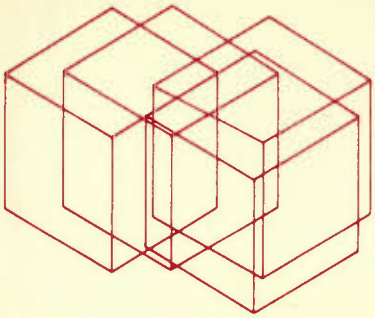

Responsible Regulation

An Interim Report by the Economic Council of Canada

November 1979

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INTRODUCTION

Canada, like other western, industrialized nations, has become a regulated society. In the morning the clock radio awakens us with the sound of music subject to Canadian content regulations. The price, at the farm gate, of the eggs we eat for breakfast has been set by a government marketing board. We drive to work on tires that must meet federal minimum safety standards and in a car whose exhaust is subject to pollution emission regulations. At lunch, the restaurant in which we eat has been subject to the scrutiny of public health inspectors. The monthly rate for the telephone we use at the office is set by a federal or provincial regulatory agency. Shopping in the supermarket on the way home, we note the unpronounceable names of certain chemical preservatives that, by government regulation, are disclosed to us on a finely printed label. As we turn down the thermostat before retiring, we are confident that a government agency has protected our purse by setting the price we will be charged by the local monopoly supplier of natural gas. Putting on our sleepwear, we are secure in our knowledge that it is not impregnated with a hazardous substance like Tris. If we live in certain cities, we approach our rest reassured that the smoke detector we were required to install will stand on guard throughout the night. In the words of Samuel Pepys, "And so to bed."

The Council defines regulation as the imposition of constraints, backed by government authority, that are intended to modify economic behaviour of individuals in the private sector significantly.[1] Regulation is effected by government departments and by statutory regulatory agencies primarily through the use of statutes and subordinate legislation in the form of regulations. The scope of regulation in Canada is so great that it is difficult to think of an activity, good, or service that is *not* subject to government regulation, directly or indirectly. The growth and pervasiveness of regulation in Canada, described in Chapter 2, has prompted demands for regulatory reform.

(A) REGULATORY REFORM: A CURATE'S EGG?

Who can be against regulatory reform? The evocative characteristics of the word "reform" alone should be enough to indicate the side on which the angels stand. The term is almost ready to be placed alongside "prison reform," "parliamentary reform," "educational reform," and "tax reform" in the pantheon of civic virtue. In the United States, where the reform cycle[2] is more advanced, one commentator has observed:

> No leader it seems, can pass this totem [regulatory reform] without a bow of respect and a new proposal in legal hieroglyph. Few topics guarantee more attention from the press — and less understanding. It is a subject of universal favor. But it remains uncertain whether these propitiary offerings to the idol of reform will really have any effect on the problems of regulation.[3]

The concept of regulatory reform is so encompassing[4] that individuals and groups with widely different interests support it. For some, regulatory reform means relief from the high costs and the technical and organizational difficul-

ties of complying with government decrees. For others, it is liberalization of the rules permitting more competitors and/or an increase in the number of weapons of competition. Some view regulatory reform as a way to reduce "paper burden" and to simplify and reduce the number of steps required to deal with the government. Regulatory reform, in the view of some individuals or groups, means making the existing framework more effective by improving administration and enforcement, increasing public participation in decision making, and by giving regulatory agencies more independence. Cynics observe that some people are saying, "Deregulate anything that imposes costs on me, but recognize I am a special case, and need *increased* protection by the government."

In short, regulatory reform is a Curate's egg. Some parts of it will be judged good by some observers and bad by others. To quote *Punch*,

> "I'm afraid you've got a bad egg, Mr. Jones."
> "Oh no, my Lord, I assure you! Parts of it are excellent."[5]

Like many other issues, regulatory reform also illustrates the policy analyst's adage, "Where you stand depends upon where you sit."

(B) BACKGROUND TO THE REPORT

This Interim Report on the work of the Regulation Reference has been prepared at the request of the Prime Minister. In his letter of July 12, 1978 transmitting this Reference to the Economic Council (see Appendix A), the Prime Minister requested the Council to prepare an Interim Report by the end of 1979. This report begins the task of developing, in the words of the terms of reference, "guidelines governments could employ in determining what areas of regulation are likely having a significant adverse economic impact and what practical changes in public policies might be undertaken to improve government regulation."

The Reference originated at the meeting of First Ministers, February 13-15, 1978. The Premier of Manitoba proposed that a federal-provincial committee be established to review all regulatory activities in order to determine areas of overlap between jurisdictions. Other premiers supported the idea of a "task force" to deal with the problem. The Prime Minister suggested that it might be useful to ask the Economic Council to undertake a series of specialized studies of the problems of government regulation. The Communiqué issued at the end of the meeting said, in part:

> The burden of government regulation on the private sector should be reduced and the burden of overlapping federal and provincial jurisdictions should be eliminated. Procedures will be instituted to review the effects of regulatory action on jobs and costs. First Ministers agreed that the whole matter of economic regulation at all levels of government should be referred to the Economic Council for recommendations for action, in consultation with the provinces and the private sector.[6]

Following the meeting, federal officials discussed the possible terms of reference with provincial representatives. Shortly thereafter, the Prime Minister formally requested the Economic Council to "undertake a number of studies of specific areas of government regulation which appear to be having a particularly substantial economic impact on the Canadian economy."

The Chairman of the Council, at the request of the Prime Minister, prepared a *Preliminary Report* on the Regulation Reference[7] for the meeting of First Ministers in November 1978. That document contained a brief discussion of the objectives of government regulation; an outline of the research agenda for the Reference; and a description of the consultative process. Part V of the *Preliminary Report* contained a summary of the regulatory review activities undertaken to that date by the federal and provincial governments. In light of the discussion of the *Preliminary Report* by First Ministers, some modifications were made in the Council's research plan.[8]

The Council has undertaken a large number of studies spanning many areas of regulation. Figure 1 lists the "specific" areas of study, as well as the general or "framework" studies.[9] Many of the study areas include several related research projects. Extensive as the Council's research agenda is, however, it does not purport to deal with all important areas of government regulation.[10]

FIGURE 1

Regulation Reference Research Study Areas

I Framework Studies

- The Growth and Changing Scope of Regulation
- The Objectives of Government Regulation
- Alternative Techniques for Achieving Regulatory Objectives
- Approaches to the Evaluation of Regulation
- The Regulatory Process

II Specific Studies

(a) By Type of Regulation
- Occupational Health and Safety
- Hazardous Products
- Land Use/Building Codes
- Environmental Protection

(b) By Industry

(i) Structurally Competitive
- Trucking
- Taxi Cabs
- Agriculture
- Marine Fisheries

(ii) Other
- Automobiles
- Telecommunications
- Food Processing, Distribution and Retailing
- Airlines
- Prescription Drugs

(c) At the Level of the Firm
- Costs of Compliance

(C) THE CONSULTATIVE PROCESS

In his letter to the Chairman specifying the terms of reference for the Council's work, the Prime Minister stressed the need to consult widely. He stated: "During the course of your work, you will wish to consult extensively not only with the Federal-Provincial Consultative Committee that I understand will remain active at least for the term of the Council reference but also with individual federal and provincial government departments and agencies, and the private sector." The emphasis on consultation is consistent with the approach previously announced by the federal government. It emphasized the value, in making public policy, of a process of "discussion, dialogue and consultation with all elements of Canadian society: provincial governments, representatives of business, labour and consumer organizations, other special interest groups, and individual Canadians."[11]

The Council and its staff have devoted considerable effort to the consultative process. In turn, the process has been of great value in defining many of the important problems associated with government regulation and in providing information to facilitate the work of the Council's researchers. Consultation has been conducted through both formal and informal processes. Although they bear no responsibility for the contents of this report, the following committees provided advice to the Chairman and the professional staff of the Reference:

- Federal-Provincial Consultative Committee on Regulation;[12]
- Federal Interdepartmental Committee on Regulation;[13]
- Business Committee on Regulatory Reform;[14]
- Economic Council Advisory Committee on the Regulation Reference;[15] and
- Project Advisory Committees[16] — one for each of twelve of the "specific" studies listed in Figure 1.

In addition to these formal consultative mechanisms, the Chairman, the Director of the Regulation Reference, and the senior staff have been involved in extensive informal consultative activities. These have included a number of meetings with representatives of trade unions and the Consumers' Association of Canada. Of particular value has been the work of the Chairman's Senior Advisor on the Reference, who has co-ordinated, "digested" and transmitted the views of concerned business executives to those working on the Reference. Both the Chairman and the Director of the Reference have been active in making speeches on regulatory issues and the work of the Reference. The informal discussions associated with these occasions are often a valuable source of "input." Numerous meetings have been held with individuals and groups interested in the work of the Regulation Reference. To describe the work of the Reference to an even wider audience, the Council issues periodically (in mimeographed form) Regulation Reference *Update*.[17]

(D) SCOPE AND OUTLINE OF THE REPORT

This report necessarily must deal with only certain aspects of our research on the broad topic of government regulation. The bulk of the research commissioned by the Council is still in progress. For this reason, a detailed assessment of the economic impact of many types of regulation must await our Final Report at the end of 1980. While this report is described as an "interim" one, it should be emphasized that the recommendations in Chapters 5 and 6 are probably the Council's final statement on the issues discussed there. However, we do not foreclose the possibility of reviewing our position in the Final Report in light of the full body of research that will then be available.

In deciding what should be the primary focus of this report, the Council had to consider the research resources available in relation to the deadline for the report, the interests of First Ministers, and the concerns about regulation expressed by individuals and groups in the private sector, which are summarized in Chapter 1. It decided to focus on certain aspects of the regulation process. Without in any way prejudging the results of the work that is still under way or the recommendations that might be put forward in our Final Report, the Council found merit in the following observation:

> . . . perhaps we should be spending fewer of our resources and energies debating the question of whether we have too much or too little government regulation in general, and more resources seeking ways of improving the quality of the regulatory processes in respect of the various classes of collective decisions which we have decided that, as a society, we should make. While there may be little prospect of wide social consensus on the role or scale of government in general or desirable substantive regulatory outcomes in many particular cases, there may be a significantly greater prospect of forging some social agreement on what, in general, the rules of the game which determine outcomes, in particular classes of cases, should be.[18]

The central issues discussed in Chapters 5 and 6, upon which the Council makes recommendations, are as follows: the balance between, first, the direction and control of statutory regulatory agencies for policy purposes by ministers and, second, the degree of autonomy deemed necessary for such agencies to carry out their "adjudicative" functions in particular; and the need to improve governmental decision making concerning regulation, in terms of both new regulations and the evaluation of existing regulatory programs.

Regulation is a political-administrative process specifically designed to replace or modify the operation of economic markets, or, in some cases, to fill gaps where no markets exist. Both the decision to regulate and the decision to change regulatory processes significantly are made in the political arena. For these reasons, the Council has found it necessary to examine both administrative and, to a lesser extent, political processes.[19] In recognition of this fact, the researchers working on the Regulation Reference are economists, lawyers, specialists in public administration, and political scientists. The analysis and recommendations reflect, in part, the observation that "to examine government regulation is to examine the role and function of government itself — no small task."[20]

Chapter 1 summarizes a number of the concerns about government regulation that prompted this Reference. Demands for *more* regulation are also

noted. Chapter 2 describes briefly the scope and growth of government regulation in Canada using a number of proxy measures, and also examines regulation in the context of federal-provincial relations. Chapter 3 offers a framework within which to undertake a fundamental review of government regulation, and suggests the values and the basic questions that should be given considerable weight in examining the state of regulation. Chapter 4 describes the two major types of regulation, however, its primary emphasis is on the explanations or rationales that can or have been used to explain government regulatory activity. Three broad categories are indicated: regulation to improve the efficiency of markets; regulation as an instrument of redistribution; and regulation to achieve broad social or cultural objectives.

As noted above, Chapters 5 and 6 are the main policy chapters. Chapter 5 addresses the question of the accountability of regulatory agencies and their appropriate role in policy making. Recommendations for improving accountability, clarifying policy making responsibilities and assuring the independence of the agencies are presented. Chapter 6 recommends mechanisms to improve the effectiveness and the efficiency of proposed major new regulations by advance notice, consultation, and by a prior assessment of their economic impact. Equally important, the chapter proposes ways to undertake the periodic, systematic evaluation of all existing regulatory programs to ensure that they are meeting the expectations of legislators and the public.

The report concludes with two very brief chapters. Chapter 7 discusses the implementation of the recommendations and Chapter 8 looks ahead to the Council's Final Report on the Regulation Reference.

1 CONCERNS ABOUT REGULATION

Those behind cried 'Forward!'
And those before cried 'Back!'
Macaulay, *Horatius*

> . . . agreement that some [government] regulations are good and others are bad is about the full extent of the consensus on the subject.
>
> Lee Loevinger

This is a most difficult time for Canadian governments. Inflation is fast reducing the value of the dollar and impugning the value of savings. The rate of economic growth is low. The rate of unemployment is high. Rising energy prices portend massive structural changes in the production and distribution of goods and services, in leisure activities, and in consumers' expenditure patterns. Canadian federalism faces new challenges throughout all of the nation's regions. Taxpayers complain about their burdens and question the benefits of public sector programs.

To add to these difficulties, there is a sense of unease about the size of governments in general and the growth and scope of government regulation of economic activity in particular. For the past few years, there has existed a widely shared perception that the growth of expenditures and employment at all levels of government has outstripped that of the economy as a whole, particularly during the 1960s and 1970s.[1] However, what is less clearly recognized is that an assessment of only public expenditures and taxes significantly *understates* the extent or impact of government action on the economy. Relatively small government expenditures on regulatory programs can impose costs many times greater on the private sector. Regulatory programs with modest budgets can also redistribute income in larger amounts or in ways unintended by the legislature.

To many observers, government regulation has become too pervasive, has grown too rapidly, and much of it may be either ineffective or too costly in relation to its benefits. In the terms of reference, the Prime Minister noted that "increasing government regulation might be having serious adverse effects on the efficiency of Canadian firms and industries and on the allocation of resources and distribution."[2] The business community, in particular, has objected to the burdens perceived as being imposed by government regulation.

Recognizing the existence of these concerns about regulation, the Reference has undertaken to identify a number of themes that recur in many complaints.

(A) DIFFERING CONCERNS ABOUT REGULATION

Considerable effort has been devoted to ascertaining the views of individuals and groups in the private sector with regard to what they see to be the problems with government regulation and the policy responses that would contribute to their solution.

In considering these views, we note that, first, a small number of issues are identified as problems by all the different groups, including business, labour and consumer groups. However, in most cases, they have differing perceptions of just *what* constitutes "the problem," and, therefore, what should be "the solution." Second, a larger number of issues are seen as central by one group but are

not included on the lists of the others. People are talking past each other, in some cases, in a different language. Third, there are some important issues associated with government regulation and regulatory reform that are not addressed by any of the parties consulted. These are being raised and will be discussed in the course of the work of the Regulation Reference. Fourth, because conflicting positions have been taken by different actors, and because these positions need not be based on well-established facts, attempts to reform regulation will be fraught with difficulty. The difficulty is compounded to the extent that changes in regulation imply economic gains for one group and significant economic losses for another. In cases in which there will be clear winners and losers from a change in public policy, the *status quo* may become more attractive.

The views taken by the different groups indicate that it is safe to say that regulation is a subject about which there is little consensus. Almost everyone would agree that there should be rules that would prevent babies from being deformed by mercury poisoning, and few would argue that some of the sillier or obsolete items on the "statute" books should not be removed. But such clear-cut issues are the exception rather than the rule.

The remainder of this section *reports* the views expressed during the consultative process. It should be emphasized, however, that the views presented below necessarily involve generalizations. Not all the gradations of opinion are presented and, of course, these summaries would not represent the views of all members of a particular group.

(1) Growth, Costs, and Benefits

Many businessmen assert that government regulation has grown rapidly and is now "out of control." Some are less sure that this is the case, although they believe that the scope and intensity of government regulation has increased. A variant of the first perception is based on the fear that Canadian governments may follow those in the United States and vastly expand or make more stringent (hence more costly) regulations in such areas as occupational health and safety, environmental protection, and consumer product safety. It is suggested that business has accommodated itself to the large existing stock of statutes and regulations. The fear is that future regulations will be more pervasive and far more costly to comply with.

Regulation is seen by some businessmen as imposing large costs on their enterprises, but it is recognized that the burden of regulation is borne only in part by shareholders. Much of it is borne by consumers in the form of higher prices for the products they buy. While some businessmen may ignore the benefits of regulation, many recognize that regulation *does* confer social benefits on society. However, they feel that in many instances, the costs may not have been considered carefully and that the benefits may be outweighed by the costs.

Some labour and consumer groups argue that government regulation is *not* purely a question of economics. By regulating, governments are consciously taking certain decisions *out* of the marketplace and making them through a political-administrative process. Regulation, they say, should reflect a concern with questions of equity (i.e., fairness), due process, and other values that cannot be properly represented in the market. The value of human life (for example, in such areas as product safety, occupational health and safety, and environmental protection) should be determined neither by the uncontrolled operation of markets nor by a purely economic cost-benefit analysis — even one that properly reflects costs and benefits accruing to the society as a whole, as opposed simply to individuals and firms. The decision to regulate should reflect a range of non-economic and humanistic (such as ethical) considerations.[3] While many businessmen would agree with these views, they would also like to see a greater awareness by regulators of the trade-offs among various public policy objectives.

Businessmen assert that many of the costs of regulation are not reflected in accounting studies of the cost of compliance with regulation, such as the one done in the United States for the Business Roundtable.[4] These additional costs include the benefits of opportunities foregone, reductions in productivity and/or the rate of technological change, costs of regulation-induced delay of major projects or new products, and the absorption of valuable executive time on regulatory compliance instead of on profit-making activities.[5] Business-

men say that politicians, regulators, and the public need to recognize that these indirect costs exist and may be significant. Such costs should be included in the assessment of economic impact as part of the public policy decision to regulate or to change existing regulations.

(2) Lack of Effectiveness

Businessmen assert that some regulation either is ineffective (fails to achieve its apparent objectives) or is itself the source of other problems unanticipated by its advocates. They become furious about regulations under which they incur real costs, but which do not achieve the policy objectives for which they were designed.[6] "Dumb" regulations reduce respect for admittedly useful ones.

Consumer and labour groups point out that, in some cases, what appear to be important forms of regulatory intervention are quite ineffective in practice — except that they may provide a form of symbolic reassurance to the uninitiated. The effectiveness of existing regulation is very much dependent upon the quality of administration and enforcement. Poor enforcement frequently nullifies potentially useful regulation. There is broader agreement on the general objectives of many types of regulation. But, businessmen argue, there are plenty of cases in which a change in the particular method by which the regulation is implemented would achieve the same objectives at lower cost.

(3) Uncertainty and Risk

Regulation is said to be an important source of much uncertainty in business's longer term planning and also in terms of its ongoing activities. This uncertainty relates to the administration and enforcement of existing regulations, the nature of possible future regulations, the costs of complying with current and future regulations, the rapid growth of new or more stringent regulations, and so on. One businessman made the the point that it was not so much the regulations themselves that were so onerous, but their constant and rapid revision. Concern was also expressed about the difficulty, particularly for people without legal training, of finding and keeping track of new regulations. Actions taken to cope with and reduce uncertainty are costly and such costs could be reduced by more sensitive government policy making.

While businessmen claim that uncertainty increases business risks, a considerable number of consumers and workers believe that the government should regulate more stringently to reduce risks to life and limb. The areas of nuclear power, product safety, and occupational health and safety are the most affected by this approach. The effect of some elements of safety regulation is to implicitly place a very high value on the effects of such hazards. Although the public has become more aware of hazards, a growing number of people would like to see a greater recognition of the fact that it is impossible to create a completely hazard-free environment, and that trade-offs must be made at some point between hazard reduction and cost.

(4) Rules versus Discretion

There are often sharply conflicting views about the desirability of administrative discretion versus the application of clear-cut, universal rules to regulatory situations. On one hand, it is argued that operating-level government administrators have too much discretion over the application of regulations that are framed in general terms. Therefore, a clear statement of "the rules," even-handedly enforced, is what is desired. On the other hand, some business executives want fewer, less rigid rules applied to every case, with local conditions and problems being treated sympathetically by regulators. For example, it is argued that specific effluent standards ought not to be enforced regardless of the age and economic condition of the plant that produces the effluent. Regulators should exercise discretion and take into account practical realities on a case-by-case basis.

(5) The Regulatory Process

Some observers feel that the process by which new regulations are created is faulty in a number of ways. First, they claim there is no effective central control over the desire of individual departments or agencies to create new regulations. Second, they contend that those who will be sub-

ject to new regulations are not consulted, or are not consulted sufficiently early in the process of drafting new regulations, or have too little influence on the number and type of new regulations. In such cases, businessmen feel that regulation is occurring "without representation." They also argue that the avenues of appeal from lower-level administrators' actions are unclear, ineffective, or absent. Third, in most cases, there is no careful weighing of total costs and benefits in deciding the nature and form of new regulations. Decisions are seen as being highly "political" in nature and ignoring important economic considerations. Alternatively, many regulations seem to reflect what are perceived to be the preferences of bureaucrats.

Both consumers and businessmen feel that certain types of regulation, e.g., marketing boards, are implemented without the government's attempting to provide an open forum for discussion of the objectives of the regulatory program and the feasible alternatives to this announced policy.

Consumers and certain other interest groups believe they are inadequately represented in hearings before federal and provincial regulatory agencies. It is asserted that the agencies cannot or should not be relied upon to represent their views. While it is seldom argued that regulatory tribunals have been "captured" by those they regulate, some evidence is brought forward that appears to indicate that some tribunals are unreceptive to interventions by consumer and labour groups. It is also argued that politically influential regulated firms are able to use provisions for appeal to the cabinet (federal or provincial, as the case may be) to reverse or significantly alter the decisions of regulatory tribunals on grounds other than those addressed in the hearings before the tribunal.[7] This both diminishes the importance of the regulatory agency and amounts to a form of political accountability limited to the "vested interests."

(6) Overlap, Duplication, and Inconsistency

Several types of costly and unnecessary jurisdictional overlap and duplication are seen by businessmen to be quite common. First, a number of different departments or agencies of one level of government exercise similar or related regulatory responsibilities, which, it is argued, should be handled by only one. "Why is it necessary to go to 17 different agencies, departments, etc., to get approval for a change in land use?" Second, when federal and provincial jurisdictions are effectively concurrent or unclear, *both* levels of government are regulating the same activities. Even when jurisdiction is clearly provincial, different provinces may have different standards or requirements. The variance of regulations from province to province is seen by business as imposing unnecessary costs on companies operating in more than one province. Conflict is often the result, with the regulated firms caught in a "political crossfire." In general, there is the perception (certainly borne out by the facts in some cases) that different regulatory entities within a level of government and between levels of government fail to co-ordinate their activities. It may even be impossible to comply with one requirement without violating another. The result of this lack of co-ordination is to impose needless costs on the regulated.

(7) Distributional Issues

Representatives of consumer and labour groups feel that when a reasonable consensus is evident, regulation may be used properly to effect changes in the distribution of income or consumption through price discrimination and/or cross-subsidization. In other words, there is considerable support for the concept of "taxation by regulation."[8] For example, low-income or geographically remote consumers should receive "life-line" rates from telephone companies even though they may not be remunerative to the company and the price of other services (notably long distance) must be well above cost to finance them. At the same time, some of those adversely affected by the price discrimination and cross-subsidization practices of regulated firms argue that regulatory agencies should eliminate persistent, important cases.

Low income consumers point out that the strongest advocates of more extensive or more stringent regulations are the better educated upper middle class. They argue that if the latter's views on regulation were instituted, many consumer products would become much more expensive and, therefore, beyond the reach of lower income consumers. This concern comes into play, for example,

in issues of product safety (e.g., car seats for children), land use regulation (e.g., minimum house or lot sizes that raise housing prices), and occupational licensure (which restricts entry and may raise quality standards too high for some consumers to afford the service at all).

(8) Concerns About Regulatory Reform

Consumer groups and labour representatives assert that calls for "deregulation" and "regulatory reform," particularly those emanating from the business community, amount to attempts to nullify the hard-won gains of consumer groups and labour unions made through the political process.[9] They say that the bulk of the so-called "costs of compliance," about which business firms complain, are in fact passed along to consumers or shifted back onto workers; shareholders only pay a portion of the costs of regulation. They are fearful that advocates of deregulation or cutbacks in certain regulations tend to be obsessed with costs and will give almost no weight to the important social benefits of regulation. As they see it, the optimal amount of regulation involves a balancing of costs and benefits. Too little attention has been paid to the benefits, only part of which can be properly evaluated in economic terms.

For all the criticism that is levelled against regulation, considerable political support can be (and has been) marshalled for specific regulations. Not the least of this comes from those who are now regulated. For example, in the Council's extensive discussions with members of the business community, very few representatives of firms subject to direct regulation advocated deregulation of their industry as the most desirable public policy. In fact, much trepidation was expressed over the possibility of partial or complete deregulation. The consultative process provided considerable evidence to support the view that "while all businessmen *preach* competition, many prefer to *practice* under the umbrella of benevolent regulation."[10]

(B) DEMANDS FOR MORE REGULATION

At the same time that pressures for regulatory reform are increasing, there are many calls for governments to extend their regulatory activities.[11] In October 1978 the *Financial Post* conducted a telephone survey of 170 of its subscribers in which 59 percent replied "yes" to the question, "Do you personally believe your business or organization is over regulated by various levels of governments?" Yet support for specific kinds of regulation was evident in the fact that 86 percent also replied "yes" to the question, "Do you think that government plans to require automobile manufacturers to introduce cars which cause less pollution are justified?"[12]

It took only modest effort to compile a long list of demands for more and more stringent regulation, which indicates the Janus-like character of public concerns about government regulation. For the politician and the policy advisor, it must be a bewildering cacophony of conflicting demands and expectations.

- The head of a tent-making firm wants the government to require manufacturers to treat cotton tents with a fire retardant. "If they don't, no one is going to make a more expensive tent that won't sell," he said.[13]

- The Ontario Minister of Health has warned members of the nursing home industry that they must improve their operation or "they can expect the province to demand new and tougher standards in such areas as the physical plant, staffing and nursing care."[14]

- The Montreal chapter of the Association des Femmes Diplômées des Universités issued a report that concluded "it is up to the state, employer and lawmaker to take the initiative in establishing a policy of affirmative action [for women in the labour market]."[15]

- Ontario NDP leader Michael Cassidy has called for more stringent and far-reaching regulations to protect condominium owners with respect to workmanship, the registration process and documentation provided by developers.[16]

- The Ontario Minister of Consumer and Commercial Relations has stated he would bring in legislation to prohibit the use of credit cards for grocery shopping after

hearing of a test of the idea by Loblaws Ltd. in three of its specialty stores. A month earlier, the Minister of Health had warned doctors he would move to prevent them from accepting credit cards as payment for medical services if the Ontario College of Physicians and Surgeons did not do so.[17]

- The federal Minister of Agriculture (in the previous government) proposed setting up a new national marketing agency to regulate the price, output, and imports of chickens in seven provinces.[18]

- A professional dance teacher and operator of a dance studio in Ottawa is trying to recruit other operators to push for "rigid requirements for anyone in the business." She wants a government licensing board to require teachers to be members of the Canadian Dance Teachers Association, to adhere to a strict code of ethics, and to be sponsored by two persons in good standing in the profession.[19]

- A member of the Ontario Legislature has argued that rebates, mandatory discounts, advertising allowances, and related trade practices in the supermarket business ought to be declared illegal or be regulated. He said, "The basic issue here is that there are a lot of trade practices that are immoral, unethical, questionable to the point that people won't defend them, and yet the governments won't pass the laws to make them illegal." A Commission of Inquiry established by the Province of Ontario is now studying the issue.[20]

- A Montreal *Gazette* editorial has demanded that the hygiene standards in poultry plants be raised. It referred to news reports stating that "about one-third of all chickens and turkeys in Canada were contaminated by salmonella, resulting in a sharp increase in intestinal illness over the past two years." The editorial concluded, "One health official says tight regulations would mean an increase in the price of chicken and turkey. But surely consumers will prefer that to the risk of food poisoning."[21] A poultry industry official is quoted as saying that chicken and turkey would cost $2 per pound if salmonella bacteria were to be eradicated. A 1977 study by Agriculture Canada is reported to have indicated that the industry would have to spend $13 for every dollar of benefit to achieve salmonella-free poultry.[22] Shortly thereafter, the Department of National Health and Welfare announced that "Canada will adopt a tougher policy on controlling levels of salmonella bacteria in chickens and turkeys."[23]

- A committee established by the Department of National Health and Welfare has recommended that the sale of non-prescription pain relievers should be severely restricted and that the use of certain ingredients be discontinued. Another report issued at the same time expressed particular concern over the rising consumption of codeine in Canada.[24]

- One newspaper has described the 1.5-litre soft drink bottles as "ginger ale grenades" and "carbonated cola cannons" which are "strictly greed and profit motivated." The editorial stated, "Tests have shown that there's no question the bottles are dangerous. Tip them over onto a hard surface, and they serve up an instant red-tinged shrapnel cocktail. Or, if you prefer, a shard soda." It accused the Minister responsible for the federal *Hazardous Products Act* of "knuckling under to the soft drink lobby." The editorial said the bottles ought to be banned outright.[25] The Consumers' Association of Canada argued that the voluntary recall procedure urged by the Minister "has not resulted in the hoped-for elimination of the products from retail stores," and also stated that the 1.5-litre bottle should be prohibited. The president of the CAC also urged the government to establish an "early warning system" for hazardous consumer products similar to programs in the United States and Britain.[26] A vice president of Coca-Cola Limited pointed out that Ontario legislation aimed at increasing the volume of returnable bottles would prevent the use of an unbreakable plastic bottle.[27] A month later, the federal government

banned the sale of the 1.5-litre bottles until they meet new safety standards.[28]

This list is by no means exhaustive,[29] but it does serve to illustrate the point that public views about regulatory reform reflect conflicting concerns that must be addressed by politicians and their policy advisors.

Government regulation has become a political issue of some significance in Canada. Complaints about "big government" and "excessive regulation" have stimulated government responses at both the federal and provincial levels.[30] The Regulation Reference itself is part of that response.

2 THE SCOPE AND GROWTH OF GOVERNMENT REGULATION

> Government, it seems safe to say, is one thing that has been growing rapidly in [Western countries]. Wherever governments were once small they have become big, and wherever they were big they have become bigger. Nothing is so rare as a shrinking government.
>
> G. Warren Nutter

(A) INTRODUCTION

Government regulation of economic behaviour is as old as government itself. Governments, in some form, date from the time men and women began to live in groups. In 2200 BC the Code of Hammurabi included the following provision concerning the safety of houses:

> If a builder build a house for a man and do not make its construction firm and the house which he has built collapse and cause the death of the owner of the house — that builder shall be put to death. . . . If [the collapse of the house] destroy property [the builder] shall restore whatever it destroyed, and because he did not make the house which he built firm . . . he shall rebuild the house . . . at his own expense.

The simplicity of Hammurabi's building regulations stands in marked contrast to the 374 page 1977 *National Building Code* of Canada. Over the millennia the regulation of economic activity grew in size and complexity. In 1202 Britain passed its first *Assize of Bread*. In 1266 this statute was revised and established "lengthy numerical tables [that] showed how the weight of the loaf should be reduced for every rise in the price of wheat. . . . The tables were calculated to provide the baker with a given profit, from costs arrived at from official test bakes."[1] Over time the cost-based formula to establish the regulated price became more elaborate.

> In 1303 an allowance of ½d was added to cover the costs of a dog and later the London Baker's Company successfully lobbied for the allowance to cover not only wood, candles, journeymen and apprentices, salt, yeast, and the miller's charges, but also the costs of the baker's house, a cat and even a wife.[2]

In one form or another, the regulation of bread in England has continued for almost 800 years.

The Spanish Crown both extensively and intensively regulated its colonies in the New World from Madrid.

> It entailed the control of every ship and every man, woman and child that sailed in her, every pound of cargo, and every gun, every ounce of powder and round of shot. No one could sail without an individual licence; no captain of a particular merchant ship or captain-general of a whole *flota* could leave Spain without putting up a cash bond (to be forfeited for any breach of the rules).[3]

The Crown determined, among other things, the number of ships that could sail to the Indies, the charter rates, the cost and technology for building ships[4] and the harbours at which the ships could land in Spain. By controlling the dates on which the ships sailed, the Spanish government made them vulnerable to both hurricanes and English and Dutch privateers. There were so many regulations that each *flota* carried a *veedor*, "a lawyer appointed by the King, whose task was to make sure no laws or ordinances were broken . . . ."[5]

New France took quite a different approach to lawyers. An ordinance passed in 1667 excluded lawyers from coming to Canada. During the short period this prohibition was in effect, one observer remarked, "I would never say that justice is here more chaste or more disinterested than in France, but at least if it is sold, it is sold much cheaper."[6] Obviously, the regulation of the legal profession is of long standing. However, its character has changed. Presently, the most important regulatory

issue is the removal of prohibitions against advertising by members of the profession.

The remainder of the chapter is divided into three major sections. The first provides a brief description of the scope of regulation in Canada today. The second reviews the growth of government regulation as measured by the number of statutes and regulations. The third section of this chapter examines some of the problems associated with regulation within the increasingly complex Canadian federal system.

(B) THE SCOPE OF REGULATION

Government regulation is pervasive in Canada today. This is not to say that current conditions represent a high water mark in the scope and intensity of economic regulation by government as seen in broad historical terms. For example, the regulatory control of the state under mercantilism was very great indeed. It was the pervasiveness of such regulation that prompted Adam Smith's brilliant discourse upon *The Wealth of Nations* in 1776 and his advocacy of the "system of natural liberty."

At the outset, it should be emphasized that all economic activity takes place in a framework of *general* laws and regulations. Because such laws are woven into the fabric of the economy, they are often overlooked. We have designated as "framework" legislation those dealing with competition policy, bankruptcy, corporation laws and intellectual and industrial property. At the federal level there are nine such statutes; at the provincial, there are 131 in this category.

Our analysis of federal and provincial statutes suggests that roughly one-third of those currently in force are what we would describe as "regulatory," i.e., aimed primarily at altering the *economic* behaviour of individuals in the private sector. Of the more than 500 federal statutes on the books in 1978, 140 were classified as regulatory. This total includes 28 statutes regulating transportation alone and 14 concerning financial markets and institutions (see Table B2-1 in Appendix B). At the provincial level in 1978, we identified 1,608 regulatory statutes, ranging from 112 in Prince Edward Island to 204 in Ontario (see Tables B2-2 and B2-3).

Some idea of the sheer range of economic activities presently subject to regulation by all three levels of government is given in Table 2-1. Government regulation has been grouped into more than a dozen broad categories ranging from communications to financial markets to transportation. We can only sketch the nature of regulatory activities outlined in Table 2-1. In broadcasting, entry is controlled by the CRTC and detailed regulations specify Canadian content requirements designed to enhance our cultural identity. In telecommunications, both entry and tariffs are controlled by federal or provincial regulatory agencies. One of the oldest and also the newest areas of regulation has been the provision of information regarding product content and the establishment of standards for products. Consumer protection statutes, of which there are 74 at the provincial level, include provisions that prohibit false or misleading advertising and regulate the use of certain sales techniques. These statutory provisions go far beyond the traditional provisions of the common law and the rule of *caveat emptor*.

A wide variety of cultural and recreational activities are subject to government regulation. Horse racing, for example, is closely regulated by provincial governments. A number of provinces regulate boxing and wrestling. The federal government passed the *Cultural Property Import and Export Act* in 1975, which permits the Governor in Council to establish a list of items, the export of which it is deemed necessary to control in order to preserve the cultural heritage in Canada.

In the energy sector, nuclear energy is closely regulated by the federal government. The exploration and development of hydrocarbons is subject to extensive federal and provincial regulation. Alberta currently, for example, has 14 statutes dealing with the regulation of energy. The prices charged by natural gas and electric utilities are subject to provincial public utility commissions. One of the most significant developments in the 1970s has been the growth of regulation to protect the envi-

TABLE 2-1

THE SCOPE OF REGULATION IN CANADA

- **Communications**
  - Broadcasting
    - Radio (AM, FM)
    - Television
  - Telecommunications
    - Telephone
    - Telegraph
    - Satellite
    - Cable TV
- **Consumer Protection/Information**
  - Disclosure (product content labelling, terms of sale, etc.)
  - False and Misleading Advertising
  - Sales Techniques (merchandising)
  - Packaging and Labelling
  - Prohibited Transactions, e.g., pyramid sales, referral sales
  - Weights and Measures
- **Cultural/Recreational**
  - Residency requirements
  - Language (bilingualism)
  - Canadian content in broadcasting
  - Horse Racing
  - Gambling (lotteries)
  - Sports
  - Film, Theatre, Literature, Music, e.g. Canadian content
- **Energy**
  - Nuclear
  - Natural Gas
  - Petroleum
  - Hydro-electric
  - Coal
- **Environmental Management**
  - (a) Pollution Control
    - air
    - water
    - solid waste disposal
  - (b) Resource Development
    - minerals
    - forestry
    - water
  - (c) Wildlife Protection
    - hunting
    - fishing
    - parks/reserves
    - endangered species
  - (d) Land Use
    - planning/zoning
    - development approval
    - sub-division
    - strata-title
  - (e) Weather Modification
- **Financial Markets and Institutions**
  - Banks
  - Non-banks
    - Trust Companies
    - Management Companies
    - Finance Companies
    - Credit Unions/ Caisses Populaires
  - Pension Plans
  - Securities/Commodities Transactions
  - Insurance
- **Food Production and Distribution**
  - (a) Agricultural Products Marketing
    - pricing
    - grading
    - storage
    - distribution
    - entry
    - supply
  - (b) Fisheries (marine, freshwater)
    - price
    - entry
    - quotas
    - gear
- **Framework**
  - Competition Policy
  - Anti-dumping laws
  - Foreign Investment Review Act
  - Bankruptcy laws
  - Corporation laws
  - Intellectual and Industrial Property
    - copyright
    - industrial design
    - patents
    - trade marks
  - Election laws
    - contributors
    - spending
    - reporting
- **Health and Safety**
  - (a) Occupational Health and Safety
  - (b) Products — Use
    - explosives
    - firearms
    - chemicals
  - (c) Product-Characteristics
    - purity
    - wholesomeness
    - efficacy
    - accident risk
  - (d) Building Codes
  - (e) Health Services
    - nursing homes
    - private hospitals
    - emergency services
  - (f) Animal Health
  - (g) Plant Health
- **Human Rights**
  - Anti-discrimination legislation in respect to hiring, sale of goods or services etc.
  - Protection of privacy, personal information reporting
- **Labour**
  - Collective bargaining
  - Minimum wage laws
  - Hours of work, terms of employment
- **Liquor**
  - Characteristics, e.g. alcoholic content
  - Distribution and sale
- **Professions/Occupational Licensure**
  - Certification/Licensure
  - Registration
  - Apprenticeship
- **Transportation**
  - Airlines (domestic, international)
  - Marine (domestic, international)
  - Railways
  - Inter-city Buses
  - Taxis
  - Pipelines
  - Trucking (inter and intra-provincial)
  - Urban Public Transit
  - Postal Express
- **Other**
  - Rent control
  - Metrication
  - General wage and price controls

ronment from pollution and the adverse effects of natural resource development.

Much local regulation is concerned with controlling land use. Today zoning and related regulatory tools are being used to attempt to influence the local "quality of life" and the structure of neighbourhoods. Property developers complain that their activities are subject to multiple approvals by up to four levels of government.

Federal and provincial regulation of financial markets and institutions is of long standing. But as more intermediaries and financial instruments appear and as communications systems become more complex, regulation in this area has expanded. Tables B2-1 and B2-3 indicate there are 14 federal and 82 provincial statutes in this area. The regulation of the production and distribution of food products occurs, in one form or another, at every stage in the food system, from the inputs used by the farmer to the supermarket shelf. Federal and provincial legislation has facilitated the creation of agricultural marketing boards, a few of which are able to control the supply and hence the price received by farmers. The common property nature of the fisheries would appear to necessitate government regulation. An elaborate regulatory structure has resulted. It is estimated that there are 18 federal and 115 provincial statutes directly concerned with the regulation of agriculture or fisheries. There are, in addition, 37 provincial and 9 federal statutes that regulate the standards of agricultural products.

A vast amount of government regulation is concerned with health and safety. We regulate health and safety conditions on the job, in the products we use, in the food, drugs and beverages we ingest, in the buildings in which we live, work and shop, and in the medical care we receive. We also regulate the health and safety of animals and plants that are for human use. At the provincial level there are currently 80 statutes concerned with the regulation of health care facilities and another 75 regulating other aspects of health and safety. This number does not include occupational health and safety statutes (see Table B2-3).

Of rising importance has been the use of the power of government to protect or enhance human rights. Constraints are placed on economic behaviour which would discriminate (by reason of sex, age, race, etc.) in regard to employment, the purchase of goods and services and so forth. The age of the computer has resulted in legislation aimed at the protection of privacy.

Federal and provincial governments establish the rules by which collective bargaining will be conducted. Minimum wage levels are established along with legislation specifying maximum hours of work and minimum holiday and vacation provisions. Some of the more elaborate and detailed provincial regulation is concerned with the production, distribution and sale of alcoholic beverages. Regulations concerning liquor licences represent one of the most complex regulatory problems as matters of taxation, morality and economics are involved.

The provinces also play a major role in the regulation of occupations. Although it is common to refer to a number of professions (e.g., medicine, law, dentistry) as "self-regulating," the professional bodies are delegated their power to license and discipline from a provincial government. An increasing number of occupations are subject to certification or apprenticeship requirements established under provincial legislation. In fact the largest number of provincial regulatory statutes (274 in 1978) are concerned with the regulation of occupations. The typical province regulates 30 to 40 occupations including, in some cases, barbers, podiatrists, dieticians, music teachers, embalmers and interior decorators. It is often difficult to separate the regulation of occupations from that of specific businesses. It is estimated there are 115 provincial statutes concerned with the licensing and regulation of specific types of business. These include such diverse businesses as seed dealers, employment agencies, private detectives, insurance brokers, paperback and periodical distributers and salvage dealers. It should be noted that the federal government licenses certain specialized occupations, e.g., pilots, air traffic controllers, and ships' officers.

Virtually every facet of transportation is subject to government regulation. Many cities control entry into the taxi business and set the rates to be charged. The Canadian Transport Commission regulates entry and fares of the passenger airlines; controls entry and reviews the general tariff

increases of railroads; and regulates the rate of return on interprovincial pipelines. The regulation of interprovincial for-hire trucking has been delegated to the provinces that regulate intraprovincial trucking. With the exception of Alberta, all provinces regulate entry and/or rates in intraprovincial trucking.

This description is not exhaustive, of course. A number of provinces engage in rent control. Between 1975 and 1978 the federal government, with the support of the provinces, operated a general system of wage and price controls administered by the Anti-Inflation Board.

Not only are there a large number of regulatory statutes, but these are also accompanied by a large volume of subordinate legislation, i.e., regulations. Priest and Wohl indicate that there are 9,475 pages of statutory instruments, including regulations, in the 1978 *Consolidated Regulations of Canada* made pursuant to the 140 federal statutes that were identified as being aimed at influencing the economic behaviour of individuals in the private sector.[7] Almost one-half of this volume applies to transportation statutes. At the provincial level, we have only the data in Table 2-2.[8]

TABLE 2-2

REGULATIONS PURSUANT TO REGULATORY STATUTES IN FOUR PROVINCES, 1978

	Regulations	
	Number	Pages
British Columbia	676	4,006
Manitoba	278	2,741
Ontario	1,118	6,631
Quebec	1,267	9,514*

*Bilingual format

In terms of "pages of law," these data suggest that regulations are more extensive than the statutes that govern them. When it is recognized that both federal regulations and those of the Province of Quebec are published in a bilingual format, it is evident that the volume of regulations in Quebec equals that of the federal government. However, the Province of Ontario's economic regulations (which are unilingual), in terms of the number of pages, are substantially more extensive than either Quebec's or those of the federal government.

(1) Measuring the Scope of Direct Regulation

It should be apparent that there has been a widespread substitution of administrative decision making for the forces of competition, imperfect as they may be. As shall be defined in more detail in Chapter 4, direct regulation is concerned with government control over price and/or supply in an industry. The latter is taken to include control over entry, exit or output while the former includes control over the structure of prices charged or the rate of return (profits) allowed.

What proportion of economic activity in Canada is subject to some form of direct regulation? Thompson and Stanbury indicate how they prepared their estimate:

> To determine the scope of price and/or supply controls, we first identified the contribution to real domestic product at factor cost (GDP) made by each industry or activity in both the U.S. and Canada. . . . Next, we identified all industries subject to price and/or supply controls and attempted to estimate the proportion of industry output subject to these controls. . . . Finally, these estimates were summed to produce an estimate of the proportion of total economic activity (GDP) subject to direct economic regulation.[9]

As Table B2-4 indicates, a considerable proportion (29 percent) of Gross Domestic Product in Canada is subject to some form of direct regulation. As a proportion of total *private* sector activity the figure would be considerably higher as GDP includes government activities. It should be emphasized, however, that the calculations do not distinguish between the different degrees of regulatory control that exist in various industries. For example, the dairy industry in Canada is intensively regulated as to both price and supply. Considerably less regulatory control is exercised by the Canadian Wheat Board over various grains.

While the proportion of economic activity in Canada subject to some form of direct regulation appears to be somewhat greater than in the United States (where the proportion was 26 percent), about one-half the observed difference is account-

ed for by differences in the economic structure of the two economies. In other words, industries subject to regulation in both countries tend to play a larger role in the Canadian economy than in the American (see Table B2-4).

In examining this measure of the scope of government regulation, Thompson and Stanbury were impressed by the similarities between Canada and the United States in respect to direct regulation.

> There are virtually no industries or activities subject to these controls in Canada that are *not* also subject to direct regulation in the U.S., and *vice versa*. These include transportation, energy (notably electricity and petroleum), telecommunications, broadcasting, insurance, banking, securities, and a substantial proportion of the agricultural sector, as well as a large number of licensed occupations and professions. Moreover, the same industries tend to be subject to the same *type* of controls in both Canada and the U.S.[10]

Although it is usually argued that the state has played a larger part in the Canadian economy than it has in the United States measured in terms of the scope of direct regulation, there is little difference between the two countries. However, it should be noted that public ownership is far more extensive in Canada than it is in the United States. Moreover, there may also be significant differences between the two countries in the field of "social" regulation, which includes health and safety, environmental, "fairness," and cultural regulation.

(C) THE GROWTH OF REGULATION IN CANADA

(1) Methodological Issues

There are a number of ways in which the growth of economic regulation may be measured.[11] The focus, for example, may be on the amount of economic activity that is subject to various types of regulation over time, or it may be on the amount of resources spent both by governments and by those subject to regulations in order to comply with them. The focus could also be placed on the activities or areas subject to regulation and a count made of activities that are made subject to regulation over time. Any method chosen presents important problems in information-gathering and measurement.

Governments can directly regulate in a variety of ways: by passing a new statute; by amending an existing act; by repealing an old act and passing a new one incorporating significant changes; and by promulgating regulations or other statutory instruments under an existing act. In addition, governments can regulate through the use of conditional grants and there are indirect methods as well.[12] We have decided to use as a proxy for the growth in regulatory activity changes in the total number of statutes that have been designated as "regulatory,"[13] and in the number of statutory instruments promulgated under these statutes. Ideally, we wish to measure the *effects* of government regulation in terms of costs, benefits, and the distribution of income. (See Chapter 3 for more detail.) The measurement of effects is a complex task that must be conducted for each area of regulation individually. Studies commissioned by the Council, the results of which we shall describe in our Final Report, will measure some of the effects of a number of types of regulation.

The Council recognizes that counting the number of statutes and items of subordinate legislation provides a measurement of the level and growth of regulatory legislation, not of regulatory activity *per se*.[14] Furthermore, it is recognized that the simple measurement of the number of regulatory statutes will not necessarily indicate the importance, complexity, or cost of the regulation prescribed. Such information could only be obtained through a detailed analysis of the substance of each statute, as well as an assessment of enforcement effort (which may be measured in terms of government expenditures) and compliance rate in relation to the subjects regulated. Nor will our tabulations of statutes and regulations indicate activities by the government that change economic behaviour by such indirect means as the threat or potential threat of government action or the use of incentives under the *Income Tax Act*. Moreover, a larger number of statutes in one area of regulation as opposed to another may not indicate that the former is subject to more extensive or intensive government regulation. For example, a new omnibus statute might incorporate several related older ones. Finally, the convention adopted in dating new regulatory statutes should be noted.[15]

(2) An Overview of the Growth of Federal and Provincial Regulation

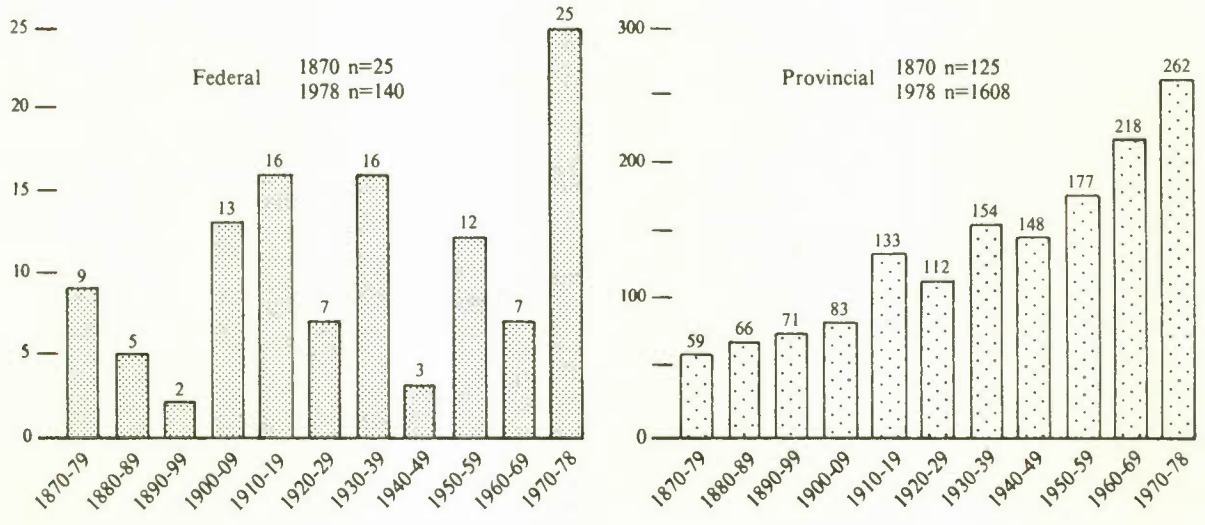
The total number of federal regulatory statutes increased from 25 in 1870 to 140 in 1978. During the same period, the total number of provincial regulatory statutes increased from 125 to 1,608. Measured in terms of an average annual rate of growth between 1870 and 1978, federal regulatory statutes have been growing at just over 1.6 percent as compared with 2.4 percent for the provinces.

The pattern of growth of regulatory statutes of the two levels of government has been quite different. As Figure 2-1 indicates, federal regulation has grown in spurts. Of the 140 statutes in existence in 1978, one-half were enacted (or their predecessors were enacted) in four decades: 1900-09, 1910-19, 1930-39 and 1970-78. Periods of high regulatory activity alternated with periods in which few new statutes were passed. The growth in the number of provincial regulatory statutes has been remarkably smooth. As Figure 2-1 shows, for all provinces combined, the number of new statutes has increased steadily in every decade but two since 1870. Only in the 1920s and 1940s did the number of regulatory statutes passed not increase over the number enacted in the previous decade. Perhaps the slight decline in the rate of increase in the '20s reflects the fiscal stringency faced by most provinces during this period. The dip in the '40s probably reflects the assumption by the federal government of vast new regulatory powers during World War II. Most of these powers were exercised under the *War Measures Act* in the form of a large number of orders in council. The number of new federal regulatory statutes in the 1940s was very small (see Figure 2-1). With the exception of Ontario and Nova Scotia, the patterns of growth in each of the other provinces over the past century has been subject to greater variation than that for all provinces combined.

Because of differences in the federal and provincial patterns of growth of regulatory statutes, the "age" of existing regulatory statutes differs considerably. One-quarter of the provincial regulatory statutes in existence in 1978 were originally enacted (or a predecessor was enacted) before 1910.[16] Fifty percent were first enacted before 1930 and 70 percent were enacted before 1960. At the federal level, 39 percent of the regulatory statutes in effect in 1978 came into existence, in some form, prior to 1910; one-half originated prior to 1920; and 77 percent were first enacted prior to 1960.

Other proxy measures for the growth of government regulation also reveal its growth. Consider the following illustrations.[17] First, the number of *pages* of federal regulatory statutes increased by almost 350 percent between 1886 and 1970. Second, between 1949 and 1978 the number of statutory instruments, including regulations, made

FIGURE 2-1
Number of Federal and Provincial Regulatory Statutes by Decade of Enactment or Enactment of their Predecessor



pursuant to federal regulatory statutes, increased by over 200 percent. The number of pages of statutory instruments increased by over 250 percent. This is more than twice the increase in the number of pages of statutory instruments made pursuant to other federal statutes, i.e., those not primarily aimed at altering the economic behaviour of individuals in the private sector. The number of pages of subordinate legislation pursuant to transportation statutes alone increased from 922 in 1949 to 4,419 in 1978. The average number of instruments per statute increased by almost 80 percent. Third, it appears that the average length of federal statutes has increased significantly, although this is not a conclusive indication of increased scope. The 33 regulatory statutes in the *Revised Statutes of Canada* in 1886 averaged 20.8 pages in length. In 1906 they had increased to 26.5, in 1927 to 27.3, in 1952 to 28.2 and in 1970 to 29.0 pages. The statutes enacted between 1970 and 1978 average 31.8 pages in length.[18] Fourth, at the provincial level estimates were made of the growth in the number of pages of regulatory statutes. These data indicate, for example, that in Ontario the number of pages increased from 515 in 1877 to 1,494 in 1927 to 3,140 in 1970. In Saskatchewan, the number of pages of regulatory statutes increased from 944 in 1909 to 3,611 in 1978. (Data for the other provinces are given in Table B2-5.)

(3) The Growth of Regulation in the '70s

Accepting all the imperfections of our proxy measures, there is considerable evidence that suggests that the 1970s have been a period of relatively rapid growth in regulatory activity. At the federal level we note that 25 new regulatory statutes were enacted in the nine-year period 1970-1978. This number exceeds the total number of such statutes (22) passed between 1940 and 1969. Because re-enactments often indicate the consolidation of a series of important amendments, they provide another measure of the expansion of regulatory capacity. If the 140 federal regulatory statutes in existence in 1978 are dated by the later of the year of original enactment or most recent re-enactment, we find that 36 were passed or re-enacted since 1970.[19] Another measure of the growth of federal regulation in the 1970s can be obtained by looking at the *flow* or change in regulation over a short period as measured by the number of regulations, amendments or revocations made pursuant to regulatory statutes. Between 1950 and 1970 the number of regulations, amendments and revocations ranged between 98 and 143 each year. After that the number increased each year (except 1972), reaching 352 in 1977.[20] There was a similar expansion of federal regulatory activity in the United States in the 1970s in terms of the number of new statutes, regulations and regulatory agencies.[21]

At the provincial level, the growth of new regulatory statutes in the '70s was not as great relative to the previous three decades. However, the absolute number is much greater. As Table B2-2 indicates, the ten provincial governments enacted 262 regulatory statutes between 1970 and 1978. This is an increase of 19 percent over the number existing at the end of 1969. Put slightly differently, on average *each* province passed as many regulatory statutes in the past nine years as did the federal government. If the 1,608 provincial regulatory statutes in existence in 1978 are dated by the later of their year of enactment or re-enactment, the growth of regulatory legislation in the '70s is more apparent. Some 487 of the existing regulatory statutes (or 30 percent) were enacted or re-enacted in the past nine years. (Over 54 percent of provincial regulatory statutes were enacted or re-enacted in the 1960s or the 1970s.)[22]

Limited information, based on only three provinces,[23] suggests that the growth of subordinate regulatory legislation has been much greater in the '70s than the growth of regulatory statutes (Table 2-3).

TABLE 2-3

PERCENTAGE INCREASE IN REGULATIONS IN THREE PROVINCES

	Number	Pages
Manitoba 1971-78	71%	222%
Ontario 1970-78	103%	78%
Quebec 1972-78	148%	78%

The bulk of the growth of federal regulatory statutes in the 1970s falls into four areas: environment, health and safety, the regulation of information or standards for non-agricultural products, and transportation. In 1970 concern for the environmental fragility of the nation's northern frontier saw passage of the *Arctic Waters Pollution Prevention Act* and the *Northern Inland Waters Act*. The former was enacted as a result of the exploitation of natural resources in the arctic areas; it regulates the type and quantity of waste that may be deposited in arctic waters, as well as the navigation of shipping in the North. The latter provides for the conservation, development and utilization of the water resources of the Yukon and Northwest Territories by licensing the use of water.

In 1971 the *Clear Air Act* was passed, establishing the federal government's regulatory powers over air pollution by prescribing emission standards for various substances. Federal regulation of water pollution is conducted under a long-standing provision in the *Fisheries Act* regulating the "obstruction and pollution of any waters frequented by fish." Two amendments to this Act in the past decade have emphasized government concern in this area. Two more environmental acts were passed in 1975. The *Ocean Dumping Control Act* reflects the concern with the dumping of waste and other substances in the ocean by ships, aircraft, platforms and other man-made structures. The purpose of the *Environmental Contaminants Act* is to protect human health by prescribing, *inter alia*, the quantity and concentration of a substance or class of substances that can be released in the course of a commercial, manufacturing or processing activity.

The *Motor Vehicle Safety Act*, reflecting to some degree the growing federal regulation of the automobile in the United States, was passed in 1970. The Act provides for minimum safety standards for motor vehicles produced or imported into Canada or exported from this country. It was followed in six years by the *Motor Vehicle Tire Safety Act* that basically fulfills the same function for motor vehicle tires. The third health and safety statute enacted in the 1970s was the *Radiation Emitting Devices Act*. It establishes standards for the manufacturing and importing of these devices (but excludes devices designed primarily for the production of atomic energy within the meaning of the *Atomic Energy Control Act*).

Four federal statutes primarily concerned with setting standards and providing information were passed in the 1970s. The *Textile Labelling Act*, enacted in 1970, regulates the labelling and advertising of textile articles produced in or imported into Canada. It prescribes information to be included on the label, such as the textile fibre content, percentage by weight of the fibres, identity of the manufacturer and the generic name of the fibres. The *Consumer Packaging and Labelling Act* of 1971 serves an analogous function for prepackaged and certain other products. It requires information to be set out on the package or label, for example, a statement of contents by unit measurement. The growing scope of regulation is illustrated by the passage of the *Weather Modification Information Act* in 1971. It establishes the procedure to be followed before undertaking weather modification activities. The OPEC-induced oil crisis prompted the *Petroleum Corporations Monitoring Act* which was passed in 1978. This Act requires the reporting of certain financial and other statistics relating to the affairs of petroleum companies carrying on business in Canada. The Act's stated purpose is "to enable the Government of Canada to better plan and develop policies for the management of Canada's energy supplies and resources" and to provide the government "with the detailed knowledge necessary to give authoritative assurances to the Canadian people that those policies are being effectively pursued in Canada."

Four transportation-related statutes were passed in the 1970s. These included the *Maritime Code Act* and the *Shipping Conferences Exemption Act*. The former codifies provisions relating to such things as the registration, ownership, identification, and transfer of ships. The latter exempts agreements concerning ocean shipping rates from the provisions of the *Combines Investigation Act*.

At the provincial level several areas of regulatory growth can be identified:

- "consumer protection and information" — 25 of the 74 statutes in existence in 1978 were passed since 1970 (another 21 had been enacted in the 1960s).

- "environmental protection" — of the 23 statutes "on the books" in 1978, 13 were passed in the '70s (another seven were passed in the 1960s.)

- "business licensing" — there was a substantial growth as 35 new statutes were passed on top of the 30 in the 1960s, bringing the total to 115 in 1978.

- "land use/planning" — although the absolute number of statutes is not great in this area (30 for all provinces in 1978), seven were passed in the 1970s (and a similar number in the 1960s).

The growth of provincial regulation in the '70s is described in Tables B2-2 and B2-3.

(4) Government Regulation of Agriculture[24]

Government intervention in agriculture provides a useful illustration of the expansion of regulatory activity in Canada. In 1900 the federal government passed the *Manitoba Grain Act* which regulated some of the services associated with the grain trade. The Act provided, *inter alia*, for the licensing of elevators, warehouses, mills and commission merchants; the filing of maximum tariffs; the regulation of receipts, storage, handling, insurance and shipping of grain; and required an allowance of 24 hours for loading freight cars either directly from vehicles or at flat warehouses. The *Canada Grain Act* of 1912 expanded the federal government's role in the regulation of the grain trade across the country and created a Board of Grain Commissioners. This body evolved into the present day Canadian Grain Commission (created in 1971) which exercises extensive regulatory powers over the licensing of elevators and grain dealers, and over the storage, handling, cleaning and weighing of grain. The Commission also establishes grading standards and maximum tariffs for services charged by licensed elevators.

Britain's demand for grain in World War I and the disruption of grain markets resulted in a federal Order in Council in 1917 creating a Board of Grain Supervisors with the responsibility for marketing the grain crop. For a time, the federal government became the sole purchasing agent for the farmers' output. Two years later, the Canadian Wheat Board was established under the first of a series of Acts permitting this government agency to market the year's crop. The Acts, passed in 1919, 1920, and 1921, contained sunset provisions, necessitating the yearly enactments. The *Canadian Wheat Board Act* of 1922, which was also to be of limited duration, required the participation of two provinces in the financing of any deficit. The necessary provincial co-operation was not forthcoming and so the Act did not become operational. The Canadian Wheat Board was not to become a permanent fixture until 1935. It was created in the face of depression-induced low wheat prices. These in turn had all but destroyed the wheat pools created in the 1920s by farmer-controlled co-operatives. (By the latter part of the 1920s, the pools, through their Central Selling Agency, were marketing one-half the Canadian grain crop.) Falling prices pushed the federal government into a variety of measures to support prices and to assist in marketing the crop. By mid-1935 the government had accumulated over 200 million bushels of wheat. In June, the Government of R.B. Bennett reluctantly introduced what was to become the *Canadian Wheat Board Act* of 1935. As drafted, it provided for the compulsory delivery of all grains to the Board. Liberal opposition altered the Bill — the Board would only offer to buy at a set price; farmers were free to accept for market their grain through the private trade. In several succeeding years, the Board incurred substantial losses as international prices fell below the price paid to farmers. Amendments were made to the Act in 1939 that set the floor price and placed a limit on the volume any farmer could sell to the Board. It was not until 1947 that the Wheat Board became the sole marketing agency for wheat (1948 for oats and barley) sold interprovincially and internationally.

Two other regulatory acts concerning the marketing of wheat were passed in 1939. The *Grain Futures Act* established regulations concerning futures trading in grain. The other statute was the *Wheat Co-operative Marketing Act* that provided a price stabilization formula for wheat co-operatives.

Legislation facilitating the creation of compulsory, producer-controlled agricultural products marketing boards began in British Columbia in 1927 with the *Produce Marketing Act*. The

demand for government intervention came primarily from fruit growers in the Okanagan Valley, who had made several unsuccessful attempts at raising and stabilizing prices through co-operative marketing schemes. The Government of British Columbia moved to make the marketing scheme compulsory because "it has been found impossible to secure 100 percent organization by voluntary methods."[25] In 1931 the British Columbia Act was declared *ultra vires* of the provincial legislature. In the same year, a Saskatchewan act aimed at the compulsory pooling of wheat suffered the same fate, and two years later a British Columbia act to equalize returns to milk producers was also struck down.

Farmers looked to Ottawa to provide the legislative means to create compulsory marketing boards. Draft legislation was in existence as early as mid-1932, but the federal *Natural Products Marketing Act* was not passed until 1934. Considerable efforts were made to avoid constitutional difficulties. Under the Act the Dominion Marketing Board was set up to supervise the local boards created by petition to the federal agency. Before any scheme was to be approved, the Governor in Council had to be satisfied that the principal market for the natural product was outside the province of production, or that some part of the product might be exported. Complementary legislation was passed in all nine provinces to give the local boards authority to regulate intraprovincial marketing. The Dominion Board delegated authority to the local boards to regulate interprovincial trade and exports of the product. The Dominion Board approved of less than one-half the schemes presented to it; however, some 22 marketing schemes were quickly approved — including one from British Columbia fruit growers.

In 1937 the Judicial Committee of the Privy Council held the federal *Natural Products Marketing Act* to be unconstitutional. In the face of the challenge to the federal marketing board legislation, British Columbia brought in new legislation in 1936, the *Natural Products Marketing (British Columbia) Act*. By 1939, five of the nine provinces had enacted valid marketing board statutes. Three more followed suit in the 1940s. Subsequently, more specialized marketing board legislation was passed by most provinces.

In 1939 the federal government passed the *Agricultural Products Co-operative Marketing Act* to permit the pooling of returns for farmer-controlled co-operative marketing schemes, as well as a price stabilization formula. But it was not until 1949 that the federal *Agricultural Products Marketing Act* was passed to replace the Act declared unconstitutional in 1937. It provided for the delegation to a federal or provincial marketing board powers in respect to interprovincial and export trade. It also provided for boards to be given the power to collect levies from farmers to create reserves and equalize returns. The expansion of agricultural marketing boards was assured.

In 1966 the Canadian Dairy Commission was created. Following the Wheat Board, it became the second national agricultural marketing scheme. The Commission has the power to stabilize the market for dairy products by offering to purchase such products and to package, store, process, ship, insure, import or export or otherwise dispose of any dairy product. In 1971 the Commission began operation of a market-sharing quota system, now national in scope, for industrial milk and cream and for fluid milk used for manufacturing purposes. In 1972 the federal government enacted the *Farm Products Marketing Agencies Act*. This enabling legislation provides for the creation of additional national marketing agencies with the support of provincial boards. The Canadian Egg Marketing Agency was created in 1973, and in 1974 a national turkey marketing scheme was established.

The effect of both federal and provincial legislation in respect to marketing boards, despite its early constitutional difficulties, is manifest. There are now over 100 federal and provincial agricultural products marketing agencies of one type or another.[26] For example, as of 1977, there were 22 marketing agencies in Ontario, 25 in Quebec, 10 in British Columbia and New Brunswick but only 1 in Newfoundland. They market everything from apples to cranberries to hogs to tobacco. Three-fifths of farm cash receipts are obtained from sales through federal and provincial marketing agencies.[27]

(5) Regulation of Transportation[28]

The field of transportation provides another excellent illustration of the expansion of government regulation in Canada. Such regulation preceded Confederation. While some railroad charters contained maximum rates (and continued throughout the century to "regulate" railways), the general regulation of railroads began in Canada in 1851 at a time when British North America had less than 100 miles of track. Under the *Railway Clauses Consolidation Act*, "the tolls of all railway companies falling under the authority of the *Act* were subject to approval of the Governor in Council and, in addition, the *Act* required that there be no discrimination or preferences in tolls."[29] In the same year, the Legislative Assembly of Canada established a Board of Railway Commissioners as an advisory body to the Governor in Council. In 1857 the Board was authorized to supervise the safety of railway construction and operation under the *Act for the Better Prevention of Accidents on Railways*.

The agreement with the Canadian Pacific Railway in 1880 provided, among other things, that Parliament could not reduce the company's rates until it had earned a 10 percent return on its capital. In addition, the CPR was given a virtual monopoly in the West as no other federally chartered lines were to be constructed south of it for 20 years.

What was to be one of the historically important federal regulatory actions took place in 1897 with the Crows Nest Pass agreement. The rates on grain and flour were reduced in return for a subsidy on the construction of a new line. The rates were enshrined in statute in 1925 and, with exception of a brief period when they were suspended, they have remained in force until today. They now represent an example of regulation-induced distortions, although the Crow rates must be put into the context of the large land grants made to the CPR. But the fault lies with Parliament, not the regulators of the railroads.

In 1888, under the *Railway Act* (originally passed in 1868), regulation of the railroads was placed under the Railway Committee of the Privy Council. It was not until 1904 that Canada created its first modern federal statutory regulatory agency — the Board of Railway Commissioners of Canada. (In the United States, the first state railway commission was established in 1844 and by 1855 there were 14 such commissions.[30] The first of many federal *independent* regulatory agencies, the Interstate Commerce Commission, was established in 1887 to regulate railroads.)

The Board of Railway Commissioners was given jurisdiction over federally chartered lines and those provincially chartered ones that were declared to be "a work for the general advantage of Canada." It had the power to control rates. The provisions for appeal established a precedent for a considerable number of the statutory regulatory agencies that were to follow.[31] Appeals to the courts were limited to questions of law or jurisdiction. However, the *Railway Act* gave to the Governor in Council, on petition of an aggrieved party, or on his own motion, the power to "vary, change or rescind any order, decision, rule or regulation" of the Board.

In 1908 the jurisdiction of the Board of Railway Commissioners was extended, giving it regulatory power over express, telegraph and telephone companies. The Board and its successors were to retain jurisdiction over telecommunications until 1975. The political strength of the Maritime Rights Movement resulted in the *Maritime Freight Rates Act* of 1927. It lowered freight rates in the Maritimes by 20 percent and made compensatory payments to the railroads affected. Again Parliament was itself regulating the railroads in the name of political contracts associated with Confederation.

The federal regulation of air transport began in 1919 with passage of the *Air Board Act*. It created a Board of five to seven members appointed by the Governor in Council. The Chairman of the Air Board was to be a cabinet minister. All regulatory functions were subject to the approval of the cabinet. These included the regulation of routes, the licensing of pilots, and the registration of aircraft and air stations. Under the *Transport Act* of 1938 both the Air Board and the Board of Railway Commissioners were brought under the newly created Board of Transport Commissioners. The new Board was given the additional power to regulate airfares as well as entry and exit.[32] However, six years later, under *An Act to Amend the Aeronautics Act*, a separate Air Transport Board

was created. "For all intents and purposes the Board was an advisory body, studying at the direction of the Minister of Transport and recommending to the government, ways and means of advancing civil aviation. All regulations made by the Board required approval by the Governor in Council."[33] In 1945 the *Aeronautics Act* was amended to give the Board the powers of a court. However, the ability of those who were regulated to appeal its decisions to the Minister was enhanced. In 1967, with the enactment of the *National Transportation Act*, the regulation of commercial airlines was transferred to the Air Transport Committee of the newly created Canadian Transport Commission.

The regulation of water transport dates from the earliest days of British North America. The predecessors of the *Canada Shipping Act*, which was passed in 1906, predate Confederation. As comprehensive as this Act was (it was over 200 pages long in the 1927 *Revised Statutes of Canada*), it did not regulate shipping rates. Under the *Inland Water Freight Rates Act* of 1923 limited control over specific rates was given to the Board of Grain Commissioners. With the *Transport Act* of 1938, the regulation of inland shipping was divided among the Board of Transport Commissioners, the Board of Grain Commissioners and the newly created Department of Transport. In addition, the Minister of Trade and Commerce administered various steamship subventions and the Minister of National Revenue licensed ships under the *Canada Shipping Act*. As the number of bodies regulating shipping increased during World War II, there was a need to co-ordinate government intervention into merchant shipping. In 1947 the *Canadian Maritime Commission Act* was passed. The Commission was almost entirely an advisory body, but it did administer the subventions formerly administered by the Department of Trade and Commerce.

The expansion of intermodal competition was reflected in the creation of the CTC under the *National Transportation Act* in 1967. One of the five intermodal committees created deals with water transport; the others deal with air, rail, motor vehicle and commodity pipeline transport.

The regulation of trucking by most of the provinces, in the form of control over entry, originated during the 1930s. It was prompted by the "destructive" competition brought about by the Depression. For example, in 1934 Ontario amended its *Public Commercial Vehicles Act* to establish a test of "public convenience and necessity" for new entrants to obtain an operating permit. Quebec and British Columbia followed suit with similar provisions in 1935. But it was not until 1963 that Ontario, for example, required the filing of rates by trucking firms. In 1937 and in 1940 bills were introduced in Parliament to regulate trucking firms engaged in interprovincial and international transport. Both were withdrawn in the face of opposition from truckers and some shippers. It was argued that the small volume of traffic involved would not justify the cost of regulations. The Royal Commission on Transportation (Turgeon Report) of 1951 suggested that the time had come for Parliament to consider the question of its control over interprovincial and international highway transport. This suggestion was not accepted, in part because the trucking industry was opposed to the possibility of two levels of government regulating it, particularly when the federal government owned a very large competitor (CNR).

The decision in the *Winner* case in 1954 determined clearly that, under section 92 (10)(a) of the *British North America Act* the federal government had jurisdiction over the intraprovincial operations of companies also engaged in extraprovincial transport, as well as over extraprovincial motor transport. The federal government had not undertaken any economic regulation of motor transport. Later in 1954 it passed the *Motor Vehicle Transport Act*, pursuant to which federal responsibility for regulation of extraprovincial trucking was delegated to provincial regulatory authorities. In 1967, however, the federal government incorporated sections 29 to 31 into the new *National Transportation Act*, which provided for the regulation of extraprovincial trucking by the CTC in the event that it should decide to take back the powers now delegated to the provinces. However, the Minister of Transport made it clear at the time that the federal government would repossess its powers only if the provinces were to consent to its doing so.

Today all provinces but one regulate entry into the intraprovincial trucking industry. Only a few provinces regulate rates, but several require that

rates be filed and adhered to by trucking operators. Alberta regulates neither entry nor rates, nor does it require that rates be filed with the Alberta Motor Transport Board.

In all, the transportation sector is currently subject to 26 federal regulatory statutes and at least twice that number of provincial ones. It is also subject to thousands of pages of subordinate legislation, i.e., regulations.

It has only been possible to briefly survey two of the many areas of government regulation in Canada. But the dynamic character of the regulation of economic activity seems clear. It reflects the growth and development of the Canadian economy and the changes in our social values. From before Confederation, Canadian governments have been regulating all elements of the transportation system that bind this enormous country together. As new modes emerged (e.g., trucking and airlines), old regulatory techniques were adapted. The economic dislocation of the 1930s saw the emergence of federal and provincial regulation to create agricultural marketing boards to improve farmers' incomes. Growing urbanization appears to have been the primary force in the creation of the now elaborate provincial and local land use and planning regulations. The cumulative effects of industrialization and rising real incomes account, in part, for the profusion in the late 1960s and 1970s of new statutes designed to regulate environmental pollution. The growth of the "welfare state" has been accompanied by the growth of the "regulatory state."

Perhaps as impressive as the growth in the number of regulatory statutes (and regulations) is the fact that the seeds of a fair proportion of them were planted before World War I, some going back to Confederation. Canada never has had an unregulated economy. The state has always been an active participant in the life of the nation. Widespread deregulation, in the sense of reducing the number of regulatory statutes or many of the powers contained in them, would seem to require a major change in the attitudes of Canadians toward their governments.

(D) REGULATION AND THE INCREASING COMPLEXITY OF CANADIAN FEDERALISM

Coincident with, and partly resulting from, the growth of government regulatory activity is the growth of the interdependence between the federal and provincial governments. A fundamental transformation has occurred in the Canadian federal system over the last thirty-five years. Although the constitutional division of powers established in 1867 and subsequently interpreted by the courts is of considerable importance,[34] the practical effect of this change has been that the constitutional jurisdictions of the two levels of government have become increasingly interrelated and intertwined.[35] This has been amplified by revenue and cost sharing arrangements between the federal and provincial governments.[36] There are few areas of policy making where one government acts alone. In terms of regulatory legislation, this interdependence is illustrated by the close relationship of constitutional jurisdictions. The exercise of constitutional powers available to each level of government will affect the activities of the other. Furthermore, many problems faced by governments today fall within *both* federal and provincial jurisdictions. Thus, both levels of government may regulate in the same area and often regulate the same behaviour. The result may be duplication, overlap, inconsistency, and confusion in regulatory requirements imposed on individuals and firms in the private sector and in the regulatory activities of the two levels of government.

A concern for the impact this complex and interdependent federal system may have on governmental regulatory activities was part of the rationale for the creation of the Reference. The following sections focus on some of the intergovernmental dimensions of regulatory activities that we have found to be a source of concern during our consultative process. We need to emphasize, however, the tentative and exploratory nature of our comments. Although we have found some useful research has been conducted in this area, much remains to be done. A more detailed analysis will be available in our Final Report at the end of 1980. Accordingly, we only survey this complex area, highlighting what we perceive to be the central issues.

In our discussions and our research, we have sought to identify the intergovernmental facets of regulation and to indicate which of these may be defined as a "burden." The first of the burdens identified pertains to the impact of regulatory activities on the integration of the Canadian economy. The second involves the enhanced costs of regulation incurred in the private sector that result from overlap, duplication, or conflict of regulatory requirements. The third reflects the additional costs to governments attributable to overlap and duplication of regulatory activity.

Two basic qualifications are in order, however, before we turn to a discussion of these burdens. First, we recognize that duplication and overlap between governments need not necessarily increase costs nor lead to inefficiency. Indeed it is possible that some duplication and overlap may be conducive to efficiency and result in decreased costs. It is argued that "redundancy serves many vital functions in the conduct of public administration. It provides safety factors, permits flexible responses to anomalous situations and provides a creative potential .... If there is no duplication, .. no overlap, .. no ambiguity, an organization will neither be able to suppress error nor generate alternative routes."[37] On the other hand, not every instance of duplication or overlap is necessarily useful. In addition to waste or conflict, duplication of regulatory activity may confuse and irritate those subject to regulation and other regulators. It also may be perceived as a jurisdictional intrusion by one level of government or another. It is, therefore, imperative that far greater attention should be directed to the analysis of the relevant costs and benefits (in economic and non-economic terms) on a case-by-case basis.

Second, we recognize that there are many values and objectives of a social and political nature that the federal system was designed, at least in part, to support, encourage or protect. Furthermore, some of these values and objectives may well be in conflict with certain of the values discussed in Chapter 3.[38]

(1) Regulation and Economic Integration

We take for granted, as a first principle of Canadian federalism, that economic integration is a *sine qua non*. Without a commitment to an integrated or common market, i.e., "a single market within which goods, services, labour, and capital may move freely without impediments created by public authorities,"[39] there can be no meaningful commitment to a unified country. Furthermore, there are, in Canada's case, very practical reasons that should reinforce that commitment. As Safarian has argued, "the large size of countries with whom we must compete and the formation of very large customs unions and free trade areas elsewhere in the world make it esssential for Canada to derive maximum advantage from its own relatively small internal market."[40]

We are concerned that governments today are increasingly exercising their regulatory powers to achieve goals that conflict with the objective of an integrated national market. In some instances, the impediments are deliberately created, in part, perhaps, according to one commentator, "to solve problems *resulting from* economic integration."[41] In others, public authorities, perhaps insufficiently appreciative of the economic interdependence we have described, unwittingly construct obstacles to economic integration. Whatever the motivation, it appears that one of the burdens of overlapping government jurisdictions that may affect the efficiency of individual Canadian firms and the economy as a whole is the exercise of regulatory powers without due regard to their impact on the integration of the Canadian economy.

Actual instances of regulatory impediments to the free flow of goods, services, labour and, to a lesser extent, capital are found in studies such as Safarian's and especially that done for the Ontario Economic Council by Trebilcock et al.[42] Such barriers pertain to agricultural marketing, advertising, land ownership, trucking, securities, and occupational and professional certification. The actions by both British Columbia and Quebec to block attempts at interprovincial takeovers of MacMillan Bloedel and Crédit Foncier, respectively, and the continuing conflict between Ontario and Quebec over rules regulating construction workers offer recent examples of this type of behaviour. We recognize that, although regulatory barriers to interprovincial trade are being identified, we lack sufficient knowledge upon which to draw strong conclusions. Nevertheless, if the barriers develop into a trend toward the fragmentation of Canada as an identified national market, the economic

consequences will be most serious. Substantial economic losses will be incurred — losses that the nation can ill afford.

(2) Private Costs

The Council is still in the process of gathering the data that would allow the quantification of at least some of the costs of overlap, duplication and conflict. Notwithstanding the absence of data, however, we can describe some of the negative aspects.

The most obvious costs to the private sector resulting from duplication and overlap are those incurred in complying with the regulatory requirements of between two to eleven governments, as opposed to a single government.[43] Given the differences we have described in the various regulatory activities, costs will inevitably be compounded by different reporting requirements and conflicting standards. In some cases, the requirements may be fundamentally contradictory. In responding to the demands of multiple regulators, resources are absorbed in coping with government, rather than in producing more goods and services. To the extent added costs are passed through by way of increased prices, the consumer pays the bill for the regulatory system. In this respect, although we have not verified the figures, it is claimed that the existing regulatory system for highway transport adds, as a direct result of the duplication and conflict in requirements, at least 5 percent to the cost of moving goods in Canada.[44] A study prepared for the Regulation Reference estimates the cost to the private sector of the ten provincial trucking regulatory authorities to be within a range of $30 to $55 million.[45] It is difficult to say by what amount this cost might be reduced if all trucking regulation were conducted at the federal level.

There are two other costs that the citizen may incur as a result of the impact of the intergovernmental system on regulatory activities. The first is under-regulation or "regulatory gaps." Although most attention has been focused on the excess of regulation giving rise to regulatory burden, there may be instances that arise because of intergovernmental conflicts where costs are incurred because of the absence of regulation, where citizens require protection but do not obtain it. One such regulatory gap was identified by the recent Ontario Royal Commission on the Health and Safety of Workers in Mines, which found that uranium miners were not adequately protected because of jurisdictional difficulties.[46] According to the federal Deputy Minister of Labour, the situation was one "of confusion and impotence" and a "no-man's-land" insofar as inspection was concerned.[47] Although this may be an isolated instance, we believe that care must be taken to ensure that adequate and necessary regulation is not sacrificed, inadvertently or otherwise, because of federal-provincial considerations. Too little regulation can also inflict costs on citizens.

The second non-economic cost the citizen may incur as a result of the impact of the federal system on the regulatory system is the diminution of accountability. The regulatory system may become so entangled, so confused, that the citizen does not know to whom to turn for redress. Nor does he know who to hold accountable and responsible for the inadequate performance of regulatory responsibilities. This uncertainty may be a serious cost if it undermines the principle of political accountability discussed in Chapter 5. Given the complexity of the present system, there is a serious danger in this respect.

(3) Costs to Governments

If the individual Canadian as consumer must ultimately bear the burden of increased costs to producers resulting from overlap and duplication, he or she as citizen and taxpayer must also pay for those costs arising out of the impact of overlap and duplication on the costs of governments. These costs have three aspects. The first is the most easily identified — the additional administrative costs that result from several jurisdictions undertaking the same regulatory activities. Although there may not always be economies of scale available in the provision of government services, it does seem inevitable that there will be some wastage in the creation, organization and operation of multiple governmental agencies.

The second aspect is perhaps more important than the first. Given the interdependence that exists in our federal system, not only may pro-

grams be duplicated, in whole or in part, but regulatory programs of one jurisdiction may be impaired and even nullified by the actions in other jurisdictions. This may result from unintended "spillovers" between jurisdictions (i.e., government-created externalities), or deliberate actions by one jurisdiction to neutralize the effects of actions by another jurisdiction. In recognition of the need for co-ordination and harmonization to prevent the disruptive impact of interdependence, governments in Canada now spend a great deal of their time and energy managing for the intergovernmental system.[48] There are now over 335 federal-provincial committees and an Alberta study, for example, documented 337 meetings of federal and provincial officials in 1975.[49] "Executive federalism"[50] has undoubtedly resulted in improved co-ordination and harmonization, and thus has reduced some of the costs of overlap. But it may be that insufficient attention has been paid to the costs associated with managing the federal system. While admittedly the political benefits may be great (and are, of course, impossible to quantify), it would be unwise to ignore what are unquestionably substantial costs in terms of expenditures and, more important, of time, energy, and political focus.

Although we lack a firm empirical base to draw definite conclusions, a case can be made that the interdependence now characteristic of our federal system may well have the impact suggested by First Ministers in February 1978: namely, "serious adverse effects on the efficiency of Canadian firms and on the allocation of resources and distribution of income." Although we have sought to identify the dimensions of the intergovernmental regulatory burden and to illustrate their nature, a more comprehensive assessment of the burden must await the results of the research commissioned by us and other parties.[51] The results of our research will be discussed in our Final Report.

3 A FRAMEWORK FOR ANALYSIS

> By now regulation almost parallels the taxing and spending powers of Government in terms of its influence and importance in the life of the nation. Finding ways to improve how it goes about regulating is the most important managerial task now facing the Government.
>
> Charles L. Schultze

Introduction

A large and growing number of Canadians agree with the First Ministers that "the burden of government regulation on the private sector should be reduced . . . ." In order to do this it will be necessary to undertake a fundamental review of the existing stock of regulations that are designed to influence economic behaviour. It will also be necessary to examine closely the process by which decisions about new regulations are made. Research conducted under the Regulation Reference could constitute a strong beginning of a "root and branch" or "zero base" review of what Chapter 2 indicated is a pervasive body of government regulation in Canada. We should stress at the outset that such a fundamental review questions both the need for governments to undertake specific regulatory functions at all and the efficiency and the effectiveness with which regulation is conducted in particular instances. The purpose of such questions is not necessarily to eliminate government regulation so much as to improve it. As we understand it, the public's concern in many cases of regulation is not whether a government should intervene, but rather whether its actions are effective and achieve its objectives at the least total cost to society.

In Chapter 4, we examine a variety of rationales that have been proposed to explain government regulation of economic activity. In this chapter, we identify three basic values (among others) in the context of which it is useful to conduct a fundamental review of existing regulations and the process by which new ones are made. These are efficiency, equity, and individual freedom. In addition, we identify a number of additional values that are important when government regulation substitutes political-administrative processes for those of the market. These values are informed decision making, accountability, procedural fairness, and openness.

We then propose a set of simple but important questions that can form the basis for a more strategic approach to government regulation and its reform. It is followed by a framework for assessing the economic impact of regulation. The final section of the chapter attempts to come to grips with the question, "How much regulation is enough?" In doing so, it discusses who should bear the onus of proof when more regulation is proposed and the concept of political markets for regulation.

(A) FUNDAMENTAL VALUES

Government regulation is neither initiated nor conducted in an ethical vacuum. Therefore, a "zero base" review of such regulation must, implicitly at least, be conducted with certain values in mind. The values upon which any serious study of questions of public policy is constructed are important. They influence the analysis and the conclusions and recommendations drawn from the analysis. Although many values are affected by regulation, we stress three: (i) individual freedom, (ii) efficiency in the allocation of scarce resources, including dynamic efficiency in the form of technological and organizational change, and (iii) equity. As we shall see, the last value is the hardest to define. Yet it has been an important objective of a good deal of government intervention in the form of regulation.

(1) Individual Freedom

While government regulation can (and does) prevent exploitation and abuse, it seems necessary in light of its scope and growth to re-emphasize the fact that it is coercive and limits the scope of individual freedom. Of course, freedom is not the absence of all constraints. There is no such thing as absolute freedom and government intervention is not the only source of constraint on individual freedom. Human needs, both physical and social, impose limits on individual freedom. Income and the action of the market itself constrain individual choices in particular situations. In some cases, regulation was imposed to constrain the action of a few that the freedom of many could be enlarged.

Nonetheless, it is useful to ask whether there are ethical as well as practical limits to what a government ought to do in interfering with the lives of private citizens. A former Labour MP argues that in Britain, "welfare-state social democrats behaved, all too often, less like liberators, trying to give ordinary people more control over their own lives, than like nannies determined to scrub recalcitrant humanity behind the ears."[1] Some aspects of government regulation in Canada appear to be aptly described by these words.

It needs to be emphasized that ". . . no examination of the role of government [regulation] could pretend to be even barely relevant to modern social concerns if it did not pay some explicit attention to the issue of freedom [and] its status as a primary social good."[2] A reduction in freedom is a real cost in a democratic society. Yet it is not included in the usual calculus of the costs and benefits of regulation. When people are well informed, the value of anything can be gauged by what people are willing to give up to obtain it, or to retain it. It may be that, as regulation and other forms of intervention have grown, Canadians have simply not been aware of the restrictions governments have placed on their sovereignty as individuals. This can be an unintended consequence of other, possibly beneficial, government actions. A fundamental review of regulations requires an assessment of the effects of regulatory actions on individual freedom.

(2) Economic Efficiency

In our view, the actions of governments should increase and not reduce efficiency in the allocation of scarce resources.[3] This involves the recognition that government intervention is not costless and that in some circumstances it may not be worthwhile to intervene. While it would be inappropriate to argue that economic efficiency should be the primary objective of regulatory policy, nevertheless, it is of great importance.[4] In many cases it will be necessary to sacrifice efficiency to achieve equity. So be it. But the efficiency costs should be carefully weighed in the decision-making process.

It is apparent that economic efficiency, considered in the abstract, is a derived rather than a basic social goal. We want efficiency, not for its own sake, but for what other tangible and intangible benefits it can provide. Efficiency in the allocation of resources is desirable because it has the capability of providing a larger total output with which to satisfy a variety of private and social goals. Moreover, a policy that promotes efficient use of resources will generally increase society's options in achieving basic social goals. Such a policy may generally be combined with another policy aimed at redistributing income so that all affected parties will be made better off. Economic efficiency may thus improve the well-being of all.

If we fail to continue to increase total output, the resources available with which to effect redistribution will be less. Furthermore, when the objective of a particular action by government is redistributive, careful consideration should be given to the efficiency with which it is effected. Regulation may or may not be the most efficient or effective method to achieve distributive objectives. Greater consideration should be given to alternatives such as taxes, subsidies, and transfers.

Perhaps of greater importance than static efficiency (whether allocative or technical) is dynamic efficiency.[5] The latter refers to technological change that is the principal basis for economic growth in terms of real income per capita. Technological change takes the form of entirely new products and services, new methods of producing existing products (which are less costly in terms of the total cost to society), the modification of existing products for new uses, and the introduction of

new techniques of organization, marketing and management. As we become increasingly aware of the "finiteness" of our stocks of traditional inputs of land, labour, capital, energy, and other natural resources, the significance of technological change increases. As we emphasize below, it is important to assess the impact of regulation on technological change.

The expectations of most citizens that their standard of living will continue to increase is vitally dependent upon our society's capacity to generate technological and organizational innovation. This is as true of the less measurable outputs such as the "quality of life" as it is of those presently reflected in the Gross National Product. To a considerable degree, social conflict can be ameliorated by widespread confidence in the existence of a growing total product.

Concern for individual freedom and economic efficiency point toward extensive reliance on markets and market-like arrangements. Competitive market forces are attractive in a number of ways: they are decentralized and impersonal; they encourage adaptability and innovation;[6] and they maintain a constant pressure to be efficient and to be responsive to the wants of those who pay the bill. Depending on the circumstances, some part of the benefits of competition can occur in oligopolistic markets. In the ideal of competitive markets, the need for coercion as a means of social organization is minimized. However, the operation of markets often conflicts with the important value of equity.

(3) Equity

For most people, the essence of equity is fairness. Some of the synonyms of fairness are "just," "unbiased," "legitimate" and "in accordance with the rules." Equity is concerned with what people would consider to be fitting or right. Rawls, for example, argues that "justice is the first virtue of social institutions" and that "laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."[7] Rawls has enunciated the concept of "justice as fairness." His ideas have been well received as they seem to evoke what many intuitively feel to be equitable social arrangements. Rawl's concept is based on two principles.[8] First, there should be equality in the assignment of basic rights and duties. These include, among others, the right to vote and hold public office, freedom of speech, and the right to hold personal property. Second, Rawls holds that social and economic inequalities are just only if they result in compensating benefits for everyone — in particular for the least advantaged members of society. In other words, those who are better off cannot be made more so unless the social action contemplated also improves the position of the least well off.

Unlike economic efficiency, which can be defined in positive terms, equity is a purely ethical concept, the definition of which lies in the eyes of the beholder. What is equitable for one person may be held to be inequitable by another.

The concept of equity has many facets. It is invoked to justify government actions designed to

- achieve broadly based minimum standards of income, health and safety, education and so forth;
- ensure fair treatment before the law and social institutions in the sense of the consistent and impartial application of rules to all individuals, e.g., to treat persons in similar circumstances similarly;
- reduce the degree of inequality in the distribution of income, wealth, power, and social and economic opportunities;[9]
- prevent "exploitation" of the unknowing or economically disadvantaged by the more knowledgeable and advantaged (e.g., the protection of minors);
- prevent economic transactions in what are regarded as personal, inalienable political and social rights[10] (e.g., the selling of votes is prohibited); and to
- reduce the impact of arbitrary or chance factors on the social and economic positions of individuals or groups (e.g., minimum standards for schools).[11]

A great deal of our stock of regulation can be explained in terms of equity. For example, economists usually justify government intervention to deal with such external effects as pollution in

terms of improving the efficiency of markets. However, widely held notions of equity would also prompt the state to act, e.g., it is unfair that all (or most) residents of many large cities have to breath the air polluted by industrial enterprises. Polluters are, in effect, using the air as a free disposal site. Hence the polluter is not paying the full cost of producing his goods, i.e., the total cost to society.

Another example is that of consumer protection laws and regulations. When many products and services are complex and require a considerable amount of information, there is a widespread belief that the strict application of *caveat emptor* is inequitable. Because sellers have more information than buyers, consumer protection laws often require disclosure, prohibit false and misleading advertising, prohibit "unconscionable transactions," and provide for a "cooling off period" in which a buyer may revoke a contract made with a door to door salesperson. A good part of occupational health and safety regulation can be interpreted as designed to prevent inequity.[12] It is argued that workers should be protected against hazards to life and limb of which they cannot be expected to have full knowledge. Poor people should not, effectively, be forced to work under hazardous conditions. It is said that minimum standards of safety and industrial health should be a right of all working people.

It is not difficult to find examples of regulatory statutes that emphasize equity. The *Farm Products Marketing Agencies Act* establishes marketing agencies "to promote a strong, efficient and competitive production and marketing industry for the regulated product." But agencies are also supposed "to have due regard to the interests of producers and consumers of the regulated product . . . ." The relative position of farmers is emphasized in the preamble to the *Agricultural Stabilization Act*, which has the purpose of

> stabilizing the prices of agricultural commodities in order to assist the industry of agriculture to realize fair returns for its labour and investment, and to maintain a fair relationship between prices received by farmers and the costs of the goods and services they buy, thus to provide farmers with a fair share of the national income.

Fairness is stated three times. Obviously, the federal government wants farmers to be treated "fairly." Similar language is used in section 8 of the *Canadian Dairy Commission Act*, which states that an objective of the Commission is to "provide efficient producers of milk and cream with the opportunity of obtaining a fair return for their labour and investment . . . ." The interests of consumers are not ignored. They are to be provided "with a continuous and adequate supply of dairy products of high quality."

In conclusion it useful to recall Okun's words that "In an economy that is based primarily on private enterprise, public efforts to promote equality represent a deliberate interference with the results generated by the marketplace, and they are rarely costless."[13]

(B) VALUE PREMISES FOR ASSESSING THE REGULATORY PROCESS

Even after the most rigorous "zero base" review, it would be naive to suggest that much of the existing stock of government regulation will or can be abandoned in favour of market forces. As was noted in Chapter 1, there is considerable pressure to increase the scope of government regulation or to make existing regulations more stringent. For both reasons, regulatory processes should be assessed in terms of the following values: informed decision making, accountability, procedural fairness, and openness. It should be noted, however, that none of these values is absolute. Effective decision making about existing and proposed regulations will require trading off and balancing these values against others.

(1) Informed Decision Making

Decisions about proposed and existing regulatory programs should be well informed and well reasoned. Because of the scope and significance of its impact, rational decision making about regulation has a high "payoff." Decision makers need to formulate a clear statement of the nature of the problem to be solved and the objectives of intervention. Alternatives must be generated and evaluated. Knowledge of the costs and benefits of regulation and to whom they accrue must be acquired by decision makers. Important affected interests must be considered in the decision-making process. Because regulatory action occurs in

response to specific problems at a particular moment, both the justification for and the techniques of regulation should be thoroughly re-examined periodically. In particular, we need to know whether existing regulations are effective. Do they achieve their objectives? Consideration must be given to the existing and planned regulatory policies of other governments or levels of government in order to ensure co-ordination and prevent overlap and duplication. Regulation, like other public policies, must be changed to suit altered circumstances. All these issues are discussed in specific terms in Chapter 6.

(2) Accountability

Under a parliamentary system of responsible government, it is essential to assure the accountability of regulators to ministers and to the legislature, whether the regulators be in executive departments or in statutory agencies. The increased scope and intensity of regulation necessarily results in a greater delegation of regulatory authority. It becomes very important to address the question, *Quis custodiet ipsos custodes*? Who is it that regulates the regulators? It is essential to spell out what it is they are to be held accountable for. At the same time, regulatory processes and related legislative processes must provide both the necessary information and opportunities to make elected officials responsible and accountable to the public for their actions in the regulatory field. These issues are discussed in more detail in Chapter 5.

(3) Procedural Fairness

Procedures must be adopted and followed that are acknowledged to be "fair" by the vast majority of those affected by them. This criterion should be applied to the process by which new regulations are created and to the administrative process for detailed rule making and decision making in specific cases. Procedural fairness requires principled decision making, that is, the "rules of the game" must be established in advance. Decisions must be taken in accordance with those rules. Fairness also requires that the entire regulatory process be comprehensible, not only to specialists, but also to interested lay persons. This is a difficult task in some fields. Regulatory processes that are not generally perceived to be fair will not be accorded legitimacy, which is the foundation of all decision-making processes in a democratic society.

(4) Openness

The procedures by which significant regulatory policy decisions are made should be characterized by openness. To enforce this value, it will be necessary to ensure greater freedom of information than presently exists. The views of all important affected interests should be considered in the decision-making process. Proceedings should be conducted in public to the greatest extent possible. Decisions, as much as possible, should be based on information that is publicly presented or that is publicly available. Reasons for decisions should be frankly stated and broadly disseminated. The Law Reform Commission of Canada wisely observes: "This value supports ... other values: an open process is more comprehensible and more accountable than a closed one; it supports its integrity; it encourages fairness; it is likely to promote effectiveness by producing more accurate decisions; it should [be more conducive] to more preformulated standards and thereby certainty."[14] The proposals advanced in Chapter 6 seek to make the prior assessment and regulatory program evaluation procedures fairer and more open.

While we endorse the values of fairness and openness in the regulatory process, we do not advocate an extreme form of "due process" requirement. Openness and fairness impose costs in terms of delay, loss of flexibility, and expense to all participants. These costs must be balanced against the benefits, and the appropriate balance will differ in various situations.

(C) ASKING THE RIGHT QUESTIONS

To think strategically about government regulation of economic activity, we should assess existing and proposed regulation in light of applying the values set out above. The level of public dissatisfaction with the current state of regulation in Canada is evidence of the need to take a more *analytical* approach.[15] This can be done by asking some simple, searching questions.[16] The very brief outline that follows is useful in a wide variety of public policy contexts, not simply in regulation.

(1) What Are the Objectives of Government Regulation?

Is the objective of economic regulation to improve the efficiency of markets in the private sector by remedying various forms of "market failure"? As we will discuss in Chapter 4, these include problems of natural monopoly; destructive competition; the existence of "spillovers" that impose costs on society as a whole, but not on those who generate them; situations in which the amount of information available to consumers is inadequate; and problems associated with the rate of utilization of natural resources.

Alternatively, is the objective of the regulatory intervention to alter the distribution of income, wealth, or power — even, in some cases, at the expense of some reduction in the efficiency with which resources are allocated? Regulation can be used to facilitate cross-subsidization by which some customers of regulated firms benefit at the expense of others by selling below cost to some and above cost to others. It can be used to make producer groups better off at the expense of consumer groups through increased prices, control over entry, or limitations upon competition. (The reverse could also be true, for some time at least.) Unlike taxes, direct expenditures, subsidies or transfers, the use of regulation may hide both the amount of the benefits and the identity of the beneficiaries of the redistributive action. Equally important, regulation in some cases is not the most *economically* efficient way to effect the desired redistribution.

The point is this: we need to have a clear idea of what are the objectives of a regulatory program. Fuzziness in thinking about what we want government to accomplish will inevitably adversely affect both the design and performance of any regulatory program.[17] This observation does not ignore the practical necessity, in some cases, for a regulation to try to achieve multiple, and even conflicting, objectives.

We would be remiss if we did not point out that ends (i.e., the objectives) and means (i.e., the alternatives) in considering public policy questions are often hard to separate. In fact, objectives are clarified as the debate proceeds about particular means of achieving them. We turn now to a consideration of means.

(2) What Are the Alternatives?

As any traveller knows, there are a number of ways to go from Toronto to Montreal or from either city to Halifax or Vancouver. So it is with the achievement of public policy objectives. Professor Hartle asserts that after taxation and expenditures, the first instrument that comes to mind is regulation. "'There ought to be a law'. . . is such a ubiquitous statement that it is a joke — literally," he says.[18] Strategic thinking requires that we examine carefully the alternative ways to achieve our objectives. Consider the following discussion of different ways to deal with the well- known health hazards of cigarette smoking:

> Tobacco consumption could be banned altogether (prohibition). Or, government could specify production standards, such as the tobacco content in cigarettes, or the kind of paper to be used (specification standards). Or, standards could be established to insure that cigarettes do not exceed certain tar and nicotine levels (performance standards). Or, government could require health hazard warnings to be displayed on cigarette packages and advertising (information disclosure). Or, taxes or fees could be imposed for the purpose of discouraging cigarette smoking (economic incentives). Several of these options could be used in a combined effort to reduce this hazard. For example, maximum tar and nicotine levels could be set, while continuing the health warning on packages. The choice of a particular option or group of options might depend on such factors as the magnitude of the hazard: its impact on the public at large; the degree of public awareness of the hazard; the elasticity of consumer demand; and the opportunities for technological development or change in the industry.[19]

This example can be generalized to include many types of public policy objectives. For example, if one of our concerns in airline regulation is to assure a certain level of service to smaller communities, it does not follow that the best way to do this is by controlling entry and setting fares high enough so that travellers to and from small centres are subsidized by those travelling between major cities. In terms of allocative and technical efficiency (see Chapter 4) society would be better off if a subsidy were paid directly to the airline to cover the higher costs of better service to smaller cities. This has been done in some instances in Canada, e.g., in communities in the far north. Note that the question of whether some travellers should be subsidized by others is a value judgment. The advantage of direct subsidies to the airline is that the

cost implications of the public decision to subsidize are made apparent. When the railroads are required to continue, or add certain unremunerative services, they receive payment directly from the federal treasury.[20] Why not apply the same approach to the larger airlines if a significant amount of cross-subsidization exists?

(3) What Are the Consequences of Each Alternative?

If we can travel by road, rail, air, or Shanks's mare between Toronto and Montreal, our choice depends upon the attributes of each mode of travel in relation to our preferences and our budget. Each alternative can be ranked in terms of speed, convenience, cost, physical effort required, and other characteristics. To make a strategic choice about government action, it is necessary to assess the consequences of the major alternative ways to solve the problem that prompted government action. We need to know the costs and benefits (and to whom they accrue) associated with each alternative. This is not an easy task, yet if it is not performed we have no assurance that the regulatory action we choose will be either effective or efficient. As we describe in Chapter 4, there are two general types of regulation: direct regulation, which is concerned with setting prices, entry, or rates of return; and social regulation, which includes health, safety, "fairness," and environmental protection legislation. They present different data problems in analyzing the consequences of various alternatives:

> Where [direct] regulation is concerned, the impact analysis [of alternatives] can be more easily applied, since the consequences are usually capable of being reduced to dollar and cent terms. Such is not always the case with health, safety and environment regulation. Here it is extremely difficult to quantify benefits since they are subject to great uncertainty and often become apparent only with the passage of time. In addition, some important benefits — such as recreational or aesthetic values — are difficult if not impossible to quantify in any meaningful way. Finally, there is the question of how the value of risks of human life, injury and suffering are computed. At present, there is no generally accepted method for evaluating such losses.[21]

It is neither possible nor, for some individuals, ethically desirable that *all* the consequences associated with actions designed to alleviate health, safety or environmental problems be put in dollar terms. It is, however, useful to determine which alternative will save the most lives or reduce pollution by the greatest amount for a given expenditure of public funds. This is known as cost-effectiveness.

(4) Which is the Preferred Alternative?

In light of our values and with some knowledge of the probable consequences associated with each alternative (we are dealing with estimates and some events that are uncertain), we now have to select the "best" one. If all consequences could be fairly measured in dollar terms, we should choose the alternative for which the social benefits minus the social costs is greatest. This is seldom possible or desirable for at least two reasons. First, as we have noted, not all the consequences of an alternative can be valued in terms of dollars. Second, as our concern with equity indicates, we are not indifferent to the *distribution* of the costs and benefits associated with different alternatives.[22] In most cases, economic efficiency and distributional or equity considerations are hard to separate. Any policy action that improves efficiency in resource allocation has particular distributional and equity consequences. Similarly, almost any action to redistribute income or to improve equity will affect the efficiency with which goods and services are produced and sold.

In summary, selecting the preferred alternative is only in part an economic question. Ultimately, it is a value judgment reflecting the preferences of individual citizens as they are expressed in the economic and political systems.

(5) Has Regulation Been Effective?

Our knowledge of the effects of government programs in Canada is quite meagre. They are seldom evaluated on a systematic basis. This is true of both expenditure programs and regulatory programs.[23] Only recently has the federal government initiated a plan to do program evaluation on a systematic basis. Compared to the performance of the private sector, government organizations and programs are hard to evaluate.

> A business in the private sector, operating under normal competition, has a direct test of how well

> the business is doing its job — profits. All companies that are inefficient or put out products not desired by the public must face the consequences. A Government agency, a Government operation — or even Government rules — need not submit to such a direct test. Inefficient operations can limp along for years without being called to account. Some regulatory rules that persist protect obsolete or inefficient production. Import quotas, agricultural marketing agreements, and outdated regulations can encourage or preserve high-cost, badly located, or obsolete facilities with little interference and no direct test of their net value. Indeed, a major problem in Government's participation in our economic life is that we have developed no systematic procedure for eliminating obsolete rules, activities, and programs.[24]

As we shall emphasize in Chapter 6, strategic thinking about regulation requires that we periodically scrutinize regulatory programs to determine if they have been effective (met their objectives); to determine if less costly or less restrictive means can be used with the same or greater level of effectiveness; and finally to see if the problems that prompted the government action still exist. Strategic thinking about regulation means asking the same questions about existing programs as we have specified about proposed ones. This will not be an easy task, but to fail to attempt to do it is tantamount to admitting that "ignorance is bliss." The most beautiful flowers grow in gardens that are subject to careful pruning. Regulation can be made both more effective and less costly by a periodic, rigorous evaluation of how well it has been working.

(D) ASSESSING THE ECONOMIC IMPACT OF REGULATION

Regulation can have a considerable impact, measured in both economic and non-economic terms, on both those who are directly subject to it and on third parties. Here we present a more detailed framework within which the economic impact of government regulation can be assessed. The discussion is analytical rather than empirical, as the studies containing such data are still under way. That material will be presented in our Final Report.

We will analyze the economic impact of regulation in terms of three broad categories: costs, redistribution of income, and the benefits of regulation.

(1) Costs

The costs of regulation can be divided into two broad categories: direct and indirect. Direct costs are government outlays on administration and enforcement and the costs of compliance borne by firms and individuals in the private sector. Indirect or secondary costs are various forms of inefficiency that may result from regulation; these are often more difficult to identify and to estimate.

(a) Direct Costs

(i) *Public sector costs: administration.* As we noted in Chapter 2, federal expenditures on regulatory activities grew in the 1970s. However, they do not account for a high proportion of total federal government expenditures. Between 1970/71 and 1977/78 they amounted to less than 2 percent of total federal expenditures.[25] Canadian federal expenditures on regulatory activities are proportionately greater than those in the United States.[26] Present expenditures and the number of persons employed by the major federal statutory regulatory agencies, with which Canadians are familiar, are quite small (Table 3-1).[27]

TABLE 3-1

MAJOR FEDERAL STATUTORY REGULATORY AGENCIES: EXPENDITURES AND STAFF, 1977-78

Agency	Expenditures ($ Million)	Staff (No.)
Atomic Energy Control Board	6.0	157
Canadian Radio-television and Telecommunications Commission	15.1	493
Canadian Transport Commission	23.1	873
National Energy Board	11.1	362
Canada Labour Relations Board	2.8	103

On the other hand, the *regulatory expenditures* and staff of some federal departments, perhaps less familiar to many Canadians, are somewhat larger (Table 3-2).[28]

TABLE 3-2

REGULATORY EXPENDITURES AND STAFF OF SOME FEDERAL DEPARTMENTS, 1977-78

Department	Expenditures ($ Million)	Staff (No.)
Agriculture (Health of Animals Branch)	79.3	2,733
Communications	23.8	998
Consumer and Corporate Affairs (Bureau of Consumer Affairs)	32.3	1,106
Environment (Environmental Protection only)	20.4	587
Health and Welfare (Health Protection Branch)	55.2	1,980
Transport (Air Transport Admin.)	35.5	1,064

It should be emphasized that the figures by themselves provide no basis for determining the appropriateness of the expenditures or the size of the staff of these parts of regulatory departments or statutory agencies. Rather, they are merely intended to show the approximate volume of resources involved.

While it is always desirable to find the most efficient way (least costly for a given level of service or program 'output') of delivering government programs, the major costs of regulatory programs do *not* show up in the public accounts documents. They lie in the costs of compliance borne by the private sector and in the various types of indirect costs resulting from regulation.

(ii) *Private sector costs: compliance.* The costs to firms and to individuals subject to regulation can be divided into several categories.[29] First, there are the costs of dealing with regulatory agencies. These include legal and expert witness fees, lobbying, preparing background material for submission, and the time of individual executives. These costs are aimed at directly influencing, for example, the standards set by the agency or the rate increase it will allow. Second, there are the costs of complying with the regulatory decisions. In the case of direct regulation, the costs are likely to involve the implementation of the rate schedule and attendant conditions set by the regulator. In the case of social regulation, the costs may be much more onerous — new capital equipment, possibly less efficient methods of production, or the costs of retraining employees. Third, there are the costs of keeping records and providing information to demonstrate compliance. This is part of the paper burden directly associated with regulation.

A U.S. study found that regulations that had a high cost of compliance were characterized by certain attributes. These included the following:[30]

- continuous monitoring of a process to ensure compliance, together with comprehensive record keeping;
- requirements to meet a level of compliance not presently achievable with available technology;
- the need to acquire new capital equipment or significantly modify existing plant or equipment;
- compliance with stringent standards even though the risks have not been adequately assessed; and
- frequently changing requirements, particularly when long-term capital commitments are necessary.

There are no estimates of the total amount of the costs borne by firms and individuals in the private sector in Canada to comply with government regulation. It is extraordinarily difficult to make even a rough estimate of such costs. Although the Council has a study under way on "the cost of compliance," the data will only estimate the impact of *certain* regulatory programs on a *small* number of firms. Economy-wide estimates cannot be derived from such data.

The costs of compliance with regulation are like the nine-tenths of the iceberg that lie beneath the surface. One writer has put the point this way: "The direct administrative cost to the taxpayer is only a minor element of total impact. Measuring

the economic impact by these costs would be like estimating the height of a building by measuring the height of the entrance to the building."[31]

The most frequently quoted estimate of compliance costs in the United States was prepared by Dr. Murray Weidenbaum and his associates. For 1976, Weidenbaum and De Fina estimated the private sector's costs of compliance with federal regulation alone to be $62.9 billion. The "administrative costs" of the federal government itself were estimated to be $3.2 billion.[32] If these numbers are correct, 95 percent of the regulatory cost iceberg lie beneath the surface, i.e., occur in the private sector. The total cost was put into perspective as being equivalent to "4 percent of the gross national product; $307 per person living in the United States; 18 percent of the federal budget; twice the amount the [U.S.] federal government spends on health; 74 percent of the amounted devoted to [U.S.] national defense; over one-third of all private investment in new plants and equipment."[33] Using the same ratio of compliance costs to federal budgetary outlays (estimated to be $4.8 billion in fiscal 1979), Weidenbaum estimates the private sector's cost of compliance with federal regulation of economic activity in 1979 to be $97.9 billion.[34] In addition to the estimates of the aggregate costs of compliance with regulation in the United States, a number have been made for specific types of regulation and for the cost of regulation to individual firms.[35]

Not surprisingly, estimates of the costs of regulation have been criticized, Weidenbaum's in particular.[36] A fundamental concern remains. When considering the impact of the costs and benefits of regulation, it is necessary to have an *explicit* standard of comparison. Analyses such as Weidenbaum's *implicitly* assume the alternative is a world without regulation. Yet it has been suggested that "we cannot postulate, even as an abstract hypothesis, a situation in which we have a functioning industrial society without government. The basic elements of economic life are all legal artifacts created by government."[37] To be realistic, we must compare one set of intervention consequences to another, for if there were no regulations there would probably be some taxes and/or expenditures in their place. This is indeed a very complex task.

(b) Indirect Costs

(i) *Inefficiency at the level of the firm.* Economists refer to inefficiency at the level of the firm as "technical inefficiency." It is measured by how closely the firms in an industry approximate the lowest attainable costs for the actual outputs they produce and distribute. Direct regulation provides the opportunity for regulated firms to be technically inefficient, and social regulation may "require" firms to adopt inefficient methods of production and distribution.

The forces of competition tend to keep prices down to a minimum, and they also maintain the pressure on firms to keep their costs down. Indeed, failure to adopt the most efficient method of production (technology) and to minimize the prices paid for various inputs will eventually result in profits less than those that could be earned in other lines of business. Firms that are directly regulated usually have both less pressure and less incentive to be efficient. Entry is usually controlled, price competition is often prohibited or restricted, and the number of competitors may be small. Where rate-base regulation is employed, the price (and price structure) is often set by the regulatory authority on a "cost-plus" basis to permit the firm to earn a specified "allowable rate of return." This method of regulation is used in the case of telephone service, pipelines, electric and gas utilities, and in a modified form by certain farm products marketing boards (e.g., eggs).

It should be obvious that, particularly when the maximum rate of return is constrained, cost-plus price setting by regulatory agencies creates little incentive to produce in the technically most efficient fashion. In fact, total profits may be increased by inflating costs. If some of those costs take the form of higher salaries and perquisites for top management, what incentive do these individuals have to keep costs down? In too many regulatory hearings, costs are taken essentially as given, and increases in costs are *ipso facto* justification for increased prices or rates. Too often, few questions are raised about the reasonableness of those costs or the possibilities of reducing them.

Averch and Johnson show theoretically that when a regulatory agency establishes an allowable rate of return that exceeds the regulated firm's

cost of capital, the firm has an incentive to increase its rate base (i.e., the amount of capital it employs), as this will increase the net earnings for its shareholders.[38] The regulated firm can do this by increasing the capital intensity of its operation (i.e., by substituting capital for labour or other inputs) or it can carry more reserve capacity than is necessary (i.e., it can expand too far ahead of demand). Since regulatory agencies are generally loath to "second guess" the management decisions of the regulated firms, "rate-base padding" is seldom effectively challenged despite its cost to the purchasers of the regulated firm's customers. Some empirical support for the Averch-Johnson hypothesis has been found,[39] although the problem is far less acute when costs are rising and regulatory lags are present.

Regulation-induced technical inefficiency can take the form of excess capacity. If regulators permit the firms in the regulated industry to restrict output and raise prices above the competitive level, part of the potential excess profits may be absorbed in the form of *persistent* excess capacity. For example, this certainly occurred in the U.S. passenger airline industry until the advent of regulatory reform.[40]

(ii) *Inhibition of technical change.* So far, the discussion has concentrated on "static efficiency" considerations, i.e., the level of actual costs in relation to those potentially obtainable under competitive conditions. Perhaps of more importance is the impact of regulation on the level of efficiency *over time.* It is through technological and organizational innovation that real gains are made in the efficiency with which resources are used. We agree that "technological change, which has created many valuable new products and often reduced the cost of existing products by entire orders of magnitude, is probably more important to the economic welfare of society than static efficiency, either allocative [to be discussed below] or internal."[41]

Does regulation inhibit technological and organizational innovations? The universal characteristic of regulation is that it imposes constraints on various aspects of the behaviour of regulated firms. Management's freedom of action is limited. As we note in Chapter 4, one of the rationales for regulation is that the administrative process is designed to slow down or delay the operation of market forces so as to achieve "economic justice or fairness." To the extent that regulation reduces the rate of technological change, individuals, interest groups, and firms are given equity rights in the *status quo.* In benefiting these people, regulation reduces the gains to society as a whole associated with technological change.

Capron and Noll, summarizing a number of papers presented at a Brookings conference on the impact of regulation on technological change, state: "Commanding wide support was the view that the pace and pattern of technological change is primarily determined by a few discrete regulatory decisions related only tangentially to prices and profits. For example, decisions to permit a new firm to enter an industry or to allow a new technology to be exploited have profound effects on a regulated sector."[42] Presently, the range and rate of technological innovation in telecommunications and closely related fields, for example, is high. In the United States, it has begun to transform that staid, old pillar of the regulatory establishment, "Ma Bell." A series of decisions by the regulator, the Federal Communications Commission, permitting entry, hence competition, into parts of the industry has spurred the growth of new service offerings and lower prices.[43] The same pressures are building in Canada, and it appears that the CRTC favours greater competition when it does not threaten the "core" of the natural monopoly in telecommunications.[44] The impact of regulatory agencies in some areas has been much less benign.[45]

(iii) *Allocative inefficiency.* The price of goods and services reflects the valuation placed on them by consumers. Under competitive conditions, the cost of goods or services reflects the value of resources required to produce them. Allocative efficiency is achieved at that level of output at which the consumer's valuation is equated at the margin to the cost of the resources devoted to producing the good or service.[46] Like the existence of any form of market failure described in Chapter 4, regulation itself can have the effect of driving a "wedge" between the market price and the cost of production.[47] Hence, in regulated industries, price may be too "high" and quantity too "low" or the reverse could also be the case. Suppose, for example in the case of direct regulation, the regulatory agency permits the regulated firms either to inflate

their costs or to raise their price above the level that would occur under competitive conditions, the effect of the concurrent restriction of output is allocative inefficiency. Conversely, if the regulatory authority keeps the regulated price/rate below the costs of production, allocative inefficiency occurs because output is "too great" and price is "too low." This appears to be the case today with respect to the Crows Nest Pass grain rates which were established in 1897.[48]

. The amount of the total loss to society due to allocative inefficiency depends upon the elasticities of supply and demand and the proportion of the nation's output subject to regulatory agencies that set prices too high or too low. An admittedly rough estimate indicates that the losses to Canada from direct regulation alone amounted to over one-half billion dollars in 1978.[49] However, this estimate does not include any part of potential excess profits that may be absorbed in the form of technical inefficiency. Nor does it include the possibility that resources are absorbed through the competitive process of obtaining government regulation, which permits firms to increase prices above the competitive level.

(2) Redistribution of Income

The use of regulation to redistribute income or wealth is discussed in Chapter 4. At the outset, it must be emphasized that from the point of view of the nation as a whole, the purely redistributive effects of government regulation are neither a cost nor a benefit although real costs may be incurred in effecting the redistribution.[50] They are simply a transfer of resources from the members of one group to those of another. Therefore, part of what are alleged to be costs or benefits of regulation are really transfers of income among the nation's citizens. From the point of view of individuals, however, regulation can create "winners" and "losers." With the passage of time, regulation has the potential to create what are perceived as "rights" or "entitlements" for certain groups or individuals, for example, to receive or to sell goods or services at preferential rates. Without regulation, the benefits of these entitlements would accrue to different segments of society.

Redistribution of income by regulation may take place *between* and/or *among* a variety of different groups. A higher price for an agricultural product will tend to redistribute income from consumers to farmers, and also possibly to food processors and distributors. The policy of maintaining artificially low rail rates for grain shipments probably results in a redistribution of income from the railroad to grain growers. Through cross-subsidization or price discrimination telephone rates may be lower for local service but higher for long distance calls — even in proportion to the costs of providing the different services. Income may be redistributed from long distance air travellers in favour of short-haul passengers. One of the apparently simpler cases is that of the gaining of a monopoly licence such as that for a cable TV operation. Hartle indicates that the distributive outcomes may be difficult to determine:

> If, [after receiving the licence] there is a great jump in the value of the [cable TV] corporation's shares, we can be reasonably certain that the cable services are to be sold (or more precisely are expected to be sold) at a price that provides a supra-normal rate of return on shareholders' equity. The shareholders at the point in time when the licence was issued obtain the capitalized value of these supra-normal profits — the stream of expected [economic] rents in the terminology of the economist. These rents constitute the prices charged for the service over and above the opportunity cost of the resources employed. The subscribers are worse off to this extent (which is not to say they are worse off than they would be without the service) and it will be reflected in their reduced future levels of consumption and/or a reduction in their personal saving and/or a reduction in their investment in enhancing their [comprehensive net worth] in other ways.
>
> The effects of the rent component in the cable subscription price may not fully accrue to the licensee's shareholders. The officers of the cable company, and their professional advisers, may well be able to obtain some of it in higher remuneration in one form or another. So might a powerful union or a monopolistic supplier of equipment.[51]

We should note that rather than merely redistributing income, the awarding of an exclusive franchise could also simply waste scarce resources from society's point of view. This would occur if a number of potential franchise holders spent a significant proportion of the anticipated "supra-normal profits" seeking the franchise.

Occupational health and safety regulations presumably result in safer or healthier workplaces. However, who really pays the costs of this regulation is not obvious: it may be the workers, the owners of capital, or the consumers by, respectively, lower wages (and less employment), lower profits, and higher prices. A similar situation occurs with respect to pollution controls or other environmental legislation. In general, since social regulation typically sets standards or specifications and does not fix final prices, estimating the redistribution of income involved is a much more difficult task both theoretically and empirically.[52]

(3) Benefits

A rational assessment of the impact of regulation requires that its benefits be estimated. While no detailed taxonomy of benefits of regulation exists that corresponds to that set out above for the costs, the benefits of regulation can be grouped into types. First, benefits may take the form of costs avoided or prevented. As noted in Chapter 4, a number of the rationales for regulation consist of remedying inefficencies in the market mechanism from the point of view of society as a whole. In the case of externalities, the existence of "market failure" imposes on various groups certain real costs that are not taken into account by those conducting economic activity (i.e., social and private costs differ). The firm that dumps raw industrial effluent into a river significantly lowers the quality of drinking water and may make recreational fishing a thing of the past. By introducing regulation, the firm may be forced to pay for the costs it previously imposed on other consumers of water and on recreational fishermen. The benefits to society take the form of a reduction in the misallocation of scarce resources. The increased costs to former polluters and the reduced costs to those formerly adversely affected by the pollution are transfers or redistributive effects.

Eugene P. Seskin, in his research with Lester Lave, has estimated that the U.S. Environmental Protection Agency (EPA) air pollution controls have resulted in a 7 percent decrease in total mortality and an approximately equal decrease in total morbidity. At a minimum, he says, the savings in terms of reduced health care expenses and lost earnings, amount to $23 billion in 1979. He contrasts this estimate of *part* of the benefits of reducing air pollution to EPA's estimate of the costs of implementing the controls of $15 billion.[53]

In the case of a natural monopoly, failure to regulate could result in losses to society in the form of allocative inefficiency, as too little of the firm's output will be produced. By reallocating resources, society could enjoy more output with the same level of input. We should emphasize that the regulatory authority's restriction on the monopolist's ability to earn "excess profits" alters the distribution of income, but does not represent a benefit to society as a whole.

Second, regulation may produce positive benefits of its own. By smoothing out price fluctuations in an agricultural product, thus reducing uncertainty, planning and forecasting may be much easier. Investment decisions are likely to be much more efficient. Maximum hours-of-work regulations may result in higher productivity and definitely do increase the amount of leisure time for workers. Common carrier regulation may ensure the certain availability of safe, convenient, scheduled services available to all.

It must be recognized that many of the potential benefits of regulation are real but intangible, and very difficult to estimate in terms of a dollar value. Consider the following examples:

- the prevention of discrimination in employment or in the acquisition of goods and services;
- compatible and aesthetic use of land resulting from land use regulation;
- a reduction in the amount or severity of misleading advertising, fraud, or deception associated with consumer protection legislation;
- preservation of wilderness, historical sites, or rare/endangered species;
- reduction in congestion in urban transportation; and
- provision of accurate information through labelling or in the form of disclosure, e.g., securities prospectuses.

Even when the potential benefits of regulation are largely tangible, as in the case of health and safety regulation, analysts are faced with important problems of estimating and valuing them. One problem is that benefits estimation in health and safety regulation is not the same as hazard identification, although the process must start there. As Eads notes,

> First, the nature of the process by which the hazard is generated must be well understood. Second, the theoretical effectiveness of a proposed remedy must be determined. Third, this theoretical effectiveness must be modified to take account of 'real world' considerations.[54]

All these steps are required to estimate the probable benefits of a proposed regulatory action.

Another problem is that the benefits may be observable only after many years have passed. As has been noted, "the damage to chemical workers health from long-term, low-level exposure to certain substances has taken a long time to show up; the effects of reductions in this exposure will require a similarly long time to manifest themselves."[55] A third major difficulty in estimating the benefits of health and safety regulation is the apparent need to place an economic value on the loss of life and limb. This raises difficult ethical questions, as well as economic ones. Yet a government can improve its decision making about regulations by calculating the value of life or limb *implicit* in the costs of various regulatory programs. A study of the value of human life implicit in various government programs in the United Kingdom estimated values that ranged from £15,000 (per life) for requiring cabs on farm tractors to £20 million for existing building codes.[56] No doubt the value of life or limb implicit in many Canadian regulatory programs varies a great deal.

Ultimately, the benefits of a particular type of regulation depend upon what people are willing to pay for it as measured in political markets. A study of federal, state, and local regulations of the production and distribution of ground beef in the United States indicated that this activity was subject to more than 200 statutes, 41,000 regulations and decisions in 111,000 court cases. It was estimated that the total cost of regulation to the consumer was 4.3 cents per pound. How do consumers perceive these regulations? The authors summarize:

> Consumers believe regulation costs are actually substantially higher than they probably are in reality, but are apparently willing to pay the higher costs [up to 16 percent of the retail price] even though they are not fully aware of what is regulated or of the benefits of regulation. Further, they do rely on government regulation to reduce risk in some areas, even though regulation may not exist in the area, but are not very confident that the regulation is effective.[57]

In a 1978 survey Americans were asked about their willingness to pay for cleaner air. The respondents were given two choices: (i) an electric power plant with some visible smoke, and some air or water pollution, and (ii) an alternative plant that produced no pollution but which would cost twice as much and result in a 25 percent increase in their monthly electricity bills. The second alternative was chosen by 57 percent while 27 percent chose the former. There was a plurality in favour of the cleaner but more costly plant in every income category.[58]

(E) HOW MUCH REGULATION IS ENOUGH?

(1) Determining the "Optimal" Amount of Regulation

Is it possible to identify with any degree of confidence what is the appropriate (optimal) amount or degree of government regulation? If Canadians are serious about a fundamental review of regulation, this difficult question must be tackled at two levels. First, there is the question of whether a government should intervene in the marketplace by means of regulation. Second, once the decision has been made to regulate, there is the question of how wide and stringent regulatory constraints should be. Because of the pervasiveness of regulation, the operational question, in most cases, boils down to determining whether government should regulate a little more or a little less. There will likely be few instances of massive new regulatory initiatives or deregulation of an area.

Can we specify a set of rules that, if properly applied, would tell us on a case-by-case basis how much *should* society be regulated? The answer is "No." The same is true for determining the total amount of regulation in a society. Regulation is

not strictly an economic good or service. All of its important characteristics cannot be summed up in information about its cost of production or what people are willing to pay for it. Nor is regulation produced and sold in economic markets. However, it is useful to speak of the demand for and supply of government regulation in political markets,[59] a point to which we shall return below.

Regulation, in most cases, is explicitly designed to incorporate into economic processes values that are deemed to be inadequately reflected in the behaviour of economic markets. Regulation involves the substitution, in varying degrees, of a political-administrative decision-making process for the operation of market forces. This process is explicitly designed to incorporate non-economic values such as "equity," "due process," "dignity," "openness," "public participation," and the "value of human life." Although attributes of these values can be defined, they are usually incommensurable with most economic measures. This is one of the reasons it is impossible to define "the optimal amount of regulation."

Elliot Richardson, former U.S. Secretary of Commerce, has pointed out that while the cost of health, safety, and environment regulation is high in that country, "no cost is necessarily 'too high' — provided society is willing and able to pay it."[60] Yet the central problem remains, for our resources *are* limited and *both* non-market values and economic goods and services absorb real resources (e.g., lengthier administrative processes designed to assure "public participation" in regulatory decisions can be quite costly). The achievement of regulatory objectives requires the "trading off" of one value for the achievement of others. The adage that "there is no free lunch" is not suspended in the case of government regulation. While economic analyses of regulation can be of great assistance, ultimately decisions in this area are value judgments that must be made in the political arena.

(2) The Onus of Proof

Who should bear the onus of proof concerning proposals to regulate in an area where government is not now doing so or to increase the scope or intensity of regulation where it is already present? Should it rest with advocates of new or increased regulation or with those who wish to prevent an expansion of government activity? Charles Schultze notes that

> The very use of the term "social intervention" assumes a good deal. It implies the "rebuttable presumption" that the desirable mode of carrying out economic and social activities is through a network of private and voluntary arrangements — called, for short, "the private market."[61]

Under what is called the "rebuttable presumption," the onus of proof would lie with advocates of more regulation. They would have to show that society would be "better off" with more regulation than it would be without it.

In the post-World War II era in Canada, it appears that the onus of proof has not only been met but may have been reversed. The ease with which greater government expenditures (and hence higher taxes), more public ownership, and more extensive government regulation have occurred suggests that the onus has been placed on the opponents of more government intervention. During this period, particularly in the 1960s, Canadians seemed almost euphoric in their belief in the capacity of governments to remedy the failures of economic markets and to right a wide variety of social injustices.

There is need for a new modesty about the efficacy of government regulation. Certainly, some of the studies of the results of such intervention suggest that we have much to be modest about.[62] In some cases at least, an expansion in the scope or intensity of government regulation must represent the triumph of hope over experience.

As a general principle, the present extent and nature of government regulation makes it desirable to place the onus of proof of the efficacy of additional regulation on the advocates of greater intervention. This does not imply that additional intervention cannot be justified. Each case must be judged on its merits in terms of contemporary values. The advocates of more regulation must be able to show that the benefits of regulation broadly defined to include the values of equity and individual freedom, exceed the costs of the circumstances to be remedied. As H. Scott Gordon observes, "in the discussion of social problems we often argue as if the disclosure of a malfunction in the private economy were sufficient in itself to warrant governmental intervention. [If] we are to

be realistic and sensible in the demands we make of government . . . we must also know how governmental operations work and where their imperfections lie."[63]

When government action is deemed desirable, a real effort should be made to preserve some of the virtues of the free market. Not only should future interventions reflect a greater sophistication in the use of market-like arrangements, but also a systematic review of existing techniques seems desirable with a view to finding more efficient and effective ones.

(3) Regulation and Political Markets

Regulation is created in response to political pressures or opportunities. It must be changed in the same forum. However, it should be pointed out that the political process itself is subject to a considerable number of "political market failures" of its own. Political markets operate infrequently and usually encompass a very wide range of issues; there are few suppliers (i.e., competing parties); and information on particular issues is costly for citizens to obtain relative to its benefits. Support of political parties is subject to the "free rider" problem, i.e., some people obtain benefits at no cost. The organizational costs for political action are high.[64] Migué is not alone when he argues that, "political choices determined by the rules of representative government are seldom efficient or equitable. Because of the imperfections of its operation, the political process is often dominated by a series of minorities who exploit the population as a whole to their advantage."[65]

In deciding how much regulation is enough, we should be aware that it is argued that "collective choice [i.e., government action of a variety of types] is simply unable to answer the question, 'How much, if any, is enough?' "[66] Even majority rule in a democracy is characterized by certain attributes that militate against efficiency:

- those who decide, decide for others;
- those who benefit are not necessarily those who pay;
- those who benefit may not know of their benefits or of their being beneficiaries;
- those who pay may not know of their burdens;
- those who are generally aware of the separation of governmental costs and benefits still know little about the magnitudes of the transfers;
- those who vote against a government program that is adopted are still required to help finance the program; and
- the preferences of the winners prevail at the expense of the losers.[67]

Therefore, the net cost of certain market failures that instigate a call for government regulation may be seen in a more favourable light when we carefully consider the public choice alternative. The Roman philosopher Livy remarked that, "We can endure neither our evils nor their cures." In other words, government regulation may generate costs that exceed those of the problem it is designed to cure. Government action *can* make things worse.[68] It makes sense to leave well (or bad) enough alone in such circumstances. Preliminary research conducted for the Regulation Reference, for example, indicates that the incremental costs of the more stringent automobile pollution emission controls established for the period 1975-85 in Canada (as compared to the base year of 1970) very greatly exceed the estimated benefits.[69] If Canada were to move from its existing 1975-85 standard to the United States' 1977 standard using exhaust catalysts, the incremental costs would also exceed by many times the incremental benefits, i.e., the health cost savings. The large savings to the nation of *not* adopting the U.S. standard in Canada could be channelled into health care programs to better effect. In purely economic terms, the cure may be worse than the disease.

4 REGULATION: TYPES AND RATIONALES

(A) ONE OF SEVERAL INSTRUMENTS

Governments can use a variety of general instruments to influence economic behaviour.[1] The most notable are:

- exhortation, negotiation and moral suasion (these include such actions as ministerial speeches, conferences, affirmative action, the creation of advisory bodies and task forces to study a problem, and "threats" of government action);
- direct expenditures, including both capital and current outlays for the provision of public services, grants, subsidies, and transfer payments;
- tax expenditures, i.e., the use of tax exemptions or incentives when the cost is measured in terms of revenue foregone;[2]
- taxation, i.e., direct and indirect taxes, fees or prices for public services, contributions to compulsory pension plans or insurance schemes;
- public ownership, including joint ventures in which government is the controlling partner; and
- regulation, which includes statutes and all subordinate legislation such as regulations, directives, guidelines, and the like.[3]

In our view, economic regulation consists of the imposition of constraints, backed by the authority of a government, that are intended to modify economic behaviour in the private sector significantly.[4] Typically, the government acts to modify one or more of the following:

- price, e.g., tariffs, rates, rents, wages, etc.;
- supply, i.e., both output and entry by means of licences, franchises, and permits or by quotas;
- rate of return, e.g., rate-base regulation of public utilities;
- disclosure of information, e.g., content labelling, securities prospectuses;
- attributes of a product or service, e.g., quality, purity, or wholesomeness of food products;
- methods of production, e.g., environmental pollution standards, worker health and safety standards;
- conditions of service, e.g., requirements to act as a common carrier; and
- discrimination, e.g., in employment or in the sale of goods and services.

Each policy instrument can be deployed in a variety of ways. Each has associated with it a number of attributes including its economic costs and benefits, its coercive aspects, and the political costs and benefits to its wielders. Despite the numerous instruments available, governments tend to reach for regulation first.

Under current conditions, the political cost of using the regulation instrument appears to be lower than either taxation, direct expenditures or public ownership. A government's budgetary costs of administering even a pervasive and stringent regulatory program are usually small. For example, the total budgetary cost of all federal regulato-

ry programs amounts to less than 2 percent of the total federal budget. The far greater cost of compliance with regulation is borne in the private sector by shareholders, consumers and workers. These latter costs will usually *not* be apparent at the time a regulatory program is proposed. If a federal regulatory program is literally created by regulations (i.e., by statutory instruments), it will not be approved by Parliament.[5] It has been suggested that regulation, as opposed to other policy instruments, has the "advantage of stealth."[6]

When one technique is "underpriced" in political terms, it will almost certainly be "over used." This tendency could become very much accentuated in an era of "stagflation" and in the face of a widespread desire for government spending restraint. In this environment, policy solutions that *appear* to be less costly can have very considerable appeal.

(B) TWO TYPES OF GOVERNMENT REGULATION

There are, broadly speaking, two types of government regulation[7] aimed at changing the economic behaviour of producers, workers, and consumers in a significant way. They are "direct" regulation and what we will call "social" regulation. This distinction is important because both the objects and the techniques of regulation are generally different in each case.

(1) Direct Regulation

Writings on regulation are plagued by the use of several different terms that have essentially the same meaning. Direct regulation is also referred to as "economic regulation," "industry-specific regulation," or "old" or "traditional regulation." All of these terms refer to circumstances in which a government regulates one or more of price, rate of return, output, entry, and/or exit. Examples of each are as follows:

- Price (and price or rate structure) — rent control, telephone rates, electric power rates, taxi fares, price of products sold through supply management marketing boards, airline fares, and wage and price controls.

- Rate of Return — pipelines, telephones, local distribution of natural gas.

- Entry — broadcasting (AM and FM radio, TV), certain professions and licenced occupations, airlines, trucking (in most provinces), taxis, fisheries, telecommunications (telephones, cable TV), railroads.

- Exit — public utilities (e.g., water, natural gas, electricity), railroads, telecommunications.

- Output — supply-management type of agricultural marketing boards, the production of oil and gas.

Direct regulation is industry-specific, that is, it applies to the activities of a single industry. For example, the federal government regulates the provision of telephone service in most of Ontario, Quebec, Newfoundland, and British Columbia under a number of Acts.[8] In Canada, direct regulation is often combined with public ownership in the form of federal or provincial Crown corporations.[9] For example, telephone services in Alberta and Saskatchewan are supplied by provincially owned Crown corporations, which are regulated by provincial agencies or the cabinet.

A significant proportion of total economic activity in Canada is subject to direct regulation. In Chapter 2, we noted that almost 30 percent of the Gross Domestic Product at factor cost in 1978 was produced in industries that are subject to price and/or supply controls. This is a slightly larger proportion than in the United States.

(2) Social Regulation

This form of regulation is sometimes referred to as the "new regulation" or as "health, safety and environmental regulation." The latter phrase is actually a useful description, but it is not inclusive of all the types of regulation that fall within the category of "social" regulation. The term "social regulation" is used to reflect the broad social objectives embodied in such regulation. However,

it should be emphasized that it is *economic* behaviour that is subject to government control. Lilley and Miller contrast economic and social regulation as follows: "While all regulation is essentially 'social' in that it affects human welfare, the economic/social distinction emphasizes some very significant differences. The old-style economic regulation typically focuses on markets, rates, and the obligation to serve. . . . On the other hand. . . social regulation affects the conditions under which goods and services are produced [and sold] and the physical characteristics of products that are manufactured. . . . The government often becomes involved with very detailed facets of the production process."[10] Most of the social regulation can be grouped into four categories: (i) health and safety, which comprises a high proportion of all regulation and includes consumer product safety, transportation safety, and occupational health and safety;[11] (ii) environmental regulation, which is taken to include areas such as the control of air and water pollution, land use regulation, and the environmental management aspects of resource development; (iii) "fairness" regulation, which, under the federal Socio-Economic Impact Analysis requirements (discussed in Chapter 6), refers to "protection against fraud, deception or inaccuracy in the reporting of information," but which should also include all consumer protection and anti- discrimination legislation; and (iv) "cultural regulation," e.g., Canadian content requirements in broadcasting, foreign ownership legislation, and language legislation.

Social regulation is aimed at controlling the attributes of a product or service, at the disclosure of information, at influencing methods of production or at influencing conditions of sale or employment. Consider the following examples:

- Information Disclosure, e.g., product labelling, prevention of misleading advertising, financial disclosure;
- Attributes of a Good or Service: *quality*, e.g., food (grading), pharmaceuticals, licenced occupations; *purity*, e.g., food, drugs, beverages; *wholesomeness*, e.g., food, beverages; *safety*, e.g., children's toys and furniture, health professions; *availability*, e.g., services; *durability*, e.g., minimum wear standards for clothing;
- Methods of Production, e.g., pollution standards, worker health and safety standards, product content;
- Conditions of Sale or Employment, e.g., minimum wage legislation; hours of work, holidays, etc.; anti-discrimination laws re employment, accommodation, sale of goods or services.

In general, social regulation cuts across many industries, although its greatest impact may be felt in relatively few. For example, air and water pollution control regulations have little impact on retailers or the financial sector, but they can be costly to the steel industry, to the pulp and paper industry, and to non-ferrous mining and smelting. Social regulation is typically conducted by prohibition, by the imposition of either performance or design (specification) standards,[12] and by the mandatory disclosure or provision of information. The use of standards in the field of social regulation generally has the effect of hiding the costs of such regulation. In contrast, the effect of regulatory changes in airfares, telephone rates, pipeline charges, or taxi fares is noticed immediately. Another important characteristic of much social regulation is that it typically involves some aspect of human health or safety. As such, it can arouse a strong emotional response so that the public — and especially the media — regard even raising the issue of cost as uncivilized and inhumane.[13]

(C) THE RATIONALES FOR GOVERNMENT REGULATION

The remainder of this chapter is devoted to a discussion of the rationales for regulation — the factors that may be considered in deciding when and if there is a basis for government intervention in the form of regulation.

Governments act to influence the operation of market forces for a wide variety of reasons. These may be grouped into three broad categories: to improve economic efficiency by remedying market failures; to alter the distribution of income; and to effect one or more broad social or cultural goals. As emphasized in Chapter 3, the existence of one or more of these rationales is a necessary but not a sufficient condition for government regulation.

The costs associated with such intervention must be compared to the costs of the problem regulation is designed to alleviate.

(1) The Efficiency Rationales: Remedying Market Failures

The purpose of this section is to review the conditions under which government intervention in the form of regulation may be justified on the grounds that it could increase efficiency in the use of scarce resources and their allocation in accordance with market demands. In practice, markets are subject to a number of "failures" that reduce the efficiency of the resource allocation process. These include natural monopoly, "destructive" competition, externalities or "spillovers," imperfect or costly information, and problems associated with common property resources.

(a) Natural Monopoly

Natural monopoly is the classic case for direct regulation by government. A natural monopoly exists when the total costs of production in an industry or market are lowest at all levels of output if there is only one producer, i.e., when any division of total output between two or more firms raises costs.[14] Natural monopoly is usually defined in terms of continuously declining average total (hence marginal) costs — at least they are declining in the range that the total demand curve intersects the cost curves.[15]

It is now widely recognized that there are very few natural monopolies, if by that we mean a firm that produces a single product, using a single production technology. However, it does appear that the local distribution of electricity, telephone service, natural gas, cable TV, and water presently fall into this category. Similarly, both pipelines and the long distance transmission of electricity are subject to simple natural monopoly characteristics.[16]

In the absence of collusion among producers and interference by the state, the existence of natural monopoly characteristics will generally result in a single firm producing all the output even if more firms once occupied the industry. This happens because a firm can reduce its average costs by increasing output and hence lower its price. This continues until one firm occupies the market.

The nature of natural monopoly is vastly complicated when it is recognized that most large firms simultaneously produce, or can produce, a number of distinct or differentiable outputs employing several technologies on the basis of varying but, in most cases, common inputs. While economies of *scale* refer to the behaviour of unit costs as output increases in the case of a single output, economies of *scope* refer to the circumstances when the total costs of a multi-output firm (for a given level and mix of output) are lower than the total costs of those same outputs produced independently.[17] Thus, the existence of a natural monopoly can rest on the fact that the same stock of plant and equipment can be used in varying ways to produce a number of different products or services. For example, a firm with access to a long distance microwave network or satellite system can offer such different services as telephone voice service, data transmission, facsimile transmission and audio or video transmission.

It is argued that regulation of natural monopolies is necessary, or at least desirable, for two reasons. First, it is desirable for reasons of income distribution, a topic discussed in the next section. Second, economists emphasize that the monopolist, in restricting output and raising prices, generates allocative inefficiency in that less than the socially optimal amount of output is produced. At its simplest, allocative efficiency requires that additional output be produced until its marginal social value, as reflected in the demand curve, just equals the marginal social cost of production.[18] In the case of a monopolist, at the profit maximizing output, the social value of additional units is greater than their cost. Too little is being produced.

Several general points should be made about the efficiency justification for the regulation of natural monopolies. First, technological and economic change may alter conditions to permit several, or even many, firms to operate in the industry under workably competitive conditions. This has certainly occurred in air transportation, if a natural monopoly ever existed, and appears to be occurring in certain aspects of telecommunications.[19] Regulation can live on in the name of natural monopoly long after its economic or technological justification has evaporated. Second, it is important to distinguish between a natural

monopoly in the production or distribution of a good or service and the possibilities of rivalry or strong competition for the right to operate the natural monopoly. For example, it has been argued that the technologically limited number of broadcasting frequencies (radio and television), cable TV franchises, or rights to operate the local distribution of gas, electricity, or water be subject to competitive bidding for contractually specified conditions of service.[20] Therefore, competition for franchises could ensure that the operator of a natural monopoly is efficient and that potential excess profits could go to the state.[21]

(b) "Destructive" Competition

When "destructive" competition occurs, in contrast to natural monopoly, economies of scale are unimportant. The industry is structurally competitive and "competition is the natural state."[22] It is the very intensity of competition, which, it is argued, has to be subject to controls over entry and/or price to protect the firms in the industry and their customers. In the absence of regulation, an industry, or at least a major part of it, might operate at a loss for long periods; consumers might suffer through degradation in the quality of the goods or service; and for some products or services, safety standards may be reduced to a dangerously low level.[23]

"Excessive" competition may be the result of a cyclical downturn in demand or of longer term trends tending to increase substantially the industry's production potential relative to demand. All industries are subject to occasional mismatching between investment and demand and to periodic excess capacity. The chief prerequisites for destructive competition are substantial excess capacity and rigidities that retard the reallocation of capital and labour.[24] It is the inability of the industry to adjust to the mismatch between demand and supply, at the competitive price level, that gives rise to extended periods of excess capacity and to the possibly resulting "cutthroat competition." It is important to distinguish the pronounced and persistent excess capacity, which is a mark of destructive competition, from temporary or even cyclical excess capacity which is a normal part of the competitive process.[25] Also, when the concern is price instability, it is important to ask if the costs of uncertainty resulting from fluctuating prices are greater than the costs of resource misallocation resulting from long-run decisions made under stable, but non-optimal (higher) prices.[26]

Moreover, where there are market imperfections that could lead to "destructive" or "excessive" competition, it is necessary to recognize that regulation is not the only, and not necessarily the most appropriate, response. Kahn refers to three questions that should be asked in such cases: "(1) to what extent those circumstances actually prevail or would prevail if controls were [introduced or] removed, (2) to what extent deterioration of service [quality] could instead be prevented merely by imposing standards of quality, safety, financial responsibility, and the like, and (3) whether such additional benefits as might be secured by limitations on entry and price rivalry are greater than the benefits that freer competition brings."[27]

(c) Externalities or "Spillovers"

A third and widespread form of market failure that may justify government intervention, possibly in the form of regulation, is the existence of externalities or spillovers. These occur when there is a divergence between private and social costs[28] and between private and social benefits. In the typical case, costs fall on persons other than those who cause them. For example, extensive air and water pollution reflect the fact that firms do not have to pay the full cost of disposing of their wastes. With very few exceptions, there are no property rights in the use of the air and water for the disposal of unwanted industrial by-products. For this reason, there is no charge or constraint on the use of these valuable resources. Pulp mills pump "excessive" amounts of effluent into rivers, lakes, and oceans because they do not have to take into account or internalize the costs inflicted on fishermen and recreational users of the water.

The most widely read introductory economics textbook declares that, "Since no one profit-maker has the incentive, or indeed the power, to solve problems involving 'externalities', there is a clear case for some kind of intervention."[29] Certainly, the existence of negative externalities or spillovers is a common justification for a great deal of government intervention in the form of "social" regulation. In addition to environmental protection legislation, these include land use regulation (e.g., zoning for compatible uses), safety regulation (e.g., for hazardous industrial and consumer prod-

ucts), health protection regulation (e.g., in occupational health and pure food and drug laws), and even the regulation of financial markets (e.g., in banking). As has been emphasized, a divergence of social and private costs and benefits is a necessary, but not a sufficient, condition for government intervention.

Recent discussions of the externalities emphasize that all costs are not internalized in private market transactions for three reasons: the absence of property rights in some valuable resources; the existence of high transaction costs; and the existence of imperfect information.[30] Transaction costs include search and information costs, bargaining and decision costs, the costs of policing and enforcement, and the costs of charging for the use of resources including the difficulty of excluding "free riders" (i.e., consumers of resources that they have not produced or paid for). While the first three may be reduced to costs associated with imperfect information, the ability of private sector actors to "bargain a solution" in the face of imperfect information depends upon the existence of property rights. If some resources can be appropriated by all, i.e., are not subject to the exclusion of other claimants, a potentially remediable market failure remains. In this case, government intervention by assigning property rights may well reduce the efficiency losses even when the costs of intervention are taken into account.[31] Governments may also be able to act to reduce transactions costs.

(d) Inadequate Provision of Information

Market failure can occur if individuals are not sufficiently well informed to permit them to make rational decisions in the light of their preferences. Economists have long emphasized the importance of information in a competitive market system.

> Market transactions cannot be an efficient method of organizing human activity unless both the buyer and the seller understand the full costs and benefits to them of the transactions they undertake, including any side effects that impinge on their own welfare.[32]

In a world of increasing specialization and complex technologies, the information for intelligent decision making about a wide variety of goods and services cannot be summed up in their observable characteristics. Was it apparent to purchasers of 1.5-litre bottles of soft drinks that injury could result unless considerable care was exercised in their handling? Did the thousands of buyers of the Firenza automobile have any idea of its long list of defects when they bought it? Can workers in a great variety of industrial jobs be expected to know the long-term effects of exposure to certain substances?

One indication of inadequate information is the existence of a sizeable market for "inferior products." When a particular bundle of characteristics can be purchased at lower prices, market forces should work toward the elimination of the higher priced alternative. A study of the glazing regulations introduced under the federal *Hazardous Products Act* implies that, based on its cost and durability, safety glass is a much superior product to ordinary annealed glass for use in storm doors.[33] The requirement for a regulation to promote the use of safety glass suggests that there was a basic lack of market information about the product's characteristics.

The fact that information available to market participants is often grossly inadequate and that this can have very significant consequences suggests a possible role for government.[34] Inadequacy of information is a general problem that is partly related to the unique features of information as a commodity. From the point of view of society's welfare, once information is produced, it should be disseminated at the (usually) very low additional cost of making it available to others. However, if this were done, the supplier of the information might not be able to recover his total costs of generating it. The result will be that a less than optimal amount of information will tend to be produced and disseminated.

The problem of inadequate information is compounded by the fact that producers or suppliers generally have far more relevant information than do the consumers about what is for sale, by whom, and what its significant attributes are. Furthermore, under certain conditions, producers have an incentive not to disclose important information and even to disseminate misinformation. The old phrase *caveat emptor* reflects this fact. In some cases, an individual's decisions are effectively made by third parties because they have a greater stock of specialized knowledge, for example, by doctors on behalf of their patients.[35]

When information is inadequate, there is a question both of how far the government should go in attempting to remedy the deficiency, and what type of response is most appropriate. Information is not a free good. There are two basic types of regulatory approaches that can be used to try to remedy this type of market failure: requiring the provision of adequate, truthful information; and the licensing of, or setting standards for, those who have the information necessary to help individuals make rational decisions. The former, less restrictive, strategy may be used when it is relatively easy or inexpensive for buyers to evaluate accurate information. Labelling requirements specifying the content of food products, clothing and hazardous chemicals for household use assist the consumer in making an informed choice. On the other hand, when there is a large step from the convenient disclosure of information to knowledge of the implications of the information provided, it may be necessary to adopt the standards or licensing approach. This is particularly true in situations when an uninformed decision can be highly risky to life, limb, or pocketbook.[36]

(e) Improper Utilization of Natural Resources

An important consideration in the improper utilization of natural resources stems from the existence of common property rights.[37] Because of interdependencies in the utilization of such resources, there is a need to manage them collectively, e.g., through government regulation. Examples include the following: imperiling the reproductive capacity of fish, whales, the forest or soil by over-utilization; the reduction of pressure of oil and gas wells so the total amount recovered may be less than what is economically feasible under single ownership; and "overcrowding" of the broadcasting spectrum so that the quality of many signals is severely degraded. In each of these cases, the producer does not have an exclusive property right in the common property resource. He reasons that any use of the resource he foregoes in the interests of the whole is small relative to the total and that it will be taken up by others. Competitive exploitation could result in a lower total benefit than could be obtained under government intervention. The failure to intervene can result in what has been called "the tragedy of the commons."[38]

In a number of cases, common property resources take the form of a common pool. A problem is created by the fact that, at some level of utilization, production from the pool by one person will decrease the amount of the resource available to others by *more* than his production.[39] For example, oil and natural gas are "migratory" resources and will flow to the surface through whatever wells are drilled in a given field. The result is that "each operator has strong incentive to increase his share of production by developing his wells quickly, before the opportunity is lost to competitors on adjoining properties, all operators together create excessive productive capacity and produce at too fast a rate. Such competition for the common resource has an inevitable tendency towards development that is too early, wasteful of labour, capital and land, and hence the potential net value of the resource."[40]

The establishment by a government of the socially efficient rate of utilization (no easy task in itself) is just the beginning of the regulatory problem as the following quotation illustrates:

> Given the rate of production, how many producers should there be? How should the production rights be allocated? Should they be auctioned off, as economists usually recommend? Or should effluent quotas, or broadcasting rights, be assigned free of charge to producers chosen by some non-price 'eligibility' criterion? Should the number of fishermen, or the size of the catch per fisherman, or the total catch be restricted? Does allocation of the broadcasting spectrum imply control of cable television? And so on.[41]

In an era when the real value of a number of resources is rising, regulatory problems promise to become increasingly important and difficult.[42]

(2) Regulation as an Instrument of Redistribution

Regulation has been used in some instances, either implicitly or explicitly, to redistribute income or wealth to certain groups in society. Such a method of redistribution may have a distorting effect on incentives and the efficiency with which resources are allocated.

The questions of why regulation exists and how it has developed raise some interesting issues about the political process and the supply and demand for regulatory activities. Attempts to explain why regulation is sometimes sought by those who will

be regulated are centred on three basic propositions: that people seek to advance their own interests rationally; that the state may be used to achieve economic gains for some groups at the expense of others; and that the benefits of influencing the political process to achieve beneficial regulation are greater than the costs in at least some instances.[43]

Demands for regulation may arise in industries in which private cartels are infeasible or costly to organize and enforce (i.e., in industries of low concentration).[44] With direct regulation in particular, the costs are often widely distributed (i.e., in terms of higher prices paid by consumers of the regulated good or service), and the benefits often concentrated on a relatively small group (i.e., in terms of higher profits, "the quiet life," etc).[45] What is not well understood, however, are the determinants of success in obtaining political action resulting in beneficial regulation.

There is evidence of instances in which regulation has served the private interests of politically effective groups. It is significant that the firms subject to direct regulation frequently themselves sought the imposition of constraints and are often the strongest proponents of maintaining the *status quo*. Evidence available on the value of licences, permits, and franchises in various regulated industries indicates that regulated firms often have a very high stake in the perpetuation of existing regulatory controls.[46]

In the attempts to understand the influences on the political decision-making process, there is no suggestion that regulation is the result of activities that are either illegal or immoral.[47] Nor is it necessarily the case that, because regulations provide substantial benefits to particular groups, they are inconsistent with some conceptions of "the public interest." It is our view, however, that the public interest is most likely to be served when there is a general appreciation of the possibilities and the limitations of government regulatory activity. An informed public that understands the appropriate role of regulation in achieving broad social and economic objectives can be an important component of the political process. It is with a view to advancing such understanding that we now discuss distributive rationales for government regulation.

We consider three rationales for government regulation as a method of redistribution of income and/or wealth: first, to constrain monopoly power by the setting of "just" and "reasonable" prices; second, to slow down or even prevent changes in the distribution of income that would occur in the private market; and third, to aid specific groups through "taxation by regulation."

(a) Constraining Monopoly Profits and "Unjust" Price Discrimination

The regulation of monopolies, "natural" or otherwise, — particularly in the popular mind — has had its greatest support in terms of prevention, or at least limitation of monopoly profits and of undesirable forms of price discrimination. These were the justifications for the regulation of the railroads in the mid to late nineteenth century and for regulation (or public ownership of) a variety of "public utilities" early in the twentieth century.[48] Such regulation sought to prevent "unjust discrimination" and to assure that consumers were charged only "fair and reasonable rates."[49] These terms are still in widespread use. Windsor and Aucoin, for example, in their study of the regulation of telephone service in Nova Scotia, note it was the legislature's concern about monopoly power and its implication of this for telephone rates that prompted the introduction of rate regulation early in this century.[50]

Some of the early writers stressed that the justification for the regulation of certain industries stems from their capacity to practice price discrimination rather than simply to engage in monopoly pricing.[51] The purpose of public utility regulation, it is asserted, is to ensure adequate service to all patrons without discrimination at the lowest rates consistent with the interests of both the public and the utilities. It should be noted that the economist's definition of price discrimination will often not be in accord with prices or rates established by regulators charged with the responsibility of preventing "unjust discrimination." The latter is largely an ethical concept and is likely to be based on personal or social characteristics; the former depends upon the relationship of price to cost. A resulting irony is that by requiring uniform pricing for services that are subject to different costs of production, regulation may in fact contrib-

ute to what economists regard as price discrimination.

(b) Regulation to Reduce the Impact of Economic Change

Regulation may be used to "slow down the rate at which the free market redistributes income."[52] This argument is based on the notion that the public is generally risk averse and that the marketplace, with its sometimes abrupt changes, is regarded as an unfair allocation mechanism. Market forces pose a threat to investments in physical and human capital for all those without instantaneous adaptive capabilities.

The objective of the administrative process is sometimes described as "economic justice." Efficiency is sacrificed for security and stability. The predominant public sentiment is that "victims of economic change should not be placed at the mercy of the market but should instead be protected by a mechanism that provides economic justice."[53] Hence, in demanding "fair" resource allocation, the public looks not to the market but to the regulatory agencies that make administrative decisions.

The use of regulation to slow the pace of economic adjustment is tantamount to acknowledging the existence of property rights in the *status quo*. In fact, regulation can create "property rights" in the form of licences, permits, franchises, quotas, etc., which are very valuable. This raises a difficult problem in attempting regulatory reform. Should these property rights be protected? The point is addressed by a recent U.S. study:

> Maintaining regulation simply to protect existing interests also means that consumers and others will make continuous payments to these groups, the sum of which will often far exceed the gains to the protected group. Yet there may be a responsibility to those who have invested on the basis of expectations as to regulation. The issue is similar to protecting consumers by controlling prices. Temporary aid or protections may be proper, but permanent shielding is likely to impose increasing costs and distortions.[54]

The preservation of property rights by means of government regulation will often raise a conflict between economic efficiency and some individuals' concepts of equity.[55] Such choices are not easy to make.

(c) Redistribution to Specific Groups: "Taxation by Regulation"

Regulation may also be used to confer benefits on certain customer groups of regulated firms deemed to be deserving of special consideration. It is necessary to recognize "that one of the functions of regulation is to perform distributive and allocative chores usually associated with the taxing or financial branch of government."[56] This has led to the use of the phrase "taxation by regulation" to describe this particular rationale for regulation. It is the power of the regulatory agency to control entry that makes possible this form of redistribution among the customer groups of a regulated industry. Taxation by regulation operates like an excise tax, with the burden falling on certain customers and the proceeds earmarked for specific purposes, including the provision of certain nonremunerative services. It may involve price discrimination, cross-subsidization or both.[57]

For example, the extent to which trucking regulation in Canada results in cross-subsidization is an empirical question. Preliminary results of a study carried out for the Council suggest that there may be cross-subsidization in at least Manitoba and Saskatchewan, the two provinces where provincial boards prescribe rates. In other provinces, however, there is frequently an attempt to impose "taxation by regulation" by requiring uniform pricing and by selectively allocating routes among carriers. John Palmer, for example, has noted that the Ontario Highway Traffic Board will sometimes grant a licence for a profitable route if the applicant will also agree to service an unprofitable route.[58]

Taxation by regulation, Posner argues, is consistent with the following phenomena observed in regulated industries:[59] control over entry; review of new construction by regulatory agencies (i.e., to prevent the use of potential excess profits for purposes other than cross-subsidization); the duty of the regulated firm to serve and the regulator's power over the abandonment of service (if regulated firms were not subject to the duty to institute and not to terminate service, they could not be relied upon to implement policies of internal subsidization); the fact that most directly regulated industries sell services and not goods (this prevents transfer to the unintended user as storage and

transfer are all but impossible); and the fact that regulated industries provide "infrastructure" services such as transportation, electricity and gas utilities, and communications (i.e., the expansion of these services can be promoted by cross-subsidization).

(3) Social and Cultural Objectives

It is often claimed that Canada is a country that contradicts natural geographic, cultural, and economic forces. Paralleling the northern border of the powerful United States with which they share a common language and some cultural traditions, Canadians may feel as if they will be overwhelmed by their neighbour to the south. Since Confederation, successive Canadian governments have used their taxing, spending, and regulatory powers to create a national consciousness or sense of identity that is maintained even at some costs to its citizens. Government support for the CPR to create an East-West, rather than a North-South, axis and the national policy of high tariffs designed to create a domestic manufacturing industry were only the beginning of the process of trying to create a flourishing culture and economy, owned and managed by Canadians. Regulation, along with all the other instruments of government intervention, has been used for the broad purpose of "nation building."[60]

Two areas of regulation stand out in this regard: transportation and communications. In 1961, the MacPherson Commission emphasized the role that national policy objectives had played in transportation — and the Commission recommended a shift in emphasis:

> Historically... national transportation has been a great deal more preoccupied with the question of how effectively the transportation system was functioning as an instrument to fulfill national policy objectives, than with the question of how well it was functioning as an economic enterprise. There were, of course, good reasons in the past why this was so. It is our view, however, that there are now equally good reasons why it should no longer be so.[61]

This shift was undertaken in the *National Transportation Act* of 1967, but in 1977 the federal government proposed amendments to the Act and related acts that would declare,

> The objective of the transportation policy for Canada is to achieve a system that (a) is efficient, (b) is an effective instrument of support for the achievement of national and regional social and economic objectives, and (c) provides accessibility and equity of treatment for users,...[62]

The regulation of communications directly reflects the social and cultural objectives of this form of government intervention. For example, section 3 of the *Broadcasting Act* states that the "Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich, and strengthen the cultural, political, social and economic fabric of Canada." Furthermore, the section also provides that the programming "should be of a high standard, using predominately Canadian creative and other resources." Since 1960, specific Canadian content regulations have been in effect for television. In Babe's view, "the major *raison d'être* of the CRTC is Canadian content." At the same time, he notes that "Canadian content cost[s] more to procure than American programming [and] it also attracts smaller audiences and hence decreases revenues [of broadcasters]."[63] Also, in the area of communications one can point to the Canadian magazine industry, which has been aided by regulations defining a Canadian magazine for deducting advertising expenses for tax purposes.[64]

Other forms of regulation have been used to achieve broad social and cultural objectives. There have been attempts to increase domestic ownership of business enterprises by, for example, allowing only Canadians to own corporations in certain "key sectors" such as broadcasting and banking. Through the Foreign Investment Review Agency, efforts have been made to extract from foreign corporations acquiring Canadian firms certain promises of performance that are more consistent with Canadian aspirations.

The general approach of many of these policies has been supported by many Canadians. However, the specifics of implementation, in many instances, are now the subject of much critical comment and discussion. These disagreements are sometimes associated with concern about the rise in income of certain groups because of the limited access to a small market by "outsiders."[65] The Council hopes there will be more studies of the impact of social and cultural regulation designed to achieve broad national objectives.

5 ACCOUNTABILITY, POLICY MAKING, AND REGULATORY AGENCIES

Introduction

This is the first of two chapters that analyze a range of problems associated with the regulatory process and its management. On the basis of the analysis and a discussion of the options available to try to remedy the problems, the Council offers in both chapters a number of recommendations for improving the regulatory process in Canada.

In Chapters 5 and 6, two broad aspects of the regulatory process are discussed. The first, which is the subject of this chapter, is concerned with the proper balance between the direction and control of regulatory agencies by elected officials and the degree of autonomy or independence deemed necessary to carry out their adjudicative and other functions. Chapter 6 is concerned with the need to improve the quality of the government's decisions concerning new regulations and existing regulatory programs.

The problem of finding a proper balance between political accountability and autonomy for statutory regulatory agencies (SRAs) is complicated by the fact that many of the agencies have broad mandates. They, as well as ministers and their departments, make public policy on regulatory matters. Politicians and others apparently would like to see a greater degree of ministerial control over SRAs. This is to ensure that the agencies are responsive and accountable in the way that public servants in executive departments are accountable to their ministers and to the legislature. At the same time, others argue that the cabinet or individual ministers influence the policy formulation and decision-making processes of regulatory agencies behind the scenes on the basis of political considerations — often in response to narrow interest group pressures. It is argued that the process by which elected officials influence SRAs should be clear and overt.

These concerns raise a number of subsidiary issues: Should SRAs be limited to adjudicative matters or, alternatively, to the provision of policy advice? Should policy formulation procedures be open and thus encourage participation by affected interests? Should "political" appeals to the minister or to the cabinet continue? If such appeals are abolished, what new mechanisms should be put in place to ensure that statutory regulatory agencies are accountable to elected officials and ultimately to the public?

(A) STATUTORY REGULATORY AGENCIES (SRAs)

Although Canada has a system of parliamentary responsible government, the regulation of economic activity is conducted through a wide variety of institutional arrangements. These include executive departments and statutory regulatory agencies, variously described as boards, commissions, and tribunals. Examples of such SRAs are the Canadian Radio-television and Telecommunications Commission (CRTC), the Canadian Transport Commission (CTC), the Ontario Municipal Board, the British Columbia Corporate and Financial Services Commission, the Manitoba Highway Transport Board and the Nova Scotia Board of Commissioners of Public Utilities. The degree of autonomy enjoyed by regulatory agencies varies across a wide spectrum, although few, if any, possess the autonomy of the many "independent" regulatory agencies in the United States.

Compared to the United States, a great deal of both federal and provincial regulation in Canada is

conducted through government departments, which are subject to the control and direction of a minister. In Ontario, for example, the Department of Consumer and Commercial Relations is responsible for enforcing a considerable amount of consumer protection legislation. Federal and provincial departments of agriculture administer a number of statutes regulating health and safety in the production of food products. The federal Department of the Environment regulates air and water pollution. Since a minister is responsible for the administration of his department, including its regulatory activities, and collectively the cabinet is responsible to the legislature for the policies and actions of the government, the lines of accountability are clear in such cases.

While statutory agencies may possess a greater degree of autonomy than do executive departments, their independence is never absolute, but rather is a question of degree. Some agencies, such as the National Energy Board on the question of certificates for pipelines or permits for the export of oil or natural gas, require cabinet (or ministerial) approval of their decisions. In other cases, a minister or the cabinet may vary or substitute a decision for that of the agency's (e.g., those of the Ontario Environmental Assessment Board on assessments). The degree of autonomy is relatively great, however, for some agencies. It is in this context that the issues of political accountability and responsibility for policy making are of greater importance.

Agencies with the following characteristics may be considered to be relatively independent,[1] although the degree of autonomy possessed by a particular SRA may be greater or lesser in practice than this list would indicate. First, the independence of an SRA is greater when the persons who comprise the agency's decision-making body (e.g., the commissioners) are appointed for a fixed term (typically three to ten years) and hold office during "good behaviour" and may only be removed "for cause." Second, agencies that make adjudicative and other decisions that may have a significant economic impact on individuals, firms or groups and from which there is no appeal or only a limited right of appeal, possess a greater degree of independence. While "the conduct of the adjudicative function by regulatory commissions is not subject to any direct government control or direction,"[2] the decisions themselves are not inviolable. The limited right of appeal typically takes two forms: (i) to the courts on issues of legality, both procedural and jurisdictional, and (ii) to a minister or to the cabinet on the substantive merits of the case, i.e., on questions of public policy. It is the second type of appeal that distinguishes Canadian SRAs from American independent regulatory agencies. The latter are not subject to "political" appeals either to the President (as head of the executive branch) or to the Congress (the legislative branch). Third, some of the more autonomous SRAs in Canada have the power to create new regulations (i.e., subordinate legislation) within the confines of their enabling statute. In a few cases, they can do so without the approval of the cabinet (Governor or Lieutenant Governor in Council) or the legislature.[3]

Constitutionally, statutory regulatory agencies have been called "structural heretics" for well over a century in that they are not politically accountable for their actions to a minister in the same way as is an executive department.[4] The Privy Council Office notes, "Ministers cannot be responsible for what happens during the process of adjudication by a regulatory commission . . . for Parliament has given them no means of fulfilling any such responsibility. Ministers are not, therefore, accountable to Parliament in this particular context."[5] However, the PCO argues that, "where Parliament has delegated powers, duties and functions to the non-departmental body [i.e., an SRA], the body itself is accountable directly to Parliament for their exercise."[6] Of particular concern, and an issue that is not satisfactorily resolved by the existence of political appeals, is accountability for the policy-making activities of SRAs. This will be discussed below.

Given the apparent conflict between the traditions of ministerial accountability to the legislature in a parliamentary system and the considerable degree of autonomy of SRAs, why have so many been created? A number of explanations have been advanced:

- Statutory regulatory agencies are designed to "take regulation out of politics."[7] It is argued that many regulatory decisions (e.g., those determining telephone, gas or electricity rates, deciding which applicant

should receive a broadcasting licence, or applying general wage and price controls) should not be subject to partisan political considerations. Instead they should be subject to impartial adjudication, as property rights are involved.[8] A variant of this argument is that, in some cases, it is desirable to put some distance between the ministers and certain sensitive decisions and to relieve them of having to account for them.[9] This need for detached, non-partisan decision making is particularly important in Canada in view of the extensive participation by Crown corporations in many regulated sectors.[10]

The Lambert Commission has said that the claim of what it defined as "Independent Deciding or Advisory Bodies" to "autonomous status is predicated on the need to preserve an arm's length relationship with Government in order to fulfil deciding, regulatory, and adjudicative tasks objectively and without danger of direct partisan interference."[11] Two points should be noted about this argument. First, changing the forum of decision making about regulatory matters does not change the issues to be decided. Second, essentially political questions are an important part of regulation. Analysis can no longer proceed (if, indeed, it ever could) on the assumption that regulation only involves the work of "experts" in obscure, technical areas of the economy, or that it is "judicial," being analogous to the work of the courts, and should therefore be exempted from politics. Telecommunications and transportation regulatory decisions, for example, are now recognized as vitally important political decisions that influence cultural and regional development.[12]

- Regulation, it is argued, involves both technologically and economically complex issues in such areas as atomic energy and environmental protection. Rational decision making requires specialized knowledge acquired by long periods of formal training or experience on the job. Therefore, the decision-making body should be characterized by continuity and stability — which can be assured by giving it considerable independence.[13]

- Autonomy is useful in instances in which it is necessary to adjudicate a large number of similar cases, but for which use of the regular courts would be too costly or previous experience has shown them to be inappropriate.

- Two closely related reasons favouring a considerable degree of independence for regulatory agencies flow, in large measure, from contemporary concerns about interest group politics and the difficulties presented for expeditious decision making. First, independent bodies with statutory obligations are able to make decisions to "break up policy log jams" and thus encourage elected officals to enunciate policy to facilitate decision making in individual cases.[14] The second reason concerns the need for unpopular decisions, such as utility rate increases, to be made in response to economic conditions and not to be put off because of an often short-term concern for adverse political repercussions. This should not be condemned as a political "cop-out." However, there is the risk that a regulatory agency's independence will be employed as a shield in an attempt to exonerate the government from any responsibility for the utility as a whole.

- Statutory regulatory agencies are more likely to employ open decision-making procedures such as public hearings, and to render decisions supported with reasons and based on the record as developed at the hearing.[15] The legitimacy of departmental decision making by the minister is based on a mandate from the electorate. A statutory agency lacks this source of legitimacy. Therefore, it has to be able to point to the fairness and openness of its processes for support.[16]

- Statutory regulatory agencies have been created when legislators wished to secure the institutional flexibility associated with the blending of a number of functions (i.e., adjudicative, legislative, research, advisory and administrative described below) traditionally performed separately by more specialized entities.

- A wide variety of other reasons have been given at different times to explain or justify the existence of statutory agencies.[17]

(B) FUNCTIONS OF SRAs

Canadian regulatory agencies perform a variety of functions; they have been called "governments in miniature." Schultz groups their powers into five categories:[18]

- *adjudicative,* i.e., the determination of outcomes in individual cases which typically deal with control over entry, the setting of prices or rates of return, and the setting of standards or rules of conduct by regulated enterprises;

- *legislative,* i.e., the ability to make general rules or regulations, in the form of delegated legislation, that have the force of law;[19]

- *research,* i.e., the power to conduct research relevant to the agency's regulatory responsibilities or on behalf of the government;

- *advisory,* i.e., the responsibility to give advice on certain aspects of public policy to a minister or department;[20] and

- *administrative,* i.e., the power to carry out a government program. For example, the Canadian Transport Commission administers several transportation subsidy programs, and the Atomic Energy Control Board administers grants for certain types of research on atomic energy.

These five functions are not exhaustive. For example, SRAs often have an educational function, both within and without the industry or activities they regulate. Their formal powers of adjudication and legislation may serve only to buttress the role of the agency in exercising moral leadership, engaging in tacit bargaining and the whole of the arts of persuasion. To quote Samuel Johnson: "How small of all that human hearts endure, that part which laws or kings can cause or cure."

Not all statutory regulatory agencies have the full range of powers listed above,[21] but all possess adjudicative and legislative powers, although these may be subject, in most cases, to approval by a minister or the cabinet. It should be noted that an SRA that possesses the full range of powers may experience conflicts in the exercise of its various functions.

(C) ACCOUNTABILITY, RESPONSIBILITY, AND PARLIAMENTARY GOVERNMENT

Ministerial responsibility, for the purpose of holding accountable those who exercise power, is at the heart of parliamentary government based on the Westminster model.[22] A government's authority comes from its ability to command a majority in the legislature and its ability to continue to maintain the confidence of the legislature in essential matters. Its legitimacy derives ultimately from its capacity to win a majority of seats in periodic popular elections. Ministers are responsible for the administration of their respective departments, and collectively the cabinet is responsible to the legislature for the policies and behaviour of the government.[23] In modern practice, ministerial accountability takes the form of "answerability" to the legislature to explain administrative failures. A minister is liable to resign only for serious policy or managerial blunders, or for personal moral or legal improprieties.[24]

Governments, in both managing and conducting the vast enterprise of public administration, must delegate authority, even if they cannot avoid ultimate responsibility. It is essential that subordinate actors be held accountable for their actions (or failures to act). Under responsible government, the "bureaucracy is simply an extension of the minister's capacity: it exists to inform and advise him; to manage on his behalf programs for which he is responsible."[25]

Ministerial responsibility in principle, in law, and in fact is neither absolute nor complete. This is so largely because of the finite capacity of human beings. There is a need to balance ministerial control for the purposes of political accountability with managerial and professional expertise, the exercise of which requires considerable autonomy. The separation of what is "policy" (usually assumed to be the province of the politicians) from what is purely an administrative matter (the re-

sponsibility of public servants) is artificial in most cases.

In the words of the Lambert Commission, accountability "is the liability assumed by all those who exercise authority to account for the manner in which they have fulfilled responsibilities entrusted to them, a liability to the Canadian people owed by Parliament, by the Government and, thus, by every department and agency."[26] It requires a two-way flow of information between public sector managers and those who scrutinize them, whether they are within the public service, at the ministerial level, in the legislature or the electorate. Accountability generally requires the exercise of discipline (and reward) upon those who fail to measure up (perform well). If no costs are borne by those who err, the notion of accountability is devoid of operational meaning.

One should not be too sanguine about the linchpin in the concept of accountability in a system of responsible government: ultimate accountability to the people. In practice, Canadians periodically elect a "collective king," i.e., a cabinet, that has enormous power. However, the exercise of this power is subject to a number of non- constitutional constraints: the threat of awkward or embarrassing questions in the legislature; the capacity of the media to "create," reflect, and amplify public opinion; the actions of politically effective groups that are capable of undermining a government's financial and electoral support; and the countervailing power of other governments. Political accountability, in reality, is a nebulous thing. As Hartle says, "to the extent that votes are cast for competing political parties rather than for the particular candidates as individuals, [voters] are choosing among the alternative *bundles* of past decisions and promised decisions that each party places before the electorate."[27] Votes are also cast for the perceived qualities of a party's leader.

In considering the possibility of strengthening the degree of political control over regulation and statutory regulatory agencies, it is desirable to be somewhat skeptical about the political process itself. Tying regulatory decisions closely to the preferences of individual ministers or the collective interest of the cabinet could have the effect of binding statutory regulatory agencies to the demands of powerful interest groups.[28]

(D) TENSION, CONFUSION AND COMPROMISE

Rather than place regulatory power in fully fledged, independent agencies, as has been done in many cases in the United States, Canada has chosen a halfway position between the independence characteristic of the United States and the accountability characteristic of Great Britain.[29] Day-to-day regulation by statutory agencies requires full-time, detached professionalism that can be obtained only by giving such bodies a considerable measure of autonomy. At the same time, governments have not been willing to see final decision-making authority handed over to non-elected bodies. This has led to appeal and review provisions, albeit used somewhat sparingly. For example, section 64(1) of the *National Transportation Act* provides that the Governor in Council (the cabinet) may "vary or rescind," on his own motion or upon the petition of any party, any decision, rule, or regulation of the CTC.

This form of compromise between regulatory independence and political control has led in recent years to a great deal of tension, confusion and compromise. The record of both the federal and provincial governments' relationships with their regulatory agencies raises a number of challenging questions. Who should make regulatory policy? How should such policy be made — through open, participatory hearings in advance of specific cases or as a result of appeals to the cabinet following a specific case? Should SRAs perform *both* adjudicative functions, for which they appear to be well suited, as well as policy advisory, research, and administrative functions, for which they may be less well suited.[30] In particular, if a policy advisory role is retained, should the agency's advice to the government be confidential or made only in public documents? Finally, is it realistic to expect a government to be able to clearly articulate its policy positions, except in rather general terms, in advance of specific choices that embody the means of implementing them? There is a recognition of the need to make value trade-offs, for which the weights change over time. Yet, there is also the need to reduce uncertainty and to increase predictability for regulators, the regulated, and the public generally.

The following short list of examples of regulatory contretemps at both federal and provincial

levels indicates the need to address the interwoven issues of politicial accountability, policy making, and autonomy for regulatory agencies.

(1) Janisch states:

> It has been a longstanding policy of the CRTC that cable companies actually own a substantial part of their cable hardware rather than act simply as programmers on a cable system leased from a telephone company.... Where the telephone service is provincially owned, as in Manitoba, it has been argued that to ensure comprehensive province-wide cable coverage, it is essential to provide for active participation by the telephone company, and this could only be assured by allowing the public utility rather than the cable companies to own virtually all the hardware. When in September, 1976, the Commission licensed areas in Manitoba according to its established policies, the government of that province succeeded in persuading the Cabinet to set aside those licences two months later.[31] Coincidentally with this move, the governments of Manitoba and Canada announced an Agreement which was aimed, in admittedly general terms, at overriding the Commission's policy.[32]

Janisch indicates there "was no specific legal authority" for the Agreement and that the CRTC could have ignored it, "but a political nod is as good as a legal wink."[33]

(2) The counsel for the Consumers' Association of Canada states that the Minister of Transport "tried to stop the CTC from holding public hearings" on the issue of domestic Advanced Booking Charters (ABCs). He went on to say:

> Mr. Lang wrote a confidential letter to the [President] of the CTC (Mr. Benson) suggesting that the CTC give Transport Canada officials access to submissions made on the introduction of domestic ABCs "on a confidential basis". Mr. Lang explained that he wanted his Department to be the one to determine the policy concerning domestic charters.
>
> To his considerable credit, Mr. Benson replied that since the Minister was so concerned, the hearings would be advanced, and he attached a copy of the notice of hearing. In answer to the suggestion made by Mr. Lang that the Department of Transport consider the matter privately and on a confidential basis, Mr. Benson stated: "The purpose of a hearing is to ensure that any person interested will be given the opportunity to make representations. Interested persons include the general public, travel agents, tour operators, government officials, the Consumers' Association of Canada and the air carriers." He concluded by stating that the Department of Transport could obtain copies of submissions made to the CTC just like any other party.[34]

The federal Cabinet subsequently modified the CTC's decision when it was appealed.[35]

(3) In Ontario, the Highway Transport Board decided to allow Greyhound to compete with Gray Coach Lines (a subsidiary of the Toronto Transit Commission). This precipitated a conflict over who was in charge of transportation policy in Ontario. "In the end, the Cabinet was persuaded to the Board's point of view, and it is now reported that Gray Coach Lines is to be run as an independent operation on business lines and not simply as a source of subsidy for the TTC."[36]

(4) In Nova Scotia, a massive rate increase for electric power was announced by the Board of Commissioners of Public Utilities just before the most recent provincial election. The Premier announced that the two most important issues in the campaign were unemployment and electricity rates, and that an extensive subsidy system for electricity would be brought in after the election. He later blamed his defeat, in part, on the fact that the electorate held "the government" responsible for the rate increases, notwithstanding that they had been approved by a regulatory agency whose decisions were not appealable to the Cabinet.[37]

These are four cases of the many that could be cited[38] to illustrate the desirability of clarifying the responsibilities for policy making of governments and their statutory regulatory agencies; the political accountability for regulatory decisions; and the means that a government can use to influence the decisions of SRAs.

(E) INSTRUMENTS OF POLITICAL CONTROL

It is often argued that political control for the purposes of ensuring accountability centres on the ability of aggrieved parties to appeal to the cabinet. Hartle, for example, states:

> The heart of the matter is the situs of statutory authority, and the powers of the ministers individually or collectively to override the decisions of statutory agencies with regulatory authority. This ministerial "override" power is usually dignified by the phrase "the right to appeal to the Minister or the Governor in Council"[39]

In fact, a government has at its command a *wide* range of instruments with which to influence the

behaviour of SRAs and to maintain its political control over important policy matters. The problem is not really whether a government can "get its own way" with one of its statutory regulatory agencies; rather, it is a question of the *way* in which it will proceed to achieve its objectives.

(1) Legal authority

A principal instrument of control consists of the government's passing new legislation, amending existing legislation, or making regulations specifying the fundamental powers of its SRAs. Agencies are often accused of "making public policy" at odds with the government's instead of simply adjudicating cases in a manner consistent with the government's set of policy objectives. The most important reason that this occurs is the failure of the government to articulate its policy objectives clearly and to ensure that they are consistent with each other. Decisions have to be made or institutional paralysis results. Agencies move to fill the policy vacuum, less because of their wish to "grab power" from the government than because of their broad mandate and their statutory responsibilities to make decisions.

(2) Appointments

The government has complete control over the appointment of the commissioners who collectively make up the deciding body of SRAs.[40] It is fair to suggest that the same care has not been exercised in the selection of commissioners as has been evident in the selection of judges.[41] Yet the economic and political significance of regulatory decisions can hardly be denied. As we noted in Chapter 2, almost 30 percent of domestic output is subject to direct regulation — mostly by SRAs. While appointment or reappointment decisions do not come along with great frequency, they *can* have an impact.[42] Broad statutory mandates provide the scope for commissioners to alter significantly the results of regulatory process.

(3) Enunciation of Government Policy

Governments can indicate their policy positions to SRAs in a number of ways *other* than by changes in an agency's legislative mandate. Policy statements are the most common, but these can be hard to interpret.[43] A government's policy statements to SRAs can be informal or even secret. Confidential communications by ministers to regulatory agencies are not unknown in Canada, as the Telesat case illustrated.[44] We believe it desirable that the government's non-statutory policies be publicly stated and easily identifiable, even if they cannot always be very detailed or completely consistent with all other policy positions.

(4) Ministerial or Cabinet Directives

At present, very few enabling statutes provide the opportunity for the government to issue general policy directives to regulatory agencies, but there have been federal proposals to expand the use of directives. For example:

> Provision was made in the *Broadcasting Act* [1967-68] for the Governor in Council to have the authority to issue *directions* to the regulatory authority (now the CRTC) on some limited aspects of broadcasting (foreign ownership primarily) coming within its purview. This authority was subsequently exercised and two directions were issued. Of greater significance are provisions contained in Bill C-14, the *Nuclear Control and Administration Act*, that, if passed, would replace the *Atomic Energy Control Act*; Bill C-33, *An Act to Amend the National Transportation Act*; and Bill C-43, the *Telecommunications Act* (which would replace the *Broadcasting Act*, the *Radio Act*, the *Telegraphs Act*, and the *CRTC Act*). If these Bills were passed as tabled, the Cabinet would, to all intents and purposes, have the authority to issue directives on any significant matter over which the regulatory authority had jurisdiction.[45]

The potential utility of ministerial or cabinet directives to SRAs in order to assure political control and accountability to the government is great, as we shall discuss in more detail below. Widespread directive power has the potential to increase the amount of policy making prior to the existence of specific adjudicative decisions that might rely on such a policy. Directives would also focus attention of both the legislature and the public on those who exercise this power.

(5) Cabinet Appeals

Unlike the large number of independent regulatory agencies in the United States, the decisions of

many SRAs in Canada are subject to appeal to a minister or to the cabinet. The Lambert Commission notes: "Such 'political' appeals have been justified in the past primarily on the grounds that in a parliamentary system, elected officials must be ultimately responsible for the determination of public policies."[46]

Cabinet appeals may be active or passive, i.e., they may depend upon the cabinet to review a case on its own initiative or upon one of the parties to appeal, either by permission of the cabinet or by right. In addition, they may be positive or negative, i.e., the cabinet may vary the decision in any way it sees fit or it may only be able to reverse the decision or indicate its concern about certain matters and send it back to the agency for reconsideration.[47] Cutler and Johnson, who have called for greater political accountability of U.S. independent regulatory agencies to the President, note a "basic paradox" in regulatory philosophy: "We respect the nonpolitical independence of the regulatory process, yet when we dislike independently made agency decisions, we invoke the political process to change them."[48]

(6) Direct Departmental Action

Governments can influence outcomes in industries regulated by an SRA by direct action through regular executive departments. These actions include taxation, tax expenditures, expenditures (including grants and subsidies), and even public ownership. For example, the Department of Transport operates all the important airports in Canada. Its actions with respect to the size, location, and fee structure for airports can strongly influence civil aviation, which is regulated by the Canadian Transport Commission.[49]

(7) The Budget of the SRA

Statutory regulatory agencies, like departments, have to go to the Treasury Board (or an equivalent agency) every year to have their budgets approved.[50] In addition, their estimates must be approved by the legislature. It is often argued that a government's priorities may best be inferred from its willingness to spend for certain purposes, rather than its willingness simply to pass legislation. In theory at least, the government could use these opportunities to press its views upon the agency and reinforce them by altering the SRA's budget in certain areas. Because it is difficult to determine the appropriate level of funding for a regulatory agency, the use of the purse strings on an annual basis to effect the government's policy control over the SRAs seems a crude tool at best. Certainly Parliamentary committees have not been able to effectively relate policy control and approval of an SRA's estimates.[51]

(8) Legislative Committees

At present, legislative committees generally play a very modest role in influencing the behaviour of SRAs. At the federal level, the various subject-matter standing committees review the estimates of all departments and related SRAs. These committees may also be able to review the performance of SRAs when they examine new legislation affecting regulatory agencies. If an agency's annual report is tabled in the legislature and referred to a committee, this provides an opportunity for government and opposition members to make their views known to SRA personnel.[52] However, without certain changes, the ability of legislative committees to influence regulatory agencies will be much less than that of their American counterparts.[53]

(9) Political and Moral Support

The government can influence the behaviour of its SRAs, in particular exercise a degree of political control over them, by the extent of the support it gives them. For example, do ministers vigorously defend an agency (or "wash their hands of it") when its decisions are attacked by the opposition, the newspapers or disappointed regulatees? Do ministers press their colleagues to appeal cases in which the courts have rendered decisions adverse to the agency? Is the government willing to make the incremental changes in the agency's statutes and regulations upon the recommendation of the agency? Has the government ensured that the remedial powers of its agencies are adequate to give effect to its decisions? In short, by giving or withholding its moral and political support, the government can influence its statutory regulatory agencies.

(F) POLICY MAKING: THE GOVERNMENT AND SRAs

(1) Policy Making: Some Distinctions

A policy is a general guide to decision making, which may be discretionary or compulsory. It provides a basis for constraining the actions of a decision maker when he is faced with a specific choice situation. In any hierarchical organization, there are potentially many levels of policy making. While the distinction between strategic and tactical policy choices is a useful one, it applies not once, but repeatedly, throughout a hierarchy. Obviously, "with the cascade of authority there also flows a cascade of even more subordinate policy decisions. What constitutes a 'policy' depends entirely upon where the observer cuts into the inevitable hierarchy of policies."[54] Moreover, the significance of a policy issue may depend upon the observer: "The materially trivial may be symbolically momentous."[55]

Of specific concern here, however, is the appropriate division of policy-making authority between SRAs and the government. To deal with this issue, it is useful to distinguish between "policy development" and "policy enunciation." The former term refers to the process of formulating policy options and evaluating their possible consequences, i.e., the shaping of advice. Policy enunciation refers to the promulgation of general decision-making rules by the responsible authority. Currently, many SRAs are involved in both policy development and policy enunciation. Policy development, in some cases, is conducted through open hearings involving public participation, ending up as general rules or agency guidelines for those they regulate. These guidelines are policy enunciation. In other cases, the agency provides confidential policy advice to a department or minister, e.g., the National Energy Board. Similarly, SRAs are also engaged in policy enunciation when they adjudicate individual cases. This would be true even if the legislative mandates under which they operate were more narrowly specified.

It should be noted that it is literally impossible for the leadership of any organization, let alone a government, to spell out in detail its complete set of objectives (policy agenda) prior to experiencing the practical problems raised by individual decisions. Moreover, vagueness may be the price of consensus.[56] Ambiguity may be the "institutional glue" that maintains stability in a democracy. The political process may be incapable of formulating public policy in specific terms for reasons that are not hard to find. Like all of us, elected officials and their advisors find it difficult to formulate their strategic objectives in the absence of the specific means to implement them, i.e., when faced with specific decisions. General goals or policies are abstractions. Policy is really made in terms of specific decisions in which real outcomes for specific groups are decided.

(2) Broad Mandates and Agency Discretion

A brief look at some major federal regulatory statutes will confirm the opportunities for policy making conferred on SRAs. The *Aeronautics Act* (section 16(3)) simply provides that licences are to be issued only when the CTC is satisfied "that the proposed commercial air service is and will be required by the present and future public convenience and necessity." As originally introduced, the *National Transportation Act*, in keeping with the recommendations of the MacPherson Royal Commission *Report*[57] that preceded it, provided that the CTC should regulate to bring about an "economic and efficient" transportation system. During second reading, an amendment was accepted that changed the criteria to "adequate, economic and efficient." No reservations were expressed at giving the agency such a contradictory mandate.[58] The CRTC has been given authority to implement, in section 3 of the *Broadcasting Act*, what at first glance appears to be a quite detailed "Broadcasting Policy for Canada." However, a closer look reveals that section 3 contains a number of competing goals for regulation, e.g., "responsibility for programs" versus "right to freedom of expression," without any ranking of these goals.[59]

It should be clear, even from this brief summary, that all policy is *not* contained in an SRA's enabling legislation. An emphasis on a positive policy role for the statutory regulatory agencies should not be taken as advocating abdication of ministerial or cabinet control over policy making. Far from it. The government must continue to strive to lay out the general principles or policy framework to be applied in regulation with as much precision as possible.[60]

(3) Policy Making: The Role of SRAs

Assuming that it has been decided that regulation is actually needed in the public interest,[61] it is reasonable to expect the recipient of delegated authority to do what the legislature itself has neither the time nor expertise to do. To insist that legislators (or the cabinet) be the only policy makers in the country is to expose those on the receiving end of regulation to the full brunt of what must very often be vague and broad discretionary powers. These powers would be unchecked by such ameliorating techniques of modern government as policy statements, policy guidelines, draft rules, rules, and policy structured by precedent.

Some regulatory agencies have made little use of these techniques.[62] For example, the CTC, despite the broad policy-making mandate given to it in the *National Transportation Act* of 1967, has largely failed to articulate the general policy considerations that underlie its individual decisions. The reasons for this are not clear. By contrast, the CRTC has made extensive use of policy statements, guidelines, and the like. Yet very few SRAs have been able to make use of these techniques, since it is thought "that an administrative tribunal had to exercise its discretion *de novo* on each occasion, and that if it adopted a consistent policy, this would amount to an unlawful fettering of its discretion. As a result, there has been some reluctance by the legal advisors to regulatory agencies to advise what common sense and good administration would seem to dictate."[63]

If history is any guide, the question today is not whether, but how, regulatory agencies will be involved in the policy-making process. Another central issue is the nature of the relationship between the SRA and politically accountable ministers. When an agency is given a broad, discretionary legislative mandate and the government has not clearly articulated its policy positions, the agency should proceed to enunciate policy. This might be done following a ministerial initiative calling for a hearing on a policy issue, which would serve as a precursor to a policy statement.[64] Depending upon its enabling statute, the agency could proceed on its own initiative. The Supreme Court of Canada has cleared away the residual doubts about certain uses of policy guidelines under the *Broadcasting Act*.[65]

Greater use could be made of open precedents as a means of specifying policy. In general, the record of Canadian regulatory agencies with respect to the publication of decisions, and sometimes the quality of reasoning in those decisions, leaves much to be desired.[66] As with policy guidelines, this reluctance to use open precedents as building blocks toward the formulation of coherent policies can be explained in part by the continuing influence of an old-fashioned view of precedent.[67]

It has been argued that governments should move to create two distinct types of regulatory agencies: advisory SRAs, and decision-making agencies.[68] The former would be limited to providing policy advice and recommendations to a minister or the cabinet; they would have no adjudicatory function. In contrast to executive departments, the advice would be based on public hearings and commissioned studies and would be made available to the public at the same time as it was given to the government. Decision-making agencies, however, would concentrate on the adjudicative function, but they could also be requested to give policy advice. They would be subject to policy directives from the government intended to clarify their mandate. During the course of any agency proceeding prior to a decision, the government would be given the power to halt such proceedings and announce a final decision in the legislature, where it would be subject to debate. Appeals to cabinet, under this proposal, would be abolished.

The advantage of the proposal outlined above is that it would clarify for the government, the regulatory agencies, the regulatees, and the public the identity of the ultimate policy-making and decision-making authority in the field of regulation. Political accountability, by virtue of political control, would fall entirely upon the government in the case of advisory agencies. Where decision-making agencies are subject to policy directives issued by the government, particularly where the government could direct the result in a specific case, the lines of responsibility would also lead to the government.

(4) The Role of Cabinet Appeals

(a) The Arguments for Cabinet Appeals

There are three commonly made arguments in favour of political appeals. First, it is said that regulatory agencies only take into account the narrow regulatory factors as presented to them by the immediate parties to a specific application. They do not, it is argued, take into account broader factors, such as enhanced employment opportunities, encouragement of indigenous research and development, and steps to overcome regional disparities that may be of concern to the government. Because the weights given to a government's objectives change over time and because there is a need to make value trade-offs, only the cabinet has the authority to make these fundamentally political decisions. Neither the weights nor all the objectives can be specified in advance, for they are part of the art of political decision making.[69] Ultimately, no one else can make a government's decisions for it.

Second, it is said that cabinet appeals are not disruptive or destructive to the integrity of the regulatory process because they occur rarely and a fairly high proportion are not successful. Although it is true that in the past there have been relatively few cabinet appeals and even fewer have been successful, the number has increased in recent years.[70] There is reason to believe that the number of such appeals will grow in this time of increasing concern and involvement by more interest groups in the regulatory process. Anxiety and uncertainty induced by the possibility of cabinet appeal is far more widespread than the impact of any single appeal from a regulatory decision. Finally, depending on one's views, the continued existence of these appeals makes for laziness in policy making or policy decisions made in a specific factual context rather than on a hypothetical basis.

Third, it has been argued that some individual decisions are of such seminal significance that no government can afford not to be involved. If it fails to be involved, it abdicates responsibility for major policy making. What is at issue here is not the sentiment but the timing. Rather than continue to employ cabinet appeals as a "catch-up" device, it would be better to give the cabinet the means by which it can be more responsive earlier in the process and not simply be reactive to specific decisions made by SRAs. An obvious technique is that of policy directives. Furthermore, as indicated above, several other instruments are also available. It is, of course, both necessary and desirable that the cabinet should have the means of transmitting its changing views on policy to the regulatory agencies. But cabinet appeals are not the best means for the transmittal of general policy.

(b) The Case Against Cabinet Appeals

A cabinet appeal comes so late in the decision-making process that it is disruptive and possibly destructive, and can only serve short-term political ends at the expense of the entire regulatory system. It comes into play only after a decision has been made following a full hearing in which the issues have been developed, often at considerable expense to the parties to an application, and after the regulatory agency has devoted a good deal of its limited resources to dealing with the matter systematically. Should a regulator fail to adopt such open, comprehensive procedures, improvement will not come from periodic cabinet reversals, but by way of concerted proposals for the reform of the procedure of SRAs.

It should also be noted that cabinet appeals inject a measure of delay and uncertainty into a decision-making process that is already seen by many as being too slow and unpredictable.

Cabinet appeals lead inevitably to what has been described as "selective" or "discretionary" accountability.[71] When it suits its political purposes, the cabinet remains largely free to hide behind the excuse that the matter has been delegated to an "independent" regulatory agency. It will be said that it is a matter that should be handled by experts, that it is simply an application of long-established principles or best dealt with "outside of politics." On the other hand, should politics so dictate, grounds can readily be found to justify intervention. The convenience of this arrangement for short-term political purposes is clearly incompatible with the development of either coherent regulation or political accountability in any meaningful sense.[72]

It may fairly be argued that cabinet appeals benefit wealthy, well-organized and politically vocal interests at the expense of possibly larger groups that do not have these characteristics.[73]

Moreover, ultimate political accountability for the reversal or affirmation of individual decisions is often more theoretical than real.[74] Accountability to the legislature is more direct and may be more effective.

There are as yet no comprehensive rules of procedure for appeals to cabinet. Issues may be raised that have not been canvassed by the SRA in making its decision. All parties to the SRA's decision may not be able to make a submission to cabinet, and those that do are not entitled to see the submissions of others to possibly rebut certain evidence or arguments. For example, executive departments may make confidential submissions despite the fact they refrained from participating in the SRA's public hearing of the case.[75] The cabinet may decide on whatever basis it chooses and it need not give written or oral reasons for its decision. Of course, it is possible for the legislature to question the decision and to debate the issue.

While cabinet appeals may provide the desired degree of control by individual ministers or the cabinet, they may *not* actually result in any real clarification of the policy of the government. Instead, what regulators and those they regulate may be faced with is a series of *ad hoc* cabinet decisions on selected individual cases for which no reasons are given and from which it is difficult or impossible to discern the policy implicit in them. The exercise of political control may thereby increase uncertainty and result in more political appeals as the SRAs either try to "get in step" with government policy or act to implement a contrary view. The delegation of decision-making authority to SRAs in the interests of administrative practicality may be defeated by the mishandling or misinterpretation of cabinet appeals.

Cabinet overrides can have the effect of demoralizing SRAs which have worked hard to hear all sides, define the issues, study contending views, and write a carefully reasoned decision in the light of their interpretation of their statutory mandate and previous statements of government policy. "Second-guessing" of the decisions of regulatory commissions could well lead to a diminution in the quality of those decisions and in the quality of the persons who will be prepared to serve on such bodies. It is one thing to be reversed in a reasoned decision of a reviewing or appellate court. It is quite another to be reversed on grounds of what appears to be expediency rather than a strategic policy choice. As the pressure mounts for greater cabinet involvement in individual decisions, a parallel bureaucracy will have to be established — a bureaucracy whose very existence is dependent on its being able to point out inadequacies in the decisions of regulatory agencies.[76]

(G) POLICY OPTIONS

We would agree with the Lambert Commission, as a matter of general policy, that "all Crown agencies (excluding shared enterprises), as they are instruments of declared public policy, must be ultimately subject to the direction of the Government — though less directly than for departments."[77] The present system of selective or discretionary accountability, as it is effected through appeals to the cabinet, is seriously flawed as a means to achieve the purpose it is supposed to serve. Furthermore, it fails to make the best use of the degree of autonomy given to statutory regulatory agencies.

A delicate balance must be found between control for the purposes of ensuring accountability and independence for the purpose of fulfilling the specialized functions expected of SRAs. To put it more directly, we do want to prevent covert, short-term political consideration from affecting almost all regulatory decisions on specific cases. We do not want to exclude ministers or the cabinet from the process of establishing strategic objectives, from specifying the framework for decision making, from making the difficult, but necessary, value choices or from being able to specify the result in specific cases of great national or provincial import.

Broadly speaking, what is involved here is the tension that exists between two competing theories for the political legitimacy of the regulatory process. Proponents of representative democracy will favour cabinet control and point to cabinet's accountability to the elected body, the legislature. Those favouring notions of participatory democracy will emphasize open procedures and fair opportunity for public input, and point to the appointed

agency's direct accountability to the public. In the end, neither of these views should prevail and there should be a subtle blending that will ensure the benefits of both at the expense of neither.

Three broad policy options are listed below. Some of the components within each option can be added or subtracted to form other combinations. All are designed to improve political accountability, clarify policy-making responsibilities, and assure the autonomy of SRAs for the performance of their adjudicative responsibilities.

1. Put all regulatory functions within executive departments, i.e., discontinue the use of SRAs, except perhaps for purely advisory purposes.

2. Maintain the present system of cabinet appeals, but modify their *procedural* aspects, e.g., permit formal representations by all interested persons; permit all such persons to comment on one another's submissions; require cabinet to give written reasons so that regulators and the regulated obtain policy guidance; require the government to table in the legislature a summary of the representations and the cabinet decision, giving reasons.

3. Abolish cabinet appeals and substitute provisions for binding "Government Policy Directives," which would have the following characteristics:

   (i) Such Policy Directives would be issued by the Governor (or Lieutenant Governor) in Council.

   (ii) They should be tabled in the legislature (hence facilitating debate) and published in a gazette.

   (iii) They would apply only to general policy questions and not to individual cases.

   (iv) A Policy Directive could not be issued once an SRA has begun proceedings on a specific case.

   (v) Policy Directives should be preceded by public hearing if possible.

(H) DISCUSSION OF THE OPTIONS

Option 1 asks the question, "If our political system has such difficulty in accommodating the 'horizontal' delegation that even a degree of independence requires, would it not be wise to bring regulation into the mainstream of government by way of 'vertical' departmental delegation?" Several points should be made. First, it must always be borne in mind that a good deal of regulation is already undertaken by departments. Departmental regulation is particularly appropriate when it does not affect a specific individual's interests, as in setting general health and safety standards, and does not involve the resolution of competing claims to some government benefit, such as an exclusive franchise. Second, it must not be too readily assumed that the mere placing of regulation in the vertical hierarchy of government would, in fact, lead to any meaningful political accountability. To be effective, accountability requires enough openness to make it possible for those both inside and outside government to question policy positions and decisions effectively. It may not be possible to question a regulatory decision made within a department with any degree of effectiveness because of the closed decision-making processes employed. There appears to be a greater chance of "capture" by the regulated in the case of a department as opposed to an SRA because of the openness of the latter's procedures. In general, departmental regulation holds out the prospect of greatly enhanced accountability, but in practice this accountability may be more theoretical than real. Third, even if greater use were to be made of vertical delegation, it would still be necessary to graft on to departmental processes certain procedural protections. These would be necessary to satisfy those directly affected by regulation that the decision to deny a rate increase, refuse a new air route or revoke a broadcasting licence had been made in an open, evenhanded, non-partisan manner. By the time this political reality is taken into account, it is quite possible that one would be back where one started from. There are no short cuts.

Option 2 recognizes political reality and at the same time tries to assure an improvement of the procedural aspects of cabinet appeals. The first point is addressed by a former general counsel of the CRTC:

> The power of Governor in Council review has been around since the earliest days of tribunals in Canada. There is little likelihood it will be suppressed unless political pressure to do so is built up to an overwhelming pitch. Quite simply, it is just too much to ask Ministers who take flack from irate constituents who have lost train service or their favourite cable channel to give up a means to respond to political pressures where circumstances warrant.[78]

The arguments for and against political appeals were canvassed above. The courts may be moving to impose some procedural requirements on cabinet appeals,[79] but at present, no government has indicated a willingness to legislate procedural rules for cabinet appeals. Rather, the best we can hope for, in the absence of judicial pronouncements, is that cabinets can be persuaded to adopt voluntarily the kind of procedural proprieties mentioned in Option 2. The hardest to achieve will be the provision of written reasons. Yet, if the policy significance of a cabinet appeal decision is to be understood by the SRA, the regulated firms, and the public, reasons are essential, for it may be difficult to infer them from the decision itself.

Option 3 seeks to find that delicate balance among (i) greater political accountability by regulatory agencies to the government (and by the government to the legislature and ultimately to the electorate); (ii) making best use of SRAs for the open and participatory development of policy and the performance of adjudicatory tasks; and (iii) the clarification of policy-making responsibilities between SRAs and the government. It has been endorsed, in some variant, by the Law Reform Commission of Canada, the Lambert Commission and by a number of academics.[80]

There is much to be said in favour of the idea that, prior to the issuance of a policy directive, the matter be referred to the regulatory agency which would hold a public hearing and issue a public report.[81] Modifications on this approach are possible.[82] That report could either be adopted, modified or rejected by cabinet.

This proposal would focus political accountability where it can be a reality. It would give the ministers and their departments another forum in which to advance openly their policy concerns. It would reinforce the principles of responsible government in that the cabinet could always prevail and be held responsible in the legislature and at the polls. Accountability to the legislature and the public would be increased, as Policy Directives would normally be issued following a public report that grew out of a public hearing. Alternatively, when the government issues a "pure directive," its responsibility for such an action would be manifest. In such circumstances, political accountability would be more than a slogan. It would bring policy making out into the open and it would eliminate the danger of imputing too much policy significance to individual decisions. It would maintain the integrity and worth of the regulatory agencies, but not at the expense of ultimate political accountability. It would be the cat's pyjamas.

The political nature of regulation has led to a great increase in participation by the provinces in federal regulation and to demands for direct government-to-government negotiations on policy matters. Will Option 3 satisfy the provinces? The answer depends on whether the provinces will be prepared to recognize that openness, with all its advantages, can only be obtained by some limitation on direct political negotiations. This was brought out forcefully by Schultz. As he noted, "In general, regulatory agencies provide an excellent and valuable opportunity for much public input and discussion of regulatory matters. It would be most regrettable if, as a consequence of the desire to effect greater political control over policy matters, such open public participation was lost."[83]

Governments should be concerned to see that the use of policy directives, which would be binding on statutory regulatory agencies, do not occasion an increase in litigation dealing with the relationship between such directives and an agency's enabling legislation.

Option 3 would *not* permit the government to stop an SRA's proceedings prior to a decision and specify a result by executive action. If such a procedure were permitted, it could combine the worst of abrogation of procedural fairness with a much flawed version of political accountability.[84]

A government already has the power (i.e., by legislation) to specify the results in an individual

case when it is committed to a preconceived result. The Law Reform Commission of Canada makes the argument as follows:

> We do not doubt that there are instances when the Government should have its way on specific issues that would otherwise be dealt with as a matter of course within the administrative process. This is particularly the case where the Government decides to establish structures or initiate programs the arrangements for which might fly in the face of existing economic or social legislation. It would be better to allow the government to take these issues right out of the regular administrative process rather than to distort the process either through informal pressure or by overruling the agency after the process has run its course. While an agency, in these cases, could provide needed advice on technical aspects of implementing the government decision, its integrity as a decision-maker would not be compromised by its participation in a mere ritual.[85]

Major policy issues do sometimes suddenly become apparent, even to the most assiduous and astute observer of the regulatory scene, when brought out in a specific application requiring an adjudicative decision. When this is the case and the government wishes to achieve a predetermined result (particularly one which "might fly in the face of existing economic or social legislation"), it should obtain new legislation to effect its purpose.

(I) RECOMMENDATIONS

R1. Appeals to or reviews by the Governor (or Lieutenant Governor) in Council should be abolished, and the enabling statutes of regulatory agencies should be amended to permit the use of Government Policy Directives, which would be binding on the agencies. This recommendation would be implemented as follows:

(i) When the government believes that a Policy Directive is required, it shall request a report from the regulatory agency on the matter in question.

(ii) The regulatory agency would receive representations, either through submissions or at public hearings, on the proposed policy. (Adequate representation will require government funding of "public interest groups," a matter to be discussed in Chapter 6.)

(iii) The agency would present a public report with recommendations to the responsible minister.

(iv) The Governor (or Lieutenant Governor) in Council, on the recommendation of the responsible minister, may accept in whole or in part, or reject completely the findings and recommendations of such a report.

(v) The policy decided upon by the Governor (or Lieutenant Governor) in Council shall be transmitted to the agency as a Government Policy Directive.

(vi) The Policy Directive shall be published in a gazette and laid before the legislature. (It could also be referred to the appropriate standing committee for study if so desired.)

(vii) Policy Directives would apply only to general policy matters and should not be issued once a statutory regulatory agency has begun proceedings in a specific case where such a directive is to be applied to that case.

(viii) Under certain conditions, these procedures may be too cumbersome. For example, in the event of an urgent matter requiring a policy directive, there could be a provision waiving the requirements of steps (i) to (v). Any such compression should be exceptional and would require appropriate ministerial justification to the legislature.

R2. If, in some cases, appeals to or reviews by the Governor (or Lieutenant Governor) in Council are to be retained, a number of procedural reforms should be made:

(i) public notice should be given of the appeal or review and interested persons should be permitted to submit written representations;

(ii) all such representations, including those of government departments or agencies,

should be made available for possible rebuttal to others who have submitted representations; and

(iii) the government, following its decision, should table in the legislature a summary of the written representations made to it, together with its reasons for decision, so that its policy position is clear to all concerned.

R3. Clear guidelines should be established governing communications between SRAs and the government. Specifically,

(i) Where one of the functions of an SRA is to provide policy advice to the government, such advice should be made public at the time it is given.

(ii) All communications from the government to an SRA concerning any matter before or about to come before the agency should be publicly disclosed at the time they are made.

R4. Governments should establish clear general provisions regarding the disclosure of information by SRAs. This may be accomplished by amendment to enabling statutes or procedural regulations or by a Freedom of Information Act, which would define the right of access to information by participants and intervenors in a particular proceeding and the general public. SRA policy guidelines, staff manuals, orders, regulations, and decisions should be published or publicly available.

6 IMPROVING GOVERNMENTAL DECISIONS CONCERNING REGULATION

> By definition, procedure does not deal with the substance of controversial issues; and by nature, it is an arcane, bloodless, and thus unattractive subject of study.... For these reasons, as all wise lawyers know, a change in governing procedures is the simplest way to effect a basic change in the end product (that is, the substance) of governmental action.
>
> Antonin Scalia

> Laws frequently continue in force long after the circumstances which first gave occasion to them, and which could alone render them reasonable, are no more.
>
> Adam Smith

(A) INTRODUCTION

(1) Deficiencies in Governmental Decision-Making Processes

The point has been made in the Introduction that only certain aspects of the broad topic of government regulation can be dealt with in this Interim Report. In deciding on the report's primary focus, the Council gave considerable weight to concerns about regulation expressed by individuals and groups in the private sector. As much as the Council's research is still in progress, a detailed assessment of the many areas of regulation and consideration of reform in specific industries or types of regulation must await our Final Report. As Sherlock Holmes remarked, "It is a capital mistake to theorize before you have all the evidence. It biases the judgement." The Council, therefore, decided to focus on certain aspects of the *process* by which governmental decisions concerning regulation are made. The concerns expressed by private sector groups recognized that the quality of such decisions is an important determinant of the general effectiveness and efficiency of regulation. We believe that, over the long term, perhaps the greatest potential for improving government regulation may lie not in a few cases of outright deregulation, but rather in less glamorous changes affecting decision processes. Paul Weaver, an astute observer of regulatory reform in the United States, put it this way: "In most areas of regulation, the need isn't for 'grand reform' but for more sensible decision making and for greater public attention to the regulatory process . . . ."[1]

Even a cursory examination of the decision-making processes of both federal and provincial governments concerning the creation of new regulations (i.e., subordinate legislation) or the monitoring of existing regulatory programs indicates a number of obvious problems. These include:

- inadequate notice of new regulatory initiatives (statutes, amendments and subordinate legislation) to interested persons;
- inadequate consultation with interested persons during the development of proposals for new regulations;
- failure to assess the costs and benefits of new regulations to society as a whole;
- failure to evaluate periodically the large stock of existing regulatory activities;

- lack of central co-ordination of regulatory activity;
- inadequate public access to information regarding the regulatory actions of government; and
- unequal opportunities for participation in decisions concerning new regulations and existing regulatory programs by those who have an interest in them.

Such deficiencies are bound to aggravate any problems that might arise from difficulties with the substance of regulation. They may help to explain the growth of regulatory intervention during the past decade. While it is true that the federal government and a number of provincial governments have recently taken steps to improve the process,[2] the Council believes that further improvement is both necessary and possible.

(2) Three Propositions

The recommendations embodied in this chapter are founded on three basic propositions:

- governments should provide advance notice of their intent to propose major new regulations (i.e., subordinate legislation), and allow an opportunity for consultation;
- governments, before imposing major new regulations, should assess the costs and benefits of such regulations; and
- governments should periodically, on a systematic basis, evaluate their existing stock of regulatory programs and agencies.

The Council recognizes that these principles are not necessarily self-evident, and require some justification.

(a) Advance Notice

Among the "concerns" reported in Chapter 1 was the failure of governments to provide the public with adequate notice of new regulations. For this reason, interested parties feel limited in their ability to influence the development of regulations before they become law. Although this criticism has sometimes been levelled at the generally faster paced provincial legislative process, it is most often directed toward the promulgation of regulations (i.e., subordinate legislation) at both federal and provincial levels.[3]

The provision of advance notice supports all the values discussed in Chapter 3. A timely warning can help to ensure that interested parties have the opportunity to make their views known on regulatory proposals before final action is taken. (Generally speaking, the more advanced the stage in the decision process, the more difficult it is to change the outcome.) Such "input" can contribute to the legitimacy of regulatory actions by strengthening the perception of openness and fairness in the decision-making process. Because additional information can be obtained, it also fosters informed decision making by improving the mix of information on which decisions are based.

Advance notice can promote economic efficiency in three ways. First, a greater appreciation of the need to weigh both the costs and the benefits, broadly defined, of a proposed action might reduce the likelihood that economically inefficient measures would be adopted. Second, the costs of complying with regulatory requirements can be minimized by ensuring that some time elapses between the point at which an interested party learns of a regulatory initiative and the point at which the measure becomes effective.[4] Third, advance notice can increase the benefits of regulation by decreasing the total amount of time necessary to attain full implementation.[5] Finally, one can expect that provision for advance notice will result in greater consultation between the government and interested parties. It is more probable that some consensus on the measures may be achieved, with the result that the coercion attributable to regulatory action will be reduced.

Of course, even with timely notice, not all interested parties will be able to respond effectively. Some groups will enjoy an advantage in pressing their views on advisors and decision makers. However, it seems reasonable to assume that providing advance notice will result in a wider range of representations, particularly if provision is made to assist financially consumer and other "public interest groups." This important issue is discussed in more detail below.

(b) Prior Assessment

Governments can take action to influence the behaviour of economic actors in the private sector in a variety of ways. At present, there is an obvious asymmetry in the extent to which expenditure programs are evaluated prior to their instigation compared with that prevailing for new regulatory initiatives.[6] The employment of any governing instrument will result in the allocation of scarce resources both within the public sector and between public and private uses. To the extent that the costs of an instrument, regulation in this case, are underestimated or are hidden, rationality in governmental decision making is almost certainly reduced.

In the absence of a requirement for formal analysis, government departments and agencies may fail to incorporate information about the economic impact of proposed regulations on the private sector into their decision-making processes. Such a failure reflects the fact that private sector costs are a cost *of* government, but not a cost *to* government. To ignore these costs is to understate grossly the impact of government action on the private sector and to invite inefficient substitution of one instrument (regulation) for another (budgetary expenditures). In an era of fiscal restraint, misconceptions regarding the cost of regulation may result in an "over use" of that instrument. This is not to say that economic costs and benefits are the only considerations, but at least we should reckon the price of equity, for example, more accurately.

To assist in the restoration of public confidence in the political process by improving effectiveness and openness of government, there is a need to do more than scrutinize taxes and budgetary expenditures. There is also a need to ensure that the costs and benefits of new regulations are competently assessed before action is taken. This is central to the principle of informed decision making and to the concept of strategic thinking about regulation discussed in Chapter 3.

Like advance notice, prior assessment of proposed regulations is responsive to many of the concerns expressed by the private sector. Properly structured, a system for prior assessment could provide advance notice of new regulations, improve the openness of regulatory decision making, and ensure the opportunity for public input. The goal of accountability would also be served. Accountability, among other things, requires an evaluation of past performance. The analysis undertaken in a prior assessment of regulatory proposals could establish the criteria, the "promises of performance," against which actual results can be judged.[7] (See the discussion of regulatory program evaluation below.)

The most important element of a prior assessment system is the analysis of the economic effects (costs and benefits) that can be expected to result from imposition of major new regulations. The system should be designed so that the information generated by the analysis is available to the public as well as to the government. The greatest benefit of the analysis is likely to come simply from ensuring that those who develop the proposals engage in the type of strategic thinking outlined in Chapter 3. Changing the way decision makers think about regulation and ensuring that the right questions are asked before action is taken would be a major accomplishment of a prior assessment system.

(c) Periodic Evaluation

Adoption of a prior assessment system would ensure that, in the future, major new regulations would be subjected to economic analysis before they became law. This, of course, would do nothing about the vast stock of existing regulatory measures (statutes and regulations) that may have outlived their usefulness. Some regulatory programs might have been implemented in response to social or economic conditions that no longer exist.[8] Others might never have been adopted in the first place if a prior assessment system had been in operation. Although many of the existing regulatory programs may well be justified, all deserve careful scrutiny.

We know, from the voluminous literature appraising regulatory programs in the United States and from the much smaller number of studies in Canada, that some programs, although not without benefits, have experienced a variety of problems:

- they are ineffective: they fail to achieve what appear to be their objectives, and new objectives have been substituted;

- they are inefficient: the cost of achieving the apparent objectives is higher than it need be;
- regulatory programs are in conflict with one another;
- regulation for limited objectives expands over time to more and more pervasive control; and
- regulation has been used to redistribute significant amounts of income in ways that may not have been intended by legislators.

The concerns reported in Chapter 1 and the growth reported in Chapter 2 suggest that Canadians have much to gain from carefully and systematically evaluating our regulatory programs on a periodic basis. The Council believes that three fundamental benefits could be expected from systematic evaluation of regulatory programs: clarification of accountability of both elected and appointed officials in the operation of the programs; improvement in the efficiency and effectiveness of the programs; and fostering of informed regulatory decision making through the provision of more information concerning the existing impact of the programs.

(3) Two Caveats

(a) Cost-Benefit Analysis

Central to both prior assessment and periodic evaluation will be the use of cost-benefit analysis. The Council recognizes the difficulty of applying this technique of economic analysis to issues that are not entirely economic in nature. We see cost-benefit analysis as a useful, albeit limited, tool that can serve as an aid to rational decision making. We have no illusions that this analytical technique can accurately assess minor or subtle differences. Cost-benefit analysis, however, is capable of identifying significant differences between costs and benefits, differences that should be considered by decision makers when evaluating new regulations or existing regulatory programs.

Cost-benefit analysis can, of course, be misused. The numbers derived are estimates and are subject to dispute among equally competent analysts. Not all relevant costs and benefits, in the broadest sense, can be incorporated into the calculations. Intangibles are particularly hard to deal with. While recognizing its limitations, we are, nonetheless, convinced that cost-benefit analysis should be utilized to aid and extend the intuition and judgment of public decision makers in the field of regulation.[9]

(b) Judicial Review

In the remainder of this chapter, the Council presents its recommendations for change in the process by which governmental decisions are made concerning the regulation of economic behaviour in the private sector. The discussion is divided into three major sections focusing on decision-making processes for new regulations; decision-making processes for existing regulatory activities; and elements common to the decision-making processes for both. Our recommendations are intended to improve the administrative aspects of these processes. It is not our intention, nor our desire, that adoption of the procedures suggested in this chapter should in any way affect the legal validity of regulatory measures and thus give rise to the possibility of judicial review. This may be of particular concern in connection with the procedures suggested for new regulations. If governments implement the suggested procedural reforms, they should take appropriate precautionary steps to preclude or minimize the possibility of judicial review. In summary, it is our intention that "enforcement" of these new procedures remain an administrative and not a judicial responsibility.

(B) DECISIONS CONCERNING NEW REGULATIONS

(1) The Limits of Procedural Reform

Governments in Canada employ a variety of procedures for effecting new regulatory initiatives, whether they be enabling regulatory statutes or subordinate legislation (regulations). The process of arriving at decisions concerning the enactment or repeal of enabling legislation is of fundamental importance. Without a legislative foundation, much (but not all) regulatory activity cannot be undertaken. Notwithstanding this fact, the Council did not interpret its terms of reference as authoriz-

ing an excursion into the area of parliamentary reform. Consequently, we have focused our attention on the process by which decisions are made concerning the development and approval of new subordinate legislation or regulations. Our recommendations deal with three aspects of this process: the desirability of early consultation with those interested in new regulations; the institution of a system for providing advance notice of the intent to propose new regulations; and the institution of a system for prior assessment of new regulations.

When procedural reforms are attempted, and especially when major adjustments to existing systems or the implementation of entirely new systems are contemplated, there are a number of dangers that can jeopardize the entire process. The greatest danger, and one to which many reform proposals succumb, is attempting too much at one time. Ambitious and wide-reaching changes can be extremely costly to implement, may provoke greater resistance to reform, and may give rise to severe problems in foreseeing the effects of change. Another danger is a tendency to over-rate new methods or analytical tools. Our recommendations, for instance, incorporate the use of cost-benefit analysis for both new regulations and existing regulatory programs. Yet, as noted above, cost-benefit analysis is, at present, an analytical tool with significant limitations. There is also the danger of attempting to make routine activities that, by their nature, will be less effective if performed in a mechanical and perfunctory fashion.

With these dangers in mind, the Council has consciously limited its recommendations for reform of governmental decision-making processes concerning new regulations. We do not suggest massive changes in the procedures for all new regulations, but rather only for those that would have significant implications in terms of cost or impact on the distribution of income. In the discussion that follows, these are termed "major" new regulations.

The Council has circumscribed its recommendations because it does not have the necessary information to determine whether more extensive procedural reforms would be feasible. Individual governments will be better able to assess the capacity for change within their own systems. The Council views its proposals as a foundation. The experience gained in implementing the Council's recommendations should provide the basis for a measured, controlled expansion of the initial reforms. We encourage governments to consider such extensions subject, of course, to the cautions regarding the dangers of over-reaching procedural reform discussed above and subject to the more general concerns regarding implementation set forth in Chapter 7.

(2) Overview of Procedures for New Regulations

The Council recommends that, for major new regulations, early consultation be encouraged, systems be instituted to ensure that advance notice is given of the proposed regulations, and that systems also be established to ensure that the costs and benefits of major new regulations are evaluated. Early consultation should take place during the "problem identification" stage when a government is attempting to discover if a problem exists and whether intervention is necessary. Due to various complications, discussed below, the Council does not consider it advisable to attempt an institutionalization of the consultative process. The Advance Notice System proposed in this chapter would require governments to give formal notice of their intent to propose major new regulations at least 60 days prior to further action. The Prior Assessment System recommended would require governments to subject proposed major new regulations to a regulatory impact analysis, publish the draft regulations together with a summary of the analysis, and allow at least 90 days for comment by interested individuals and groups before promulgation.

Perhaps the most important feature of each system (Advance Notice, and Prior Assessment) would be the specification of an economic cost threshold. Each threshold would determine which regulations would be subject to the procedures of the system in question. As noted above, the Council's recommendations proceed on the basis that these thresholds be set at levels sufficiently high to ensure that only the more costly regulations are covered. Expansion of the systems, either in tandem or separately, so as to capture a greater proportion of new regulations could be accomplished simply by varying the thresholds. For example, a government might wish to limit the

Prior Assessment System to "major" regulations yet expand the advance notice requirements to cover a broader range of new regulations. Such a change could be effected by lowering the economic cost threshold of only the Advance Notice System, leaving that of the Prior Assessment System untouched.

Figure 6-1 shows the stages through which a major new regulation would pass under the Council's recommendations.

We can now address, in more detail, the main aspects of the governmental decision-making process for major new regulations.

(3) Consultation

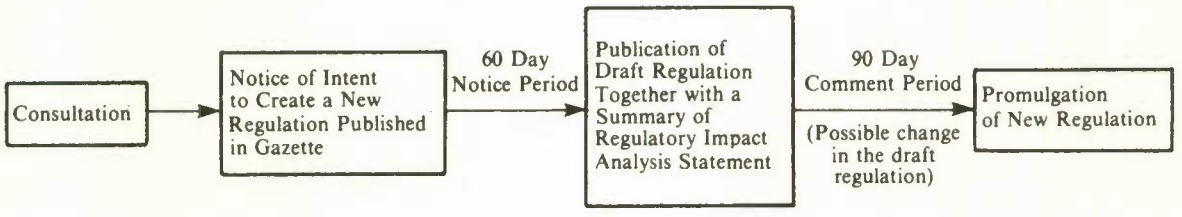
Consultation is the process of exchanging information and advice between government departments and agencies and private sector groups and individuals. While it is not part of the process of making a final decision about regulatory intervention, it serves important functions, particularly at the problem identification and problem definition stages.[10] Both government and the private sector should benefit from consultation. Governments are better able to assess whether intervention is necessary, gain a better understanding of the implications of their proposals, and may be able to identify alternatives to the proposed form of intervention. Private sector groups will have an opportunity early in the process to influence the regulations with which they must live and may provide valuable information that a regulatory authority will use in deciding an appropriate form or standard of regulation. The net result should be more rational development of proposals for regulatory intervention and a better understanding of the problems and attitudes on both sides. In the long run, success in achieving regulatory objectives may be facilitated and time spent in consultation may ensure easier and more immediate compliance.

Consultation, however, is a flexible, dynamic process, the elements of which may change over time. We do not feel that it would be useful to attempt to formalize those elements. Furthermore, a number of problems need to be resolved in consulting with the private sector. First, there is the question of timing. On one hand, if consultation is undertaken "too early," governments may be accused of not providing enough information to which the private sector can respond. Governments, like other decision makers, consider many courses of action in varying detail and intent. Consultation at a very early "idea-floating" stage may raise false hopes or fears. Frequent consultation on inadequate proposals may overload private sector groups, particularly "public interest groups." On the other hand, if consultation is "too late," governments may be seen as being committed to a given fully developed proposal. Indeed, the greater the investment that has been made in refining a proposal, the less likely it is to be changed. The full benefits of consultation would then be lost.

The second problem is answering the question of how much consultation is appropriate. While enough input to give a full range of information is desired, the private sector may complain of excessive government demands for information. Furthermore, there is a danger of confusing inadequate consultation with failure of governments to agree with the positions of those consulted. Sharing of information does not necessarily imply a sharing of decision-making authority.

The question of whom to consult raises the third problem. While there will undoubtedly be a set of

FIGURE 6-1
Decisions Concerning Major New Regulations



obvious candidates in most instances, governments should avoid the convenient habit of consulting only with "established" groups. When new regulations may affect a large number of diverse groups, it may be hard to determine which to consult.

In view of these problems, we conclude that it would be difficult, if not impossible, to institutionalize, particularly in the form of legislation, any meaningful requirement for a consultative process.[11] The Council, however, urges government departments and agencies to continue and, when appropriate, expand their informal procedures for consultation with individuals and groups that might be affected by regulatory intervention.

(4) Advance Notice System

(a) Alternative Systems

A number of mechanisms could be used to provide advance notice of new regulations; the Council considered two alternatives. The first was an annual regulatory calendar. The regulatory calendar would be a document issued annually by a government, identifying the major regulations (subordinate legislation) it expects to issue during the following 18 to 24 months.[12] The major advantage of a regulatory calendar is that it would provide, in consolidated form, advance notice of all major new regulations. The second alternative was a simpler requirement of publishing separate notices of anticipated major regulations. Exactly the same information could be communicated through either system.

Although the Council sees merit in the concept of a regulatory calendar,[13] it recognizes that such a system would entail considerable problems of organization, co-ordination and planning. The Council, therefore, recommends that the second option, separate advance notices, be implemented by governments. Individual notices of major regulations that the government plans to introduce should be published in a gazette at least 60 days in advance of the next step in the regulation-making process. Governments might consider moving to a consolidated regulatory calendar when they have evaluated the experience with the simpler system.

(i) *Content of the notice.* Advance notice, whether it be separate or included in a regulatory calendar, should do more than merely identify upcoming regulations. It should be used to provide basic, although necessarily tentative, analytical information. While there is a danger in requiring too much information,[14] the Council is of the opinion that the following data should be provided:

- major purposes of proposed regulation;
- legal authority (enabling legislation);
- major alternatives under study (brief description);
- industrial sectors, geographic regions and/or particular groups affected (brief description);
- timetable for development of the regulations (specifying major steps by quarter or month as appropriate); and
- person in the department or agency to contact.

It may be desirable to provide a "tentative" notice for instances in which the government is uncertain as to whether new regulations will be enacted.

(ii) *Threshold and coverage.* Determination of threshold and coverage criteria will undoubtedly be the most difficult part of setting up an Advance Notice System. The Council concluded that it would not be advisable for it to prepare detailed recommendations on these matters. However, some basic principles can be noted.

Whether advance notice would be required for a new regulation would depend on three factors:

- an identification of types of subordinate legislation subject to the system;
- an identification of regulatory statutes subject to the system; and
- a specification of a total economic cost threshold (i.e., costs to both the government and the private sector).

The Advance Notice System should apply to all types of subordinate legislation[15] that are issued under a specified list of statutes, and that based on

preliminary estimates, are expected to exceed the specified economic cost threshold. Coverage should include both statutory regulatory agencies (SRAs) and regular departments and should deal with both social regulation and direct regulation as defined in Chapter 4. Notices need not deal with the case-by-case decisions of regulators. Licence applications, renewals, or rate cases, for instance, would not be included as they are already provided for by existing machinery. It would also be necessary to exempt the many routine, economically insignificant or non-economic items which need to be issued frequently. "Emergency" regulations would, of course, have to be exempted as well.

(b) Co-ordination with Regulatory Legislation

It can reasonably be expected that a good proportion of regulatory actions which take the form of new legislation or amendments to existing legislation would exceed the economic cost threshold of the Advance Notice System. Regardless of the form that a regulatory initiative takes, it is desirable that there be advance warning to interested persons. To some extent, the Speech from the Throne accomplishes this task. The Council recognizes that the legislative process at both federal and provincial levels is characterized by features that would make it difficult, if not impossible, to announce the intent to enact new regulatory legislation by means of an Advance Notice System. However, when new regulatory legislation has been given Second Reading, notice of proposed regulations that are to follow the Bill could be provided through the system proposed above.[16]

(5) Prior Assessment System

(a) The Regulatory Impact Analysis Statement (RIAS)

In the Council's view, governments should implement systems to ensure that analyses of the anticipated economic impact of all major new regulations are prepared.[17] Each analysis, together with other pertinent information described below, should be embodied in a single document — a Regulatory Impact Analysis Statement (RIAS). Although it is desirable that, within each government, a common general methodology and format be established, and that there be clearly defined responsibility for ensuring that the Prior Assessment System functions properly, the job of carrying out individual analyses and preparing a RIAS should lie with the department or agency proposing the regulation.[18]

(i) *Content of the RIAS.* A RIAS should document the analysis undertaken in the preparation of the regulation and should identify the objectives of the proposed regulation, the alternatives examined, and the consequences associated with the alternatives.[19] It is essential that an estimate be provided of the costs, both capital and current, that will be borne by the government *and* by the private sector as a consequence of the proposed regulation. Equally important, but more difficult, is the need to specify the benefits that can be expected. The Council recognizes that, in some cases, the benefits are intangible and difficult to quantify. If dollar values cannot be assigned, benefits should at least be specified or described in "physical terms" (e.g., the number of serious injuries or deaths prevented in the case of safety regulation). The RIAS should also provide some information on the expected distributive effects of the regulation (i.e., identify the "winners" and the "losers").[20]

(ii) *Threshold and coverage.* As was the case for the Advance Notice System, specification of threshold and coverage criteria for the Prior Assessment System will be difficult. Yet it is a crucially important element. Again, the Council prefers to leave the job of preparing detailed criteria to those better able to assess the demands that such criteria would place on the analytical resources of each government. However, the same fundamental principles would apply here as they did to the Advance Notice System. The regulatory activities of both departments and statutory regulatory agencies should be included. Although the type of analysis proposed is more easily applied to direct regulation, new social regulations should also be assessed.[21] Routine, non-economic items and case-by-case decisions of regulatory agencies would not be covered.

The Council is convinced that considerable benefit can be gained from the adoption of prior assessment requirements. However, it wishes to stress that it would be far better for governments to begin in a modest fashion, aiming at the production of only a fairly small number of high quality analyses each year. It would be a mistake to

launch a grand design which would merely add a costly bureaucratic layer, unnecessarily impede desirable regulatory actions, and produce a large number of *pro forma* analyses. The purpose of the system, at the beginning at least, should be to avoid large errors in adopting new regulations. Therefore, the Council recommends that the economic cost threshold initially be set at a fairly high level. As experience is gained and the necessary expertise developed, the threshold can be lowered.[22]

The Council recognizes that, in some cases, a regulation could result in the transfer of a substantial amount of income from one group to another, yet not give rise to social costs in excess of the specified threshold.[23] It is desirable, regardless of the economic cost, to subject new regulations having large distributive consequences to an economic impact analysis to ascertain the nature of the distributive effects.

(b) Emergency By-pass Procedure

An emergency "by-pass" procedure would be required to allow a government to take quick action, when necessary, without the need for formal prior assessment. However, any regulation processed on an emergency basis should be subject to a regulatory impact analysis after promulgation.[24]

(c) Overall Responsibility for Prior Assessment

Overall managerial responsibility for the Prior Assessment System must be assigned to an agency possessing sufficient expertise and resources to ensure that the analyses are properly carried out. This agency could provide originating departments or agencies with technical advice and assistance in connection with the preparation of individual RIASs.

(d) Appraisal of RIASs

The Council feels that appraisals of RIASs should be performed on a selective basis by officials of the agency responsible for managing the Prior Assessment System. The purpose of the appraisals would be to facilitate monitoring of the system's performance by ensuring that the methodology is being applied correctly; to be sure that the threshold criteria are being interpreted properly (to prevent "end runs"); and, possibly, to comment on the overall conclusions of individual analyses. As an incentive to do high quality analysis, the appraisals should be forwarded to the President of the Treasury Board (or equivalent minister) for possible action in the context of reviewing the originating department or agency's budget in the future. Since the RIASs themselves will be subject to public scrutiny (see below), it would be acceptable to keep such appraisals within the bureaucracy.[25]

(e) Comment Period

The Advance Notice System proposed by the Council responds to the need for longer term notice of a government's intention to regulate. However, it is also necessary to provide the public with a greater amount of information concerning the details and anticipated effect of a proposed initiative. This can be achieved by linking a requirement for advance publication of major regulations in draft form together with summaries of RIAS reports with a mechanism that ensures that the public can have "input" into the decision-making process. The Council believes that such input is desirable and endorses the concept of a comment period as an adjunct to an improved system for prior assessment of new regulations.[26]

All draft regulations subject to RIAS procedures should be published in a gazette 90 days before the regulations are to be promulgated. Included with the draft regulations should be a summary of the RIAS. The complete RIAS document should be available for inspection in appropriate public offices across the country or the province. Copies should be supplied at a nominal charge. During the 90-day period, interested persons could study the draft, review the RIAS, and make representations (preferably in writing) to the originating department or agency.[27]

The department or agency cannot, of course, be required to modify the proposed regulations to satisfy the objections raised by various interests.[28] The comments are advisory to the department or agency; it may respond as it sees fit. It should, however, compile and make public a summary of the representations made to it so that interested parties may know of the "inputs" of all parties. Copies of complete submissions should be available for inspection at appropriate public offices across the country or the province. Copies should also be supplied at a nominal charge.[29]

(C) DECISIONS CONCERNING EXISTING REGULATORY ACTIVITIES

(1) Alternative Review Mechanisms

Canadian regulatory programs are currently reviewed in part, at least, in such contexts as: judicial review of regulatory agencies' decisions; cabinet appeals; the appointment/re-appointment process; and *ad hoc* reviews.[30] None of the review mechanisms described ensures that systematic, broad-gauge evaluations of major regulatory programs are conducted periodically. This is not to say that, in a number of policy areas, there have not been several excellent Royal Commissions and Task Forces which have resulted in important changes in public policy.[31] Nevertheless, the need for systematic evaluation remains. Although in the past, attempts have been made to implement program evaluation at the federal level as a component of Planning, Programming and Budgeting management systems, the efforts cannot be described as unqualified successes.[32]

Recently, heightened concern about the federal government's ability to control its spending has resulted in renewed plans for the general use of evaluation at the federal level. Lessons have been learned from past mistakes and it is felt that the potential benefits are significant enough to justify another try. To date, the emphasis, at least publicly, has been on the evaluation of expenditure rather than regulatory programs. However, it should be evident from their growth that the latter deserve attention as well.[33]

The Council endorses systematic program evaluation for regulatory programs housed in both agencies and departments of federal and provincial governments. Such evaluations are a necessary step in moving toward improved accountability and more rational decision making about regulation. The Council also believes that governments should, as part of this review process, re-examine periodically the consequences of any deregulation of specific activities. We now present our views on the desirable characteristics of a system for regulatory program evaluation. In the preparation of our recommendations, we have relied, to some extent, on principles derived from a recent (1977) comprehensive program evaluation system for federal departments and agencies.[34]

The Council addressed six basic questions in the course of formulating its recommendations for evaluation of regulatory programs:

- Who should be responsible for managing the evaluation system?
- How (and by whom) should the schedule for evaluation of programs be determined?
- What questions should be answered by the evaluations?
- Who should do the evaluations?
- Who should review the results of the evaluations?
- Who should take action following the evaluations?

(2) Overall Responsibility for Periodic Evaluation

Someone must be charged with the responsibility for ensuring that the regulatory program evaluations are being done as required and that the results are being communicated to the appropriate decision makers. Merely admonishing each department or regulatory agency to go forth and evaluate will not be sufficient. Managerial responsibility for the evaluation system must be centralized within each government. Furthermore, it should be vested in an existing or new agency with sufficient power to see that the requirements of the system will be carried out. The agency could provide departments and agencies with ongoing technical advice in connection with program evaluation. At the federal level, the basic functions and authority of the Treasury Board and the analytical expertise existing in its Secretariat suggest that the Board is a logical choice. Placement of managerial authority for similar systems within provincial governments may vary from province to province.

(3) Determining the Schedule

It is essential that a schedule be established to ensure that all major regulatory programs are evaluated periodically, perhaps every four to ten

years.[35] The Council considered the following methods of determining the schedule:

- by departments and agencies in agreement with the managing agency;
- through "sunset" legislation; and
- by a parliamentary review committee.[36]

All three options have advantages and disadvantages. "Sunset" legislation would legally *force* periodic review and re-authorization of regulatory programs. However, caution should be exercised in the extent to which this device is embraced. There is a danger that wholesale use of "sunset" provisions for *all* regulatory statutes/agencies could be counter-productive. Although it might be appropriate in any particular case, universal application of sunset provisions could easily overload our legislatures and the analytical resources of governments. This apparently has been the experience in the United States.[37] However, it is possible that the greater control exercisable by the government over the legislature in a parliamentary system could ameliorate, to some extent, the difficulties observed in the United States. The Council believes that the primary schedule should be established by the regulatory department and agencies in conjunction with the managing agency and with the advice of a legislative committee, which should be charged with the responsibility of reviewing the evaluations.[38] In certain cases, evaluations could be triggered by sunset provisions in enabling legislation.

(4) Asking the Right Questions

In Chapter 3 we identified five basic questions that are central to strategic thinking about regulatory intervention. Subsequent evaluation of regulatory programs is designed to answer the fifth question: "Has regulation been effective?" In practice, the detailed questions to be answered in an evaluation should be determined by the information needs of the intended recipients and by the analytical techniques and resources available. However, in every case, evaluations should address the following questions:

- What are the present objectives of the program?
- Are the original objectives still relevant?
- What are the priorities and trade-offs if multiple objectives exist?
- What means are used to achieve the objectives?
- What are the effects, intentional or unintentional, of the program? (This would include economic and non-economic considerations.)
- What other means could be used to achieve the same objectives?[39]

Who determines the questions (i.e., establishes the terms of reference for the evaluation) is also an important issue. Since the emphasis on various questions can differ greatly in particular evaluations, the intended user of the evaluation obviously should have a major voice in determining the questions. If the evaluations are intended for use primarily as a managerial tool and are to be kept entirely within the public service, the problems of appropriate questions and techniques can be left to the departments, statutory regulatory agencies, and the managing agency. However, if, as we recommend below, the evaluations are to be reviewed by legislative committees, it is advisable that the group establishing the terms of reference be expanded to include such users.

(5) Preparing the Evaluations

There appear to be three alternatives for conducting the evaluations:

- self-evaluation by the regulating department or agency;
- evaluation by officials of the managing agency; or
- evaluation by an independent official reporting directly to the legislature.[40]

Each alternative has differing implications for the objectivity of evaluations, the efficiency with which they can be carried out, and the political acceptability of the proposed system. Recognizing

that there is no perfect choice, the Council proposes that evaluations be conducted by the regulating departments or agencies with the involvement of outside consultants whenever possible. However, as a concomitant part of adopting this alternative, the Council places great emphasis on the need for external review of regulatory program evaluation reports.[41]

(6) Reviewing the Results

In the Council's opinion, a Periodic Evaluation System should incorporate procedures for an external review or "audit" of evaluation reports. The need is especially acute if a system of self-evaluation is being utilized, for in such a case, special efforts must be taken to encourage objectivity. External review could be carried out through three mechanisms:

- publication and public scrutiny of the reports;
- "audit" of selected evaluation reports; and
- legislative review.

The Council considers that all three mechanisms can be profitably incorporated into the system for regulatory program evaluation.

(a) Publication of the Evaluations

The Council places considerable importance on the principle of making public the reports prepared under the system proposed above. Simply ensuring that these reports see the light of day may do much to encourage objectivity in the evaluations. Consequently, the Council recommends that public access to all regulatory program evaluations be guaranteed. As noted below in the discussion of freedom of information, specific legislative provisions may be required to achieve this result. In addition, the Council recommends that governments publish summaries of all evaluation reports. Publication could be timed to coincide with the tabling of evaluation reports in the legislature, as discussed below.

(b) Internal Audit

The Council recommends that a review of regulatory program evaluations be undertaken on a selective basis by officials of the agency responsible for management of the evaluation system. It is expected that this function would be performed, to some degree, in any case. Utilization of publication and legislative review may reduce the need for "audit" procedures.[42]

(c) Legislative Review

Although review of evaluation reports by agency officials is desirable, it should be recognized that the evaluations will raise essentially "political" issues (i.e., broad value choices) similar to those which were (or which should have been) addressed by legislators when the statute underlying each program was enacted. It is essential, therefore, to provide for a review of evaluation reports by elected representatives. The Council recommends that all evaluation reports be tabled in the legislature and be referred automatically to a legislative committee charged with the function of reviewing such evaluations. The review committee should be empowered to hold hearings, receive briefs and commission its own analytical work with respect to the regulatory evaluation reports it chooses to scrutinize in detail. Upon completion of each review, a report should be submitted to the legislature with recommendations for action.[43]

The addition of a legislative review function to a system of program evaluation is not without its drawbacks. We must recognize the pressures created for departments and agencies by public scrutiny of regulatory program evaluations. There is the possibility that defensive responses might occur in both the selection of programs to be evaluated and in the substance of the evaluations themselves. On balance, the advantages which come from open, accountable government override these dangers in our view. Of greater concern is the possibility that certain groups (poorly organized, diffuse interests), which already operate under a handicap in the political system, will be placed at a greater relative disadvantage by changes that place additional emphasis on political participation. This is a very real danger. However it is more compelling as an argument for financial support of these groups (discussed below) than as an objection to reforms capable of bringing more informed decision making and openness to the government decisions about regulation.

(7) Follow-up Action

It is clear that under our system of parliamentary government the responsibility for following up

on the results of a regulatory program evaluation must rest with the government and, in particular, with the minister responsible for the relevant department or agency. The government, armed with the regulatory program evaluation and, in some cases, a review of it by a legislative committee which would necessarily incorporate practical political factors into its assessment, should be free to introduce changes as extreme as abolition of the agency or repeal of legislation or leave well enough alone. The ultimate accountability for the effectiveness of public programs is to the electorate.

(D) OTHER ELEMENTS

(1) Central Co-ordination

In addition to the need for someone to take responsibility for the overall management of the Advance Notice, Prior Assessment and Periodic Evaluation systems, the Council feels that there is need for a broader co-ordinating role, which should be played by a central agency within each government. It is important that this need be recognized and that adequate resources be made available for the execution of this function. Within the federal government, the role could be carried out by the Privy Council Office under the general direction of its President who has similar responsibilities with regard to the preparation of government legislation. At the provincial level, the commensurate functions are usually performed either by the Provincial Attorney General or by the staff of the Executive Council.[44]

The duties required extend beyond the narrow legal scrutiny of regulations and other statutory instruments, although this is admittedly an important task. The review carried out by the central agency should ensure that the substance of regulations are in accord with general government policy, that affected departments are aware of the proposals, that any federal-provincial implications are recognized, and that cabinet (or an appropriate cabinet committee) gives particular attention to proposals when the substance of the policy has not already been approved.

(2) Freedom of Information

Success in evaluating either proposed or existing regulations and regulatory programs depends, to a large degree, on interested persons having access to the necessary information. A Freedom of Information Act would provide the statutory framework for such access, but it may be necessary to provide specifically for publication or public availability of certain types of documents. This would, of course, apply to both federal and provincial governments.[45] Specific provisions may have to be made for the public disclosure of RIASs and regulatory program evaluation reports. The Australian Draft Freedom of Information Act and the Model Bill prepared by the Canadian Bar Association both provide that a report or study on the performance or efficiency of a department or regulatory agency *and* any feasibility or other technical study, including a cost estimate, relating to a proposed government policy or project be subject to disclosure.[46] At present, program evaluations are generally confidential and the RIASs and regulatory program evaluations might be considered to be policy advice to the government. Under a system of parliamentary responsible government, such advice is usually kept secret. In the absence of a general Freedom of Information Act that includes sections similar to those noted, specific authorization for disclosure and publication of RIASs and evaluations should be provided.

The publication of proposed regulations in draft form also raises the question of when the public is entitled to have access to the drafts, which may have gone through several versions before the department or agency considers them ready for public scrutiny. The balance to be achieved is between the desire of affected parties to have meaningful input into the regulation-making (i.e., subordinate legislation) process and the need of the regulation maker to explore freely policy options and obtain candid advice from professional staff. The approach taken under the *Freedom of Information Act* in the United States,[47] and followed in the Australian and Canadian Bar Association drafts,[48] is to require disclosure of only the final proposal for the preparation of subordinate legislation. Our recommendations would, therefore, refer to publication of the draft at a similar stage. The word "final" should not be taken literally since one of the purposes of a comment period would be to allow a government to modify the draft in the light of comments and representations received. A Freedom of Information Act alone would allow interested parties to obtain a copy of draft regulations. But it should be noted that our

proposals would require governments to publish on their own initiative and would establish a waiting period for comments.[49] These aspects of the recommendations would have to be provided for even if a general Freedom of Information Act were passed.

A further important right that may have to be specifically established by governments is the right of those making submissions on a proposed set of regulations or a regulatory program to have access to the submissions of other parties. Since we can realistically expect that such submissions will be presenting the views of certain interest groups and that the interests of various groups may be opposed, each should have an opportunity to meet arguments presented by other groups. The minister or the department concerned would then have the benefit of the full scope of arguments, concerns, and information presented by all the interested individuals or groups.

(3) Assistance to "Public Interest Groups"

As noted at several points earlier in this report, there is some risk in altering the regulatory processes of governments to place a premium on participation by interested parties. The problems arise from the simple fact that some interests are better able to organize themselves and make their views known to the relevant decision makers. In particular, smaller, more tightly knit groups of individuals with large stakes in the outcome of a decision will have an advantage over large groups of individuals with small stakes in a specific issue. Consumer and anti-poverty groups are commonly cited examples of the latter category.

If reforms designed to improve the openness, equity, legitimacy, and accountability of regulation are to succeed, governments must also take steps to ensure that those interested groups and individuals can participate on a reasonably equal footing. The Council fears that implementation of the institutional reforms without the necessary adjustments to ensure balanced public participation might well prove to be counter- productive.

Consequently, it is recommended that, as an integral part of any regulatory reform package, governments institute programs to provide public funds to "public interest groups" for participation in the processes by which decisions are made concerning regulation. The Council recognizes that such funding programs bring with them difficult problems: Who shall be funded? How much should they get? Should funding be granted on a general basis or only for specific issues? Should it be linked to the "quality" or "contribution" of the intervention? What degree of control should be exercised over the use of the funds? In what sense is the government to be held politically responsible for the use made of the funds by recipients? These are matters that must be addressed by each government in light of prevailing social, economic, and political circumstances. The "right answers" are certain to vary for each jurisdiction, and for the different decisions concerning regulation.

The Council will devote more attention to these matters in its Final Report. However, we wish at this point to reiterate one fundamental principle: funding for "public interest groups" must be considered as an essential component of regulatory reform.[50] In assessing the extent to which the institutional changes recommended by the Council can be implemented, governments should consider the expected benefits, the expected costs, and their budgetary constraints. The Council suggests that outlays for a "public interest group" funding program be included in the total cost estimate. We wish to emphasize that the failure of "public interest groups" to participate in decisions concerning new regulations or the review of the evaluations of existing regulatory programs for want of public funding would undoubtedly diminish the value of the other reforms we propose.

(E) SUMMARY OF RECOMMENDATIONS

Throughout this chapter we have made a number of recommendations for change in the regulatory processes of both federal and provincial governments. It may now be helpful to summarize them.

Consultation

R1. In the course of determining the need for and content of new regulations, governments should, as early as possible, consult with individuals and groups with an interest in such regulations.

Advance Notice

R2. Governments should establish systems to ensure that advance notice is given for major new regulations (i.e., subordinate legislation).

- Notice of intent to propose a major regulation should be published in a gazette at least 60 days prior to the next step in the regulation-making process.

- "Emergency" regulations should be exempted.

- When new regulatory legislation (i.e., a new statute or amendments to an existing one) has been given Second Reading, notice of proposed major regulations that are to follow the Bill should be given through an advance notice system.

- Consolidation of notices in the form of an annual regulatory calendar would be beneficial; governments should consider adoption of this device in the future.

Prior Assessment

R3. Governments should establish systems to ensure that the costs and benefits of proposed major new regulations are assessed.

- A Regulatory Impact Analysis Statement (RIAS) should be prepared for any new regulation exceeding a specified economic cost threshold.

- To ensure that the RIASs are of high quality, the economic cost threshold may need to be set initially at a sufficiently high level to ensure that only a fairly small number of new regulations are analyzed each year.

- RIAS evaluations should be prepared by the department or agency proposing the new regulation.

- Major regulations processed on an "emergency" basis should be subject to a Regulatory Impact Analysis Statement after promulgation.

- RIASs should be audited on a selective basis by officials of an agency having managerial responsibility for the operation of the prior assessment system.

R4. All regulations subject to RIAS procedures should be published in draft form, together with a summary of the RIAS, at least 90 days prior to the date on which the regulations are to be promulgated, so as to allow time for public comment.

- Copies of the complete RIAS should be available for inspection at public offices across the country or province; copies should be supplied to the public upon request at a nominal charge.

- Departments and statutory regulatory agencies originating new regulations should publish summaries of all representations made to them concerning proposed regulations. Copies of complete (written) submissions should also be available.

Periodic Evaluation

R5. Governments should implement systems to ensure that existing regulatory programs are subjected periodically (perhaps every four to ten years) to systematic evaluation.

- As part of this process, governments should periodically re-examine the consequences flowing from the deregulation of particular activities.

- Managerial responsibility for ensuring that a regulatory program evaluation system is functioning properly should be assigned to an existing or new agency with sufficient power to ensure that the requirements of the system will be carried out.

- The schedule for evaluation of regulatory programs should be established by departments and agencies in conjunction with the managing agency and with the advice of a legislative committee, which

should be charged with the task of reviewing the evaluation reports.

- Evaluations could also be triggered by "sunset" provisions in regulatory legislation.

- Those who must use the information generated by the evaluations (e.g., legislators) should be involved in determining the specific questions to be addressed by those evaluating regulatory programs.

- The actual evaluations of a regulatory program should be done by the department or agency concerned, but independent consultants should be involved whenever possible.

R6. All regulatory program evaluation reports should be made public.

R7. "Audits" of regulatory program evaluations should be done on a selective basis by officials of the managing agency.

R8. Legislative committees should be charged with the function of reviewing program evaluation reports.

- Every RIAS should be tabled in a legislature and should be referred automatically to such a committee.

- The committees should be empowered to hold hearings, receive briefs, and commission independent analytical work with respect to the regulatory evaluation reports they choose to scrutinize in detail.

Central Co-ordination

R9. Within each government, responsibility for the general co-ordination of decision making about proposed regulations and existing regulatory programs should be assigned to a central agency. Sufficient resources should be allocated to ensure that the agency can carry out its responsibilities properly.

Funding of "Public Interest Groups"

R10. Adequate provision should be made by governments (i) to finance representations by "public interest groups" at hearings on the development of Policy Directives (which we recommended in Chapter 5); (ii) to undertake consultation with and representations to governments concerning proposed new regulations; and (iii) to make representations in response to completed evaluations of regulatory programs.

7 IMPLEMENTATION OF THE RECOMMENDATIONS

> There is nothing more difficult to take in hand, more perilious to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things.
>
> Machiavelli

> Reformers have the idea that change can be achieved by brute sanity.
>
> George Bernard Shaw

It is often argued, correctly it seems to us, that many otherwise well-designed proposals for changing public policy fail because of a lack of consideration of the problems of implementation.[1] We are aware of the need to see that our recommendations are practicable. In particular, we realize that the reforms we propose in Chapters 5 and 6 must be put into place by ordinary human beings, not giants.

Change in the regulatory processes of both federal and provincial governments will be necessary if progress is to be made in improving the efficiency, informed decision making, openness, and accountability of regulation in Canada. Our existing mechanisms for evaluating new regulations and existing regulatory programs are simply not adequate. Yet, what some might view as "necessary" institutional or procedural reforms may not be easily achieved. Opinions will differ as to both the nature of the problem and the recommended solutions. For instance, those generally favouring less regulation will see a requirement for prior assessment as a useful "filter" for controlling the rate of growth of government intervention. (Prior assessment could effectively shift the onus of showing the desirability of new regulations to the departments or agencies (and ministers) that propose them.) Those pressing for new regulations in particular instances will probably view prior assessment as an undesirable impediment to the amelioration of social evils.

However well-intentioned, there is little merit in proposals that are essentially incompatible with existing institutions, that require resources not readily obtainable, or that entail substantial expenditures with little chance of benefit. There may be a danger of doing more harm than good:

> . . . some of the solutions proposed to rid us of over-regulation would shackle the government with the same kind of regulatory apparatus which the business community has found so objectionable. There may be a kind of rough justice in this development. But . . . the public interest will [not] be best served by the imposition of elaborate and burdensome procedural requirements which only further expand the . . .bureaucracy and further reduce the efficiency of the regulatory agencies. . . . Ill-conceived regulatory reform will itself create obstacles to good government.[2]

(A) MANAGING REGULATION

The Council is proposing what amounts to a system for managing government decisions about regulation. This new system, like any other form of regulation, will not be costless. Expenditures will be incurred by governments (as reflected in their budgets) and by the private sector as well. Although the system can influence the "return" from these expenditures, one basic rule should be followed: the system should be developed, installed and used only if its benefits exceed its costs, taken to include economic and non-economic aspects. In practice, the point at which the advantages are

outweighed by the system's disadvantages may be hard to recognize. As is the case when establishing any new process, an initial investment (here primarily in "human capital") will have to be made. However, the long-term costs of operating the system should not be too onerous. The adoption of the proposed system should not result in a significant increase in the *total* budgetary outlay (or man-year complement) of a government. Part of the costs may be met by the diversion of funds and personnel from other, less beneficial programs.[3] If the system has the effect of improving the quality of regulatory intervention, it may even "pay for itself" from a simple internal budgetary point of view, without the need to include compliance-cost savings from the private sector or any of its non-economic benefits.

The Council wishes to stress that if, because of budgetary concerns or the availability of skilled personnel (or for other reasons) certain of the components of our recommendations in Chapter 6 cannot be implemented, there is merit in implementing some of the others. In particular, we suggest that it should be possible to adopt the advance notice procedure without the Regulatory Impact Analysis Statement (RIAS) system. The RIAS system could be instituted without either the advance notice procedure or the central agency "review" feature. The regulatory program evaluation system could be implemented without the prior assessment system.

The apparent complexity of the system the Council has recommended will be of particular concern to the smaller provincial governments. It is tempting to suggest that no government can afford not to adopt procedures like those recommended. However, the Council realizes that such an argument would be quite unrealistic and economically unsound as well. Advance notice, prior assessment, and program evaluation systems should be adopted and utilized only to the extent that their perceived advantages exceed their disadvantages. Thus, when the economic implications of a regulatory proposal are minimal there is little justification for elaborate economic analyses. What the Council has done is identify the major components for a better system of assessing and adopting regulatory measures. The complexity, and therefore the cost, of each component can be varied considerably. Consequently a complete, yet simplified, system should be within the reach of any provincial government in Canada. Even a streamlined version could do much to advance the principles of openness, accountability, and informed decision making.

A corollary that the Council wishes to stress most strongly is that it is far better to subject only a few cases of government regulation to a careful, critical analysis than to go through the motions with a great many:

> To ignore serious data and methodological difficulties and the inherent limitations of what analysis can accomplish is as dangerous as overstating them as an excuse for doing nothing. What is urgently required is some thorough studies focused on carefully selected policies and programs, the studies to be carried out by the most competent analysts in the relevant fields. We must avoid an avalanche of superficial pieces of supposed analysis that would drown the recipients — Parliamentarians and the public alike — in paper and eventually result in the rejection of policy and program evaluation as worthless. Too much *pro forma* "evaluation" means no real evaluation.[4]

The beneficial effect on other regulatory programs of a few careful evaluations, the results of which are publicly available, should not be underestimated.

(B) IMBALANCE IN ASSESSMENT OF REGULATORY MECHANISMS

The Council does have some concern that implementation of a RIAS system that focuses on the assessment of new regulations, as opposed to regulatory legislation, might create an imbalance in the degree to which various instruments of regulatory intervention are scrutinized. The central purpose of prior assessment is to improve the quality of decision making in the public sector. Unless the potential impact of *all* the important substitutable instruments of government intervention is subject to similar techniques of analysis, the choice among instruments may be biased. It is useful to ask, "If all new regulations or amendments to regulations are subject to this procedure, are we not instituting a more rigorous requirement than is the case for new statutes or amendments to existing statutes?"

Admittedly, new statutes and major amendments are usually scrutinized by a standing com-

mittee. However, this scrutiny does not normally include the type of analysis proposed here for new regulations.

Legislators may wish to explore the advantages of requesting a RIAS when they consider a new regulatory statute or major amendment.[5] In all likelihood, much of the necessary analysis would already have been undertaken by the sponsoring department in preparation for the cabinet approval process. It would not, therefore, be particularly onerous to require that a RIAS be provided to the legislative committee studying the bill.

(C) IMPEDING DEREGULATION?

The prior assessment system for new regulations proposed by the Council would, if fully implemented, subject new regulatory initiatives to more searching scrutiny and more formal analysis. One can expect that the cost of implementing new measures might be increased and that a greater amount of time would be required in some cases. Those who oppose increases in the scope and coverage of governmental intervention will applaud this outcome. However, it should be recognized that the same system could also require that initiatives designed to *deregulate* private sector activity would also be subject to the new procedures.

(D) GREATER RELIANCE ON AN IMPERFECT POLITICAL SYSTEM

Several of the Council's recommendations, especially those designed to increase both procedural openness and control by politically accountable ministers, would shift a greater portion of the regulatory process to the political arena. In theory, this should improve the accountability for regulatory decison making. Yet, there is a possibility that such changes would increase the imbalance of influence that exists between widely dispersed interests with small stakes and those interests that are wealthier and better organized. If this were to happen, the regulatory process would be even more "imbalanced" than it is at present. The legitimacy of governmental decisions regarding regulatory intervention might be eroded. Therefore, there is a need to increase government funding of "public interest groups" for the purpose of participating in hearings on proposed policy directives, commenting on new regulations, and being represented at the parliamentary review stage of the regulatory program evaluation process.

(E) OVERLOADING LEGISLATORS?

As was emphasized several times in this report, regulation is essentially a political phenomenon, the product of political demands expressed through the legislative process. In the long run, it may not be the substance of any particular decision that is important, but rather the existence of the means to ensure that those who create and administer regulation can be held accountable to the public. Legislators and their committees constitute an important link in the accountability chain. Increased involvement by legislators in evaluating regulatory programs is highly desirable. Yet, there are very severe limitations on the extent to which we can expect them to become involved. The Hon. Robert Stanfield, among others, has argued eloquently that the federal Parliament is already overloaded.[6] Complaints about the length of legislative sessions at the provincial level are by no means uncommon.

It would be quite unrealistic to design a system wholly predicated on intensive legislative review. Legislators operate in an adversarial environment structured on party lines. It would be foolhardy to design a system that depended for its success on a magical evaporation of party discipline and the application of purely "objective," non-partisan scrutiny to the government's regulatory activities. Legislative review of program evaluation reports on a selective basis (and, perhaps, draft regulations and RIASs) is desirable and should be facilitated by necessary adjustments to legislative procedures. However, the overall system should not be designed in such a way that its success is solely dependent on the performance of this function.

The important principle we wish to stress is the acceptance of critical evaluation as a necessary function. Even without a provision for legislative review, implementation of such a system should lead to improved governmental decisions about regulation. With the addition of an effective legislative review component, the system would have all the features sufficient to make regulatory programs more effective, more efficient, and more accountable.

8 LOOKING AHEAD: "EYEBALLING THE ONION"

> "Paul MacAvoy [then Co-Chairman of the U.S. Domestic Council Review Group on Regulatory Reform] thought there was a main taproot of regulation, that if you got to it you could excise the malignancy," says William Lilley [then Acting Director of President Ford's Council on Wage and Price Stability]. "But you can't. There is no taproot. All there is is a 300-year-old onion." Which is to say that after government exhausts its limited opportunities for dramatic deregulation — for going after a few regulatory programs as if they were the taproot — it will find itself eyeball to eyeball with the onion.
>
> Paul H. Weaver

Beyond the process of evaluating regulations or holding regulatory agencies accountable, there is the purpose and substance of each individual regulatory activity. We identified in the Introduction the areas of regulation to which the Council is giving attention. These include occupational health and safety, hazardous products, land use/building codes, environmental protection, airlines, trucking, and some other industries. We are also looking at some of the costs of regulatory compliance that firms now face. Most of these studies are still under way.

In looking ahead to the Final Report on the Regulation Reference, the Council must continue to focus on the main issues. As we have shown, governments at every level regulate an almost endless range of activities. It is important to keep a sense of perspective about the kinds of regulatory reforms that are feasible. Some regulations impose identifiable and specific costs on firms or individuals, while their benefits are less visible and more widely dispersed, e.g., many regulations involving health and safety. In other cases, such as pollution controls and food and drug regulations, scientists are continously uncovering effects that are both favourable and unfavourable to mankind. Many of the complex technical issues are still unresolved and the required levels of control may be either uncertain or judgmental.

We have focused principally on regulations administered by government departments or by statutory agencies, but these are only part of the larger set of constraints that affect everyday life. Many industries and some occupational groups exercise a considerable degree of formal or informal "self-regulation," sometimes with a view to reducing competition and raising their incomes. Government regulation may, in these cases, be established as a countervailing mechanism to the market power exercised by producers or distributors over consumers or suppliers. In many cases, the regulations themselves, however burdensome, have been accommodated and discounted as part of the acknowledged costs of doing business. Further change, even in the direction of deregulation, may well impose new costs on some groups and benefits for others that are difficult to assess. Even if the cost-benefit information and the distributional consequences were fully known, there is no clear criterion determining where the balance of advantage should lie among the contending groups.

Many regulations imposed on the private sector serve as a substitute for other forms of government intervention, such as expenditure programs and taxes. If Canadians collectively still value the objectives of these regulations, eliminating them could well require their replacement by other

forms of intervention. In some of these situations many Canadians, businessmen included, may prefer to live with the regulations. Alternatively, if at least some of the burdensome costs of regulations could be lifted from the private sector, then some of the offsetting tax incentives or protective barriers that accompany them and effectively distort competitive markets might also be eliminated.

Political judgments will be needed in cases of jurisdictional overlap and duplication. It may be far from clear which level of government should give way. The choice may turn on the achievement of relatively uniform national standards, on regional balance and equity, or even on the exercise of local or provincial initiative sensitive to local situations. Furthermore, there may be advantages to a certain amount of overlap and duplication. In any event, the public may be prepared to pay the associated costs.

In some cases it will be clear where regulatory reforms can be effected and the Council will want to say something on that. In other cases there will be considerable uncertainty as to the best course of action. This is true when regulation's principal effect is to alter the distribution of income. Yet, even when regulations entail normative objectives that go beyond that of economic efficiency, the Council's main concern will be to present as many facts as possible to Canadians. Do the original objectives that underlie the regulatory activity still hold? Are the present regulations genuinely effective in meeting those objectives? And are they really preferable to the alternative ways of doing so? In short, a "zero base" assessment in the broadest sense, as we have emphasized in Chapter 3, must be conducted with the onus of proof on those who would expand the regulatory framework.

To start this fundamental assessment of government regulation, more than 40 research contracts have been undertaken. Supplementing the Council's Final Report, therefore, will be a host of research studies or working papers that will deal with the specific regulatory areas in some technical detail and complexity. There, the authors will have an opportunity to assess the efficiency, equity, and effectiveness of the regulations they have been studying. Not all will approach the problem with the same set of values or the same methodology. Their findings, conclusions, and recommendations, along with those that the Council itself expresses in the Final Report, will become part of the public debate. Thereafter, the decision to eliminate, alter, or even add regulations will rest with governments.

Already, of course, the desire for regulatory reform is sufficiently pressing that governments cannot wait for publication of the Council's studies and Final Report. Other sources of insight are necessary. We are aware, for instance, of many regulatory areas, particularly those at local levels, that we have not been able to study. Moreover, the issues our research will be addressing will not expose a multitude of specific regulations that may be burdensome and unnecessary. It is important that individual groups be invited to register their specific concerns, and that there be appropriate forums for them to do so at all levels of government. In this regard we are encouraged by the appointment of a federal Minister specifically responsible for regulatory reform and by recent developments that have helped to bring the views of various groups in the private sector before both federal and provincial governments. The Federal-Provincial Consultative Committee on Regulation is also playing a role in discussing concerns about regulation and avenues for reform. As indicated in the Chairman's *Preliminary Report to First Ministers* in November 1978, the work of the Regulation Reference is only a start to what should be a continuing process.

The message of this Interim Report is that there should be increased accountability by governments in the conduct of regulation through statutory agencies, a full appraisal of the potential benefits and costs of major new regulations, and periodic, systematic evaluation of all regulatory programs, with full disclosure of the findings. There is also a need for statutory regulatory agencies to be fully accountable to the legislature for the regulations they now administer while also continuing to contribute their expertise to policy making in regulation. More specific areas in which the Council would urge action must await the Final Report.

Notes to the Introduction

[1] See Chapter 4 for a more detailed definition of economic regulation. A distinction should be made between regulation, as defined in the text, and regulations, which are statutory instruments made in the exercise of a legislative power conferred by an act of Parliament or a provincial legislature. See Margot Priest, W. T. Stanbury, and Fred Thompson, "On the Definition of Economic Regulation" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming).

[2] Banfield divided the "reform cycle" into three stages: issue awareness, communication or articulation of demands, and governmental response. The cycle continues with awareness of new issues, and so on. Edward Banfield, *Political Influence* (New York: The Free Press, 1962).

[3] Ernest Gellhorn, "Reform as Totem — A Skeptical View," *Regulation*, May/June, 1979, p. 23.

[4] The term regulatory reform can legitimately include any or all of the following:

- "deregulation," a term that probably should be reserved for cases when the regulatory legislation affecting an activity or industry is repealed in whole or in significant part. In the United States, this has been done in several cases: brokerage fees, air freight, passenger airlines, the wellhead price of natural gas. See Fred Thompson, "Regulatory Reform and Deregulation in the United States" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, 1979).

- more modest changes of one or more aspects of a regulatory system, such as statutes, delegated legislation (regulations), regulatory personnel, the evaluation of proposed or existing regulatory programs, and appeal or review procedures by the minister, cabinet, or courts. The effect of such changes could be significant and result in improvements in either the efficiency of regulation, in equity (due process, fairness, legitimacy) or both.

- the imposition of *new* regulation in an area not previously subject to it, e.g., Ontario has recently begun to regulate driving schools and driving instructors. As will be noted in the section "Demands for More Regulation" in Chapter 1, regulatory reform, for some, means *extending* the scope and coverage of government regulation.

To this list may be added the possibility that regulatory reform might consist of only symbolic gestures in response to what are perceived to be short-term pressures to "do something" about "big government." See Murray Edelman, *Politics as Symbolic Action* (New York: Academic Press, 1971) and Murray Edelman, *The Symbolic Uses of Politics* (Urbana, Ill.: University of Illinois Press, 1964).

[5] Vol. CIX, 1895, p. 222.

[6] See Appendix A.

[7] See, *Regulation Reference: A Preliminary Report to First Ministers* (Ottawa: Economic Council of Canada, November 1978).

[8] For example, a study of the *Foreign Investment Review Act* was incorporated into the revised research agenda.

[9] These studies are described in Regulation Reference *Update*, May 1979 (Ottawa: Economic Council, 1979, mimeo).

[10] For example, there is no study of broadcasting regulation; the regulation of the production, distribution, and sale of alcoholic beverages; cultural regulation; consumer protection legislation; the regulation of financial institutions and markets (including securities); energy regulation (notably nuclear power and petroleum resources); intellectual/industrial property legislation; and the regulation of labour markets (e.g., minimum wage laws). But it should be noted that the Council has recently published a study of television broadcasting (Robert E. Babe, *Canadian Television Broadcasting Structure, Performance and Regulation*, Ottawa: Economic Council of Canada, 1979) and the Law Reform Commission of Canada has undertaken a study of the CRTC. Late in 1978, the Council began work on a project incorporating a number of studies of financial markets — including studies touching on the impact of government regulation. The Institute for Research on Public Policy will shortly be publishing a study of the impact of minimum wage legislation.

[11] Government of Canada, *The Way Ahead* (Ottawa: October 1976), p. 32. An example of this approach was the 23 manufacturing industry task forces, consisting of representatives of business, labour, and academia, which made recommendations to federal and provincial governments on specific programs required for the development of these industries. See *A Report by the Second Tier Committee on Policies to Improve Canadian Competitiveness* (Ottawa: Department of Industry, Trade and Commerce, October 1978), p. 2. More generally, see W. Dodge, ed., *Consultation and Consensus: Toward a New Era in Policy Formulation*? (Ottawa: The Conference Board in Canada, 1978).

[12] The Committee's chairman is a senior official in the Department of Consumer and Corporate Affairs, Ottawa. It met on June 28 and September 13, 1978, and February 13, June 26, and October 11, 1979.

[13] The Committee's chairman was the Deputy Minister of Consumer and Corporate Affairs. The following departments or agencies were members: Industry, Trade and Commerce; Treasury Board Secretariat; Finance; Agriculture; Communications; Transport; Labour; Health and Welfare; Privy Council Office; Federal-Provincial Relations Office; Energy; and Environment.

[14] The Committee was formed by the Business Council on National Issues, the Canadian Manufacturers' Association, and the Canadian Chamber of Commerce to represent the views of the business community on regulatory problems and to provide assistance to the Economic Council in carrying out the Regulation Reference. Its chairman is Mr. William Boggs, President of Canada Systems Ltd. His views are expressed in "Regulations: Benefit or Burden?" *Odyssey*, April 1979, pp. 40-41.

[15] Dr. Pierre Laurin, a member of the Council, is chairman of this Committee, which consists of several members of the Council, three academics, and three senior business executives.

[16] These committees comprise representatives of the business community, labour organizations, consumer groups, provincial governments, and federal departments or agencies. They met for the first time in the spring of 1979 (see Regulation Reference *Update*, May 1979, p. 2) to review the draft research proposals of the Council staff and contract researchers. The role of the committees was described in the May 1979 issue of Regulation Reference *Update* as follows:

> The PACs have been most helpful in defining the key research issues in each area of study. These will

> continue to assist the Council's researchers in providing access to people and information relevant to each research project. As researchers complete drafts of their studies, the PAC will review them and provide valuable "feed-back". Each Committee will be meeting again to review the draft report(s) by the researcher(s). The PACs provide a formal linkage to the Regulation Reference through which the views of various governments and interests in the private sector can be expressed.

In the area of transportation, the Reference benefited from its liaison with the Interdepartmental Committee on Competition and Regulation in Transportation. The Committee, comprising the Departments of Transport, Consumer and Corporate Affairs, and the Canadian Transport Commission, has a number of studies of regulation and competition in transportation industries in progress.

[17] The first issue was February 12, 1979, (12 pp.); the second, May 1979 (38 pp.).

[18] Michael J. Trebilcock, "The Deregulation Debate: Interest and Ideologies," unpublished paper, Faculty of Law, University of Toronto, March 1979, p. 18.

[19] This is not without precedent. See, for example, Economic Council of Canada, *Eighth Annual Review: Design for Decision-Making* (Ottawa: Information Canada, 1971).

[20] Douglas G. Hartle, *Public Policy Decision Making and Regulation* (Montreal: Institute for Research on Public Policy, 1979), p. 1. This study was commissioned by the Economic Council.

Notes to Chapter 1

[1] In October 1976, the federal government concluded that "a basic and fundamental reassessment of the role of government" is necessary. It went on to say that "an essential theme emerging from this reassessment is the necessity to increase both the reliance on and the effectiveness of the market system." Furthermore, the government stated, "The role of government policy should not be to direct and manage the economy in detail." Most important was the recognition that "governments can become too pervasive and oppressive actors in the daily lives of Canadians." See Government of Canada, *The Way Ahead: A Framework for Discussion* (Ottawa, October 1976), p. 23. For a formal analysis of the growth of government, which is frequently at odds with popular perceptions, see David K. Foot, ed., *Public Employment and Compensation in Canada: Myths and Realities* (Toronto: Butterworths for the Institute for Research on Public Policy, 1978); Meyer W. Bucovetsky, ed., *Studies in Public Employment and Compensation in Canada* (Toronto: Butterworths for the Institute for Research on Public Policy, 1979); Richard M. Bird in collaboration with Meyer W. Bucovetsky and David K. Foot, *The Growth of Public Employment in Canada* (Montreal: Institute for Research on Public Policy, 1979).

[2] See Appendix A.

[3] The *Report of the Second Tier Committee on Policies to Improve Canadian Competitiveness* (Ottawa: Department of Industry, Trade and Commerce, 1978), pp. 8-9, illustrates this point:

> Another area affecting the economic environment which was a common concern to business members of the Task forces, was government regulation. The Committee agrees that government regulation is necessary in a modern democratic economy especially to protect the rights of individuals or groups who otherwise could not protect themselves .... We believe ... that government regulation should be simplified, and that conflicts and overlaps among and within governments should be resolved in order to reduce the cost to industry and government of enforcing and meeting regulation. An area of particular concern to business members of the Task forces was that government should make available cost-benefit analyses of any new regulations prior to their introduction into law. The labour concern was that cost-benefit analyses do not express the true value of social benefits. The Committee, therefore, recommends that impact assessments take into full consideration both qualitative and quantitative aspects.

[4] See Arthur Andersen & Co., *Cost of Government Regulation Study for the Business Roundtable* (New York: The Business Roundtable, Executive Summary, March 1979), pp. 11-12.

[5] *Ibid.*, pp. 11-12.

[6] While businessmen dislike ineffective, inefficient and cumbersome regulations, the point has been made that reform of such regulations should be weighed carefully since the initial investment in complying with them was so large that abolishing them may be more costly than living with them.

[7] This view is superbly documented and articulated in H.N. Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Agencies in Canada," *Osgoode Hall Law Journal*, Vol. 17, No. 1, April 1979, pp. 46-106.

[8] This term is attributable to Richard A. Posner, "Taxation by Regulation," *Bell Journal of Economics and Management Science*, Vol. 2, No. 1, Spring 1971, pp. 22-50. See the discussion in Chapter 4.

[9] See, for example, "The Publisher's Page," *Canadian Consumer*, Vol. 9, No. 4, August 1979, p. 5.

[10] Michael Pertschuk (Chairman of the U.S. Federal Trade Commission), "Special Interest Regulation and Public Interest Deregulation," speech before the Consumer Federation of America, Washington, D.C., February 8, 1979, p. 1. See also his delightful "A fable of regulation: scratch a tired competitor and you'll find a closet regulator," *Across the Board*, January 1979, pp. 2-3.

[11] See W.T. Stanbury, "Reforming Regulation in Canada: Political Pressure and Policy Response," in Law Reform Commission of Canada, *Seminar for Members of Federal Administrative Tribunals* (Ottawa: Law Reform Commission of Canada, forthcoming).

[12] "Our readers' views on key public policy issues," *Financial Post*, October 21, 1978, p. 6.

[13] *Globe and Mail*, July 7, 1978, p. 5.

[14] Ottawa *Citizen*, October 17, 1978.

[15] *Globe and Mail*, June 16, 1979, p. 16.

[16] Ottawa *Citizen*, October 11, 1978, p. 10.

[17] *Globe and Mail*, March 16, 1979, pp. 1-2.

[18] Toronto *Star*, December 30, 1978, p. A3.

[19] Ottawa *Citizen* January 13, 1979, p. 2. The woman's actions were prompted by the conviction of an Ottawa dance instructor for using undue pressure in selling dance contracts. The instructor was fined $11,000 and sentenced to a year in jail.

[20] Interview with David MacDonald, MPP for York South, on "Canada AM," CTV Network, October 10, 1978, 8:15 a.m.

[21] Montreal *Gazette*, July 14, 1979, p. 18.

[22] *Globe and Mail*, July 14, 1979, p. 11.

[23] Ottawa *Citizen*, July 20, 1979, p. 5.

[24] *Globe and Mail*, July 4, 1979, p. 12.

[25] Ottawa *Citizen*, July 7, 1979, p. 6.

[26] Montreal *Gazette*, July 11, 1979, p. 93.

[27] "Canada AM," CTV Network, July 9, 1979, 8:20 a.m.; see also Ottawa *Citizen*, July 17, 1979, p. 11.

[28] *Globe and Mail*, August 8, 1979, p. 1.

[29] For a further list of examples, see W. T. Stanbury, *op.cit.*

[30] See Economic Council, *Regulation Reference — a Preliminary Report to First Ministers*, *op. cit.*, Part V; and G. Bruce Doern, "Rationalizing the Regulatory Decision-Making Process: The Prospects for Reform" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, 1979); Stanbury, *op. cit.* The most recent summary is contained in *Report on Federal and Provincial Regulatory Reform Activities* (Ottawa: Federal-Provincial Consultative Committee on Regulation, November 1979).

Notes to Chapter 2

[1] W. Duncan Reekie, *Give Us This Day . . .*(London: Institute of Economic Affairs, 1978), pp. 24,25.

[2] *Ibid.*, p. 25.

[3] Dudley Pope, *Harry Morgan's Way: The Biography of Sir Henry Morgan* (London: Secker and Warburg, 1977), p. 18.

[4] Pope, *ibid.*, p. 23, notes that the specifications for ships "were rarely if ever modified or modernized, so the effect was to paralyze development in a notoriously traditional industry."

[5] *Ibid.*, pp. 24-25.

[6] The Hon. James C. McRuer, *The Evolution of the Judicial Process* (Toronto: Clarke, Irwin & Co., 1957), p. 46, quoting Baron de Lahontan.

[7] Margot Priest and Aron Wohl, "The Growth of Federal and Provincial Regulation of Economic Activity, 1867-1978" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming).

[8] While more comprehensive coverage is desirable, the staff of the Regulation Reference were able to complete the arduous task of counting regulations for only four provinces. Quebec regulation were computed from the *F.M. Compilation of Quebec Statutory Regulations/Recueil F.M. des règlements d'application des lois du Québec* (Farnham, Quebec: F.M. Publications, 1977, looseleaf updates).

[9] Fred Thompson and W.T. Stanbury, "The Scope and Coverage of Regulation in Canada and the United States: Implications for the Demand for Reform" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming).

[10] *Ibid.*

[11] See Margot Priest, W.T. Stanbury and Fred Thompson, "On the Definition of Economic Regulation" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming).

[12] Priest and Wohl, *op. cit.*, refer to "regulation achieved indirectly by means of other non-regulatory statutory authority, e.g., the *Income Tax Act* [and] broadening of the scope or effect of an existing regulatory act by court decisions or imaginative administration."

[13] In a general sense, all legislation is regulatory, but we shall use the term to refer to legislation that is aimed primarily at modifying economic behaviour in the private sector.

[14] See Priest, Stanbury and Thompson, *op. cit.*, for a discussion of this point.

[15] The time distribution of regulatory statutes was derived by taking the total stock of regulatory statutes in 1978 and then obtaining the date they were first enacted or the date at which any predecessor (in whole or in part) was enacted. In this way we are able to determine the earliest point at which the federal or a provincial government began to regulate in an area in some fashion. For example, the *National Energy Board Act* was passed in 1959. However, the export of electric power was first regulated under the *Electricity and Fluid Exportation Act* passed in 1907. Federal authority was also established over the export of petroleum, natural gas, water "or other fluid whether liquid or gaseous capable of being exported by pipelines or other contrivances." While the *NEB Act* is far more comprehensive than its predecessor, it has been dated from the earlier statute. The effect of this method is to understate legislative action. For example, if statutes are passed and are later repealed or are ruled *ultra vires* and do not serve as direct precursors of existing statutes, they are not recorded in the Tables B2-1 and B2-2.

[16] Table B2-2 and the others relating to the provinces trace the origins of their regulatory statutes and subordinate legislation (statutory instruments including regulations) back prior to the entry of six provinces into Confederation. Manitoba entered Confederation in 1870, British Columbia in 1871, Prince Edward Island in 1873, Alberta and Saskatchewan in 1905, and Newfoundland in 1949. In this way, no adjustments have to be made in comparing the growth of provincial regulatory legislation over time.

[17] These are taken from Priest and Wohl, *op. cit.*

[18] Derived from Priest and Wohl, *op. cit.*, Table 3 and Appendix IV. The greatest increase in length occurred in the "Financial Markets and Institutions" category: from an average of 15.4 pages in 1886 to 43 pages in 1927 to 71 pages in 1970. Priest and Wohl carefully qualify the interpretation of the average length of statutes as a measure of their complexity or detail:

> It is important to note, however, that drafting style will also affect page length and that page length is not in itself an indication of the effect a regulatory scheme may have on business. For example, a relatively short and uncomplicated (in drafting style) statute may confer broad discretionary powers on an

agency to intervene in a wide variety of business sector activities, whereas a more complicated statute may owe its length to the precise limitations on its authority delineated in the statute.

[19] On the same basis, the figure for the 1960s was 17 and for the 1950s it was 23.

[20] Priest and Wohl, *op. cit.*, Table 9 and Appendix V.

[21] See William Lilley III and James C. Miller III, "The New 'Social' Regulation," *The Public Interest*, No. 47, Spring 1977, pp. 49-61.

[22] Tabulation by staff of the Regulation Reference.

[23] The small number is simply a reflection of the difficulty of doing the tabulations — particularly when a province's regulations have not been consolidated.

[24] This section draws extensively from Carman Baggaley, "The Emergence of the Regulatory State in Canada, 1890-1939" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming). The detailed citations may be found in that source.

[25] These are the words of the B.C. Minister of Agriculture as quoted in Grant Vinning, "Regulation and Regulatory Modes in Canadian Agriculture," M.A. thesis, Carleton University, 1978, p. 147.

[26] The growth of marketing boards in Canada is described in G. Hiscocks, "Theory and Evolution of Agricultural Market Regulation in Canada," in *Market Regulation in Canadian Agriculture*, University of Manitoba, Agricultural Economics Department, Occasional Series No. 3, May 1972; Federal Task Force on Agriculture, *Canadian Agriculture in the Seventies* (Ottawa: Queen's Printer, 1969); and M.M. Veeman and R.M.A. Loyns, "Agricultural Marketing Boards in Canada," in *Agricultural Marketing Boards: An International Perspective* (Cambridge, Mass.: Ballinger, 1979).

[27] Data provided by Agriculture Canada. In 1976-77 sales through marketing boards amounted to $5,935 million.

[28] This section draws extensively upon Baggaley, *op. cit.*, and Privy Council Office, *Submissions to the Royal Commission on Financial Management* (Ottawa: PCO, March 1979), pp. 2-37 to 2-73. Detailed citations may be found in those studies.

[29] PCO, *Submissions*, *op. cit.*, p. 2-38.

[30] J.J. Sprengler, "Evolution of Public Utility Regulation: Economists and Other Determinants," *South African Journal of Economics*, Vol. 37, 1969, p. 14.

[31] The issue of appeals to the Governor in Council is discussed in some detail in Chapter 5.

[32] A useful, short history of airline regulation is William A. Jordan, "Comparisons of American and Canadian Airline Regulation," in G.B. Reschenthaler and B. Roberts, eds., *Perspectives on Canadian Airline Regulation* (Toronto: Butterworth & Co. for the Institute for Research on Public Policy, 1979), pp. 17-31.

[33] PCO, *Submissions*, *op. cit.*, p. 2-47.

[34] For a discussion of the constitutional division of powers, see Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) and *Laskin's Canadian Constitutional Law*, A. Abel, rev., 4th ed. (Toronto: Carswell, 1975). The relevance of this division of powers to policy making is illustrated by several recent Supreme Court decisions. See, for example, *Canadian Industrial Oil and Gas, Ltd.* v. *Government of Sask.* (1977), 80 D.L.R. (3d) 449; *Central Canadian Potash Ltd.* v. *Government of Sask.* (1979), 88 D.L.R. (3d) 609; *Nova Scotia Bd. of Censors* v. *McNeil* (1978), 84 D.L.R. (3d) 1.

[35] See Alan C. Cairns, "The Other Crisis of Canadian Federalism," *Canadian Public Administration*, Vol. 22, 1979, pp. 175-195.

[36] Gérard Veilleux, "Intergovernmental Canada — Government by Conference? A Fiscal and Economic Perspective," paper for Annual Conference, Institute of Public Administration of Canada, Winnipeg, 1979.

[37] Martin Landau, "Redundancy, Rationality and the Problem of Duplication and Overlap," *Public Administration Review*, Vol. 29, 1969, p. 356. Landau (p. 351) points out that "Redundancies allow for the delicate process of mutual adjustment, of self-regulation, by means of which the whole system can sustain severe local injuries and still function creditably."

[38] Obviously, we do not seek to argue that social and political objectives must give way to economic objectives. Having recognized the mix of social, political and economic considerations that underlie the federal system, we would, nonetheless, suggest that in the interplay of these considerations and the policies and programs to supporting them, the costs should not be assumed away. In other words, while regulatory considerations cannot automatically lay claim to pre-eminence, they should not be ignored.

[39] A.E. Safarian, *Canadian Federalism and Economic Integration* (Ottawa: Information Canada, 1974), p. 2. For a legal analysis of this question, see Ivan Bernier, "Le concept d'union economique dans la constitution canadienne: de l'intégration commerciale à l'intégration des facteurs de production, *Cahiers de Droit*, Vol. 20, 1979, pp. 177-227.

[40] Safarian, *op. cit.*, p. 3.

[41] John C. Pattison, "Dividing the Power to Regulate," in Michael Walker, ed., *Canadian Confederation at the Crossroads*, (Vancouver: Fraser Institute, 1978), p. 112, emphasis in original.

[42] M.J. Trebilcock et al., "Restrictions on the Interprovincial Mobility of Resources: Goods, Capital and Labour," in Ontario Economic Council, *Intergovernmental Relations* (Toronto: Ontario Economic Council, 1977).

[43] Some aspects of such costs are being dealt with in our study on the costs of compliance. See Regulation Reference *Update*, May 1979 (Ottawa: Economic Council of Canada, mimeo).

[44] "How much do we pay for the mishmash of provincial regulation?" *Financial Post*, September 24, 1977.

[45] Norman Bonsor, "The Costs of the Regulatory Process in the Trucking Industry" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming). This

figure does *not* include the ten provincial governments' costs of administering the regulation of the trucking industry.

[46] Ontario, Royal Commission on the Health and Safety of Workers in Mines, *Report* (Toronto: Queen's Printer, 1976), pp. 85-88.

[47] *Globe and Mail*, June 6, 1979, p. 5.

[48] Although it is true that, in some cases, greater interdependence may increase the intragovernmental administration and of intergovernmental co-ordination, these may be entirely or partially offset by savings in the cost of communication and political interaction between each government and its electors. Therefore, merely examining one subset of the federal system will not give an accurate picture. See Albert Breton and A.D. Scott, The Economic Constitution of Federal States *(Toronto: University of Toronto Press, 1978).*

[49] *Globe and Mail*, September 15, 1979, p. 3. See also, Gérard Veilleux, "L'évolution des mécanismes de liaison intergouvernementale," in R. Simeon, ed., *Confrontation and Collaboration: Intergovernmental Relations in Canada Today* (Toronto: Institute of Public Administration of Canada, 1979).

[50] See Donald Smiley, *Canada in Question: Federalism in the Seventies*, 2d. ed. (Toronto: McGraw-Hill Ryerson, 1976).

[51] Within the Federal-Provincial Relations Office, the task force on the reduction of duplication has been active since mid-1978 in examining areas of administrative duplication, whether regulatory in nature or in terms of delivery of programs. It was recently given new impetus by the Prime Minister when he asked the Minister of Federal-Provincial Relations to assign the highest priority to it. Initial emphasis has been placed on nine subject areas nominated by the provinces; namely, consumer and corporate affairs, environmental protection, agricultural research, offshore mineral resources, the regulation of uranium mining and the nuclear idustry, housing and urban affairs, administration of justice, correctional services and post-secondary education. When the task force deals with issues concerning regulatory duplication, it does not question the purpose or impact of government regulation but rather works toward effecting a rationalization of the administration of regulations within the existing framework of regulatory policies.

Notes to Chapter 3

[1] David Marquand, "Inquest on a Movement: Labour's Defeat and Its Consequences," *Encounter*, July 1979, pp. 9-10.

[2] H. Scott Gordon, "The Demand and Supply of Government: What We Want and What We Get" (Ottawa: Economic Council of Canada, Discussion Paper No. 79, 1977), p. 56. The legitimacy accorded a government's coercive actions does not make them any the less coercive. The effect of regulatory constraints depends upon how they are imposed, how they are administered, and for what purpose they are introduced. It seems appropriate, in some instances at least, to describe "public servants" who wield administrative power as "public masters" (see Gordon, *op. cit.*, p. 53).

[3] Charles L. Schultze, *The Public Use of Private Interest* (Washington, D.C.: Brookings Institution, 1977, p. 1), notes, "The term 'efficiency' carries far more freight in the economists' vocabulary than in normal parlance. It does not simply mean producing and distributing goods cheaply. Rather it is a measure of how well society meets — in quality and quantity — the material wants of its members. An economic system that produced large quantities of unwanted low cost goods would not be efficient." See also Gordon, *op. cit.*, p. 75.

[4] In 1969, the Economic Council, in its *Interim Report on Competition Policy*, emphasized its commitment to economic efficiency as follows:

> Essentially, we are advocating the adoption of a single objective for competition policy: the improvement of economic efficiency and the avoidance of economic waste, with a view of enhancing the well-being of Canadians. (p. 19)

The Council's concern for economic efficiency is also documented in *Efficiency and Regulation: A Study of Deposit Institutions* (Ottawa: Economic Council of Canada, Minister of Supply and Services Canada, 1976), Ch. 12, and in its consensus report on free trade, *Looking Outward* (Ottawa: Economic Council of Canada, Information Canada, 1975).

[5] See, for example, L.A. Skeoch with B.C. McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Minister of Supply and Services Canada, 1976); Senate Special Committee on Science Policy, *A Science Policy for Canada* (Ottawa: Queen's Printer, 3 Vols., 1970, 1972, 1973).

[6] Schultze (*op. cit.*, p. 47) states, "It is not simply that market incentives and the price system stimulate new technologies in general, but that they tend to direct innovation toward conserving those resources which are scarce." Schultze (*op. cit.*, p. 46) also notes another advantage of markets — they reduce the need for hard-to-get information usually required at a central level by officials administering a government program.

[7] John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971), p. 3.

[8] *Ibid.*, pp. 14-15; p. 60; pp. 302-303.

[9] Okun defines greater equality in terms of smaller disparities among families in their maintainable standards of living, which in turn implies lesser disparities of income and wealth relative to the needs of families of different sizes. Arthur M. Okun, *Equality and Efficiency: The Big Tradeoff* (Washington, D.C.: Brookings Institution, 1975), p. 3. Equity may refer to equality of opportunity to achieve positions of economic and social advantage. Rawls (*op. cit.*, p. 73), for example, defines liberal equality as follows:

> In all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed. The expectations of those with the same abilities and aspirations should not be affected by their social class.

For a study indicating the ineffectiveness of certain forms of government intervention in achieving equality of opportunity, see Christopher Jencks et al., *Inequality* (New York: Basic Books, 1972). Equity is sometimes taken to be equality of outcomes in terms of economic and social position, i.e., regardless of individual effort or capacity, certain rewards should be equalized.

[10] See Okun, *op. cit.*, Ch. 1.

[11] Realism suggests that in the name of equity the politically effective can engage in paternalism or even in the pursuit of self-interest. For example, a greater diffusion of economic rewards may simply be a form of social insurance against

intergroup conflict and the loss of long-term positions of advantage. See Frances F. Piven and Richard A. Cloward, *Regulating the Poor: The Functions of Public Relief* (New York: Random House, 1972).

[12] Harry Glasbeek and Susan Rowland, "Are Injury and Killing At Work Crimes?" *Osgoode Hall Law Journal*, Vol. 17, No. 3, 1979 (forthcoming).

[13] Okun, *op. cit.*, pp. 4-5.

[14] Law Reform Commission of Canada, *General Working Paper on Independent Administrative Agencies* (Ottawa: unpublished draft, June 1979), p. 28.

[15] This point was emphasized by the American Bar Association in its 1978 report, *Federal Regulation: Roads to Reform*:

> When Congress has been faced with a public demand for regulation in a particular field, its typical response has been to create a commission or other regulatory body, and endow it with power to issue rules and orders having the force of law, subject to general guidelines in the authorizing legislation and to limited judicial review. Typically, the regulator has recourse to one or more of the familiar techniques of licensing, rate-setting, and imposition of standards.(p.12)

The ABA concludes, "The critical issue today is whether this is always the most efficient approach, or whether the provision of profit incentives, recourse to taxation, or increased reliance on the free market might be more effective."

[16] We are reminded of Kipling's observation in "The Elephant's Child":

> I keep six honest serving men
> (They taught me all I knew);
> Their names are What and Why and When
> And How and Where and Who.

[17] R.L. Wettenhal argues that "effective accountability stems in the first place from the careful spelling out of the functions and objectives of the agency in the creating act: if this is well done, it is then much easier to measure the actual performance." ("Report on Statutory Authorities" in Royal Commission on Australian Government Administration, *Report* (Canberra: Australian Government Publishing Service, 1976), Appendix, Vol. I, p. 333.)

[18] Douglas G. Hartle, *Public Policy Decision Making and Regulation* (Montreal: Institute for Research on Public Policy, 1979), p. 86. Schultze, *op. cit.*, p. 65, states "it is clear that we do limit the politically acceptable techniques for social intervention to a few predetermined approaches, and usually block out of our vision that class of alternatives that use marketlike principles to achieve social objectives."

[19] Committee on Govermental Affairs, United States Senate, Study on Federal Regulation, Volume VI, *Framework for Regulation* (Washington, D.C.: USGPO, December 1978), p. xxiii.

[20] See H.L. Purdy, *Transport Competition and Public Policy in Canada* (Vancouver: University of British Columbia Press, 1972).

[21] *Framework for Regulation*, op. cit., *p. xxiv.*

[22] If the previous actions of Canadians are a guide, it is evident that regulatory choices will be strongly influenced by concerns about equity and distributional considerations. In fact, particular regulatory programs have been instituted precisely because of their distributional consequences. An obvious example is the supply-management type of agricultural products marketing boards. See, for example, Broadwith, Hughes and Associates, "The Ontario Milk Marketing Board: An Economic Analysis," in Ontario Economic Council, *Government Regulation: Issues and Alternatives, 1978* (Toronto: Ontario Economic Council, 1978), pp. 67-102; Herbert Grubel and Richard Schwindt, *The Real Cost of the B.C. Milk Board* (Vancouver: Fraser Institute, 1977); Grant Vinning, "Regulation and Regulatory Modes in Canadian Agriculture," M.A. thesis, Carleton University, 1978; J. D. Forbes et al., *A Report on the Consumer Interest in Marketing Boards* (Ottawa: Canadian Consumer Council, 1974).

[23] This point needs to be qualified in that there are quite a number of studies of certain aspects of some government programs. Many more exist in the United States than do in Canada. But the majority of these studies have been done by researchers external to the government and often without the co-operation of the agencies or departments studied. It should also be noted that the formal methodology of "evaluation research" is in its infancy. See, for example, Frances G. Caro, ed., *Readings in Evaluation Research*, 2nd ed. (New York: Sage Publications, 1977); and Marcia Guttentag and Elmer L. Struening, eds., *Handbook of Evaluation Research*, Vol. 1 and 2 (Beverly Hills: Sage Publications, 1975).

[24] Economic Report of the President with the *Annual Report of the Council of Economic Advisers* (Washington, D.C.: USGPO, February 1970), p. 92.

[25] These figures were calculated from the regulatory expenditures of the federal government, estimated by the Regulation Reference staff, divided by the total federal expenditures on a National Accounts basis, i.e., regulatory expenditures for 1970/71 were divided by total federal expenditures for 1970, and so on. The latter figures were taken from Department of Finance, *Economic Review*, April 1979 (Ottawa, 1979), Table 55, p. 185.

[26] Thompson and Stanbury point out that Canadian expenditures in 1975/76 on federal regulatory programs were one-fifth of those in the United States, while the Canadian economy (as measured by GNP) is only one-ninth the size of the U.S. economy. Their study followed the definitions used in and compared the results to those of Marcia B. Wallace and Ronald J. Penoyer, "Directory of Federal Regulatory Agencies," Washington University, Center for the Study of American Business, reprinted in *Cost of Government Regulations to the Consumer*, Hearings before the Subcommittee for Consumers, Committee on Commerce, Science, and Transportation, United States Senate, 95th Congress, 2nd Session, Nov. 21, 1978, pp. 99-171. Fred Thompson and W.T. Stanbury, "The Scope and Coverage of Regulation in Canada and the United States: Implications for the Demand for Reform" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming).

[27] These data were obtained by staff of the Regulation Reference from the *Public Accounts*, the *Estimates*, and the agencies concerned.

[28] *Ibid.*

[29] See Roland McKean, "Avoidance and Enforcement Costs in Government Regulation," unpublished paper, Washington University, St. Louis, October 1976; and Marvin Kosters,

"Counting the Costs," *Regulation*, July/August 1979, pp. 17-25.

[30] Arthur Andersen & Co., *Cost of Government Regulation Study for the Business Roundtable*, (New York: The Business Roundtable, Executive Summary, March 1979), p. 19.

[31] Lee Loevinger, "The Impacts of Government Regulation: The History and the Effect," *Vital Speeches of the Day*, Vol. 45, No. 5, December 15, 1978, pp. 134-135.

[32] Murray L. Weidenbaum and Robert De Fina, *The Cost of Federal Regulation of Economic Activity* (Washington, D.C.: American Enterprise Institute, Reprint No. 88, May 1978), p. 2. They point out that for many federal regulatory programs they had no estimate of the compliance costs, i.e., their estimate assumed them (incorrectly) to be zero.

[33] *Ibid.*, p. 3.

[34] Murray L. Weidenbaum, "On Estimating Regulatory Costs," *Regulation*, May/June 1978, p. 17. More generally, see Murray L. Weidenbaum, *The Future of Business Regulation* (New York: AMACON, 1979); and Murray L. Weidenbaum, "The Costs of Government Regulation of Business," study prepared for the Subcommittee on Economic Growth and Stabilization, Joint Economic Committee, United States Congress (Washington, D.C.: USGPO, April 10, 1978, 29 pp.). There are a number of other estimates for the total costs of complying with regulation in the United States. See Warren Buhler, "Calculating the Full Costs of Government Regulation" (Washington, D.C.: Management Design Inc., September 13, 1978); *An Economic Evaluation of the OMB Paper on "The Costs of Regulation and Restrictive Practices"*, staff paper prepared for the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, United States House of Representatives (Washington, D.C.: USGPO, September 1975).

[35] See, for example, the estimates given in Subcommittee for Consumers, Committee on Commerce, Science, and Transportation, United States Senate, *Cost of Government Regulations to the Consumer*, Hearings November 21, 22, 1978 (Washington D.C.: USGPO, 1978); and *Framework for Regulation*, *op.cit.*

Businessmen emphasize that not all the costs of complying with government regulation can be measured even by thoroughgoing accounting methods. They argue there are many less visible secondary effects that cause substantial costs to the companies and to society in general. These include opportunity costs, changes in productivity, costs of regulatory-caused delays, investment disincentives, shortage of supplies, reductions in international competitiveness, and inflation. Robert Leone, in his article, "The Real Costs of Regulation" (*Harvard Business Review*, Vol. 56, November/December, 1977, pp. 58,59), argues that "most managers equate government regulation with red tape and higher costs of doing business," but that "these direct impacts are almost trival when compared with the indirect influences various government agencies have on an industry's cost structure, on the institutional arrangements that make business work, and on the individual skills required of successful managers."

[36] Ralph Nader, for example, has stated: "The claim that regulation is costing business upwards of $100 billion is sheer nonsense. Not only are the figures as phony as a three-dollar bill, but they include none of the returns, such as public-health benefits" (quoted in *Saturday Review*, January 20, 1979, p. 39). Several more substantive points can be made in respect of the interpretation of the U.S. estimates of the costs of regulation. First, one cannot judge the desirability of a public policy, or even a private action, until one knows both the benefits and the costs associated with it. Second, in analyzing Weidenbaum's figures (and others), it appears that he has failed to distinguish between the efficiency losses to society engendered by government regulation and the redistribution of income that also results from regulation. While the former is a true social cost, the latter is simply a *transfer* of income or wealth from one group in the nation to another. Third, much of the discussion of the private costs of compliance, particularly that emanating from business leaders, suggests that such costs are borne by their shareholders. If compliance costs are analogous to taxes, they can only be borne by individuals. Thus, the incidence of regulatory compliance costs must fall on one or more of the shareholders of the firm subject to regulation; the customers of the firm subject to regulation, i.e., the "tax" is shifted forward (if the output is exported, the costs of compliance may be borne by foreigners); or the suppliers of inputs to the regulated firm — notably labour.

[37] Loevinger, *op. cit.*, p. 130.

[38] H. Averch and L.L. Johnson, "Behavior of the Firm Under Regulatory Constraint," *American Economic Review*, Vol. 52, December 1962, pp. 1053-69.

[39] See, for example, Robert M. Spann, "Rate of Return Regulation and Efficiency in Production: An Empirical Test of the Averch-Johnson Thesis," *Bell Journal of Economics and Management Science*, Vol. 5, No. 1, 1974; Leon Courville, "Regulation and Efficiency in The Electric Utility Industry," *Bell Journal of Economics and Management Science*, Vol. 5, No. 1, 1974, pp. 53-74; and H. Craig Peterson, "An Empirical Test of Regulatory Effects," *Bell Journal of Economics and Management Science*, Vol. 6, No. 1, 1975, pp. 111-126.

[40] See George W. Douglas and James C. Miller III, *Economic Regulation of Domestic Air Transport: Theory and Policy* (Washington, D.C.: Brookings Institution, 1974); and Theodore E. Keeler, "Domestic Trunk Airline Regulation: An Economic Evaluation," in Appendix to Vol. VI, *Framework for Regulation*, Committee on Governmental Affairs, United States Senate (Washington, D.C.: USGPO, December 1978), pp. 33-160. The existence of excess capacity among Canadian airlines at certain times of the year was highlighted by the Air Canada's recent special "Seat Sales." (See, e.g., *Globe and Mail*, August 2, 1979, p. 1.) However it is not clear whether the regulatory agency prevented actions by the carriers to reduce *seasonal* excess capacity in previous years.

[41] Richard A. Posner, "Natural Monopoly and Its Regulation," *Stanford Law Review*, Vol. 21, No. 3, 1969, p. 584.

[42] W.M. Capron and Roger G. Noll, "Summary and Conclusions," in W.M. Capron, ed., *Technological Change in Regulated Industries* (Washington, D.C.: Brookings Institution, 1971), p. 225.

[43] See "Behind AT&T's Change at the Top: The biggest corporate reorganization in history puts Ma Bell on a collision course with IBM," *Business Week*, Special Report, November 6, 1978, pp. 114-139; Tom Alexander, "The Postal Service Would Like to be the Electronic Mailman, Too," *Fortune*, June 18, 1979, pp. 92-94, 98, 100; and Robert F. Stone, M.A. Schankerman, and C.G. Fenton, *Selective Competition in the Telephone Industry* (Cambridge, Mass.: T&E Inc., 1977).

[44] CRTC "Decision: CNCP Telecommunications: Interconnection with Bell Canada" (Ottawa: CRTC 79-11, May 1979). See also Wayne Lilley, "How Challenge bloodied Bell," *Canadian Business*, November 1978 pp. 50-57, 61; Jay Bryan, "Supreme Court ruling backs Bell competitors," Montreal *Gazette*, Nov. 22, 1978, p. 57.

[45] See, for example, David H. Maister, "Technical and Organizational Change in a Regulated Industry: The Case of Canadian Grain Transport," in W.T. Stanbury, ed., *Studies on Regulation in Canada* (Montreal: Institute for Research on Public Policy, 1978), pp. 153-207. On the other hand, the U.S. Interstate Commerce Commission inhibited the use of the piggyback rail car and large grain cars. This was *not* the case in Canada.

[46] Economists use the term "allocative efficiency" to refer to the set of combinations of price and output such that no readjustment at the margin, anywhere, could provide a net gain in total output and in total economic welfare. If this situation holds in every market, the price accurately reflects social value at the margin, and observed costs precisely reflect the true cost to society of additional production. In essence, allocative inefficiency occurs when a firm or an industry is producing too much or too little output relative to that which would occur under competitive conditions. A very lucid discussion can be found in Committee on Governmental Affairs, United States Senate, Study on Federal Regulation, Vol. VI, *Framework for Regulation* (Washington, D.C.: USGPO, December 1978), pp. 58-63.

[47] This approach is emphasized by H.C. Wainright & Co. Economics, *The Impact of Government Regulation on Competition in the U.S. Automobile Industry* (Boston, May 4, 1979).

[48] For a study of the impact of these statutory rates, see D.R. Harvey, "Christmas Turkey or Prairie Vulture: An Economic Analysis of the Crows Nest Pass Rates" (Montreal: Institute for Research on Public Policy, Occasional Paper, forthcoming).

[49] Fred Thompson, "Some Estimates of the Social Costs of Economic Regulation in Canada and the U.S.," unpublished paper, University of California at Los Angeles, 1979.

[50] We must emphasize that significant costs can arise in the *process* of effecting the transfer of income or wealth. See John McManus, "On the Efficient Design of an Agricultural Marketing Board," unpublished paper, Carleton University, Ottawa, July 1978; and George Lermer, "Notes for an Address to the Canadian Agricultural Economics Society Workshop, Vertical Integration in Food Processing and Retailing" (Toronto, June 7, 1979).

[51] Hartle, *op. cit.*, pp. 101-102.

[52] Hartle, *op. cit.*, pp. 101-118, examines in some detail the analogy between several types of regulatory constraints and taxation transfer schemes.

[53] See *Cost of Government Regulations to the Consumer*, *op. cit.*, p. 304. More details are given in Lester B. Lave and Eugene P. Seskin, *Air Pollution and Human Health* (Baltimore: Johns Hopkins University Press, 1977). Another study estimates the health benefits of a 60 percent control of ambient air pollution in the United States to be between 43.5 and 117.9 billions of 1978 dollars per year. See Allen V. Kneese, "Benefit Analysis and Today's Regulatory Problems," unpublished paper prepared for Conference on the Benefits of Governmental Health and Safety Regulations sponsored by the Public Interest Economics Foundation and the National Science Foundation, Berkeley Springs, West Virginia, Oct. 12-13, 1978, p. 16. A study done for the Environmental Protection Agency in the United States estimated that the benefits of a 60 percent reduction in U.S. air pollution would reduce expenditures on health by $40 billion. This amount comprises a $36 billion increase in worker productivity due to reduced illness and a $4 billion saving through a decline in mortality. The study also pointed out that in 1977 the costs of compliance with air pollution regulation was $6.7 billion. Between 1970 and 1977 the EPA estimates that industrially emitted pollution was reduced by 12 percent. (*Wall Street Journal*, March 30, 1979, p. 7.)

[54] George Eads, "The Benefits of Better Benefits Estimation," unpublished paper presented at the Conference on The Benefits of Governmental Health and Safety Regulations, *op. cit.*, p. 4.

[55] *Ibid.*, pp. 2-3.

[56] C. Sinclair, P. Marstrand, and P. Newick, "Innovation and Human Risk" (London: Centre for the Study of Industrial Innovation, 1972).

[57] Colorado State University, *Benefits and Costs of Public Regulation of the Production, Processing, and Distribution of Ground Beef* (National Science Foundation Grant APR 76-18473, August 1977), p. 13 of the executive summary.

[58] Gene Pokorny, "Living Dangerously . . .Sometimes," *Public Opinion*, June/July 1979, p. 11.

[59] See, for example, Michael J. Trebilcock, Leonard Waverman, and J. Robert S. Prichard, "Markets for Regulation: Implications for Performance Standards and Institutional Design," in Ontario Economic Council, *Government Regulation: Issues and Alternatives, 1978* (Toronto: Ontario Economic Council, 1978) pp. 11-66.

[60] Elliott L. Richardson, "Introduction" to *Toward Regulatory Reasonableness* (Washington, D.C.: U.S. Department of Commerce, 1977), p. 6.

[61] Schultze, *op. cit.*, p. 13.

[62] See, for example, Ontario Economic Council, *Government Regulation: Issues and Alternatives 1978* (Toronto: Ontario Economic Council, 1978); Robert E. Babe, *Canadian Television Broadcasting Structure, Performance and Regulation* (Ottawa: Economic Council of Canada, Minister of Supply and Services Canada, 1979); H. N. Janisch et al., *The Regulatory Process of the Canadian Transport Commission* (Ottawa: Law Reform Commission of Canada, Minister of Supply and Services Canada, 1979); Alastair R. Lucas and Trevor Bell, *The National Energy Board, Policy, Procedure and Practice* (Ottawa: Law Reform Commission of Canada, Minister of Supply and Services Canada, 1977); W. T. Stanbury, ed., *Studies on Regulation in Canada* (Montreal: Institute for Research on Public Policy, 1978); J. D. Forbes et al., *A Report on the Consumer Interest in Marketing Boards* (Ottawa: Canadian Consumer Council, 1974); John R. Baldwin, *The Regulatory Agency and the Public Corporation* (Cambridge, Mass.: Ballinger, 1975); Economic Council of Canada, *Efficiency and Regulation: A Study of Deposit Institutions* (Ottawa: Minister of Supply and Services Canada, 1976).

[63] Gordon, *op. cit.*, p. 5.

[64] Trebilcock et al., *op. cit.*, p. 15.

[65] Jean-Luc Migué, *Nationalistic Policies in Canada: An Economic Approach* (Montreal: C.D. Howe Research Institute, 1979), p. 71.

[66] William C. Mitchell, "The Anatomy of Public Failure: A Public Choice Perspective," (Los Angeles: International Institute for Economic Research, June 1978).

[67] *Ibid.*

[68] Charles Wolf Jr., "A Theory of Nonmarket Failure: Framework for Implementation Analysis," *Journal of Law and Economics*, Vol. 22, April 1979, p. 107. It seems clear that the actions of the Civil Aeronautics Board in the United States prior to 1977 effectively eliminated price competition among the airlines, but they also created a situation in which the costs of service-based competition left little profit, despite the high fares allowed. See G. W. Douglas and J. C. Miller, *Economic Regulation of Domestic Air Transport: Theory and Policy* (Washington, D.C.: Brookings Institution, 1974). Deregulation had the effect of increasing the airlines' profits, lowering their costs per seat mile (particularly when the extraordinary OPEC-induced rise in fuel costs is ignored), increasing load factors, *and* lowering the average fare. See the Hon. Marvin S. Cohen (Chairman of the CAB), "The Impact of Deregulation on U.S. Airlines and the Travelling Public," in James C. Miller III and W.T. Stanbury, eds., *Airline Deregulation: U.S. Experience and Canadian Prospects* (Montreal: Institute for Research on Public Policy, forthcoming). Service to small communities in the United States, with only a handful of exceptions, has improved in terms of the number of flights per week. This has been done by the substitution of more frequent flights by smaller, turbo-prop commuter aircraft (such as the Canadian-made Dash 7) for fewer flights by larger jet aircraft. Retrospectively, many Americans are probably wondering why they paid so much for so long to avoid real competition among the airlines.

[69] Dennis J. Reynolds, "The Regulation of The Automobile in Terms of Emissions, Fuel Economy and Safety" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming), Ch. 2, p. 65.

Notes to Chapter 4

[1] More generally, see Theodore Lowi, "Four Systems of Policy, Politics and Choice," *Public Administration Review*, Vol. 32, May-June 1970, 314-325; and G. Bruce Doern and V. Seymour Wilson, eds., *Issues in Canadian Public Policy* (Toronto: Macmillan, 1974), Ch. 1, 6.

[2] See Roger S. Smith, *Tax Expenditures: An Examination of Tax Incentives and Tax Preferences in the Canadian Federal Income Tax System* (Toronto: Canadian Tax Foundation, 1979), and the papers in *Canadian Taxation*, Vol. 1, No. 2, Summer 1979. See also "Cut tax spending too," *The Economist*, August 4, 1979, pp. 47-48. The seminal reference is Stanley Surrey, *Pathways to Tax Reform: The Concept of Tax Expenditures* (Cambridge, Mass.: Harvard University Press, 1973).

[3] The *Report of the Special Committee On Statutory Instruments* defined a regulation as "a rule of conduct, enacted by a regulation making authority pursuant to an Act of Parliament, which has the force of law for an undetermined number of persons; it does not matter if this rule of conduct is called an order, a decree, an ordinance, a rule, or a regulation." (House of Commons, *Votes and Proceedings*, October 22, 1969, p. 1427.) This point was re-emphasized by the present Standing Joint Committee on Regulations and other Statutory Instruments: "The distinction between 'regulations' and 'other statutory instruments' provided for in the Statutory Instruments Act should be abandoned. There should be but one class of subordinate laws, called statutory instruments, broadly defined in accordance, in general terms, with the definition of 'regulation' as contained in the Interpretation Act." Furthermore, the Committee noted the need for a more comprehensive definition of a regulation. It said, "Any Departmental Guidelines, Directives or Manuals which contain substantive rules not contained in statutes or in other statutory instruments should be included within the definition of a statutory instrument and be subject to Parliamentary scrutiny." (*Minutes and Proceedings of the Senate*, No. 31, February 3, 1977, pp. 286, 287.)

[4] A far more comprehensive treatment may be found in Margot Priest, W.T. Stanbury, and Fred Thompson, "On the Definition of Economic Regulation" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming).

[5] Since January 1, 1972 the Standing Joint Committee on Regulations and other Statutory Instruments has scrutinized statutory instruments after they have been published. Not all statutory instruments are published. In 1969 there were only 11 Statutes of Canada that provided for disallowance or affirmation procedures for statutory instruments in Parliament. In 1974 the Committee established a list of 14 criteria, which are legal in nature, against which to review statutory instruments. Between January 1974 and July 15, 1976 the Committee considered 1,348 statutory instruments (excluding Income Tax, Veterans Land Act, and Immigration Special Relief Regulations). *Minutes and Proceedings of the Senate*, No. 31, February 3, 1977, pp. 206, 208, 209-211. For a general review of the process by which regulations (i.e., all delegated legislation) are made by the federal government, see Robert Anderson, "The Federal Regulation-Making Process and Regulatory Reform, 1969-1979" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming). See also Gary Levy, "Delegated Legislation and the Standing Joint Committee on Regulation and Other Statutory Instruments," *Canadian Public Administration*, Vol. 22, No. 3, Fall 1979, pp. 349-365.

[6] Douglas G. Hartle, *Public Policy Decision Making and Regulation* (Montreal: Institute for Research on Public Policy, 1979) p. 91, argues as follows:

> The beneficiaries of a concession prefer to obtain that benefit through regulation or a tax concession rather than by means of subsidy for the painfully obvious reason that the costs are thereby hidden. *Everyone* shudders when a headline appears such as "Dairy Farmers to Receive One-Half Billion Tax Dollars This Year" or "Mining Interests Rip-Off Treasury to the Tune of $— ." The taxpayers/voters shudder because they ache in their wallets: the recipients shudder at the image created which, of course, they believe to be completely erroneous . . . . [However,] all can agree that with such headlines appearing annually proclaiming such forthright subsidies, the subsidies are much more vulnerable to criticism and consequently present tempting targets for expenditure cuts.

[7] Our taxonomy is not unique. For example, in its recent report *Federal Regulation: Roads to Reform*, (Washington, D.C.) 1978, pp. 43-57, the American Bar Association indicated that

there were five "classical types of regulatory programs." See also Paul L. Joskow and Roger G. Noll, "Regulation in Theory and Practice: An Overview," California Institute of Technology, Social Science Working Paper No. 213, May 1978 for tripartite classification.

[8] See generally, H. Edward English, ed., *Telecommunications for Canada* (Toronto: Methuen, 1972).

[9] Consider the following examples:

- Airlines: the largest (Air Canada) and fourth largest (Nordair) are owned by the federal government; the third largest (Pacific Western Airlines) by a provincial government. All are regulated by the Canadian Transport Commission (CTC). However, it is the policy of the federal government to return Nordair to the private sector.

- Broadcasting: the largest radio and television networks in Canada (Canadian Broadcasting Corporation) are owned by the federal government and regulated by the CRTC.

- Electric Power: almost all electric power in Canada is produced by provincial Crown corporations. They are regulated by provincial regulatory agencies or by the provincial cabinet.

- Railroads: the largest (Canadian National Railway) is a federal Crown corporation, the third largest (British Columbia Railway) is provincially owned. The former is subject to CTC regulation, the latter is regulated by the provincial cabinet.

- Automobile Insurance: in three provinces, Manitoba, Saskatchewan and British Columbia, the monopoly supplier is owned by the government and regulated by the cabinet.

[10] William Lilley III and James C. Miller III, "The New 'Social Regulation'," *The Public Interest*, No. 47, Spring 1977, pp. 53-54. It should be emphasized that some elements of what is now called social regulation are not new. See, for example, David Roberts, *Victorian Origins of the British Welfare State* (New Haven: Yale University Press, 1960), Ch. 2 and 3; and Carman Baggaley, "The Emergence of the Regulatory State in Canada, 1890-1939" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming).

[11] Other examples include pure food and drug laws, public health regulation, fire protection regulation, energy production and utilization (e.g., safety aspects of nuclear power), building codes, occupational licensure, and health of animals and plants for human consumption.

[12] The former concentrates on the means (or techniques), while the latter concentrates on the ends (or outcomes). For example, in dealing with the problem of industrial accidents, the performance-standard approach would establish a maximum incidence rate for various categories of accidents, perhaps on an industry-by-industry basis. Employers and employees are left free to find the best way to reduce accidents. If design standards are used, the regulatory agency establishes detailed specifications for various kinds of equipment and a set of rules for its use. Machine guards are mandated, workers are required to wear specific types of protective clothing, and work flow procedures are specified in government regulations.

The use of standards, it is argued, is "based on the questionable notion that [the government's] setting standards guarantees compliance, whereas the effects [of other techniques of intervention such as] incentives and information are slow, uncertain, and uneven. This view necessarily assumes adequate enforcement resources, effective sanctions or consequential 'moral suasion' effects of standards." (Committee on Governmental Affairs, United States Senate, Study on Federal Regulation, Vol. VI, *Framework for Regulation* (Washington, D.C.: USGPO, December 1978) p. 165.

Of particular concern is the use of design or specification standards rather than performance standards. The main problem with design standards is that they necessarily limit the range of technological and organizational innovation, and hence increase the cost of achieving a regulation's objectives. Flexibility is lost as firms and individuals are given little scope to find the cost-minimizing ways of compliance. At the same time, it must be recognized that when the risks to life are very severe, it may be necessary to specify particular technologies, processes, or products. For example, in nuclear-generating plants, it may be necessary for the regulator to specify that certain pumps be used, that a specific grade of steel be incorporated into the construction, and so on. In general, design standards make it easier to assure compliance.

[13] Hartle, *op. cit.*, p. 87, has described this phenomenon as the "sacred nature of human life axiom" by which he argues that "voters will not accept any scheme that explicitly acknowledges that each human life is not infinitely valuable." Constraints on real resources imply the need for trade-offs. At the same time, humanistic considerations induce demands that society spend what is necessary to avoid the risks of serious accident or death. Handling both is an exquisitely difficult task — and one for which, in the absence of unanimity, there is no unambiguous "solution." In the U.S. context, this point is ably discussed by John Mendeloff, *Regulating Safety: An Economic and Political Analysis of Occupational Safety and Health Policy* (Cambridge, Mass.: MIT Press, 1979), Ch. 4.

[14] Richard Schmalensee, *The Control of Natural Monopolies* (Lexington, Mass: D. C. Heath, 1979), p. 3.

[15] It can be shown that continuously decreasing average costs imply, but are not implied by, natural monopoly. See W.J. Baumol, "On the Proper Cost Tests for Natural Monopoly in a Multiproduct Industry," *American Economic Review*, Vol. 67, December 1977, pp. 809-822.

[16] *Framework for Regulation, op. cit.*, pp. 9-10.

[17] Until the past decade, the ability of a firm producing under natural monopoly conditions to protect itself from entry was not considered a problem. However, some economists did ask why it was deemed necessary for the regulator to control entry into such industries. Recent theoretical work indicates that a very subtle problem arises with respect to the sustainability of natural monopolies based on economies of both scale and scope. It may not be possible, in the absence of regulatory control over entry, for the natural monopolist to establish a set of prices for its various outputs that will prevent competitors from entering some of its markets. The effect of such entry may be to raise the total costs to society of providing all the services involved. See W. J. Baumol, E. E. Bailey, and R. D. Willig, "Weak Invisible Hand Theorems on the Sustainability of Prices in a Multiproduct Monopoly," *American Economic Review*, Vol. 67, June 1977, pp. 350-65; J. C. Panzar and R. D. Willig, "Free Entry and the Sustainability of Natural Monopoly," *Bell Journal of Economics*, Vol. 8, Spring 1977, pp. 1-22; and J. C. Panzar and R. D. Willig, "Economies of Scale in Multi-Output Production," *Quarterly Journal of Economics*, Vol. 91, August 1977, pp. 481-494. An excellent review is Robert D. Willig, "Multiproduct Technology and Market Structure," *American Economic Review*, Vol. 69, No. 2, 1979, pp. 346-351.

[18] This point is subject of course to the problem of "second best," see K. Lancaster and R. G. Lipsey, "The General Theory of Second Best," *Review of Economic Studies*, Vol. 24, No. l, 1956, pp. ll-32.

[19] See *Framework for Regulation, op. cit.*, pp. 11-12; *Business Week*, special report on telecommunications, November 6, 1978, pp. 114-139; and Ralph F. Harris, "The Regulation of Air Transportation," in G. Bruce Doern, ed., *The Regulatory Process in Canada* (Toronto: Macmillan, 1978), pp. 2ll-236.

[20] See, for example, Harold Demsetz, "Why Regulate Utilities?" *Journal of Law and Economics*, Vol. 11, April 1968, pp. 55-65; and Richard A. Posner, "Natural Monopoly and Its Regulation," *Stanford Law Review*, Vol. 21, No. 3, 1969, pp. 548-643 (hereafter cited as 1969).

[21] Two other points may also be considered. First, the allocatively most efficient price and output under a single output natural monopoly will not provide sufficient total revenues to cover the firm's total costs. This is because allocative efficiency requires that price be set equal to marginal costs and the latter will be below average costs. Therefore, the regulator must find a way to subsidize the regulated firm with government funds or allow the price at least to cover average costs (including an appropriate level of profit). Second, the regulation of a natural monopoly raises some difficult questions about the impact of regulation on technological change. If an assiduous regulator prevents the monopolist from obtaining any of the benefits of technological change, what incentive is there to innovate? Alternatively, does the assured market of the regulated monopolist reduce the risks and increase the benefits of investing in research and development? The evidence is contradictory on this issue. See Posner, 1969, *op. cit.*

[22] Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions*, Vol. 2 (New York: John Wiley, 1971), p. 171.

[23] The *Report* of the Royal Commission on Truck Transportation (St. Johns: Queen's Printer, 1962), pp. l0-ll, painted a vivid description of what it perceived to be the consequences of destructive competition:

> The virtue which truck transportation has of requiring a relatively small investment per unit becomes with lack of proper regulations, a vice. Too many people go into the truck business for hire. Cutthroat competition follows, rates are slashed far below the cost of service, some operators work their drivers beyond a safe limit of hours and others are compelled to follow suit or lose business; equipment deteriorates to the accident point, and proper depreciation is not provided for, with the result, ultimately, that the public get poor service; the operators go into bankruptcy; the employees are inadequately paid; regrettable accidents happen, and everyone concerned suffers. The bankrupt operator emerges from bankruptcy only to go into business again, or someone else takes his place, making a small down payment on new equipment and goes through the same demoralizing process again.

Studies for the Council indicate that profits, service quality, and safety standards in the unregulated trucking market in Canada do not at all approach the low levels one would expect in a situation of destructive competition.

[24] For an industry to continue operation with subnormal profits for an extended period of time, it is also a prerequisite that the firms' cost structure include a high proportion of fixed costs. In these situations, the firms would be more inclined to continue operation and cover their variable costs rather than to shut down and have their investments wiped out.

[25] Destructive competition is sometimes a concern because of the ease of entry into an industry. The scenario described in footnote 23 assumes that most future entrants fail to learn from the unhappy experience of those who preceded them. The assumption that ignorance about an industry persists over time is inconsistent with available evidence and therefore very difficult to accept.

[26] See W.G. Waters II, "Public Policy and Transport Regulation: An Economic Perspective," in K.M. Ruppenthal and W.T. Stanbury, eds., *Transportation Policy: Regulation, Competition and the Public Interest* (Vancouver: Centre for Transportation Studies, 1976) p. 14.

[27] Kahn, *op. cit.*, p. 178.

[28] Private costs are those incurred by individuals and firms directly party to specific transactions; social costs reflect the total costs incurred by society including those over and above private costs.

[29] Paul A. Samuelson, *Economics*, 9th ed. (New York: McGraw-Hill, 1973), p. 817. One writer argues that, "The political history of the last 150 years can be interpreted as a revolt of large masses of people (including small business) against social costs." (William K. Kapp, *Social Costs of Business Enterprise* (New York: Asia Publishing House, 1963), p. 15 (the 2nd edition of *The Social Costs of Private Enterprise*, 1950).)

[30] See, for example, J. H. Dales, *Pollution, Property and Prices* (Toronto: University of Toronto Press, 1968); Carl J. Dahlman, "The Problem of Externality," *Journal of Law and Economics*, Vol. 22, April 1979, pp. 141-162; and Steven N. S. Cheung, *The Myth of Social Cost* (London: Institute of Economic Affairs, 1978).

[31] With respect to property rights, it has been shown that it is irrelevant who is assigned the property right, i.e., the generator of an externality or those affected by it. (See R. H. Coase, "The Problem of Social Cost," *Journal of Law and Economics*, Vol. 3, October 1960, pp. 1-44.) Coase has also shown that external effects are reciprocal. Actions taken against the producer of a negative externality, for example, are not sufficient to secure an optimal allocation. Bilateral taxation/subsidies are required to achieve efficient allocation. (See also James M. Buchanan and W.C. Stubblebine, "Externality," *Economica*, Vol. 29, November 1962, pp. 371-384; and Ralph Turvey, "On Divergencies Between Social Cost and Private Cost," *Economica*, August 1963, pp. 309-313.) The important implication of this point is that the use of taxes and subsidies to correct for externalities could be administratively very complex — and *costly*. The use of standards-type effluent regulation results in a less efficient outcome, although it *may* be administratively less costly. Furthermore, as McManus points out,

> Proponents of regulation often seem to ignore the effect on behaviour of changes in external effects. But the absence of a means of payment does not mean that individuals experience external benefits. Residental development will be less intensive downwind of a smoking factory; automobile drivers will demand more comfortable cars as traffic congestion increases; and individuals will alter their locational choices in response to the availability of railway services.

(John C. McManus "On the 'New' Transportation Policy After Ten Years," in W. T. Stanbury, ed., *Studies on Regulation in Canada* (Montreal: Institute for Research on Public Policy, 1978), p. 214.)

[32] Charles L. Schultze, *The Public Use of Private Interest* (Washington, D.C.: Brookings Institution, 1977), p. 36.

[33] See Lee McCabe, *A Case Study of Consumer Products Safety Glazing Regulations Under the Hazardous Product Act* (Ottawa: Treasury Board and Department of Consumer and Corporate Affairs, forthcoming).

[34] Consumer protection legislation recently introduced in Canada has helped to correct the imbalance between producers and consumers, but only partially so. One commentator has noted the danger that regulation may give rise to a false sense of security:

> Those who have proclaimed the demise of caveat emptor have placed far too much reliance upon the recent consumer-oriented laws which have been emerging from our legislatures. . . . Indeed the consumer has to come to place so much trust in the government's watchfulness that he sometimes falls prey to the belief that certain legislation exists when in fact it does not.

John Zinn, "Let the Buyer Still Beware," *The Business Quarterly*, Summer 1977, p. 54.

[35] See the discussion in M. J. Trebilcock, C. J. Tuohy, and Alan Wolfson, *Professional Regulation* (Toronto: Ontario Professional Organizations Committee, 1979), Ch. 3.

[36] "It would be foolhardy to expect consumers to acquire the expertise needed to understand and evaluate every possible food additive and prescription drug, since there is a significant possibility of disastrous effects. Similarly, it would be intolerably costly for consumers to inspect the conditions under which meat is slaughtered or food and drug products are manufactured. In the case of prescription drugs, the consumer has very little choice—it is the physician who determines the choice of the most economical and effective drugs." (*Framework for Regulation*, *op. cit.*, p. 19.) See also the distinction between a standards and a labelling approach in Ron Hirshhorn, "A Case Study of The Proposals for Energy Consumption Labelling of Refrigerators" (Ottawa Economic Council of Canada, Regulation Reference Working Paper, October 1978), p. 32.

[37] See J. H. Dales, "Beyond the Marketplace," *Canadian Journal of Economics*, Vol. 8, No. 4, November 1975, pp. 483-503.

[38] See Garrett Hardin, "The Tragedy of the Commons," *Science*, Vol. 162, 1968, pp. 1243-1248.

[39] There are really two distinct problems: the timing of production and the total amount ultimately produced. Private wealth maximization may imply a rate of utilization of both renewable and non-renewable natural resources that fails to maximize the total net economic benefit to society as a whole. One of the reasons for the divergence is a possible difference in the social or collective rate of time preference (discount rate) and the discount rates employed by individuals and firms comparing present and future values. If private discount rates are higher than the social discount rate (as most writers suggest is the case), there may be a need for government intervention. A related problem is the value to be placed on the interests of future generations. At a discount rate of 10 percent, the present value of $1 of a resource to be received 30 years from now is only 5.7 cents. What weight should be given to the preferences of persons not yet born? A low discount rate favours the future; a high rate favours the present. In the case of some natural resources, e.g., the forests or wilderness areas, some people argue that purely economic criteria are inappropriate. Each generation should hand over to the next certain things unspoiled or at least "in good repair."

[40] M. Crommelin, P. Pearse, and A.D. Scott, "Management of Oil and Gas Resources in Alberta: An Economic Evaluation of Public Policy," University of British Columbia, Department of Economics Discussion Paper, 76-19, 1976, p. 41.

[41] Dales, *op. cit.*, p. 496.

[42] This discussion has excluded the whole issue of the distribution of the economic rents associated with national resources. This has been a source of conflict between the federal and provincial governments, between governments and resource extractors, and between extractors and consumers of natural resources. For a readable discussion of this issue in Canada, see John Richards and Larry Pratt, *Prairie Capitalism: Power and Influence in the New West* (Toronto: McClelland and Stewart, 1979).

[43] See, for example, George J. Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science*, Vol. 2, No. 1, Spring 1971, pp. 3-21; and Sam Peltzman, "Toward a More General Theory of Regulation," *Journal of Law and Economics*, Vol. 19, No. 2, 1976, pp. 211-248. What Stigler and Peltzman propose is, essentially, a theory of optimal political coalitions. Implicit is the notion that, if regulation is selected as the means of effecting a given transfer of wealth, it is because regulation is the least costly means (to the suppliers) of bringing it about. Peltzman's principal contribution to this argument lies in his assertion that, "even if groups organize according to economic interest (producers versus consumers), political entrepreneurship will produce a coalition which admits members of the losing group into the charmed circle." That is, using the choice-theoretic, utility-maximizing assumptions of microeconomics, Peltzman identifies regulatory equilibrium in which the cost and benefits to the different interest groups affected and the interests of elected officials are equated at the margin.

[44] See Richard A. Posner, "Theories of Economic Regulation," *Bell Journal of Economics and Management Science*, Vol. 5, No. 2, Autumn 1974, pp. 335-358.

[45] See James Q. Wilson, "The Politics of Regulation," in James W. McKee, ed., *Social Responsibility and the Business Predicament* (Washington, D.C.: Brookings Institution, 1974).

[46] For example, taxi cab medallions in a number of Canada's major cities sell for from $5,000 to $45,000 — not including the cab itself! It is estimated that these values reflect an increase in taxi fares of from 3 to 11 or 12 percent above those that would occur in the absence of direct regulation. (These data are from a study for the Regulation Reference by Benôit Papillon.) Studies for the British Columbia Select Standing Committee on Agriculture indicate that in 1977 the quota values for three commodities produced under supply management schemes were as follows: (i) milk — $75 per pound per day: a reasonable operation would consist of a 50 cow herd or a quota of 3,000 pounds; (ii) eggs — $800 per case per week: the average quota size would be about 144 cases; (iii) broiler chickens — $5 to $6 per bird per 11-week

cycle: the average size of flock would be 25,000 birds. (These figures are cited in R.M.A. Loyns, "Marketing Boards: The Irrelevance and Irreverence of Economic Analysis," unpublished paper presented to the Third Triennial Canadian Marketing Workshop, Faculty of Administrative Studies, York University, June 1979.)

These figures imply that the market value of the *right* to sell through the marketing board, for a typical producer of these three products, is $225,000, $115,000 and $125,000, respectively. These quota values consist largely of the capitalized stream of anticipated above-normal profits generated by the output-restricting, price-raising activities of the marketing board. Consumers pay higher prices than would be established under competitive conditions and farmers' incomes are higher, although not necessarily in the same proportion as the increase in the price of the commodity. However, it should be noted that the gains only accrue to those holding the licence or quota at the time the board increases prices. For a new entrant, the quota value (or the taxi medallion) is a capital cost, which forms part of his investment and upon which he must earn a return. On this point, see Gordon Tullock, "The Transitional Gains Trap," *Bell Journal of Economics and Management Science*, Vol. 6, 1975, pp. 671-678.

[47] Even if regulated firms operate efficiently, they may utilize part or all of the anticipated economic gains from regulation in the process of *acquiring* it in political markets. This too is wasteful of scarce resources and a dead weight loss to society. See Richard A. Posner, "The Social Costs of Monopoly and Regulation," *Journal of Political Economy*, Vol. 83, No. 4, August 1975, pp. 807-827; and Anne O. Krueger, "The Political Economy of the Rent-Seeking Society," *American Economic Review*, Vol. 64, No. 3, June 1974, pp. 291-303

[48] See J.J. Sprengler, "Evolution of Public Utility Regulation: Economists and Other Determinants," *South African Journal of Economics*, Vol. 37, 1969, pp. 3-31.

[49] Public utility regulation has come to centre on rate-base regulation, which is a specialized form of cost plus pricing. Rates (more precisely the rate structure) are to be established to yield the regulated firms no more than a "reasonable" rate of return in relation to its capital investment. Since most public utilities sell their outputs to different customers (e.g., residential versus commercial or industrial users) in different quantities at different times of the day, an often elaborate structure of rates if established.

[50] Howard Windsor and Peter Aucoin, "The Regulation of Telephone Service in Nova Scotia," in G. Bruce Doern, ed., *The Regulatory Process in Canada* (Toronto: Macmillan, 1978), pp. 237-258.

[51] See H. E. Batson, "The Economic Concept of a Public Utility," *Economica*, No. 42, November 1933, pp. 457-472; and Frederic C. Benham, "The Economic Significance of Public Utilities," *Economica*, No. 34, November 1931, pp. 426-436.

[52] Bruce Owen and Ronald Braeutigam, *The Regulation Game: Strategic Use of the Administrative Process* (Cambridge, Mass: Ballinger, 1978), p. 26.

[53] *Ibid.*, p. 20.

[54] *Framework for Regulation, op. cit.*, p. xix.

[55] See H. Scott Gordon, "The Demand and Supply of Government. What We Want and What We Get" (Ottawa: Economic Council of Canada, Discussion Paper No. 79, 1977).

[56] Richard A. Posner, "Taxation by Regulation," *Bell Journal of Economics and Management Science*, Vol. 2, No. 1, Spring 1971, p. 23 (hereafter cited as 1971). See also George W. Hilton, "The Basic Behavior of Regulatory Commissions," *American Economic Review*, Vol. 62, May 1972, pp. 47-54.

[57] It is necessary to distinguish profit-maximizing price discrimination by a monopolist from cross-subsidization. Only the latter involves sales at prices below marginal cost, providing marginal cost is above average variable cost. The discontinuance of such sales would *increase* the net profit of the firm. Predatory pricing is not cross-subsidization as it is meant here because it is temporary. Peak-load pricing, including seasonal cases, is not cross-subsidization as profits would fall if off-peak or low seasonal sales were discontinued.

[58] John Palmer, "Taxation by Regulation? The Experience of Ontario Trucking Regulation," *Logistics and Transportation Review*, Vol. 10, No. 3, 1974, pp. 207-212. See also Fred Nix and Al Clayton, "Canadian Trucking Regulation: Institutions and Practices," study submitted to the Economic Council and the Institute for Research on Public Policy, mimeo, 1979.

[59] Posner, 1971, *op. cit.*, pp. 34-39.

[60] Aitken emphasizes the defensive nature of government intervention in Canada:

> . . . expansionism in Canada has been largely induced rather than autonomous. It has been contingent on state action both in the political integration of widely separated regional economies and in the provision of indispensable transport facilities. Throughout Canadian development expansionism has been defensive in character. It has been part of a general strategy of containing the expansionism of the stronger and more agressive economy of the United States and preserving a distinct political sovereignty over the territory north of the present international boundary. Each phase of expansion in Canada has been a tactical move designed to forestall, counteract, or restrain the northward extension of American economic and political influence. Primary responsibility for maintaining and strengthening this policy on defensive expansionism has fallen on the state.

H.G.J. Aitken, "Defensive Expansion: The State and Economic Growth in Canada," in W.T. Easterbrook and M.H. Watkins, eds., *Approaches to Canadian Economic History* (Toronto: McClelland & Stewart, 1961), p. 221. Ostry sees the issue differently:

> Underlying the social security and indeed regulatory systems in [Canada and the United States] . . . run significantly different interventionist philosophies... A paramount theme in Canadian politics has been that of national unity, and flowing from that concern has been the desire for the set of income security, health, education and opportunity programs to be uniformly high standard in every part of Canada."

(Sylvia Ostry, "Government Intervention in Democratic Countries: A Comparison of Canada and the United States," in *Conference on Canadian-U.S. Relations* (Montreal: Institute for Research on Public Policy, 1978), p. 6.)

[61] *Report of the Royal Commission on Transportation* (Ottawa: Queen's Printer, 1961), Vol. I, pp. 180-181.

[62] Bill C-33, *An Act to amend the National Transportation Act*, S.I (2nd Session, 30th Parliament, 25 Elizabeth II, 1976-77). For a general discussion, see Trevor D. Heaver and James C. Nelson, "The Roles of Competition and Regulation in Transport Markets: An Examination of Bill C-33," in W. T. Stanbury, ed., *Studies on Regulation in Canada* (Montreal: Institute for Research on Public Policy, 1978), pp. 231-249.

[63] See R.E. Babe, *Canadian Television Broadcasting Structure, Performance and Regulation* (Ottawa: Economic Council of Canada, Minister of Supply and Services Canada, 1979), p. 141. This study was commissioned by the Council prior to the Regulation Reference.

[64] See Frank W. Peers, "Tensions Over Communication," in Elliot J. Feldman and Neil Neville, eds., *The Future of North America: Canada, The United States, and Quebec Nationalism* (Cambridge, Mass. and Montreal, Que.: Center for International Affairs and Institute for Research on Public Policy, 1979), pp. 87-100.

[65] See, for example, Jean-Luc Migué, *Nationalistic Policies in Canada: An Economic Approach* (Montreal: C.D. Howe Research Institute, Montreal, 1979). Mordecai Richler ("Canadian Identity," in Feldman and Neville, eds., *op. cit.*, p. 50) puts it this way:

> Nationalists are lobbying for the imposition of Canadian content quotas in our bookshops and theatres. Canadian content quotas would oblige bookshops and those who maintain paperback racks to legally display or offer as much as twenty percent Canadian content. In our theatres, the nationalists are after fifty percent content quotas. In a word, largely second-rate writers are demanding from Ottawa what talent has denied them, an audience, applause.

Notes to Chapter 5

[1] A more comprehensive discussion can be found in H. N. Janisch, "The Role of the Independent Regulatory Agency in Canada," *University of New Brunswick Law Journal*, Vol. 27, 1978, pp. 83-120 (hereafter cited as 1978a) and Privy Council Office, *Submissions to the Royal Commission on Financial Management and Accountability* (Ottawa: PCO, March 1979), Submission 2 (hereafter cited as "PCO, *Submissions*").

Persons appointed "at pleasure" do not have the same security of tenure, hence may not be as capable of being independent. We would not classify agencies that only have the power to recommend, typically to a minister (e.g., the National Energy Board), as independent, even if the members have strong security of tenure.

For examples of agencies with various powers, see the study by Hudson Janisch and Kathleen Ward, *Compilation and Analysis of Selected Provincial Regulatory Statutes* (Ottawa: Federal-Provincial Consultative Committee on Regulation, 1979), which analyzes the statutory provisions for six areas of regulation in the ten provinces.

[2] PCO, *Submissions*, p. 2-85.

[3] Both the CTC and CRTC, for example, can make certain new regulations without the approval of the cabinet or Parliament. In this sense they are "legislative" bodies. In the United States, all independent regulatory agencies can create new regulations without obtaining the prior approval of the legislative branch. However, the regulation-making power of many agencies is subject to the veto power of Congress, which has been used with greater frequency in recent years.

[4] This term is attributable to J. E. Hodgetts, *The Canadian Public Service: A Physiology of Government, 1867-1970* (Toronto: University of Toronto Press, 1973), p. 138. The Law Reform Commission of Canada poses the central dilemma of the autonomy of statutory regulatory agencies (SRAs) in a parliamentary system where ministers are individually and collectively accountable.

> As an organizational phenomenon, independent agencies are by definition set up as specialized bodies separate from departments or other ministerial services, and have considerable autonomy from the executive branch of government. However, since they are not separated from Cabinet influence by constitutional convention, as is the Judiciary, it is unclear how the political norms of parliamentary democracy and ministerial responsibility apply to them.

(Law Reform Commission of Canada, *Working Paper on Administrative Agencies* (Ottawa: unpublished draft, June 1979, p. 60.) The issue is also discussed by F. F. Schindeler in his study, *Responsible Government In Ontario* (Toronto: University of Toronto Press, 1969), see p. 74, and by the *Report of the Committee on the Organization of Government in Ontario* (Toronto: Queen's Printer, 1959), p. 66. The influential *Report* of the Royal Commission Inquiry into Civil Rights (McRuer Commission) (Toronto: Queen's Printer, 1968), Vol. 1, p. 45, contains a strong reaffirmation of the central importance of ministerial responsibility.

[5] PCO, *Submissions*, p. 2-101.

[6] *Ibid.*, p. 2-26. It should be noted that the legislature can always change the powers of an SRA by amending its enabling statute.

[7] Any proposal to remove regulation entirely from politics could create a dangerously wide range of power for which there would be no accountability. Ironically, the consequence of such a severance of regulation from the lifeblood of politics has been to weaken, rather than to strengthen, its impact. Without direct political support, a regulatory commission will be unable to make headway against the opposition of regulated interests. This, in turn, leads to concern for the "capture" of the agency by the very interests it is supposed to regulate. "In practice, agencies have often not found strength through independence, but merely weakness in isolation." (Janisch, 1978a, *op. cit.*, p. 104).

[8] See PCO, *Submissions*, pp. 2-8 to 2-10.

[9] Historical experience suggests that there can be a legitimate need for a "shield" between politicians and public. Elected officials cannot, and should not, be expected to answer for each and every regulatory decision. This is not intended to denigrate the value of ministerial responsibility, but rather to make it more effective. It is argued that responsibility can be adequately discharged with respect to individual decisions by setting up a competent and accessible regulatory commission. This is what is done, after all, with respect to the courts — there is no political accountability for individual decisions, but the government is held responsible for the provision of an adequate system of courts. The danger is that politicians will seek to avoid responsibility even for general policy by hiding behind the "independence" of the statutory agency. This can be avoided in a number of ways, as described later in this

chapter. What is critical is that accountability be insisted upon in matters of general policy (where it can be really effective), rather than overload ministerial responsi bility with the burden of individual decisions.

[10] For example, in airline regulation, a department would be suspect of favouring publicly owned Air Canada over privately owned competitors, such as CP Air. Similarly, in broadcast regulation, where the system is made up of both public and private elements, it is essential to have an independent regulatory agency with considerable autonomy. This point is also emphasized by Richard J. Schultz, *Federalism and The Regulatory Process* (Montreal: Institute for Research on Public Policy, 1979), pp. 71-73.

[11] Royal Commission on Financial Management and Accountability, *Report* (Ottawa: Minister of Supply and Services Canada, 1979), p. 49 (hereafter cited as "RCFMA *Report*").

[12] Complex railway rate cases are seen as battles in the East-West tension over economic development. Broadcasting decisions are now perceived as influencing cultural identities. In practical terms, when a regulator of telecommunications endorses a telephone company's practice of system-wide pricing involving the cross-subsidization of rural services by urban services, local exchange service by long distance, and residential rates by business rates, it is, in fact, exercising what amounts to a delegated taxing power. The same is true when a regulator of transportation sets out deliberately to protect an air carrier from competition on a lucrative route on the understanding that it provide greater service than it might otherwise on less well travelled routes. See H. N. Janisch, "Political Accountability for Administrative Tribunals," *Conference on Administrative Justice 1978: Papers and Comments* (Ottawa: University of Ottawa, 1978), pp. 1-44 (cited hereafter as 1978b), particularly pp. 10-11. There has been a considerable increase in both the quantity and quality of provincial involvement in federal regulation. This has brought with it further demands for direct government-to-government negotiations on regulatory policy matters. (See Schultz, *op. cit.*) To summarize, "Regulatory agencies are deeply involved in the making of 'political' decisions in the highest sense of that term — choices between competing social and economic values and competing alternatives for government action — decisions delegated to them by politically accountable officials." (Lloyd N. Cutler and David R. Johnson, "Regulation and the Political Process," *Yale Law Journal*, Vol. 84, June 1975, p. 1399.)

[13] This point has been emphasized by James O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (London: Cambridge University Press, 1978), p. 74, who notes, "majorities, although essential to the democratic idea, are not always everything, and that for many purposes reliance upon qualities such as expertise, professionalism, independence, seniority, continuity, and tenure is more sensible, more *functional*, than reliance on pure political accountability."

[14] This phenomenon was illustrated in the recent CN/CP interconnection case before the CRTC. The issue was whether it was in the public interest to allow CN/CP to provide specialized intercity telecommunications services by interconnecting its system to Bell Canada's local distribution network. This was by no means a new issue. It had been the subject of a number of regulatory proceedings in the United States. But it had never been dealt with in a definitive manner at the political level in Canada. Delay was seen a threat to the continued viability of CN/CP as a telecommunications carrier. Before the CRTC, it was argued by Bell Canada and certain intervenors that a decision as important as this ought not to be made by a federal regulatory body acting alone. Instead, the federal and provincial governments should collectively determine comprehensive policies toward the industry. In the meantime, it was suggested that the application should be denied, or any decision delayed. The Commission rejected this line of argument. See CRTC, "Decision: CNCP Telecommunications: Interconnection with Bell Canada," CRTC 79-11, May 17, 1979.

[15] See Pierre Juneau, "External Relationships," in *Seminar for Members of Federal Administrative Tribunals* (Ottawa: Law Reform Commission of Canada, 1978), pp. 64-65; and "Summary of the Position of the Consumers' Association of Canada on the Issues Under Consideration by the Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty" (Ottawa: January 18, 1979), especially pp. 2-5.

[16] The regulatory process is important, although it should not be allowed to become a substitute for the efficacy and efficiency of its outcomes. Charles Dalfen, Vice Chairman of the CRTC, put it as follows:

> It seems to me that even though corporation executives, government officials or the CRTC commissioners or any group may come out with decisions that are in substance brilliant, considered from all angles of a situation, nevertheless, where there are divergent interests at stake, it's probably preferable to go through the process of a hearing, to go through the adversarial process, even at the risk of coming up with a decision that is much less perfect than any of us would have conceived of in the privacy of our own study or our own boardrooms. Because, again, the process becomes almost more important in yielding the decision than the brilliance, the conciseness or the perfection of the decision itself.

"Telecommunications and Regulation," *Proceedings, Sixth Annual Meeting, Canadian Telecommunications Carriers Association* (Edmonton, 1977), p. 34.

Indeed, in this time of great doubt as to the best resolution of many major regulatory issues, process takes on more importance. This is something that departmental regulation will probably find it harder to address.

[17] For example, there was no department in existence or desire to create a new department; the desire to give greater visibility or identity to a new or existing regulatory activity; and the need to respond to a particular problem in general terms without a clear idea of how to implement specific regulatory actions, i.e., the agency will exercise its judgment as it gathers experience. See Law Reform Commission of Canada, *Working Paper on Administrative Agencies* (Ottawa: unpublished draft, June 1979), pp. 63-65; and Royal Commission on Australian Government Administration, *Report* (Canberra: Australian Government Publishing Service, 1976), pp. 84-85 (cited hereafter as "RCAGA *Report*").

[18] Richard J. Schultz, with the assistance of Stephen Armstrong and Audrey Robinson, "Regulatory Agencies and Accountability," a study prepared for the Royal Commission on Financial Management and Accountability, May 1978, unpublished mimeo, pp. 3-7. The Privy Council Office (*Submissions*, pp. 2-77 to 2-93) lists five functions performed by SRAs: adjudicative, legislative, advisory, investigative, and administrative. With respect to the fourth function (not listed by Schultz et al.), the PCO notes, "Several regulatory commissions have a mandate to carry out investigations on behalf

of the government. Further, each commission undertakes investigations to ensure compliance with licence requirements, conditions, standards and regulations." (PCO, *Submissions*, p. 2-92.) The CTC, for example, must investigate railway accidents.

[19] Schultz et al. (*op. cit.*, p. 50) suggest that there are three types of legislative powers: "by-laws" or procedural rules; "administrative" rules that pertain to the operating procedures of the regulated; and "policy" legislation that establishes "norms or standards of conduct, goals or substantive requirements that must be met by those subject to the regulations."

[20] For example, the NEB is required by statute to "study and keep under review" energy matters and to "recommend to the Minister such measures . . . as it considers necessary or advisable in the public interest for the control, supervision, conservation, use, marketing and development of energy and sources of energy." (*National Energy Board Act*, section 22(1).) More generally, see Alastair R. Lucas and Trevor Bell, *The National Energy Board: Policy, Procedure and Practice* (Ottawa: Law Reform Commission of Canada, Minister of Supply and Services Canada, 1977).

[21] See Schultz et al., *op. cit.*, Table II.

[22] A most useful discussion, mercifully free of cant, is that by T. M. Denton, "Ministerial Responsibility: A Contemporary Perspective," in Richard Schultz et al., eds., *The Canadian Political Process*, 3rd ed. (Toronto: Holt, Rinehart and Winston of Canada, 1979), pp. 344-362. See also Canadian Study of Parliament Group, *Seminar on Accountability to Parliament* (Ottawa: April 7, 1978, published by the Speaker of the House of Commons). See also PCO, *Submissions*, pp. 1-1 to 1-68. The traditional references include Ivor Jennings, *Cabinet Government*, 2nd ed. (Cambridge: Cambridge University Press, 1951); A. H. Birch, *Representative and Responsible Government* (London: Allen & Unwin, 1964); S. E. Finer, "The Individual Responsibilities of Ministers," *Public Administration*, Vol. 34, 1956, pp. 377-396. G. W. Jones (*Responsibility and Government*, Inaugural Lecture, London School of Economics and Political Science, 1977, pp. 3-4) notes that there are four interdependent elements in the concept of responsibility: accountability, causation or authorization, obligation, and concerns for consequences.

[23] Ministers, individually and collectively, take responsibility before the legislature for acts done in the name of the Crown by public servants under their direction. But for some interesting counter-examples see Kenneth Kernaghan, "Power, Parliament and Public Servants in Canada: Ministerial Responsibility Reexamined," *Canadian Public Policy*, Vol. 3, Summer 1979, pp. 383-396.

[24] See Denton, *op. cit.*, pp. 356-358, and Kernaghan, *op. cit.*

[25] RCAGA *Report*, pp. 11-12.

[26] RCFMA *Report*, p. 21. The Lambert Commission (p. 9) notes that accountability is hard to define, but suggests that it is "the activating, but fragile, element permeating a complex network connecting the Government upward to Parliament and downward and outward to a geographically dispersed bureaucracy." The control centre for this chain of accountability is the Cabinet.

[27] Douglas G. Hartle, *Public Policy Decision Making and Regulation* (Montreal: Institute for Research on Public Policy, 1979), p. 127. How is it possible to associate a government's electoral defeat with even a series of "scandals" or major policy "boo boos," scattered over four or five years of office? If this is difficult to do, how can a government's stance on an appeal from a specific regulatory decision — even one involving, at the federal level, as general an issue as a rate increase for Bell Canada — be correlated with electoral defeat? The process by which voters form a political gestalt is not well understood.

[28] The "public choice" literature points out the nature of political market failures. See, for example Albert Breton, *The Economic Theory of Representative Government* (Chicago: Aldine, 1974); Anthony Downs, *An Economic Theory of Democracy* (New York: Harper & Row, 1957); James M. Buchanan et al., *The Economics of Politics* (London, Institute of Economic Affairs, 1978); and Dennis C. Mueller, "Public Choice: A Survey," *Journal of Economic Literature*, Vol. 14, No. 2, June 1976, pp. 395-433. Politically effective groups are those able to induce the government to act in their interest. These are more likely to be the well organized and well financed "special interests." Groups that do not have these characteristics, but which may be numerically large, may be systematically disadvantaged by the process. In a political system cloaked in executive secrecy, such as ours, regulation that is closely politically controlled may be a vehicle for redistribution away from the majority and in favour of the politically effective minority. Regulation that serves the broad public interest rather than special interests will not be increased simply by providing for greater political accountability. Even if this argument were to be rejected as an overstatement of the rolling series of compromises that characterize political decision making, it should lead to insistence on as much openness as possible in the political process. It is probably unrealistic to increase the political control over regulatory decisions on the assumption that the public interest would thereby automatically be served. Openness would at least make it possible for the public at large to determine what interests are being furthered in the political process. A closed political process, premised on the illusion that elected officials always act in the public interest, must be avoided.

[29] See Hartle, *op. cit.*, p. 124; and H. N. Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada," *Osgoode Hall Law Journal*, Vol. 17, No. 1, April 1979, pp. 46-106 (hereafter cited as 1979).

[30] It is argued that if "pure" adjudication is wanted, the courts may be used. The advantage of SRAs is that they can combine adjudication with other functions.

[31] Order in Council No. P.C. 1976-2761 (Nov. 10, 1976).

[32] Janisch, 1979, *op. cit.*, p. 67.

[33] *Ibid.*

[34] Gregory Kane, "Canadian Consumers Learn Their ABCs," in G. B. Reschenthaler and B. Roberts, eds., *Perspectives on Canadian Airline Regulation* (Toronto: Butterworth & Co. for the Institute for Research on Public Policy, 1979), p. 47.

[35] See Reschenthaler and Roberts, *op. cit.*, Appendix 1 and Appendix 2, for the CTC's decision and the Cabinet's subsequent Order in Council modifying it.

[36] Janisch, 1979, *op. cit.*, p. 71 and Janisch, 1978b, *op. cit.*, p. 7.

[37] Janisch, 1979, *op. cit.*, pp. 72-73.

[38] See Janisch, 1979, *op. cit.*; Janisch, 1978a, *op. cit.*, and "CAC Action: Interference and Independence," *Canadian Consumer*, February 1978, pp. 18-20 and "The P.M. Replies," June 1978, pp. 37-38.

[39] Hartle, *op. cit.*, p. 121.

[40] See Caroline Andrew and Réjean Pelletier, "The Regulators," in G. Bruce Doern, ed., *The Regulatory Process in Canada* (Toronto: Macmillan, 1978), pp. 147-64; G. Bruce Doern et al., "The Structure and Behaviour of Canadian Regulatory Boards and Commissions: Multi-disciplinary Perspectives," *Canadian Public Administration*, Vol. 18, No. 2, 1975, pp. 189-215; C. Lloyd Brown-John, "Membership in Canadian Regulatory Agencies," *Canadian Public Administration*, Vol. 20, No. 3, 1977, pp. 513-533; and for an analysis of the early membership of the Board of Railway Commissioners, see Carman Baggaley, "The Emergence of the Regulatory State in Canada, 1890-1939" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming).

[41] The Law Reform Commission of Canada (*op. cit.*, p. 289) comments:

> In the majority of cases, highly competent individuals are appointed to agency membership. Even so, isolated cases do persist of appointments of individuals totally unsuited to the tasks required. More objectionable than these isolated cases is the negative public perception generated by this unstructured system of political appointments. It gives rise to the appearance of partisan government reward to "politically helpful" individuals rather than appointment for intrinsic merit. It also has the effect of creating the impression that the agencies are used to assist loyal but reckless individuals who are having job placement or career maintenance problems elsewhere. This perception hampers agencies because their effectiveness can be impeded if, whatever may be the truth of the situation, members are believed to have insufficient professional qualifications.

The federal appointments process is described in Gordon S. Smith, "Relationship to the Privy Council Office and the Cabinet," in *Seminar for Members of Federal Administrative Tribunals* (Ottawa: Law Reform Commission of Canada, 1978), pp. 170-172. The Law Reform Commission (*op. cit.*, pp. 287-288) states: "Even though some agencies have been in existence for many years, and the nature of the skills and experience required for the job should be well known, to date there has been no systematic preparation of job descriptions to assist in the appointment process." The Commission recommends that "at a minimum, for each agency that has Governor-in-Council appointees as members, there should be general written guidelines indicating the qualifications an appointee to a given post should have."

For a study of the appointments process in the United States, see Committee on Government Operations, United States Senate, Study on Federal Regulation, Vol. I, *The Regulatory Appointments Process* (Washington, D.C.: USGPO, 1977).

[42] The most obvious recent examples were the appointments of John E. Robson and Dr. Alfred Kahn as chairman of the U.S. Civil Aeronautics Board in April 1975 and June 1977 respectively. Both men were able to alter significantly the effect of regulation on the airline industry *without* a change in legislation. See Alfred E. Kahn, "Applications of Economics to an Imperfect World," *American Economic Review*, Vol. 69, No. 2, May 1979, pp. 1-13; and Alfred E. Kahn, "A Paean to Legal Creativity," *Administrative Law Review* (forthcoming).

[43] First, the agency may find it hard to discern the outlines of government policy positions from ministerial statements (sometimes in the form of a press release), departmental publications of various sorts, and from ministerial speeches in the legislatures and elsewhere. When is a statement a *policy* as opposed to a symbolic gesture? Second, the apparent policy statement may be unclear, or it may be contradictory to other policy positions or even to the legislation under which an SRA operates. Agencies are faced with subtle problems in interpreting the signs embedded in the the entrails of such statements. See, for example, Hon. E. J. Benson, "Canadian Airline Regulation," a dinner address to the National Conference on Airline Regulation (Ottawa, June 27, 1979); and the exchange between the counsel for the Royal Commission on Corporate Concentration and Mr. Guy Roberge of the CTC, reprinted in G. B. Reschenthaler, "Direct Regulation in Canada: Some Policies and Problems," in W. T. Stanbury, ed., *Studies on Regulation in Canada* (Montreal: Institute for Research on Public Policy, 1978), p. 79.

[44] See Janisch, 1979, *op. cit.*, pp. 69-70 and *Canadian Consumer*, February 1978, pp. 18-20 and June 1978, pp. 37-38.

[45] Hartle, *op. cit.*, p. 123. Bill C-33 was given first reading in January 1977. It contained a provision that will enable the Governor in Council (cabinet), on the recommendation of the Minister of Transport, to issue such binding "directions" to the CTC as he considers necessary to achieve the objective of the new transportation policy set out earlier in the Bill. It provided, however, that "... êach direction shall be without specific reference to any particular matter before the Commission." Similarly, in Bill C-43, which was given its first reading in March 1977, a provision was made for binding "directions" to the CRTC "... respecting the implementation of the telecommunications policy for Canada" as set out in the Bill. Because of the particular sensitivities involved in some aspects of the regulation of broadcasting, it provided, *inter alia*, that no direction was to be made with respect to: the issue of a broadcasting licence to a particular applicant or the amendment or renewal thereof, the content of broadcasting programming, the application of qualitative standards to programming and the restriction of freedom of expression. For a more extensive analysis of these Bills, see Janisch, 1978a, *op. cit.*, pp. 94-120.

On October 16, 1979 the federal government, at a Federal-Provincial Conference of Ministers Responsible for Communications, announced it is considering making a number of changes in the Telecommunications Bill (C-16) introduced on November 9, 1978. Included is the following:

> That Parliament have the power to revoke any direction issued by the Governor in Council to the CRTC by means, for example, of a negative resolution of one or both Houses. This would enable the legislators to exercise control over the executive body in respect of the development of all tele communication policies made under Section 9 of the Bill. A Parliamentary Committee could probably examine a direction of this type and receive comments on it from the industry and from interested groups."

("Discussion Paper on Canada's Telecommunications Bill" (Ottawa: Department of Communications, October 16, 1979), p. 1.)

[46] RCFMA *Report*, p. 318. Cutler and Johnson (*op. cit.*, p. 1409) argue in the same vein: "Only elected officials can provide the requisite overview, coordination, and practical political judgment to weigh competing claims, make the necessary ultimate decisions, and stand accountable at the polls." It is interesting to note that the first federal regulation of railroads in 1851 made railroad rates subject to the approval of the Cabinet. See PCO, *Submissions*, p. 2-38.

[47] See Schultz et al., *op. cit.*, pp. 11-14.

[48] Cutler and Johnson, *op. cit.*, p. 1397. Their position has been endorsed by the American Bar Association in its report, *Federal Regulation: Roads to Reform* (Washington, D.C.: ABA, 1978). The ABA's House of Delegates endorsed the report, see Stephen Wermeil, "ABA Urges President Be Given Authority to Overrule Regulatory Agency Actions," *Wall Street Journal*, August 15, 1979, p. 7.

[49] See Sandford F. Borins, "Self-Regulation and the Canadian Air Transportation Administration: The Case of Pickering Airport," in W. T. Stanbury, ed., *Studies on Regulation in Canada* (Montreal: Institute for Research on Public Policy, 1978), pp. 131-151.

[50] See Jack Swayne, "The Relationship to the Treasury Board," in *Seminar for Members of Federal Administrative Tribunals*, *op. cit.*, pp. 191-202.

[51] See Mitchell Sharp, "The Relationship to Parliament," in *Seminar for Members of Federal Administrative Tribunals*, *op. cit.*, pp. 182-185; Schultz et al., *op. cit.*, pp. 88-110; and the RCFMA *Report*, pp. 313-314.

[52] The Lambert Commission (RCFMA *Report*, p. 325) recommends that "the annual reports of Independent Deciding and Advisory Bodies be automatically and permanently referred to the appropriate standing committees of the House of Commons, and that they provide a thorough description of the activities of the preceding year including both achievements and problems, a record of reports issued and directives received, and plans for the coming year." See also Sharp, *op. cit.*, pp. 188-189. For an example of an agency head appearing before a Parliamentary Committee, see H. N. Janisch et al., *The Regulatory Process of the Canadian Transport Commission* (Ottawa: Law Reform Commission of Canada, 1979), pp. 103-106.

[53] See, for example, Committee on Government Operations, United States Senate, Study on Federal Regulation, Vol. II, *Congressional Oversight of Regulatory Agencies* (Washington, D.C.: USGPO, 1977).

[54] Hartle, *op. cit.*, p. 70.

[55] *Ibid.*, p. 71.

[56] It must be asked whether vagueness and a series of *ad hoc* responses to specific decision situations avoid conflicts or merely submerge or delay them to reappear in a different guise or in a different place. Clearly, the political present value of unavoidable conflicts postponed in light of the relatively fixed character of the political cycle of election campaigns is not to be ignored.

[57] *Report of the Royal Commission on Transportation*, (Ottawa: Queen's Printer, 1961).

[58] See Janisch et al., *op. cit.*, pp. 14-15. Bill C-33 amendments to the *National Transportation Act*, introduced in January 1977, appeared to exacerbate the conflict among objectives. See Trevor D. Heaver and James C. Nelson, "The Roles of Competition and Regulation in Transport Markets: An Examination of Bill C-33," in W.T. Stanbury, ed., *Studies on Regulation in Canada* (Montreal: Institute for Research on Public Policy, 1978), pp. 231-249.

[59] While the statutory provision for a "Broadcasting Policy for Canada" does provide a useful starting point for regulation, it does not, to any significant degree, diminish opportunities for policy making left to the CRTC. Indeed, that Commission has made extensive use of its policy-making opportunities.

[60] It has to be recognized that there are limits on what the legislature can do effectively. It would, for example, be quite inappropriate for it to establish the minutiae of standards, even if it or the cabinet were to hold ultimate control over their becoming law. In general, "The fundamental task is to integrate the authority which comes from popular election with that which derives from professional knowledge and experience, while upholding the principle of ultimate political control." (RCAGA *Report*, p. 43.)

[61] If the legislature cannot even begin to formulate the principles to be applied, this may raise doubts as to the need for the regulation in the first place. The concept of "the public interest" is one of great complexity. Not the least of the difficulties is the fact that there are many conflicting definitions of the public interest. See W.T. Stanbury, "Definitions of 'the Public Interest'," Appendix D in Hartle, *op. cit.*, pp. 213-218.

[62] By and large, the CTC has chosen to confine itself to adjudicating cases as they come before it and has only infrequently attempted to set out in a coherent and open manner the general principles it applies. In quite a measure it has exhibited an undesirable degree of "judicialization" — a degree probably not intended by Parliament (see Janisch et al., *op. cit.*, Ch. VII). Janisch, 1979, *op. cit.*, p. 96, states that "The [CRTC] constantly seeks to move from adjudication of new problems on an individual case by case basis through policy statements and guidelines as the issues become more familiar to it and it feels that it is possible to generalize, and finally, when the issues are well defined it has moved to codification of its policies in regulations which have the force of law." See also Robert E. Babe, *Canadian Television Broadcasting Structure, Performance and Regulation* (Ottawa: Economic Council of Canada, Minister of Supply and Services Canada, 1979), Ch. 3.

[63] Janisch, 1979, *op. cit.*, p. 96. He continues, "if an agency is going to be confronted by a whole series of all but identical applications for licences, for example, it is surely fairer to the parties and administratively more convenient to announce in advance the policy which the agency intends to follow. This leads to both greater predictability which will assist applicants, and to a higher degree of consistency which is, after all, a hallmark of fairness."

[64] A technique that could possibly be adopted more widely is the proposed use of "issue hearings" by the CRTC in telecommunications regulation. Certain continuing problems common to CRTC-regulated companies would be dealt with at a policy-oriented hearing, rather than at one dominated by an immediate need to arrive at a decision on rates.

[65] See *Capital Cities Communications Inc.* v. *Canadian Radio-television Commission* [1978], 2 S.C.R. 141, 81 D.L.R. (3d) 609. Chief Justice Laskin and a majority of the Court

endorsed the use of guidelines as a desirable regulatory technique:

> In my opinion, having regard to the embracive objects committed to the Commission under s. 15 of the Act, objects which extend to the supervision of "all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act", it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the Broadcasting Act. Although one could mature as a result of a succession of applications, there is merit in having it known in advance. (81 D.L.R. (3d) 609 at 629).

See also Janisch, 1979, *op. cit.*, pp. 96-98.

[66] See H. N. Janisch, "Introduction," in A. H. Janisch, *Publication of Administrative Board Decisions in Canada* (London: Canadian Association of Law Libraries, 1972).

[67] It is often stated that administrative tribunals such as regulatory agencies do not and should not follow precedent. This rejection of the "dead hand of precedent," which is sometimes specifically provided for in the empowering statute, is based on a rigid notion of precedent that calls for a mechanistic application of earlier decisions. Even the courts no longer subscribe to this view of precedent — witness the willingness of the House of Lords and perhaps even the Supreme Court of Canada to reverse their own earlier decisions. In regulation, there should be a whole range of possible uses of a doctrine of precedent. The issue should not be whether or not an agency follows precedent, but rather the extent to which it seeks to reconcile its later decisions with those that have preceded them. See Janisch, 1979, *op. cit.*, pp. 98-100.

[68] Hartle, *op. cit.*, p. 132.

[69] For a most useful discussion, see Henry Fairlie, "The Politician's Art," *Harper's*, Vol. 255, No. 1531, December 1977, pp. 33-46; 123-124. Patrick Gordon Walker, *The Cabinet: Political Authority in Britain* (New York: Basic Books, 1970), p. 13, describes the cabinet as "the seat of political authority."

It is useful to ask whether there is anything in the regulatory process that would prevent such broader factors referred to above from being taken into account. Are there good reasons to wait until after a decision has been made before articulating them? Proponents of the "broader factors" thesis should bear in mind that, in an appeal, cabinet does not have a completely free hand to act on any consideration it might deem appropriate. A statutory appeal (such as that provided for in section 64(1) of the *National Transportation Act)* is limited in scope to the purposes of the statute creating the appeal. Therefore, it may be subject to reversal by way of judicial review should it take into account "extraneous considerations" or seek to achieve an "unauthorized purpose."

[70] Wright indicates that, between 1904 and 1961 under the *Railway Act* of 1903, there were 72 appeals to the Governor in Council: 39 were dismissed, 6 were allowed, 15 were referred back to the Board, and 12 were withdrawn, discontinued, etc. (Arthur R. Wright, "An Examination of the Role of the Board of Transport Commissioners for Canada as a Regulatory Agency," *Canadian Public Administration*, Vol. 6, 1963, p. 385.) Kenniff indicates that between 1967 and 1975 there were 8 appeals to Cabinet from decisions of the Canadian Transport Commission. In only 1 case, the Bell Canada rate increase in 1973, was the decision varied. In that particular one, the Cabinet varied the decision on its own motion. (Kenniff states that of the 121 appeals to the Minister of Transport between 1955 and 1975, "about one-quarter were successful," 6 were reversed and about 20 were referred back to the agency for reconsideration.) Since 1976, the Cabinet has varied the CTC's decision on Advance Booking Charters and upheld its decision in the Nordair case (see Janisch, 1979, *op. cit.*). With respect to the CRTC, Kenniff indicates there were only 2 cabinet appeals between 1968 and 1973; neither was successful. Between 1974 and 1976, he states there were 7 appeals; none was successful. Between 1977 and September 1979, 5 appeals were decided (one comprising several decisions); only 1 decision was reversed. Patrick Kenniff, "Political Control of Independent Regulatory Agencies," in Patrice Garant, ed., *Aspects of Anglo-Canadian and Quebec Administrative Law* (Quebec: Université Laval, Faculté de Droit, March 1979), pp. 66-95 at pp. 75-76. See also P. Kenniff, D. Carrier, P. Garant, D. Lemieux, *Le contrôle politique des tribunaux administratifs* (Quebec: Presses de l'Université Laval, 1978).

[71] See Hartle, *op. cit.*, p. 126.

[72] Parties appearing before an SRA that is regularly overruled on appeal to the cabinet will lose respect for the agency and instead concentrate their efforts on the political actors. The entire process will become undesirably politicized. As to the development of policy through cabinet appeals, this depends on the happenstance of a suitable decision or rule being made by a regulatory agency. But an individual case may be an unsuitable vehicle for generalization. Furthermore, there exists no means to follow up individual decisions to ensure that the newly enunciated policy will, in fact, be taken into account by the agency.

[73] This point was emphasized in the debate over the provision for cabinet appeal in the Stage II competition policy proposals. See M. T. MacCrimmon and W. T. Stanbury, "The Reform of Canada's Merger Law and the Provisions of Bill C-13," in J. W. Rowley and W. T. Stanbury, eds., *Competition Policy in Canada: Stage II, Bill C-13* (Montreal: Institute for Research on Public Policy, 1978), p. 103.

[74] Lucas has pointed out, "Even the most casual observation discloses that elections are rarely fought on issues involving specific alternatives. Particular issues are either submerged in broad, carefully tailored election issues or are simply forgotten because they arose early in a government's term of office." (Alastair R. Lucas, "Legal Foundations for Public Participation in Environmental Decision Making," *Natural Resources Journal*, Vol. 16, January 1976, p. 75.)

It is extremely difficult for even discriminating members of the electorate to identify the key issues in individual decisions. For example, what really was at stake in the Telesat case and who benefited by the reversal of the CRTC decision? What were the grounds of the "disallowance" of the 1973 Bell rate increase? Who benefited by that decision? What is really involved in the recent CN/CP-Bell Canada interconnection case, and to whose advantage is it to have the decision suspended or implemented?

[75] For many people, once a decision has been made in an open manner, the only credible way in which it can be reversed is

in a similarly open manner. Those who have succeeded in winning at an open hearing are hardly likely to accept reversal behind closed doors with good grace, even when it is couched in terms of broad considerations of the public interest. And those who seek reversal through the political process of what they consider to be a narrow and restrictive regulatory decision will want to be satisfied that their views have, in fact, reached the decision makers in undiluted strength and have not been filtered through a departmental strainer.

[76] See Janisch, 1978a, *op. cit.*, pp. 109-112, for a discussion on this point.

[77] RCFMA *Report*, p. 49.

[78] John Lawrence, Q.C., "The Future of Administrative Tribunals," in *Seminar for Members of Federal Administrative Tribunals*, *op. cit.*, p. 246.

[79] See *Inuit Tapirisat* v. *Léger* (1979), 24 N. R. 361 (Fd. Ct. of Appeal) [leave to appeal to the Supreme Court of Canada was granted on February 9, 1979]. This case and related ones are discussed in G. V. La Forest, Q.C., "Opening Address," in *Seminar for Members of Federal Administrative Tribunals* (Ottawa: Law Reform Commission of Canada, forthcoming).

[80] See Janisch, 1979, *op. cit.*; Schultz, *op. cit.*, pp. 78-82; Kenniff, *op. cit.*; Hartle, *op. cit.*, pp. 132-133; The Law Reform Commission of Canada, *op. cit.*, Ch. 4; and the RCFMA *Report*, Ch. 18. See also Gordon Smith (*op. cit.*, p. 178), who states, "we are also going to find changes in the appeal process. If the government of the day has the power to issue policy directions to regulatory agencies, it seems to me the other side of that coin will be that the government may not feel it needs to have the power to overturn specific decisions. In other words, this process indeed may enhance the independence of administrative agencies in decision-making."

Recently, the federal government has given an indication that its position on cabinet appeals may be altered. In its "Discussion Paper on Canada's Telecommunications Bill" (*op. cit.*, p. 1), it proposed "That the Governor in Council no longer have the power to vary, suspend to set aside CRTC decisions, but that he retain the power to refer back decisions for further consideration by the CRTC within a period of sixty days, accompanied by new directions, if applicable." The document continues, "The Lambert Commission recommended that all powers of the Governor in Council to review decisions that are held by regulatory agencies should be abolished, without making the above distinction. However, it might be useful to retain this distinction because the power to issue directions will, in all probability, be used only rarely; it would, therefore, be important that the Government have a means of intervening in cases where no directions have been given or when directions are misinterpreted . . . ."

Some of the clearest thinking on the question of political appeals, and certainly the most accessible, has come from *Globe and Mail* columnist Geoffrey Stevens. See the following columns: "A rotten system," September 27, 1978, p. 6; "Appeal for justice," September 28, 1978, p. 6; "A weird decision," November 8, 1978, p. 6; "A duty to be fair," November 24, 1978; "Deregulation," February 1, 1979, p. 6; "The right to seek redress," February 2, 1979, p. 6; "The appeal 'game' goes on," February 27, 1979, p. 6; "Change will not come easily," March 22, 1979, p. 6; "Not before May 22," April 4, 1979, p. 6; "Vary or rescind," June 25, 1979, p. 6.

[81] It should be noted that this technique is already being adopted quite extensively and that, while its general adoption would be novel, there already exist a number of examples of its successful employment. For instance, the RCFMA *Report* cited the recent requests by the government for reports from the CRTC and the CTC on the introduction of pay television and a preferred passenger rail plan respectively. Even more recently, the CTC was called on by the Minister of Transport to hold extensive hearings on possible amendments to the airline charter regulations. See Reschenthaler and Roberts, *op. cit.*

[82] Three approaches could be used as circumstances dictate:

- "Advisory Hearings Approach": the government could require an agency to hold hearings and prepare a report on a policy issue of concern to the government. The government would be free to have its departments make representations at the hearings. Certain "public interest groups" would receive public funds to finance their representations. Following the agency's report and recommendations, the government would issue its binding Policy Directive.

- "Draft Government Directive": the government could issue a draft Policy Directive and require the agency to receive representations on the draft and prepare a report recommending a "final" version. The government would be free to accept or modify the agency's suggestions. It would then issue its binding directive.

- "Pure Government Directive": the government could simply issue a Policy Directive that would be binding on the agency.

The problem with the power to issue directives, as recently proposed in federal legislation (as outlined above), is that it appears to be a pre-emptory power to make policy edicts. In the 1977 proposals, there were no requirements for any form of consultation or participation. This point has been argued vigorously by Janisch, 1978a, *op. cit.*, pp. 112-20; 1978b, *op. cit.*, pp. 21-29; and 1979, *op. cit.*, pp. 91-95. He indicates that certain safeguards should be built into the grant of a directive power. First, the whole concept of fully formed government directives misconceives the usual way in which policy is made in regulation. Most policy emerges from front-line regulatory experience. In brief, regulatory policy making is largely an incremental, rather than an inspirational, process. It is true that, on occasion, there will be need for a major change in the basic assumptions on which regulation is proceeding. This cannot be accomplished by way of an incremental approach, but should involve the legislature and an amendment to the agency's legislative mandate in recognition of the significance of the change contemplated.

Second, the proposals for government directives ignore the recent rapid growth in consultation and public participation in a wide variety of policy-making activities at all levels of government. This is a development that cannot be ignored in designing contemporary techniques for policy transmittal to regulatory agencies. (See David J. Mullan, *Rule-Making Hearings: A General Statute for Ontario?* Toronto: Ontario Commission on Freedom of Information and Individual Privacy, Research Publication 9, 1979.)

Third, it is worth repeating that no one has a monopoly on wisdom when it comes to regulation. Here, openness has not only an important symbolic value, but also a functional one, even if the possibly adverse impact of zealots and the media is acknowledged.

Fourth, a common failing of regulatory agencies is their tendency to become bogged down in the minutiae of adjudica-

tion and not to live up to their potential as policy makers. Thus, a procedure should be devised that will put a regulatory agency on the spot and make it face up to the policy-making responsibilities delegated to it by legislation in an open, positive manner.

[83] Schultz, *op. cit.*, p. 73. It is to be hoped that the view cited by Schultz (*op. cit.*, pp. 73-74) will prevail.

> This argument was forcefully made by one of the provincial officials interviewed for this study. Although adamant about the need for political control, he insisted that it was not a black-and-white situation of completely replacing regulatory agencies with political forums, for he argued that "the public hearing process of regulatory agencies has a lot of advantages to a closed door political conference". The issue is how to balance governmental and public input. While there must be mechanisms for resolving political disputes and "in a federal state, the two most important sources of dispute are the two levels of government", this official insisted this must not mean that all other sources are ignored. He concluded by emphasizing that "the public interest argument is crucial and the scope and range of input must be respected". His basic concern, and it is one that this report shares, is that, given the legitimate demand for political control, "the pendulum will swing too far". In that event not only would regulators be denied an opportunity to contribute to policy formation but the contribution of the various "publics" who hitherto have participated in the regulatory process would be lost.

[84] Hartle, *op. cit.*, pp. 132-133, describes how the process could work to permit the government to effect its control and, at the same time, to make it clearly accountable for its actions:

> At any stage of the proceedings prior to *the agency's decision* on any matter, the government of the day could declare that it deemed the particular decision to be of such significance that it would treat it as a *government* policy decision. Consequently, the decision-making powers of the agency would thereby be withheld in the particular case and the agency's conclusions, whether in the form of a draft decision or advice or recommendations, would be treated as such, and the final decision would be announced by the responsible minister as a government policy decision debatable in the House of Commons. To be fair to the participants, the executive branch would make its intention to shift the agency from the decision-making role to the advisory role in a particular case at the earliest opportunity. The appropriate point in time, in most instances, would be shortly after all submissions in a particular case had been received. [Emphasis in the original.]

[85] Law Reform Commission of Canada, *op. cit.*, p. 164.

Notes to Chapter 6

[1] Paul Weaver, "Unlocking the Gilded Cage of Regulation," *Fortune*, February 1977, p. 188.

[2] For a general discussion see Robert Anderson, "The Federal Regulation-making Process and Regulatory Reform, 1969-1979" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming); G. Bruce Doern, "Rationalizing the Regulatory Decision-Making Process: The Prospects for Reform" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, 1979); and Eric A. Milligan, "The Potential for Parliamentary Review of Regulatory Activity in Canada" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming). See Doern, *op. cit.*, for details on new developments at federal and provincial levels.

[3] In most cases, there are no formal procedures to ensure that the public has prior notification of new regulations. Government departments and agencies undoubtedly engage in informal consultation with individuals, firms, and interest groups on a selective basis. Some voluntarily follow a policy of advance publication. However, formal requirements for advance publication are rare. See David J. Mullan, *Rule-Making Hearings: A General Statute for Ontario?* (Toronto: Ontario Commission on Freedom of Information and Individual Privacy, Research Publication 9, 1979); and Robert Anderson, *op. cit.* See also Standing Joint Committee on Regulations and other Statutory Instruments, *Second Report* (Ottawa: Department of Supply and Services Canada, 1977), for a discussion of the distinction between "regulations" and "statutory instruments."

[4] Even if the social benefit of a particular regulatory action does not exceed its social cost, the principle of economic efficiency is served by minimizing the cost of compliance. It is likely that during the initial period of adjustment, there will be a short-term increase in demand for those resources that must be utilized in order to meet the new requirements. By extending the time over which the resources are required, the relative increase in demand and, therefore, the increase in price, can be kept down.

Costs of compliance over the long term can be reduced if sufficient time is allowed for optimizing changes in behaviour by the affected interests. For instance, the longer the period allowed for modification of production techniques, the greater the probability that innovation or technological advances will facilitate compliance at a lower cost.

Delay in implementation, of course, means delay in obtaining the expected benefits of regulation. In theory, as long as the incremental reduction in cost is greater than the incremental reduction in benefits, allowing additional time for implementation will increase economic efficiency. In practice, gauging the optimum period of delay will be virtually impossible and the decision is likely to be determined by reference to other principles such as "fairness."

[5] See Mullan, *op. cit.*, pp. 7, 141. Although, in theory, efficiency gains might be realized if the onset of a notice period begins *after* a decision is taken, providing notice of *intended* regulatory action is preferable. By ensuring that affected interests are allowed the opportunity to participate in the formulation of regulatory provisions, the ultimate acceptability of the measures may be improved. The extra time invested in the developmental stage will be more than offset by savings in the time necessary for full implementation, savings due to improved understanding and co-operation. It is also true, however, that if regulatory requirements are likely to generate economic waste, advance notice could *increase* total costs by facilitating implementation.

[6] See H.V. Kroecker, *Accountability and Control — The Government Expenditure Process* (Montreal: C.D. Howe Research Institute, 1978); and D.G. Hartle, *The Expenditure Budget Process in the Government of Canada* (Toronto: Canadian Tax Foundation, 1977).

[7] For example, a prior assessment of pollution standards might indicate that the purpose of the proposed regulations is to

reduce the effluent of pulp mills by X units per ton of production. Several years later, performance can be judged against this target (assuming the analysis can account for the effects of other intervening variables).

[8] For example, entry restrictions were added to the regulation of the Ontario trucking industry in 1934 after a severe bout of "destructive competition" during the depression years. Underlying the malaise of the industry was a drop in demand for trucking services, indeed for all modes of transportation, consequent upon the fall in industrial output that began in 1929. Although the original economic conditions that prompted entry controls no longer exist, the resulting regulatory measures have been retained. See Norman Bonsor, "The Development of Regulation in the Highway Trucking Industry in Ontario," in *Government Regulation, Issues and Alternatives 1978* (Toronto: Ontario Economic Council, 1978), pp. 103-135.

[9] With respect to the limitations of cost-benefit analysis see for example, Peter Self, *The Econocrats and the Policy Process, the Politics and Philosophy of Cost-Benefit Analysis* (London: Macmillan, 1975) and Alan Williams, "Cost-Benefit Analysis: Bastard Science? and/or Insidious Poison in the Body Politick?", *Journal of Public Economics*, Vol. 1, No. 2, August, 1972, pp. 199-225. Three standard texts on cost-benefit analysis are E.J. Mishan, *Cost-Benefit Analysis* (London: George Allen and Unwin, 1971); and A.K. Dasgupta and D.W. Pearce, *Cost-Benefit Analysis* (New York: Barnes and Noble, 1972); and P. Dasgupta, S. Marglin, and A. Sen, *Guidelines for Project Evaluation* (New York: United Nations, 1972). See also Canada, Treasury Board, *Benefit-Cost Analysis Guide* (Ottawa: Information Canada, 1976).

[10] Canada, Treasury Board, *Administration Policy Manual*, Chapter 490, "Socio-Economic Impact Analysis of Health Safety and Fairness Regulations," p. 11, defines the "problem definition stage" as the realization "that government intervention may be required." Departments and agencies then are required to "consult with directly affected parties."

[11] General requirements for consultation have been legislated. The *Consumer Packaging and Labelling Act*, S.C. 1971, c. 41, s. 11(2), for example, provides that for the purpose of establishing packaging requirements for any prepackaged product or class of prepackaged product, the Minister shall seek the advice of at least one organization in Canada of consumers and one organization of dealers in that prepackaged product or class of prepackaged product, and may seek the advice of the Standards Council of Canada or any organization in Canada engaged in standards formulation.

[12] In March 1978, the Government of the United States, pursuant to Executive Order 12044 (see *Federal Register*, May 30, 1978, Part II, "Improving Government Regulations, Proposals for Implementing Executive Order 12044"), instituted a number of major reforms of the U.S. federal regulatory process. Included in the reforms was the requirement for publication of a regulatory calendar. The U.S. regulatory calendar is published semi-annually. For the first issue, see *Federal Register*, Part IV, February 28, 1979, pp. 11387-11516.

[13] Some measure of central governmental control of regulatory intervention could be facilitated by a regulatory calendar. Consolidation of the information could also aid in the co-ordination within and between governments necessary to minimize wasteful overlap, duplication, and inconsistency — a particular concern of First Ministers in proposing that the Council undertake this study of government regulation.

[14] The data requirements for the U.S. regulatory calendar are more elaborate than those proposed here. See *Federal Register*, Part IV, February 28, 1979, pp. 11387-11516.

[15] Instruments subject to advance notice requirements would include regulations, orders, rules, ordinances, by-laws, and proclamations. It is essential that, regardless of the specific instrument (excluding new statutes or amendments to existing ones) utilized by a department/agency, notification be required if the anticipated economic cost exceeds the specified threshold. The fact that an agency uses a directive rather than a formal statutory instrument should be irrelevant. An analagous point was made in the *Second Report* of the Standing Joint Committee on Regulations and other Statutory Instruments, *op. cit.*, p. 84:

> Any Departmental Guidelines, Directives or Manuals which contain substantive rules not contained in statutes or in other statutory instruments should be included within the definition of a statutory instrument and be subject to Parliamentary scrutiny. This inclusion should extend to Guidelines, Directives, etc. which constitute instructions to staff where the rules so made are applied to or in respect of non-staff members or where the breach of the rules can lead to discipli nary action against the staff member commit ting the breach.

A host of related problems regarding the federal regulation-making process are canvassed in Robert Anderson, *op. cit.* One particularly Kafkaesque example was described in the *Second Report* of the Standing Joint Committee on Regulations and other Statutory Instruments (*op. cit.*), p. 26:

> The most serious problem ... is to get the documents where the Committee's right of scrutiny is denied by the Government on the ground that they are not statutory instruments. The Committee may want to see these documents, in order to decide whether, in its opinion, they are statutory instruments.
>
> It requests production. The legal officer of the department refuses. The Committee asks why. He says that the document is not a statutory instrument, but he cannot demonstrate this or give the reasons for his assertion because to do so would be to give a "legal opinion" .... Or ... he may say the Department of Justice has given an opinion, which the Committee may not see, that the document ... is not a statutory instrument.
>
> The Committee asks why it may not see the Department of Justice's opinion .... The officer refers to the Deputy Minister of Justice's views on the role of the Department ... which preclude the divulging of such information to the Committee.
>
> The Committee ... is utterly thwarted. Reference to outside counsel or to the Law Clerks is useless because the Department of Justice must surely not afford to them what it has withheld from the Committee.
>
> A report to the two Houses is impracticable on a document the Committee has not seen and in respect of which the Government relies on an undisclosed opinion of the Department of Justice.

[16] It would be advisable to clearly distinguish notices regarding regulations under proposed legislation, as opposed to existing statutes. In particular, to avoid any suggestion that a government is prejudging the legislature's ultimate decision on a bill, the "timetable" section should indicate subsequent steps in terms of "x months after passage."

[17] At the federal level, a foundation for a comprehensive prior assessment system exists in the form of the SEIA (Socio-Economic Impact Analysis) program. Much of what is proposed in the following discussion of prior assessment constitutes an extension and modification of this program. The Council has adopted the term, "Regulatory Impact Analysis Statement," primarily to distinguish its proposals from the existing federal "Socio-Economic Impact Analysis" program.

The federal SEIA programs which came into effect August 1, 1978, is intended to promote a more thorough and systematic economic analysis of all major new regulations that are primarily social in nature. However, regulations that set fares or rates, or control competition are *not* covered. The new program applies to regulations made in the "health, safety, and fairness" areas. This includes important environmental regulations that have substantial economic costs, and those relating to working conditions in various occupations and to the sale of hazardous goods and food contamination. "Fairness" regulations would relate to protection against fraud, deception, or inaccuracy. The required analyses must describe the direct costs and benefits of the regulation (as appraised by the issuing authority) and also the effects on costs and prices, on the distribution of costs and benefits, the effects on international competitiveness of Canadian industry, and the regional impacts of the action proposed. These economic impact studies would only be required when the estimated annual economic costs of the regulation are $10 million or more and thus would imply not more than a dozen or so studies in a year (see footnote 22 below). The program requires that a summary of the socio-economic analysis be published along with the draft regulation in the *Canada Gazette*, and that the report as a whole then be available on request. The first SEIA summary was published in the *Canada Gazette* Part I on March 24, 1979 (pp. 1803-1806), along with a draft regulation that would proscribe the use for many purposes of chlorofluorocarbons because of the serious danger they cause to the ozone in the stratosphere. In this case, it was not possible to quantify the value of the benefits to Canadians, and the social costs were estimated at less than $10 million. However, the summary report did compare the cost effectiveness of the proposed regulation in reducing pollution with alternate courses of action. At the provincial level, the Province of Manitoba is in the process of developing a system that would require departments advancing new regulations to prepare some form of economic assessment of their proposals. For a discussion of the U.S. experience with economic impact analyses, see Fred Thompson, "Regulatory Reform and Deregulation in the United States" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming); and James C. Miller III and Bruce Yandle, eds., *Benefit Cost Analyses of Social Regulation: Case Studies from the Council on Wage and Price Stability* (Washington, D.C.: American Enterprise Institute, 1979).

[18] Under the federal SEIA program, the requirement for preparation of the analyses, the procedures, and the methodology are contained in Chapter 490 of the federal *Administrative Policy Manual*, issued and approved by the Treasury Board. The chapter was developed by Treasury Board staff in close consultation with line departments. The Technical Advisory Group, under the Treasury Board Programs Branch, provides advice and assistance to departmental personnel who carry out the required analysis.

[19] The federal SEIA requirements (Canada, Treasury Board, *op. cit.*, p. 16) state that each analysis must contain a section on alternatives as follows: "identification of all technological and policy-instrument alternatives considered and discussion of the feasibility of each alternative, including status-quo alternative; for each feasible alternative, costs and benefits should be identified, estimated and compared as is appropriate." In light of the number of analyses that will have to be undertaken, this level of detail is probably impractical and should be scaled down.

[20] When, for whatever reason, proper cost-benefit analysis cannot be undertaken, a cost-effectiveness study should be carried out in which a comparison is made of the cost and quantifiable results of each alternative considered.

The federal SEIA requirements (Canada, Treasury Board, *op. cit.*, p. 14) state that "An analysis of the impact of the following non-allocative factors shall be presented wherever appropriate: income distribution and regional balance, technological progress, market structure and competition, output and employment, balance of payments and international competitiveness, energy consumption, and inflation." This seems too ambitious. Requiring a less comprehensive analysis, especially during the initial "break-in" period, is likely to improve the chances for success of a prior assessment system. As expertise and experience are developed and after the system itself has been subjected to a cost-benefit analysis, more sophisticated analysis can be considered.

[21] In the United States, all federal regulatory programs are subject to some form of *ex ante* or prior analysis. A recent report by the Committee on Governmental Affairs, U.S. Senate, Study on Federal Regulation, Vol. VI, *Framework for Regulation* (Washington, D.C.: USGPO, December 1978, p. xxiv) notes that prior analysis is more easily applied to direct economic regulation, but that it should also be done for health, safety, and environmental programs. See Miller and Yandle, *op. cit.*, for examples of evaluations of social regulation. In Canada, the federal SEIA requirements (Canada, Treasury Board, *op. cit.*, p. 6) specifically exclude regulations dealing with "economic rate setting"; the Council's proposal would cover all types of regulation aimed at influencing economic behaviour in a significant way.

[22] The Council suggests that for the federal government, the economic cost threshold for a Prior Assessment System initially be set at a level higher than that of the existing SEIA threshold. The SEIA threshold is as follows:

> A proposed HSF regulation shall be considered as *major* if one of the following holds:
>
> (a) the direct and indirect social costs of implementing the proposal will exceed $10 million (at 1979 prices) in a single continuous period of 12 months;
>
> (b) the direct and indirect social costs of implementing the proposal will exceed $10 + 2 x million dollars (at 1979 prices) over a period of x years from the time the first such costs are incurred, when the said costs are discounted to the first year of the period at a real discount rate of 10 per cent, for any x less than or equal to 10. (This means, for example, that if the discounted costs are $15 million in the first two years, the regulation exceeds the cost criteria even if the discounted costs over the first four years are only $17 million);
>
> (c) the direct and indirect social costs (at 1979 prices) of implementing the proposal, discounted at 10 per cent, exceed $35 million over the foreseeable future. (For example, a proposed regulation which would cost $3.5 million a year, forever). (Canada, Treasury Board, *op. cit.*, p. 26).

[23] The cost that should be considered is the total social cost, including compliance costs, which will be generated as a consequence of the regulatory initiative. Pure transfers of income from one group to another should not be included as social costs.

[24] The emergency approval standards and procedures developed under the federal SEIA program constitute a possible model for this aspect of a prior assessment system.

[25] At the federal level, the review function could be undertaken by officials of the Treasury Board. A similar procedure already exists for the review of performance measurement and program evaluation reports by the Office of the Comptroller General. The difference here is that the review would be of a regulatory initiative before it is implemented. If possible, officials who provide advice and assistance to departments and agencies in connection with the preparation of specific RIASs should not perform the review function. It should be noted that if the recommendations in the *Final Report* of the Royal Commission on Financial Management and Accountability (Ottawa: Minister of Supply and Services, 1979) are adopted by the federal government, modifications in the procedure proposed in this report will be required.

[26] See Mullan, *op. cit.*, Ch. 5, for an explanation and analysis of U.S. rule-making procedures with emphasis on the "notice and comment" provisions found in section 553 of the U.S. federal *Administrative Procedure Act*. The advisability of establishing formal hearing procedures in the regulation-making process was considered by the Ontario *Report* of the Royal Commission Inquiry into Civil Rights (the McRuer Commission) (Toronto: Queen's Printer, 1968), the *Third Report of the Special Committee on Statutory Instruments* (the MacGuigan Committee) (Ottawa: Queen's Printer, 1969), and more recently, in the study by Professor Mullan (*op. cit.*). The Council's examination of these matters has not led it to a conclusion on the advisability of a formal hearing process similar to that employed in the United States.

[27] The federal SEIA program, as well as notice requirements in federal statutes, specifies a period of 60 days. (Canada, Treasury Board, *op. cit.*, p. 3). The Council feels that, for major federal initiatives, a longer period may be desirable. This would be especially true in cases in which the regulations affected other departments or had significant federal provincial implications. If the division of federal regulation-making authority could be rationalized between the Governor in Council and individual ministers, the 90-day period might only be required for the more complex initiatives requiring Governor in Council approval. At the provincial level, where communication between the government and the public is likely to be more direct and less costly, a 60-day period might be justifiable.

[28] Achieving such a result would, in most cases, be impossible. Where the distributive effects of a regulatory proposal are well understood, it is highly unlikely that everyone can be seen to be a "winner." Furthermore, to require a government to "satisfy" objections would amount to a significant constitutional limitation on its ability to govern. Finally, there is the problem of determining who should decide whether the government's changes are satisfactory. Normally, this decision is made by the voters on election day (or, in some cases, by the legislature on a vote of confidence).

[29] Under the federal SEIA requirements, the originating department or agency is responsible for "replying to comments made by non-government groups on the regulation as well as on the analysis." (Canada, Treasury Board, *op. cit.*, p. 4.)

[30] Judicial review of the actions of statutory regulatory agencies is episodic (depending on private parties for initiation) and limited in character (dealing with questions of law and jurisdiction). The courts focus almost entirely on issues raised in proceedings of SRAs and not on departmental regulation. They do not, and were not intended to, provide the kind of systematic, broad-gauge evaluation required for regulatory programs.

Cabinet appeal or review applies to an even smaller number of cases, although they are usually matters of some significance, as discussed in Chapter 5. The reviews are generally concerned with essentially judgmental issues of a political, often distributional, nature arising from particular cases and are thus too narrow to perform a broad assessment function. Although the appointment/ re-appointment process is carried out *in camera*, it may be possible to infer the government's approval or disapproval of an individual's or agency's performance from the decision. A major difficulty, however, is that regulatory decisions are collegial and it may be hard to measure the performance of an individual. Furthermore, the technique applies only to statutory regulatory agencies and thus is inapplicable to the majority of regulatory programs that are found within departments.

Ad hoc reviews may be undertaken by Royal Commissions, Task Forces, Commissions of Inquiry, inter-departmental and departmental committees, research bodies such as the Economic Council or the Science Council of Canada, the various law reform commissions, or by legislative committees. Some of the reviews may have the advantage of being more independent, thorough, and publicly available. However, the technique, by its very nature, is not responsive to the need for a periodic, systematic review with broad coverage. *Ad hoc* reviews, which often are established in response to "political" crises, are simply done too infrequently.

[31] Examples include the following: British Columbia forest policy, federal transportation policy, and medical care. The role of royal commissions is discussed in James Eayrs, "Is This Latest Royal Commission Necessary?" Toronto *Star*, May 1, 1975, p. B4.

[32] See Hartle, *op. cit.*; and his other pieces: "Open Letter to Allen Lambert...," *Financial Post*, February 11, 1978, p.7; "Canada's Watchdog Growing too Strong," *Globe and Mail*, January 10, 1979; "The Report of the Royal Commission on Financial Management and Accountability (The Lambert Report): A Review," *Canadian Public Policy*, Vol. 3, Summer 1979, p. 366. It can be argued that no parliamentary democracy has been able to implement successfully a workable system of program evaluation. The difficulties lie not in technical problems (these can usually be solved), but rather in the structure of a system of responsible-cabinet government, which severely complicates the decisions of "by whom" and "for whom" the analysis should be done.

[33] Recent experience in the U.S. government demonstrates the benefits that can be obtained through application of systematic review to existing regulatory activities. The Executive Order (12044) issued by President Carter in March 1978 required executive branch regulatory agencies to review all existing regulations and to remove the obsolete, the contradictory, and the ineffective. The Order produced almost immediate results. The Occupational Safety and Health Administration deleted 1,100 regulations. The Department of Health, Education and Welfare reduced by 25 percent the

number of backlogged regulations and extensively reviewed its existing regulations, reducing the total number of pages by nearly one-third. Predictions of disaster caused by immobilization of the agencies proved to be unfounded. See Fred Thompson, *op. cit.*, and Miller and Yandle, *op. cit.*

[34] On September 30, 1977 the federal Treasury Board issued Policy Circular 1977-47, "Evaluation of Programs by Departments and Agencies." The new system, which applies to all federal departments and agencies subject to Treasury Board review, specified that:

> Departments and agencies of the federal government will periodically review their programs to evaluate their effectiveness in meeting their objectives and the efficiency with which they are being administered.

Responsibility for developing, implementing, and supervising the new federal program evaluation system rests with the Office of the Comptroller General. Deputy heads of departments and agencies were made responsible for the establishment of procedures to ensure that:

- *all* programs are periodically evaluated;
- the results of such evaluations are communicated to deputy heads as well as to other appropriate levels of management; and
- the evaluation reports are objective.

The Policy Circular does not explicitly mention the types of programs subject to the evaluation system. However, it appears that both expenditure and regulatory programs are covered.

Considerable progress has been made toward implementing the requirements for program evaluation specified in Policy Circular 1977-47. Just as the federal SEIA program constitutes a useful model (and, for the federal government, a foundation) for the development of an expanded system of prior assessment, the federal program evaluation system now being established provides the basic machinery necessary for the periodic, systematic assessment of regulatory programs. In essence, the recommendations that follow constitute a modification of the new federal system to provide for legislative review of evaluation reports.

[35] The time-span of three to five years specified in the new federal system may be too short. It is essential that a realistic assessment be made of governments' ability to carry out these evaluations. As in the case of RIASs, the goal should be the production of high-quality evaluations. Given the constraints on budgetary and analytical resources, the number that can be conducted to meet this standard will be relatively few.

[36] With respect to the first option, it should be noted that the Treasury Board Policy Directive 1977-47 requires departments and agencies to develop "evaluation plans" under which all programs are scheduled for evaluation at least once every three to five years. These "plans" are to be filed with the Office of the Comptroller General and become a standard by which the managerial performance of deputy heads can be evaluated. The plans will also be provided to the Auditor General and the Public Accounts Committee of the House of Commons. They could, therefore, become public knowledge. The Treasury Board has the authority to request alterations to the evaluation schedules established by departments and agencies. The second option ("sunset" provisions) would require periodic, mandatory review and re-authorization of regulatory programs (e.g., the present federal *Bank Act*). The cycle for re-authorization established by the sunset provisions would determine the schedule for the periodic evaluation system.

Under the third option an "evaluation calendar" could be established by a legislative committee which could also undertake review of evaluation reports. (See the discussion of "Reviewing the Results" in text.) Good planning and the need to reduce partisan "gamesmanship" would suggest that the evaluation calendar be set for three years in the future. Alternatively, part of the calendar could be fixed and part could be variable (chosen one year in advance). The variable component would allow the government to choose one or two programs and the opposition to do the same. Therefore, if four major programs were to be evaluated each year, two would be fixed three years in advance and the government and opposition could specify one each, one year in advance.

[37] See, for example, Roger D. Behn, "The False Dawn of Sunset Laws," *The Public Interest*, No. 49, Fall 1977, pp. 103-117; Barry Mitzman, "Sunset Laws: Why They Aren't Working," *The Washington Monthly*, Vol. 11, No. 4, June 1979, pp. 48-51; and Paul J. Halpern "The Sunset Concept and the Process of Regulatory Reform" (unpublished paper prepared for the American Bar Association's Commission on Law and the Economy, May 26, 1977). More positive views on sunset legislation can be found in Bruce Adams and Betsy Sherman, "Sunset Implementation: A Positive Partnership to Make Government Work," *Public Administration Review*, Vol. 38, January/February 1978, pp. 78-81; and Subcommittee on Intergovernmental Relations of the Committee on Governmental Affairs, United States Senate, *Sunset Act of 1977* (Washington, D.C.: USGPO, 1977).

[38] The legislative review committee could, from time to time, ask the government to make special reports on programs or agencies not on the schedule or request that the timing of certain evaluations be changed. Unless the committee were given independent authority to make such requests, approval of the legislature would be required.

[39] An evaluation of "other means" should include consideration of the consequences of eliminating, reducing or expanding the program. The potential effect of changes in institutional design and/or changes in administration of the program might also be addressed. In addition, if regulation is still thought to be appropriate, it might be asked if the legislation, regulations or resources allocated are suitable to the task.

[40] Under the new federal program evaluation system, evaluations are to be conducted by the departments or agencies themselves. The Office of the Comptroller General provides assistance in the identification of programs capable of evaluation, in the development of an evaluation schedule, and in the execution of individual studies. The methodology is not standardized. Although the Treasury Board will monitor the implementation of department or agency "plans" and can request copies of individual evaluations for review, the departments or agencies are not obligated to submit evaluations to a managing agency. Obvious candidates for review by an independent official would be the federal or provincial Auditors General. A variation might be evaluations carried out by the staff of legislative committees.

[41] There is an obvious problem of self-interest in the perpetuation of a program or agency when self-evaluation is allowed. The problem can be met in part by settling the evaluation function on a separate departmental or agency unit that is not involved in program delivery and that reports directly to

the deputy head. This technique has been adopted in the new federal program evaluation system. Use of outside consultants could also provide new perspectives and help to ensure greater objectivity. Departments may use outside consultants, but are not required to do so, under the present federal system. Perhaps the most powerful technique, however, would be the inclusion of a review function in the Periodic Evaluation System.

[42] As noted in connection with the Prior Assessment System, it would be preferable that officials who provide advice and assistance to departments and agencies regarding the preparation of specific program evaluation reports not perform the audit function. Under the new federal program evaluation system, the Treasury Board has authority to undertake "spot checks" of evaluations. The Council understands that at the outset, the purpose and emphasis of such checks will be to ensure that the procedures for evaluation are in place and operating.

[43] The principle of legislative review for program evaluations was endorsed by the federal government in the Speech from the Throne of October 11, 1978:

> In the further promotion of open and efficient government, a proposal will be placed before you to provide for the review by Parliament of evaluations by the Government of major programs.

At the federal level, a legislative review function could be undertaken by any one or more of the following:

- the present Standing Joint Committee on Statutory Instruments and other Regulations;
- the relevant Standing Commons Committee for the department or agency;
- the present Public Accounts Committee of the House of Commons;
- a new Regulatory Program Evaluation Review Committee, which could be structured either as a standing joint committee or as a standing commons committee; or
- a new Program Evaluation Review Committee, which could be structured either as a standing joint committee or as a standing commons committee.

The Council does not possess sufficient information regarding all the provincial legislatures to justify its expressing an opinion regarding the best arrangement for provincial legislative review committees.

Although all evaluation reports should be referred to the review committees, it is unlikely that a committee devoted entirely to the review function could handle more than four or five reports a year. If, at the federal level, procedural changes were implemented to allow Commons committees greater independence, some evaluation reports not reviewed by a specialist Program Evaluation Review Committee might be examined by the Standing Committee responsible for the subject matter in question.

[44] See G. Bruce Doern, *op. cit.*

[45] Freedom of information has been the subject of several Canadian studies in recent years. See, generally, Robert T. Franson, *Access to Information, Independent Administrative Agencies*, a study prepared for the Law Reform Commission of Canada (Ottawa: Minister of Supply and Services Canada, 1979); J. Murray Rankin, *Freedom of Information in Canada, Will the Doors Stay Shut?*, a research study prepared for the Canadian Bar Association (Ottawa: Canadian Bar Association, August 1979); Richard D. French, "Freedom of Information and Parliament," paper presented at the Conference on Legislative Studies in Canada, Simon Fraser University, February 1979; Canada, Secretary of State, *Legislation on Public Access to Government Documents* (Green Paper) (Ottawa: Minister of Supply and Services, 1977); and Research Publications prepared for the Ontario Commission on Freedom of Information and Individual Privacy. See also Gordon Robertson, "Access to Government Documents," *Proceedings*, the annual conference of the Institute of Public Administration of Canada, Halifax, N.S., September 8, 1976. Two provinces have enacted freedom of information legislation. In Nova Scotia, the *Freedom of Information Act*, S.N.S. 1977, c. 10, came into force on November 1, 1977. The New Brunswick *Right to Information Act*, S.N.B. 1978, c. R-10.3, was assented to on June 28, 1978, but has not yet been proclaimed. On October 24, 1979, the federal government introduced Bill C-15, the *Freedom of Information Act*.

[46] Royal Commission on Australian Government Administration, *Report Appendix*, Vol. 2 (Canberra: Australian Government Publishing Service, 1976), A Draft Bill for a Freedom of Information Act, section 31(2)(f)(g); *Freedom of Information in Canada, A Model Bill* (Ottawa: Canadian Bar Association, March 1979), section 22(2)(f)(g).

[47] 5 U.S.C. 522 (b) (5).

[48] Australian Draft Bill, section 31(2)(m); Canadian Bar Association Model Bill, section 22 (2) (1).

[49] For a complete discussion of notice and comment periods and hearings on rule-making procedures in a Canadian context, see David J. Mullan, *op. cit.*

[50] For more detail on the factors that impede effective participation in the public decision-making process by large, thinly spread interests, see M.J. Trebilcock, "Winners and Losers in the Modern Regulatory System, Must The Consumer Always Lose?" *Osgoode Hall Law Journal*, Vol. 13, No. 3, Dec. 1975, pp. 619-647; "The Consumer Interest and Regulatory Reform," in G. Bruce Doern, ed., *The Regulatory Process in Canada* (Toronto: Macmillan of Canada, 1979), pp. 94-127; and W.T. Stanbury, "The Consumer Interest and the Regulated Industries: Diagnosis and Prescription," in Karl M. Ruppenthal and W.T. Stanbury, eds., *Transportation Policy: Regulation, Competition, and the Public Interest* (Vancouver: The Centre For Transportation Studies, University of British Columbia, 1976), pp. 109-155. Some discussion of general funding for "public interest intervenors" can be found in *Northern Frontier, Northern Homeland; The Report of the Mackenzie Valley Pipeline Inquiry*, (the "Berger Report") Vol. 2, *Terms and Conditions*, Appendix 1, p. 225 *et seq.* (Ottawa: Minister of Supply and Services, 1977) and Canada, *Alaska Highway Pipeline Inquiry* (the "Lysyk Report"), Ch. 10, p. 141 *et seq.* (Ottawa: Minister of Supply and Services, 1977).

The more limited issue of cost awards in proceedings before regulatory bodies has been examined in detail in Consumers' Association of Canada, Regulated Industries Program, *Cost Awards in Regulatory Proceedings; A Manual For Public Participants* (Ottawa, 1979).

An extensive discussion of both the impediments to "public interest group" participation in the United States and the

issues involved in providing support to such groups is found in Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, United States Senate, *Public Participation in Federal Agency Proceedings, S. 2715* (Washington, D.C.: USGPO, 1976); and Committee on Governmental Affairs, United States Senate, Study on Federal Regulation, Vol. III, *Public Participation in Regulatory Agency Proceedings* (Washington, D.C.: USGPO, 1977).

Notes to Chapter 7

[1] See, for example, Walter Williams and Richard F. Elmore, eds., *Social Program Implementation* (New York: Academic Press, 1976); J. Pressman and Aaron Wildavsky, *Implementation* (Berkeley: University of California Press, 1975); Eugene Bardach, *The Implementation Game* (Cambridge, Mass.: MIT Press, 1977); Paul Berman, "The Study of Macro and Micro Implementation," *Public Policy*, Vol. 26, No. 2, Spring 1978, pp. 158-184; W. T. Stanbury, I. Vertinsky and P. Vertinsky, "A Contingency Theory of Policy Implementation: A Kantian Inquiry" (Vancouver: University of British Columbia, Faculty of Commerce & Business Administration, Working Paper No. 651, February 1979); and Erwin C. Hargrove, *The Missing Link: The Study of the Implementation of Social Policy* (Washington, D. C.: The Urban Institute, 1975).

[2] Roberta S. Karmel, a Commissioner of the U.S. Securities and Exchange Commission, as quoted in the *Wall Street Journal*, August 24, 1979, p. 10.

[3] The U.S. federal Economic Impact Analysis program was adopted without a significant increase in the resources required by the subject agencies. This result was achieved because the federal Office of Management and the Budget insisted that the program could be implemented through the redeployment of *existing* resources. Most agencies already had a staff of potential analysts with training in economics. See Fred Thompson, "Regulatory Reform and Deregulation in the United States" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming). In Canada, the fact that the SEIA and program evaluation programs are already established minimizes the additional cost of implementing a complete system with broader coverage at the federal level. Developing the necessary resources at the provincial level, however, is likely to be more difficult. As a consequence, the incremental cost of establishing comparable systems would almost certainly be greater for provincial governments. The present provincial systems are described in G. Bruce Doern, "Rationalizing the Regulatory Decision-Making Process: The Prospects for Reform" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, 1979).

[4] Douglas G. Hartle, "The Report of the Royal Commission on Financial Management and Accountability (The Lambert Report): A Review," *Canadian Public Policy*, Vol. 3, Summer, 1979, p. 381.

[5] A recent study prepared for the Business Council on National Issues recommended that, whenever possible, regulations contemplated for a new bill be drafted and accompany the bill at the time it is presented to Parliament. If this is done, such regulations could "escape" the prior assessment procedures unless it is made clear that they should be included. See Thomas d'Aquino, G. Bruce Doern, and Cassandra Blair, *Parliamentary Government in Canada: A Critical Assessment and Suggestions for Change* (Ottawa: Intercounsel Limited, 1979).

[6] Robert L. Stanfield, "The Present State of the Legislative Process in Canada: Myths and Realities," in W. A. W. Neilson and J. C. MacPherson, eds., *The Legislative Process in Canada: The Need for Reform* (Montreal: Institute for Research on Public Policy, 1978), pp. 39-50.

Appendix A

TEXT OF THE PRIME MINISTER'S LETTER TO THE CHAIRMAN OF THE ECONOMIC COUNCIL OF CANADA, JULY 12, 1978

Dear Dr. Ostry:

I am writing to request that the Economic Council of Canada undertake a number of studies of specific areas of government regulation which appear to be having a particularly substantial economic impact on the Canadian economy. As you know, there has developed in Canada a strong concern that increasing government regulation might be having serious adverse effects on the efficiency of Canadian firms and industries and on the allocation of resources and distribution of income. You will recall that First Ministers, in February 1978, "...agreed that the whole matter of economic regulation at all levels of government should be referred to the Economic Council for recommendations for action, in consultation with the provinces and the private sector". In addition, First Ministers expressed concern about the overlapping of federal and provincial regulatory jurisdictions. You will find the relevant paragraph from the communiqué issued from the First Ministers Conference appended to this letter.

I understand that subsequent to the First Ministers' meeting, you consulted with the members of the Federal-Provincial Committee of officials representing all ll governments which was constituted as a result of this agreement to study government regulation and that you have discussed the terms of this reference with them.

In the evaluation of specific areas of government regulation, including regulation of price, supply, entry, product standards and environmental and safety standards, the studies should, among other things, focus on:

—an analysis of the objectives of regulation;

—an analysis of the nature and magnitude of the economic impact of regulation;

—an examination of the regulatory responsibilities of the different levels of government and their rationale;

—an analysis of the processes and procedures relating to regulation;

—an analysis of the techniques and alternative methods of effecting regulatory objectives;

—a determination of whether or not regulation is on balance in the public interest and, if so, whether superior regulatory alternatives are available for obtaining the objectives of regulation with less adverse economic impact; and

—an analysis of the practical implications of introducing specific regulatory reforms including the alternatives of deregulation.

These studies should be designed to provide the Economic Council of Canada with the analyses and information necessary for an interim and final report. The final report in particular should develop guidelines governments could employ in determining what areas of regulation are likely having a significant adverse economic impact and what practical changes in public policies might be undertaken to improve government regulation.

I realize that the development of practical guidelines for improving the process of government regulation in Canada in areas where it is having a substantial economic impact is an extremely complex task but I believe it is also an enormously important one. You will no doubt also want to draw upon existing research in this area as well as research presently underway or contemplated by the different levels of government as well as research in universities, in research institutes and in other countries. During the course of your work, you will wish to consult extensively not only with the Federal-Provincial Consultative Committee that I understand will remain active at least for the term of the Council reference but also with individual federal and provincial government departments and agencies, and the private sector.

The Council's final report should be completed by the end of 1980, with an interim report available by the end of 1979. In addition, you should, in consultation with the Federal-Provincial Committee, prepare a preliminary report for the next meeting of the First Ministers in November 1978. It might well contain a general overview of the issues, focusing on the question of why governments regulate, and an attempt to indicate in a very general way the scope and growth of government regulation in Canada. This report should delineate the research program in some detail, setting out, for example, specific information on the studies referred to above and, in general, filling in details on the research agenda relevant to the completion of the Council's work. I would also like it to set out in some detail the consultative arrangements developed or planned with respect to governments, businesses, trade unions, consumer groups, universities and research institutes.

On this basis and pursuant to Section 10 of the Economic Council Act, I request the Economic Council of Canada to undertake to study government regulation in Canada and the prospects for regulatory reform.

You should discuss with the Treasury Board the provision of the additional resources which the Council will require in order to carry out this reference.

Sincerely,
P.E. Trudeau

Section of First Ministers' Communiqué on *The Business Environment, February 16, 1978:*

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

TABLE B2-1

FEDERAL REGULATORY STATUTES BY YEAR OF ORIGINAL ENACTMENT OR ENACTMENT OF THEIR PREDECESSOR

Type of Statutes	pre-1870	1870-79	1880-89	1890-99	1900-09	1910-19	1920-29	1930-39	1940-49	1950-54	1955-59	1960-64	1965-69	1970-74	1975-78	Number of Statutes in 1978
Agriculture					1	1	1	3			1		1			8
Communications	1					1		1								3
Energy					1	1			2				1		2	7
Environmental and Resource Management					1	1	1			1				3	2	9
Financial Markets and Institutions	5				1	2		3		1				1	1	14
Fisheries	2						1	2	1	3			1			10
Framework	2		2		1	1								2	1	9
Health and Safety	2				2	5	1			1	1		1	2	1	16
Information and Standards:																
Agricultural		1	1		2	1	1	2			1					9
Other	3	1		1	1	1		1				1		3	1	13
Intellectual Property	2				2											4
Occupational Health, Safety and Fairness		1		1	1			1		1				1		6
Transportation	7	5	2			2	2	2		2		1	1	2	2	28
Miscellaneous	1	1						1							1	4
Total	25	9	5	2	13	16	7	16	3	9	3	2	5	14	11	140

Source: Margot Priest and Aron Wohl, "The Growth of Federal and Provincial Regulation of Economic Activity, 1867-1978" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming).

TABLE B2-2

PROVINCIAL REGULATORY STATUTES BY DATE OF ORIGINAL ENACTMENT OR ENACTMENT OF THEIR PREDECESSOR

	pre-1870	1870-79	1880-89	1890-99	1900-09	1910-19	1920-29	1930-39	1940-49	1950-59	1960-69	1970-78	Total*	% enacted after 1960	% enacted before 1920
Alberta	0	3	11	11	10	15	10	16	19	20	29	29	173	34	29
British Columbia	13	8	4	17	10	15	14	18	16	20	12	32	179	25	37
Manitoba	0	15	12	5	5	17	6	13	17	16	15	18	139	24	39
Ontario	20	6	8	8	10	14	17	12	19	20	34	36	204	34	32
New Brunswick	16	4	3	4	6	12	8	15	11	21	18	23	141	29	32
Newfoundland	15	5	3	8	6	9	8	12	7	24	34	29	160	39	29
Nova Scotia	22	3	5	6	7	13	10	12	12	15	23	24	152	31	37
Prince Edward Island	9	4	1	2	2	2	11	12	16	14	20	19	112	35	18
Quebec	30	8	7	4	12	13	17	19	11	8	13	24	166	22	45
Saskatchewan	0	3	12	6	15	23	11	25	20	19	20	28	182	26	32
Total	125	59	66	71	83	133	112	154	148	177	218	262	1608	30	33

*Number of statutes in effect in 1978.
Source: See Table B2-1.

TABLE B2-3

NUMBER OF PROVINCIAL REGULATORY STATUTES BY FUNCTIONAL AREA IN 1978

	Alta.	B.C.	Man.	N.B.	Nfld.	N.S.	Ont.	P.E.I.	Que.	Sask.	Total	%	No. of Statutes Passed in 1960s	1970s
Agriculture & Fisheries	10	12	8	12	10	12	20	13	7	11	115	7.2	16	10
Consumer Protection, Information, and Registration	7	12	6	4	8	8	9	4	7	9	74	4.6	21	25
Culture and Recreation	5	8	8	6	8	9	9	7	9	9	78	4.9	10	10
Energy	14	9	7	5	6	5	6	3	7	9	71	4.4	7	17
Environment	4	4	1	2	1	2	4	1	1	3	23	1.4	7	13
Resource Management	14	11	11	11	11	7	13	4	11	17	110	6.8	10	17
Financial Mkts & Institutions	7	11	5	9	7	9	13	4	9	8	82	5.1	10	14
Framework	11	11	11	11	12	14	12	11	21	17	131	8.1	14	11
Health & Safety:														
Health Facilities	9	6	9	5	8	6	19	6	4	8	80	5.0	14	11
Other	8	8	5	8	9	8	11	5	6	7	75	4.7	11	13
Land Use/Planning	3	2	4	2	4	1	5	3	2	4	30	1.9	7	7
Liquor Licensing	2	2	1	2	2	1	3	1	3	2	19	1.2	0	5
Licensing:														
Professions/Occupations	30	29	31	31	22	29	18	18	28	38	274	17.0	37	30
Business	15	13	7	8	14	10	13	9	12	14	115	7.2	25	35
Occupational Health, Safety and Fairness	8	17	10	10	19	10	15	7	14	9	119	7.4	11	14
Standards:														
Food Products	5	3	3	4	6	2	5	3	4	2	37	2.3	1	0
Other	9	7	6	6	4	10	13	9	7	7	78	4.9	13	14
Transportation & Communications	12	14	6	5	9	9	16	4	14	8	97	6.0	3	16
Total	173	179	139	141	160	152	204	112	166	182	1608	100.0	218	262

Source: See Table B2-1

TABLE B2-4

ESTIMATE OF THE PROPORTION OF GROSS DOMESTIC PRODUCT AT FACTOR COST SUBJECT TO PRICE AND/OR OUTPUT CONTROLS (INCLUDING ENTRY CONTROLS), CANADA AND THE UNITED STATES, c. 1978

Industry of Origin	Percentage of Real GDP by Industry of Origin, 1976		Percentage of GDP Subject to some form of Direct Regulation, c. 1978	
	Canada	United States	Canada	United States
Agriculture	3.371	3.520	.775	.700
Forestry	.715	.290	—	—
Fishing and Trapping	.181	—	.181	—
Mines	3.819	1.189	.800	.276
(Petroleum, Natural Gas, etc.)	(1.492)	(.460)	(**)	(**)
Manufacturing	22.862	25.700	.760	.870
(Food and Beverages)	(3.254)	(1.892)	(**)	(**)
(Petroleum and Coal Products)	(.394)	(1.127)	(**)	(**)
Construction	6.990	5.341	—	—
Transport	6.32	3.949	2.685	2.454
(Rail)	(1.82)	(.867)	(1.820)	(.867)
(Local and Interurban Passenger)	(.57)	(.246)	(.570)	(.246)
(Trucking and Warehousing)	(1.06)	(1.657)	(.795)	(.994)
(Water)	(.51)	(.282)	(.510)	(.226)
(Air)	(.63)	(.648)	(.630)	(.032)
(Pipeline)	(.18)	(.089)	(.180)	(.089)
Communications	2.964	2.767	2.964	2.767
(Telephone and Telegraph)	(1.600)	(1.856)	(1.600)	(1.856)
(Radio and TV Broadcasting)	(.400)	(.222)	(.400)	(.222)
(Post Office)	(.960)	(.690)	(.960)	(.690)
Public Utilities	2.816	1.749	2.816	1.749
Trade	11.367	15.518	—	—
Finance, Insurance and Real Estate	12.036	11.403	9.630	9.122
Business and Personal Services	7.578	7.096	1.200	1.100
(Services to Business Management)	(2.311)	(2.820)	(**)	(**)
(Personal Services)	(1.000)	(1.991)	(**)	(**)
Community Services	11.781	6.293	5.50*	6.70*
(Education)	(6.509)	(.88)	(**)	(**)
(Health and Welfare)	(5.272)	(5.383)	(**)	(**)
Public Administration and Defence	7.388	15.035	—	—
TOTAL	100.0%	100.0%	29.1%	25.7%

Notes: ( ) indicates subtotal
** included in sector total
* primarily health services

Source: Fred Thompson and W. T. Stanbury, "The Scope and Coverage of Regulation in Canada and the United States: Implications for the Demand for Reform" (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, forthcoming).

TABLE B2-5

NUMBER OF PAGES OF REGULATORY STATUTES BY PROVINCE, VARIOUS YEARS, 1873-1978

Alberta	yr.			1915	1922		1942	1955		1970
	pp.			729	1206		1930	2990		3163
B.C.[1]	yr.		1888	1911	1924	1936		1948	1960	
	pp.		255	1287	1755	2235		2543	2663	
Manitoba[2]	yr.	1880	1892	1913			1940	1954		1970
	pp.	236	608	1015			1797	2373		2603
New Brunswick	yr.	1877	1903		1927			1952		1973
	pp.	123	529		877			1032		1864
Nfld.	yr.		1896	1916				1952		1970
	pp.		174	447				1125		2357
Nova Scotia[3]	yr.	1884	1900		1923			1954	1967	
	pp.	339	669		1067			1961	2427	
Ontario[4]	yr.	1877	1887	1914	1927	1937		1950	1960	1970
	pp.	515	725	1253	1494	1867		2203	2623	3140
P.E.I.	yr.							1951		1974
	pp.							603		1263
Quebec	yr.		1888	1909	1925		1941		1964	1977
	pp.		638	1083	1530		2145		2440	2520
Saskatchewan	yr.			1909	1920	1930	1940	1953	1965	1978
	pp.			944	1431	1837	2246	2860	3484	3611

[1] (1897) 806
[2] (1902) 769
[3] (1873) 198
[4] (1897) 1082

Source: See Table B2-1

Regulation Reference Staff for the Interim Report

Director: W. T. Stanbury
Deputy Director: Paul K. Gorecki
Senior Advisor to the Chairman: Gail C. A. Cook

Staff: Judy Bradley
Ida Henderson
Ron Hirshhorn
Cheryl MacDougall-Wilkie
Dawn Murphy
Louise Pharand
Roslyn Raskin
Charlotte St. Clair
Betty Yolkouskie

Consultants: Robert Anderson, Toronto
Carman Baggaley, Ottawa
G. Bruce Doern, Carleton University
H. N. Janisch, University of Toronto
Eric A. Milligan, Ottawa
Margot Priest, Ottawa
R. J. Schultz, McGill University
Fred Thompson, University of California, Los Angeles
Aron Wohl, Ottawa