked in 1970 against the alleged threat of the FLQ in Quebec. (Id. at A-18, col. 4).


[A] complex network of tariffs, subsidies and other forms of economic control . . . have made the Canadian economy a highly artificial one. . . . A high level of state
(domestic and international) so as to provide a less risky environment for Canadian firms and individuals, and to achieve consensus and co-ordination of contending private or public sector efforts in order to avoid “waste and duplication”.

Regulatory reform would appear to require that Canadians increase their belief in the efficacy of competitive market forces as opposed to the ability of government officials (regulators) to plan, co-ordinate, and control the actions of both privately and publicly-owned enterprises; accept the fact that certain market failures are more costly (in social terms) to correct by government regulation than they are to tolerate; and recognize that much regulation is aimed at protecting and enhancing the position of producer groups at the expense of unorganized, diffuse consumer groups. In historical terms, such a shift in belief seems unlikely.

Moreover, compared to Americans, Canadians tend to be less enamoured of the putative benefits of competition. “There does not exist in Canada any fundamental belief in the virtues of competition as a method of allocating scarce resources . . . our more structured, authoritarian society takes business power for granted.” Hardin, for example, argues that Canada is a monopoly culture:

In Canada, in key sectors of the economy, monopoly has meant efficiency and market competition has meant pernicious waste. Monopoly is the economic model. Monopoly suits us, and always has. We have an aptitude for monopoly, in a world where monopoly, with a dynamic beyond competition, is coming into its own as a creative entrepreneurial form. Yet being in thrall to the colonial ideology, we force unnatural and contrived competition on ourselves. We cannot accept our monopoly culture because others won’t accept it for us.

In other words, this author perceives Canadians’ anti-competitive instincts as a virtue. Deregulating industries in which prices and entry are regulated implies a reliance on competition as a method of social control that is uncharacteristic of Canadians.

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138 Here we should note some of the failures of the regulatory reformers in the Carter administration. They range from the inability to place certain kinds of reforms on the Presidential agenda—almost the full menu of proposals in the area of the new social regulation fall into this category—to embarrassment in Congress and deregulation of the well-head price of natural gas and oil. See Jones, “Congress and the Presidency,” in Mann and Ornstein, supra note 64, 223 at 240.

139 Stanbury, Business Interests and the Reform of Canadian Competition Policy, 1971-75 (Toronto: Carswell/Methuen, 1977) at 45.

B. Endogenous Factors

1. The Legislative Process

If our understanding of the factors exogenous to the Canadian political processes leads to a somewhat pessimistic evaluation of the prospects for deregulation, might not a consideration of factors endogenous to it modify this assessment? Certainly the structure of the Canadian legislative process bears no relationship to that of the United States. Legislative decision-making in Canada is highly centralized and party discipline is almost complete. As Pross explains:

"The Canadian political system is based only to a limited degree on a pluralistic, competitive approach to decision making. . . . The fact that the executive operates within a cabinet and parliamentary system of government means that rivalries between legislators cannot be readily exploited."

In Canada, the Cabinet dominates every aspect of the policy process. Cabinet has the power to set it in motion and to control its outcome. Cabinet ministers, either collectively or individually, have the power to set goals and to order the bureaucracy to design policies to achieve those goals. And, with a majority government, the Prime Minister dominates Cabinet.

The traditional view holds that the virtually unchecked political authority of Cabinet permits it to undertake bold, risky initiatives on behalf of the public interest. This view assigns a minor role to interest groups in the legislative process. Cabinet may listen to group representatives, because political leaders are concerned about the consequences of their actions. Interest group support is a proxy for programme effectiveness. For example, if the unions support policy X, it is usually safe for political decision makers to assume that X will benefit labour. Hence, the traditional view holds that Cabinet attends to special interests primarily because it wishes to avoid causing harm to minority interests as it seeks to promote the interest of the many. Certainly this view of the Canadian political process would reject the notion that Cabinet would cater to the special interests of one or more backbenchers (or even Ministers) and their constituents to the detriment of the public interest and, therefore, the party's majority.

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142 The ECC in its Interim Report on the Regulation Reference, supra note 1, at 57 notes: "In practice, Canadians periodically elect a 'collective king', i.e., a cabinet that has enormous power." The Council, therefore, was "not too sanguine about the linchpin in the concept of accountability in a system of responsible government: ultimate accountability to the people."

One problem with the traditional view is that it is fundamentally inconsistent with the fact that, until very recently, regulatory policy outcomes in both the United States and Canada were remarkably similar. Not only did both countries regulate the same things in much the same way at the same levels of government, the rent creating consequences of their regulatory activities were practically identical—inefficiency combined with redistribution in most cases from the many to the few. In other words, regulatory outcomes in both countries reflected the pattern of bias characteristic of interest group politics. Such similar outcomes must have been produced by similar legislative and policy processes.

2. The Failure of Party Politics

In the face of the evident differences between the constitutional structures and political systems of the two countries, the similarity of regulatory outcomes may seem an almost absurd conclusion. It should seem less so, however, if it is understood that in the United States, legislative responsiveness to interest group demands is primarily explained by what might be called incumbancy maximization. That is, every legislator is, in the words of the title of a recent popular psychology book, "looking out for number one". Similar outcomes would likely occur in Canada if the government party were to accept incumbancy maximization as a collective goal. The hard question is why would a responsible Cabinet government choose to maximize incumbancy rather than the number of seats it obtains?

To this question we can only offer a tentative answer. A Liberal federal government (a Conservative provincial government in Ontario or Alberta, etc.) might choose to maximize incumbancy, but a Conservative government would not. A Liberal Cabinet might not maximize seats because it does not have to. The reliability of Liberal party support in Quebec (reinforced by Cabinet's power to determine the frequency and timing of elections, combined with the ability to spend large sums of public money on regular, confidential polling) means that the Liberal majority is largely insulated from the requirements of competitive party politics. Perhaps, therefore, incumbancy maximization is collectively pursued at least in part as a result of the absence of vigorous, effective interparty competition.

Note that in a competitive market, management must seek to maximize profit if the firm is to survive. By analogy, the governing party in a competitive political market must seek to maximize its majority (seats) in order to stay in

144 See Stanbury and Thompson, supra note 4.
145 It is hard not to conclude that federally Canada is a "democratic, one-party state." The Liberals have held office for almost 40 of the past 46 years. (We might note that in Ontario the same is true for the Conservative Party.) For some of the reasons this is the case, see, for example, Whitaker, The Government Party: Organizing and Financing the Liberal Party of Canada, 1930-58. (U. of Toronto Press, 1977); Perlin, The Tory Syndrome: Leadership Politics in the Progressive Conservative Party (Montreal: McGill-Queens Press, 1980); Simpson, Discipline of Power: the Conservative Interlude and the Liberal Restoration (Toronto: Personal Library, 1980).
146 See the discussion in Gwynn, The Northern Magus (Toronto: PaperJacks, 1981), chs. 18, 19.
(gain) power. In Canada federal political power is highly centralized and party discipline is almost complete. By analogy, a legislator in a competitive political market must seek to maximize votes if he is to be re-elected. Under competitive conditions, economic or political actors have little or no discretion—they must respond appropriately to market-determined conditions (that is, demands and costs). Under monopoly, on the other hand, a firm's management has a degree of latitude or discretion that does not exist in a competitive market. The monopoly firm may use its discretion to restrict production, increase price, and earn excess profits. It may choose to be inefficient and absorb potential excess profits (monopoly rent) in this fashion, or it may be benign and establish a price and output combination similar to that which would occur under competitive conditions.

Similarly, Cabinet may use its monopoly power to restrict the supply of new legislation to the minimum required for re-election and utilize its "monopoly rent" (if any) to satisfy the personal preferences of those who control the governing party. Alternatively, Cabinet may use its discretion to "fritter away" its monopoly rent by adopting inefficient policies or by giving to interest groups more than is necessary to ensure their support. Finally, Cabinet may behave as a "benign monopolist" and offer the same volume (and types) of new legislation as would be offered under competitive conditions.

To say that the federal Liberal Cabinet is relatively exempt from the con-
straints that would be imposed upon it by interparty competition does not, of course, necessarily imply that it will employ its discretion to maximize incumbancy or cater to pressure group demands. It has considerable discretion within certain limits to do pretty much whatever it wants. What it will do depends on the preferences of its members, their political and bargaining skills, the kind of leadership exercised by the Prime Minister and so forth.

We have reason to believe, that Liberal MPs reject seat maximization as unethical, dangerous to the party influential, and unfair to the party faithful.

According to Lovink, who based his conclusions upon a careful survey of Liberal MPs in the 28th Parliament, most are strongly committed to their own and each others re-election.\footnote{Lovink, Is Canadian Politics Too Competitive? (1973), 6 Canadian Journal of Political Science 341 as reprinted in Richard Schultz et al., eds., The Canadian Political Process (3rd ed. Toronto: Holt, Rinehart & Winston of Canada, 1979) at 145-75. See also Thompson, "Legislative Committees, Workload, Party Discipline, and Incumbancy," unpublished manuscript, Graduate Program in Public Policy and Administration, Columbia University, July 1982.} They would almost certainly reject the idea that a backbencher should be sacrificed for the good of the party. Furthermore, Lovink demonstrates that the Liberals have been fairly successful in maximizing incumbancy. Turnover rates in Parliament have tended to fall over the past two or three decades and now approximate those of the United States Congress!\footnote{151}

Apparently, the Liberal Cabinet is, in fact, concerned about maximizing incumbancy. Since maximizing incumbancy leads to responsiveness to special interests, and because interest group legislation is biased, this may explain why Parliament often behaves like Congress, at least, in part, and with respect to regulatory policies and practices. The federal Liberals need not be so responsive to interest groups. A Liberal Cabinet, could choose to be less responsive. Perhaps, after more pressing matters are dealt with or under different leadership, it will.

Ironically, ceteris paribus, incumbancy maximization ultimately increases the probability that the Liberals will lose power. The Conservatives, as a result of their more tenuous position, might be more responsive to the requirements of party politics than their predecessors. This means they would be more concerned about seat maximization and, perhaps, this would favour the prospects for deregulation.

In the meantime, it seems that, in the absence of strong support from the Prime Minister or from a strong Cabinet Minister with a major regulatory role\footnote{152} who supports regulatory reform, Cabinet will not exercise its con-


\footnote{151}Jackman, not incidentally, has observed that national factors are now much less influential in determining the Liberal proportion of the total vote in national elections than they once were. Indeed, when he conducted his analysis, they had dropped nearly to zero, while the regional and especially riding specific components of the variance had increased. Jackman, Political Parties, Voting and National Integration: The Canadian Case (1971-72), 4 Comparative Politics 511, reprinted in Schultz et al., eds., supra note 150, at 130-44.

\footnote{152}The Minister of Transport has already issued a discussion paper, "Domestic Air Carrier Policy (Unit Toll Services)" (Aug. 14, 1981) that would increase the restrictions
considerable discretion on behalf of regulatory reform. As noted above, the Prime
Minister's interests are otherwise engaged. Moreover, many Liberal Cabinet
Ministers are philosophically inclined toward more government interven-
tion. Therefore, we would conclude that it is highly unlikely that Cabinet
will seek to promote comprehensive regulatory reform.

3. The Importance of the Bureaucrats

In practice, the power to initiate policies has, in large part, been assumed
by the bureaucracy. Most new policy proposals are initiated by and take shape
within the bureaucracy. That was certainly the case with the initial work to
assess the performance of regulation. Although Cabinet will not act on its own on behalf of regulatory reform, Cabinet Ministers are unlikely to respond to the initiatives of the public serv-
ants in their bureaux. This is not because bureaucrats are especially responsive
to special interests. While most interest group representations in Ottawa are
directed at the bureaucracy, the public servant/interest group relationship
tends, or has tended, to be dominated by the public servants.

In the past, perhaps, the civil servant’s propensity to exclude from the
process of policy making all but legitimate, well-behaved, and quasi-official
groups, may have somewhat exacerbated the bias of interest group representa-
tion. But recent reforms have tended to open the process to a far wider circle
of stakeholders. Today, public servants are required to clear nearly all self-
initiated proposals with practically everyone. This has certainly made their
job harder and increased the uncertainty of the policy process. It has also likely

on competition and foreclose all possibility of entry. The presidents of Air Canada and
CP Air have already condemned the ECC’s proposals to gradually deregulate the in-
dustry (infra). The Minister of Agriculture has already made vituperative comments on
the Council’s recommendations to stop the spread of supply management schemes and to
expand the quota volumes under existing ones—see Stanbury and Thompson, supra
note 4, at ch. 3.

This would apply to most of the Quebec ministers, to the honourable Mr. Lalonde in particular, and the leading nationalist/interventionist, the honourable Mr. Herb Gray. See, for example, Robertson, “The New Patriots”, Today Magazine 25
April, 1981 at 8-11. In a recent speech Peter C. Newman, former editor of Maclean’s,
has argued that, “In their unyielding aim to preserve themselves in political power,
governments will attempt to move the private sector into a system of compulsory plan-
ning that will destroy the free enterprise system. . . . Almost certainly, key companies
within pace-setting industries will be nationalized. . . .” “Duel to set the path for
Canada”, The Globe and Mail (Toronto), Sept. 1, 1981 at 8, col. 1. See also Diebel,
“Plan sets economic overhaul”, The Vancouver Sun, Sept. 18, 1981 at 1; see also the
columns in the same paper by Lamb, September 18, 21 and 23, 1981 at A-4.

See the discussion in Stanbury and Thompson, supra note 4.

See, e.g., Gwynn, supra note 146, at ch. 5, who states that “without realizing he
was doing it, Trudeau bureaucratized the cabinet.” The Clerk of The Privy Council, we
are told, forbade ministers from bringing their political aides to Cabinet committee
meetings. Instead, they were accompanied by senior public servants. “Bureaucrats thus
entered the mainstream of political decision-making and were all the more influential
because . . . they were so adroitly deferential.” (at 88).

In fact, the lack of interparty competition may be somewhat offset by the often
fierce policy debates that occur among various federal departments. Certain depart-
ments (e.g. Agriculture; Health and Welfare; Industry, Trade and Commerce) do repre-
reduced the power of well entrenched groups to influence the direction of policy changes on their own behalf (except insofar as they share in a veto power with everyone else).

The real problem with the bureaucracy is not that it is particularly enamoured of government intervention *per se.* Civil servants, particularly those at the top level, far more than their political masters, understand the limits of government's power to do 'good' or overcome 'evil'. But bureaucrats do tend to value stability. (We might recall that the credo of the *British North America Act* is "peace, order and good government".) This preference, perhaps, accounts for the fact that in the past, various departments sought to discipline their client groups in order to keep them in line, speaking with one voice, and adhering to the departmental position. As one wag put it, "there is no 'Organization of Potential Entrants' in Ottawa, if there had been, Transportation or ITC would have squashed it."

Furthermore, in a number of cases, civil servants have a direct interest in the regulatory status quo. Deregulation would reduce the size and power of their bureaux. It could also liquidate the value of their personal human capital in the form of regulatory expertise. Finally, there is the cost of change itself. Decades of experience must be "unlearned". Old dogmas must be abandoned.

This does not mean, of course, that regulatory reform or even deregula-

157 Hartle (*supra* note 43, at 76) argues that "the most senior public officials, particularly those who support ministers with collective responsibilities [e.g., central agencies] to the Cabinet as a whole . . . resist as strongly as their influence allows more government intervention. They feel that the burdens they carry are already staggering, . . ." On the other hand, Presthus and Monopoli, *Bureaucracy in the United States and Canada: Social, Attitudinal and Behavioral Variables (1971)*, 18 Int'l. J. Comp. Soc. 176, found that on their measure of "economic liberalism" (i.e., willingness to have government intervene in the economy) 29% of Canadian federal bureaucrats scored "high" as compared with 11% for Canadian provincial officials, 9% for U.S. federal and 16% for U.S. state officials. They also found that, "For those for whom bureaucratic norms presumably have had an opportunity to take hold [5 or more years of service], there seems to be a linear movement away from economic conservatism, and especially among the Canadian sample." (at 182). Presthus and Monopoli found that the bureaucrats "do not share the unrestrained welfare capitalist preferences of their political masters." (at 182). At the same time, they found that "Canadian bureaucrats have much stronger perceptions of the influence of their role than do their American peers." (at 184). We note that Canada achieved an enlightened railway rate policy under the *National Transportation Act* of 1967. This policy was apparently developed and promoted by the bureaucracy although it of course had ministerial support in its enactment.
tion is not possible. It means no more than that regulatory ministries are unlikely to embrace it or that deregulatory proposals are unlikely to be initiated in regulatory departments, for example, Agriculture, Transportation, and Communications. But support for such proposals may be expected from other quarters of the bureaucracy, for example, Privy Council Office, Treasury Board, Department of Finance and Consumer and Corporate Affairs. Moreover, the same reforms that required departmental decision-makers to clear their proposals with a wider circle of stakeholders have also increased the power and influence of these coordinating units and the staff departments concerned with the delivery of public services, the oversight of its activities, and the general performance of the economy.

IV. CONCLUSIONS

Generally speaking, we have little patience with casual references to political infeasibility. In most cases, the issue of political infeasibility is a smokescreen put up by those who, for whatever reason, do not want to entertain the possibility of change or who want to resist the particular change itself. At best, the claim that something is not politically feasible is a defence advanced by those who have lost the battle on its merits. At worst, it is a concession of defeat before the battle has been engaged. As Gaskins explained, after the deregulators took on the truckers and the Teamsters on the floor of Congress and won, "lots of things are politically feasible if you are clever enough to figure out what you want and attempt to get it."

The conundrum of obtaining deregulation has yet to be solved. Hartle and Trebilcock propose that the first step toward general regulatory reform in Canada is greater governmental funding for public interest groups. They hope, thereby, to somewhat offset the bias of interest group representation—in their view, the principal cause of inefficient and inequitable aspects of regulatory policies and the major obstacle to change. Regardless of the relevance of their proposal to regulatory reform, public funding of public interest groups is an appealing idea. Furthermore, it has the advantage of familiarity. For example, most of the money for the Consumers' Association


159 Gaskins, former chairman of the ICC quoted in Graymer and Thompson, eds., supra note 72.

160 Hartle and Trebilcock, Regulatory Reform and the Political Process (1982), 20 Osgoode Hall L.J. XX.

161 See Reforming Regulation, 1981, supra note 13, at 134-36 which recommends that costs be awarded to public interest groups appearing before regulatory agencies, that governments provide longer-term funding for public interest groups, and that through the tax system governments encourage small, individual contributions to such groups even though they may engage in a small amount of political activity. See also Ross, "Cancelled due to lack of interest", Maclean's, 6 July 1981 at 42-43.
of Canada’s (CAC) Regulated Industries Program now comes from the federal government. If the CAC has not been too effective, perhaps this is because it has not had adequate resources.

Indeed, the possibility of greater use of private interests to promote the public interest is intriguing. Imagine the effect of encouraging the formation of groups with a direct interest in freer entry or more flexible prices in directly regulated industry. Imagine, too, a world in which the directory of Ottawa lobbies included the "Organization of Potential Entrants". But as appealing as this idea is, it is a fantasy. Moreover, even if one knew how to bring it into being, promotion of countervailing group activity seems a rather roundabout approach to regulatory reform. For the present, we have greater faith in the power of ideas—if they are given the time to be diffused and to become common currency.

Proponents of deregulation should, therefore, keep making the case for reform on its merits. Without good evidence, the case for deregulation cannot win. If at times it seems that no one is listening to the evidence, maybe there just has not been enough time for its implications to sink in or, perhaps, we are providing the wrong kind of evidence, or are providing it in the wrong way or to the wrong people. What at first seems radical and threatening, with the passage of time may become the conventional wisdom.

Of course, as noted, we do not honestly believe that comprehensive regulatory reform or even deregulation of a few industries is likely at this time. If anything, the trend is in the opposite direction; in the short run, we expect more, not less, regulation. If so, then for the next few years the best we can hope for is to retard the growth of government control of the economy.

Fortunately, we do know how to retard the growth of regulation: regulate it. Procedural or structural reforms will not lead to substantive reform, but might mitigate the excesses caused by overzealous regulators or correct the more perverse incentives facing the regulatory bureaucracy. The American experience with a variety of regulatory review mechanisms, together with the Canadian experience with the SEIA program, demonstrates that ex ante review of regulatory proposals can slow down the output of new initiatives. In

162 For a report on this program, see Janisch, "Regulation and the Consumer Interest," speech to the Consumers' Association of Canada, Hamilton (June 18, 1980, mimeo).


164 The most detailed and consistent evidence in Canada is that on the adverse effects of supply-management marketing boards. There is now more than a score of such studies from a variety of different sources: The Consumer Research Council; the Institute for Research on Public Policy and the Economic Council; the Department of Finance; the Royal Commission on the Canadian Dairy Commission; and the Fraser Institute. The weight of such studies and the publicity they have obtained has made the present federal Minister of Agriculture (Eugene Whelan) and the heads of a number of marketing boards and farm organizations remarkably defensive lately. See Stanbury and Thompson, supra note 4.

165 See the proposals set out in the documents in notes 6, 11, 12 and 14, supra.

other words, if we can not strike directly at our large regulatory stock, we can work at the margin—the annual flow of new regulations.

As noted above, there is considerable consensus among experts about what should be done to regulate regulation: require \textit{ex ante} review using some form of cost-benefit analysis, require earlier and more extensive consultation, create a regulatory agenda, replace appeals to Cabinet by government policy directives, define clearer regulatory mandates in statutes and regulations, have the legislature scrutinize proposed new regulations more closely and evaluate existing regulatory programmes. More important, these proposals have been widely endorsed by the media, most interest groups, and even tentatively by the government.

Therefore, proponents of regulatory reform should support the implementation of these procedural reforms. Requiring the regulators to \textit{justify} their decisions may not result in better decisions, but it should slow the outpouring of new regulations. For the time being, this is very likely the best outcome we can hope for.
APPENDIX A*

SUMMARY OF THE ECONOMIC COUNCIL OF CANADA'S RECOMMENDATIONS RELATING TO DIRECT REGULATION.

1. Railroads
   - Increase the speed and freedom of the CTC to respond to grievances under the "captive shipper" provisions of the Railway Act.
   - Disallow intermodal acquisitions where the efficiency gains do not offset the harmful effects on competition.
   - Review the exemptions from the Combines Investigation Act.

2. Trucking
   - Remove all regulatory restrictions on the operating freedom of existing for-hire carriers.
   - Abolish all rate-filing or tariff-setting regulations.
   - Administer all licensing of interprovincial carriers through the Canadian Conference of Motor Transport Administrators rather than the provinces.
   - Permit entry based only on carriers meeting minimum technical requirements on a first-come, first-served basis (note, the provinces could still control entry).

3. Taxicabs
   - Gear price and entry controls toward a very gradual reduction in the market value of taxicab licences (including special licences to serve airports).
   - Licence cabs over an entire urban area.
   - Permit all licenced cabs to serve airports when existing exclusive contracts expire.

4. Airlines
   - Allow new entry based on a "one-way swinging gate" approach (i.e., the regionals could freely enter the national carriers' markets, but not vice-versa for several years).
   - Allow completely open entry into transborder operations (subject to U.S. requirements).
   - Remove all restrictions on service immediately and prohibit all informal understandings regarding entry or service levels, etc..
   - Allow abandonment of any service within eight months.
   - Allow all airlines to establish such fares as they see fit; increases in an existing fare above the annual rate of inflation must be approved by the CTC.
   - Greatly liberalize domestic and international charter regulations.
   - Greatly strengthen section 27 of the National Transportation Act concerning mergers.
— Ensure that government-owned carriers are not favoured or restricted by government or regulatory policy.

5. Telecommunications
— Encourage entry and the provision of specialized private-line and data communications services; at the same time, prevent refusal to supply or discriminatory pricing and require interconnection as in the CNCP case.
— Remove all restrictions on the leasing and resale of long-haul transmission facilities including satellites.
— Permit all forms of attachment unless the devices can be shown to result in technical harm to the telephone system.
— Require regulated carriers entering the direct-sale market for equipment or competitive services to do so through an arms-length affiliate.

6. Agricultural Marketing Boards
— Exercise caution in creating additional boards with supply management powers. (Note, in the text (p.65) the Council took a stronger position, saying it “has considerable difficulty justifying the continued existence, or the creation of, new supply management boards with exclusive powers to determine prices and set production quotas for individual producers. . .”)
— Expand output quotas (and reduce prices) over five to ten years in order to bring quota values down to “reasonable levels”.
— Make output quotas divisible and freely transferable among individual producers; make all future output quotas and a significant proportion of existing quotas freely transferable within Canada; relax other restrictions on quotas that impair efficiency.
— Re-examine the objectives, terms and structure of the industrial milk subsidy program; make the Milk Supply Management Committee and the Canadian Dairy Commission subject to the supervision of the National Farm Products Marketing Council.
— Ensure that there is a balance of producer, consumer and processor representation on agricultural supervisory boards; permit appeal to the supervisory board where an individual can show substantial injury from the actions of a commodity board.

7. Tidal Fisheries
— Regulate individual ocean fisheries through a system of transferable, quantitative, stinted landing rights based on optimal sustainable yields.
— Supplement the system of stinted landing rights by the use of landing taxes, license fees, and/or buyback schemes.
— Review the federal and provincial direct subsidies in the form of grants or low-interest loans on gear or various tax incentives with a view to phasing them out gradually.