MODERNIZING ECONOMIC FRAMEWORK LEGISLATION:

A DISCUSSION PAPER

G. Bruce Doern

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A Study Prepared for the Department of

Consumer and Corporate Affairs

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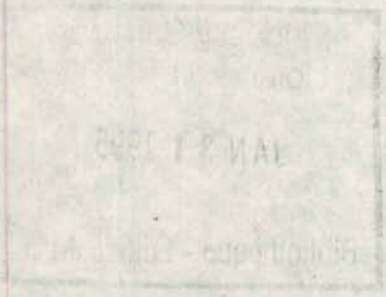

Preface

This study was dependent on the kind cooperation of numerous officials in CCA, elsewhere in the federal government and in the private sector. Their contributions are greatly appreciated. Thanks are also owed to Jean Flowers for her word processing and editorial services.

Bruce Doern
Ottawa,
September 1987

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INTRODUCTION

This study arises out of a growing concern about the Department of Consumer and Corporate Affair's (CCA) capacity to ensure the continuous and timely modernization of its basic economic framework legislation and policy. The department has been criticized over the past decade for its inability to gain passage of new modern legislation in fields such as competition policy, bankruptcy, copyright and other framework areas of basic marketplace regulation. While some progress has been made in the mid 1980s, it is still sluggish.

The purpose of this study is dual in nature. It is first to review the department's experience, especially over the last decade, in attempting to modernize legislation. We examine and attempt to clarify the reasons why the decision process has been difficult. The focus here is on case studies of three areas of legislation--competition, bankruptcy, and copyright--but we also draw illustratively on the experience of other federal departments that administer framework law.

The second purpose is to develop an approach that will both help explain the sluggish performance of the past and also help supply a way of strategically thinking about how the department can secure in future a more continuous modernization of its legislation. It is evident that strategies cannot be single dimensional and thus the discussion of them will explore their strengths and weaknesses and the links among them. The key practical assumption is that future improvements must be rooted in a practical appreciation of both executive-bureaucratic and Parliamentary political and decision processes as well as the larger politics of the interests involved.

The organization of the study is quite straightforward. Chapter 1 defines the key issues involved and sets the background context for the study. Chapter 2 briefly and quite descriptively reviews CCA's experience since the early to mid

1970s with framework legislation, focussing in particular on three case study areas, competition, bankruptcy, and copyright. Chapter 3 revisits the three cases--but also other federal experience--through a more precise analysis of five factors that influence success or failure in achieving legislative and policy decisions. These factors are: consultative strategies and the nature and complexity of interests; the nature of governmental, departmental (CCA) and legislative priorities; the nature of the policy area or field itself; ministers, personalities, and unique timing factors, and the nature of the department and its internal strategic capacity. In Chapter 4 we examine possible ways of enhancing the modernization process keeping in mind the five factors, the interdependence of the key institutions involved and suitable yardsticks of success and failure.

Readers of this study should be conscious, as the author has tried to be, of both the potential and the limits of this type of study. There is a sense in which this paper is an attempt to provide CCA with two things--first, an account of its own history and secondly, a set of questions and a way of viewing the dynamics of change in framework law . It is often true that large organizations lack a significant organizational memory. Officials are obviously aware of some of their department's history some of the time, but it can often be incomplete and limited. Hopefully, this study will supply a somewhat fuller picture, in large part because it has drawn on many officials' (and other persons') accounts of several policy events over a full decade and presents an approach for analyzing them.

Yet there are clearly practical and methodological limits to the approach used in this analysis. The three case studies are presented quite briefly (in part to ensure that they will actually be read) but we do not claim to present a full account of these events as seen by all the players. We are ultimately interested in presenting, especially in Chapter 3, as plausible and sensible an analysis as possible

under the time constraints given for the study, of the factors that influence policy/legislative outcomes. There are invariably multiple and subtle variables at play--a fact which only confirms once again that policy formulation is more art than science.

It also follows then that our proposals and conclusions about how in the future to maximize the probability of continuous modernization of framework legislation cannot produce a magical short "wish list" of reforms. We discuss possible institutional change as it must be discussed, namely as a set of very interdependent and interlocked choices.

The study is based on three principle sources. First, interviews were conducted with about 15 officials and experts, including former ministers and deputy ministers. Second, published literature was reviewed both in the direct CCA mandate area on the general policy process in Canada and on other federal departments. Third, the author has drawn on his own experience with quite detailed research over the past fifteen years on several federal policy fields, including aspects of CCA's mandate.

CHAPTER I

BACKGROUND FACTORS AND ISSUES

Four background factors and issues require an initial introduction. These are: the factors that are contributing to the need for more continuous modernization; the definition of economic framework legislation and policy; the character of CCA as a department and its particular framework legislation; and the criteria for determining if modernization is occuring fast enough.

SOURCES OF THE PRESSURE FOR CHANGE

In general there are three broad sources that are pressing for change. In short, they are propelling the argument that framework legislation must be modernized more effectively and continuously than in the past. The first is technological and economic change. The simple argument is that new and emerging technologies in computers, communications, and manufacturing techniques, are changing at an escalating rate. They are redefining the very nature of how one views heretofore "natural monopolies" and competitive practices. They yield new producers and users of intellectual property, blur distinctions between services and manufacturing, and increase the probability of both more dying and rising firms.

For example, the merged and interwoven use of micro chip computing and data processing with long distance telecommunications including satellites and fibre optics has lead to new patterns of entry and competition in realms of activity previously imprisoned by stable technologies and monopolistic practises. The burgeoning computer software industry has produced new demands to protect software innovations under more modern copyright protections. These are increasingly intricate connections between copyright and industrial design.

Both technological and ideological-political pressures result in calls for the

deregulation of industry to enable markets to flourish. But simultaneously, especially in a more "rights oriented" society, many groups and interests seek new forms of regulation to consolidate their gains or to prevent future losses. Artists, authors and musicians demand a "charter of rights for creators." Unions and workers, seing bankruptcy laws used to obviate collective agreements, seek renewed protections.

The second factor propelling change arises from Canada's obligations to international trading regimes and the pressures, direct and indirect, of foreign governments and economic interests. The fact that other countries have more modern legislation or that Canada's laws must be coordinated with other states itself compels a concern for change. In the medium term, the possibility of free or freer trade with the United States adds additional impetus.

International trading regimes such as GATT increasingly seek to define both the new rules of the "service" economy and ever broader notions of non-tariff barriers. Export consortia and collusion are to be encouraged but domestic market conspiracy prevented. Modern framework laws in all countries must live with a series of compelling contradictions inherent in the very task of "regulating" a "free" market. For Canada, the special connections with the U.S. market and with U.S. law are especially compelling. American pressures on Canada to change patent law, copyright law, and investment law have been strong and continuous in recent years.

The first two factors are easily linked to the third, namely,pressure from domestic interests. They too are plugged into the larger world, feel its pressures, and seek the advantages of the new economic opportunities afforded by the changing technologies. But the domestic interests do not speak with one voice. Indeed, it is the vast array of interests, in their complex pattern as supporters of change, preservers of the status quo, and practitioners of widely varying political

tactics that especially require us to define what economic framework legislation is.

DEFINING FRAMEWORK LAW

Economic framework legislation is defined in this study as any statute whose purpose is to define broad rules for marketplace behaviour that apply across all or most sectors of the economy. This distinguishes it from other legislation that is more sector specific, such as energy legislation or fisheries law. The definition does not prevent debate about some grey zones where general laws impact more directly on some sectors than on others, but it is indicative of a type of legislation that produces a different scale of problems for policy makers and interest groups alike. There will always be, in addition, differences of degree in the extent of the horizontal "stretch" among framework laws. As we show later, competition law has greater framework qualities than bankruptcy law but both are usefully viewed as framework statutes. It is also evident that CCA is not the only department that has to deal with such generic legislation. The Department of Finance and the Department of Labour, among others, have similar challenges to face.

Economic framework legislation is inherently accompanied by three attributes which help determine the nature of the political conduct involved in changing and maintaining it. First, it can be considered as a classic public good. A public or collective consumption good is one that, once produced, is impossible or very costly to withold from a potential consumer.[1] It is available to an individual consumer irrespective of whether he chooses to pay for it. It cannot easily be appropriated by any particular private interests and all interests can more or less share in its benefits. Second, it produces a high probability of both free rider and rent-seeking political behavior. The "free rider" concept refers to the inherent difficulty that "collective rights" associations such as "consumers", "environmentalists" or "tax payers" face in mobilizing membership.[2] Since the

public good they seek, once obtained, cannot be appropriated only by those who joined, non-joiners obtain a free-ride and have no incentive to join. Thus it is difficult to sustain large membership based on ideals alone, that will defend the public good defined for example as a "competitive market", a "clean environment" or as a "simple progressive tax system".

On the other hand, in the absence of special institutions to protect these generalized public interests, it is fairly easy for so-called "rent seeking" behavior to occur.[3] Narrower or special interests, especially producer interests can organize themselves more readily to appropriate "rents" from the public purse or from the regulatory system, especially by preventing change or stalemating the system. In short, it is very difficult for any single interest group to mobilize others to change legislation and fairly easy to prevent change. This suggests either that the state itself must lead the change process or that some form of so-called "peak association" must mobilize the interests by resolving the conflicts and stalemating within the structure of interests. In either case, the political effort will be very difficult.

A third feature of framework legislation is that it is highly technical. Obviously all legislation is technical in the sense that some persons become expert about it and create their own world in and around it. But this core of technicality in framework law is magnified precisely because the laws' effects across several kinds of sectors, regions, firms and industries are even more complex and varied. This technical aspect also produces dilemmas for elected politicians in that it is more difficult to conceptualize and sell change politically either in simple understandable ways for a general voter or for particular interest groups since the benefits to the "collective good" are general and usually longer term.

THE DEPARTMENT OF CONSUMER AND CORPORATE AFFAIRS

The Department of Consumer and Corporate Affairs arguably has a higher proportion of such framework laws and the resultant dilemmas than any other federal department. CCA is responsible, or shares responsibility for the administration of 72 statutes and more than 80 sets of regulations.[4] CCA was formed in 1967 out of an array of previously scattered programs. The specific political impetus in the late 1960s was the emerging consumer movements. In total though the department must be looked upon as an "attorney general" for the marketplace. Its role is inherently ambivalent because it is intended to see that the market and competitive forces flourish, and at the same time to regulate and remove their excesses. It exists to ensure that citizens as consumers, investors, inventors and managers are treated fairly. The minister has responsibility for consumer groups, legal metrology, product safety, the incorporation of businesses, bankruptcy, and patents, trademarks, and other aspects of intellectual property. In addition, within the government it plays a role both through advocacy and warnings, in other department's legislation including fields such as transportation, culture, communication, and energy.

Three additional features of CCA as a department are important each of which will be elaborated on in the course of the analysis. First, its very name implies, at a minimum, a dual clientele--consumers and corporations--that are both diffuse, and whose interests (if one can discover them) must be balanced or at least continuously juggled.[6] In the department's early years and perhaps until the mid 1970s its public personnae seemed tilted more to its consumer clientele, while in the last decade the corporate tilt is arguably more in evidence. Second, the department is perceived to be almost by definition only a modestly influential department in the inherent pecking order of federal ministerial portfolios. This leads to possible tautological reasoning that CCA is uninfluential because it lacks

influence but it is a feature, nonetheless, that cannot be ignored. Inherent perceptions do matter. Third, CCA is primarily a regulatory department rather than a major spending department. This is partly a synonym for the set of framework issues already stressed above but, in addition, regulatory departments face other constraints and greater difficulties in evaluating tasks and performance.[7] Unlike spending which has greater advantages of quantification into some kind of common coinage in public budgets, regulation shows up especially in private budgets which are more difficult to guage in terms of common public policy effects.

This last attribute of regulatory departments such as CCA must also be related to the nature of regulatory - as distinct from expenditure - decision making in the Government of Canada as a whole. The Government of Canada is much more geared-up for expenditure decision making. There is a regular rhythm and cycle of behavior tied to the annual budget envelope-estimates process. The central regulatory priority setting and decision process is rudimentary at best and non-existant at worst. We return to this point later. Suffice it to say at this stage in the paper that this fact affects the conduct of CCA in quite profound ways in part because it makes it that much more difficult to build alliances with the central players. It is also inherent in the general problem of assessing the performance of CCA, or the adequacy of its capacity to modernize framework law.

CRITERIA FOR ASSESSING MODERNIZATION

Given the three issues set out above, one must ask the question regarding how one can tell whether modernization of framework law is occuring fast enough and effectively enough. Are their meaningful criteria of either success or failure? Performance over the past decade seems unsatisfactory because several attempted bills have not been passed.

One could for example compare over the last decade the ratio of bills passed to those given first reading for each federal department. If confined to framework legislation only, this might supply a rough indicator of success. On the other hand, such indicators require further refinement, perhaps, as in diving competitions, a "degree of difficulty" factor. If CCA or Finance simply have more of such difficult framework statutes, then this must be factored in when comparing their legislative output with departments that have less diffuse clientele (e.g. agriculture or fisheries). The purpose of raising this logical point is not to reduce judgement to some trite formula but rather to induce some reasonable limits to the debate about success and failure in "modernizing" legislation.

Such potential interdepartmental comparisons must also be related to the larger pattern of success rates in Parliament as a whole. The most recent independent analysis of the ratio of bills passed to bills introduced shows two trends of importance.[5] Since the mid-1960s, there has been an overall downward trend in success rates from those in the high 80 to low 90 percent rates to the 60 to 70 percent rate. Secondly, success rates are even lower in the last two years of a four year mandate, plummeting to as low as 30 percent.

To posit such criteria, however, is to open up a series of questions regarding other criteria. Presumably one is not just interested in legislative output for its own sake. The quality and effects of modernization are also important. So too is the degree of legitimacy and acceptance of the changes. Two bills passed out of ten attempted but which enjoy acceptance by key interests may be a better batting average than nine bills passed out of ten which do not garner legitimacy. Legitimacy is vital because in practical terms framework laws depend upon vast amounts of private sector cooperation and implementation.

Similarly, at the other end of the analytical spectrum, one must be realistic about what the consequences have been of the cummulative inability to

obtain legislative change. Clearly, the world has gone on despite the lack of modern legislation. Not surprisingly, where laws are not up to the task, markets and private players invent substitutes, either by contractual arrangements, administrative procedures, or consensus guidelines. Equally, however, this cobweb of substitute arrangements produces a set of interests with a strong stake in the status quo which in turn makes future modernization all the more difficult.

These then are the four background factors and issues which set the context for the paper. These are strong technological, economic and political sources of pressure to modernize framework law more rapidly and effectively. Framework laws possess inherent characteristics that make change more difficult than in many other areas of law and policy. CCA has a high proportion of such law to contend with and thus must grapple with the difficult criteria involved in gauging performance and with the complex politics involved in securing changes. Before examining these issues more precisely, however, we need to look first at the three case studies selected for this study. They will enable us to form an initial impression of the dilemmas faced by CCA.

Notes to Chapter 1

1. See Robin W. Boadway and David E. Wildasin, Public Sector Economics 2nd Edition (Little Brown, 1984).

2. See Mancur Olson, The Logic of Collective Action (Harvard University Press, 1965).

3. See Mancur Olson, The Rise and Decline of Nations (Yale University Press, 1982). The analysis in this paper is not intended to support Olson's view of rent-seeking as a theory of general economic decline. We simply note the importance of special interest behavior and the stalemating effect it can, at times, have.

4. W.T. Stanbury and Susan Burns, "Consumer and Corporate Affairs: Portrait of a Regulatory Department," In G. Bruce Doern, ed. How Ottawa Spends 1982 (Lorimer, 1982), pp. 174-175.

5. Robert J. Jackson and Michael M. Atkinson, The Canadian Legislative System 2nd Edition (Macmillan 1980), Chapter 8.

6. Richard W. Phidd and G. Bruce Doern, The Politics and Management of the Canadian Economic Policy (Macmillan 1978), Chapter 11.

7. These issues are discussed in W.T. Stanbury and Fred Thompson, Regulatory Reform in Canada (Institute for Research in Public Policy, 1982) and G. Bruce Doern and R.W. Phidd, Canadian Public Policy: Ideas, Structure, Process (Methuen 1983), Chapters 5 and 11.

CHAPTER 2

THE CASE STUDIES IN BRIEF

This chapter describes very briefly the main chronological events involving each of the three case studies of framework legislation, competition policy, bankruptcy, and copyright legislation. In each case we primarily describe previous efforts at securing reform and we sketch the key interests and issues involved. The more analytical treatment of the cases as a whole begins in Chapter 3.

COMPETITION POLICY

The Department's efforts to change competition policy can usefully be divided into five periods: the early 1970s, the 1975 phase I amendments, the 1979 Discussion Paper, the 1983 Bill, and the 1984-85 legislation.

Following a major reference report on the subject by the Economic Council of Canada, the federal government in June 1971 introduced Bill-C256, the Competition Act. Encompassing 106 pages and an even longer explanatory text, the bill proposed radical changes to the existing Combines Investigation Act.[1] The existing legislation had long been criticized, particularly for its reliance on the criminal law and the almost impossible task of proving that a conspiracy existed where parties had "unduly" limited competition. The key features of the new federal policy included:

1) Ending exclusive reliance on the criminal courts by permitting the establishment of an independent tribunal to rule on economic and business matters.

2) A list of practices to be subject to outright prohibition. These per se offences would arguably be the toughest and most explicit offences under any competition law in the western world.

3) The determination by an expert body of the relative advantages and disadvantages of mergers and a capacity by such a body to rule on the acceptability of specialization and export agreements, trade practices, and other aspects of competition policy in accordance with criteria established in the act.

The reaction of the business community was overwhelmingly negative. The Minister who introduced the bill, Ron Basford, was viewed by the business community as being too pro-consumer and by early 1972, in large part because of business pressure, he was replaced as minister by Robert Andras. The new minister almost immediately indicated that a revised bill would be introduced taking into account business criticisms of the first bill. The autumn election of 1972 produced a minority government and, in its wake, yet another Minister of Consumer and Corporate Affairs, Herb Gray, indicated in 1973 that competition legislation would be presented in stages. Stage I amendments were presented early in 1974 and were eventually passed in October 1975. In the interval, there had been another federal election that reestablished Liberal majority government and the fifth new CCA minister in five years. The Stage I amendments were also strongly criticized by business interests. When finally passed they included such matters as; the inclusion of commercial services, the expansion of provisions on resale price maintenance and misleading advertising, and increases in maximum penalties. This left for Stage II such unresolved issues as mergers and monopolies, price discrimination, consumer class actions, rationalization, specialization and export agreements, and the specialized civil tribunal.

The 1979 Discussion Paper presented by André Ouellet was itself a belated effort to deal with the Phase II issues following the initial introduction of a bill on

the subject in March, 1977. This bill in turn had been preceded by the Skeoch-McDonald Report. The bill was later withdrawn and reintroduced in November 1977. Major business opposition continued throughout this period. The political climate for debate was cumulatively poisoned by a series of accidental and related events. They began with Ouellet's resignation as minister in January 1976 following a conviction for contempt of court, extended through the tabling of the Bryce Royal Commission Report on Corporate concentration which essentially concluded that corporate concentration was not a problem in Canada, and culminated in the 1979 paper which was widely viewed as just a pre-election show piece.

Following the brief Conservative Government interregnum in 1979 and the reestablishment of a Liberal majority in 1980, CCA once again attempted to deal with Phase II issues. Its April 1981 document was sent out to interest groups explicitly as a "framework for discussion" and thus reflected a more concerted effort to consult. Nonetheless, the business community continued to view the federal package as being too structuralist. That is, it was regarded as being driven by an excessive zeal to establish a priori criteria of appropriate market behaviour to be decided eventually by a tribunal. If the business community wanted any Phase II reforms it preferred a regime informed by a more pragmatic case by case approach. The business community's antagonism to the policy and to the approaches being taken reached new heights and included actions such as those of the Canadian Chamber of Commerce which had produced a film and marshalled a speakers bureau to oppose the government's policy.

In addition, parts of the business community began to change their strategy from a reactive to a proactive one. The Business Council on National Issues (BCNI) in particular decided to commit major resources to the process including the drafting of its own version of a bill. Their demand for more detailed involvement

was reinforced within the government, especially in 1982, when Marc Lalonde became the Minister of Finance. Lalonde insisted that the government could only proceed with another round of competition policy change if there was full and detailed consultation. The business community wanted no more surprise unilateral interventions such as the 1980 National Energy Policy and the November 1981 tax reform budget. Within CCA as well there was cummulative frustration with past efforts and a willingness to try something new.

The new approach was to deal directly with the main business lobbies, BCNI, the Canadian Manufacturer's Association (CMA), and the Canadian Chamber of Commerce (CCC), later dubbed the "gang of three." In effect the approach was to say to these business interests "we want an acceptable new bill. We're willing to play ball. Are You?" With fresh memories of previous failure, and with the impact of the 1982 recession even fresher, the business groups were also interested in progress. The business interests set out two requirements for the process. First they wanted to get the policy right. Second, they wanted to see the legislation in detail because they believed that no set of officials could possibly know such details as well as the business community.

The desire to get the policy right meant that in effect the business interests had to become more structuralist and deal with matters such as the threshold levels to which new legislation applied. The desire for legislative detail meant that CCA had to tilt more strongly to a mixed case by case and clause by clause negotiation of the statute. The consultative process became a defacto negotiation process. An official Justice Department draft could not be used with outside interests, so a new one was prepared and given to the representatives of the BCNI, CMA, and CCC as individuals on condition that they not reveal it to their principals.

By this stage in 1983 a new minister, Judy Erola, had been appointed. CCA was only her second Cabinet portfolio. Since the consultation/negotiations with business were well underway, she basically endorsed the process. CCA had insisted that the representatives from the gang of three be responsible persons and interested in securing new legislation. The working group which consisted primarily of these three representatives and two senior officials in the policy branch of CCA, met virtually twice a week for several months.

Bill C-29 was introduced in Parliament in 1983. Extra strategic advice for selling the policy to Parliament and elsewhere was secured through the firm of Public Affairs International. This reflected an effort by CCA to touch all bases, especially in that delicate grey zone between "doing policy analysis and development" and selling it in a "small p" political sense. Despite these efforts, Bill C-29 languished. In part this was due to some continuing disatisfaction from the business community (including those not included in the gang of three) and a growing sense in 1983 that the Liberal Government was in political decline and might be replaced by a Conservative government more favourably disposed to business.

When the Conservatives came to power in 1984 with an overwhelming majority, a new minister of CCA, Michel Coté, was appointed. New to both politics and to government, Coté was nonetheless given two initial mandates by the Prime Minister. The most immediate was to resolve the festering criticism within the Conservative caucus regarding the implementation of the metric system. The second was the competition bill. The first issue was handled with considerable political skill, and enhanced the minister's reputation, especially in caucus.

On the competition bill the minister, partially reflecting his own small business roots and partially deriving lessons from the most recent CCA experience, insisted on three changes in the process. First, he wanted the gang of three

changed to the gang of five. The two additions were the Grocery Products Manufacturer's Association of Canada, whose leader had been vocal about being excluded from the previous process, and the Canadian Bar Association, which brought both expertise and prestige. Second, he wanted in addition a more visible mode of consultation. This was achieved through the work of the Minister's Advisory Committee on the Competition Bill. Third, he insisted on the need to package the essence of the bill so as to give it a more saleable public personna. This was done by selling it as a measure that would help small and medium sized businesses adapt to the competitive realities of the international economy.

The 1983 and 1984 bills were essentially similar. On conspiracies, the bill retained the criminal law nature of offences but reduced the burdens of proof on the Crown and doubled the penalties on conviction. On mergers, the bill provided for civil procedures adjudicated by the regular courts. In determining if a merger lessens competition significantly the courts are given a list of specific factors to consider. The Director of Investigation and Research must be notified of mergers resulting in a firm with assets or annual sales of more than $500 million in Canada. Advance ruling on mergers can also be made. Other provisions in the bill dealt with abuses of dominant position, export agreements, specialization agreements, and Crown corporations, the latter being brought into the ambit of the act for the first time.

A stage II bill was finally passed in 1985. Even at this stage it seemed to take a special combination of events to secure passage. The new minister had no Parliamentary experience. Legislative committee success therefore depended to a considerable extent on the persistence and skill of the minister's Parliamentary Secretary, Bill Domm. André Ouellett was the chief opposition critic. Though he secured some changes to the final bill, he shared some personal pride of authorship for the legislation as a whole and he knew, moreover, how difficult it had been to

patch together a private sector consensus and how easily it could come apart. The bill also got an extra boost from the opposition when still other former CCA ministers such as Herb Gray and John Turner, now the Leader of the Opposition, spoke supportively.

BANKRUPTCY LEGISLATION

Between 1975 and the mid 1980s six bills have been introduced to modernize bankruptcy legislation, none of which was enacted. The 1949 Bankruptcy Act had been amended in 1966 but all subsequent efforts at statutory change had failed. Most of the bills were forged on the basic recommendations of the 1970 Tassé Committee on Bankruptcy and Insolvency Legislation. A former Superintendant of Bankruptcy, Tassé proposed a completely new statute that would establish an integrated and comprehensive bankruptcy system. It would provide for the orderly and fair distribution of a bankrupt's property among its creditors and permit an honest but unfortunate debtor to obtain a discharge from debt, subject to reasonable conditions. This was the core objective of the 1949 statute but the full bankruptcy and insolvency agenda from the Tassé Report period on to the mid 1980s had evolved well beyond the central creditor-debtor relationship to a more complex interplay of issues and interests. By 1986, a report by an advisory committee had enumerated 12 issues for reform and set out the following objectives for modernization of the statute.

- Bankruptcy legislation should be fair and equitable. It should establish a proper equilibrium in the balance of power between the debtor, the secured creditors and the unsecured creditors. It should provide for an equitable distribution of the proceeds in a bankruptcy among the various classes of secured and unsecured creditors and at the same time assure fair treatment of debtors.

- Bankruptcy legislation should allow for effective reorganizations and support the maintenance of viable business enterprises. It should promote arrangements between consumer, debtors and their creditors where practicable.

- It should facilitate the rehabilitation of debtors where feasible.

- Bankruptcy legislation should be flexible. It should be able to effectively address special needs and circumstances while considering the interests of different classes of creditors.

- In seeking to ensure fair treatment of debtors, the legislation should recognize the special circumstances of different categories of debtors. For example, the insolvencies of financial institutions (banks, trust companies, insurance companies and securities firms) create special problems which demand special treatment.

- Bankruptcy legislation should encourage commercial morality. It should prevent abuse of the bankruptcy system and treat fairly those who behave honestly in bankruptcy situations.

- Bankruptcy legislation should be understandable and administratively workable in order to provide for speedy and inexpensive liquidation of assets and discharge of bankrupts where alternatives to bankruptcy are not feasible.

Space does not permit a discussion of all 12 issues but at least three key issues must be highlighted since they bear directly on the structure of interests involved. These are: wage earner protection, commercial reorganizations, and consumer bankruptcies. With these issues as background, we can then discuss somewhat more chronologically the CCA efforts to change the law.

Wage earner protection issues centred on whether wage earners should be given "super priority" ahead of all other creditors as the Tassé Report had recommended and as Bill C-60 in 1975 had provided for. The entrenched creditors, especially banking interests, strongly opposed this idea, while organized labour supported it. Moreover, there were severe practical problems in that there is no absolute certainty that the wages owed would actually be paid or paid expeditiously. The Senate Committee which reviewed Bill C-60 proposed instead that a government administered fund be established to pay employee wages to a

limit of $2000. The fund option had been established in several European countries. Over the years, as the debate dragged on, the fund option also inevitably raised issues of who would pay for the fund and how big it might become. The politics of "who pays" shifted with the onset of recessions and deficits but also involved genuine dispute about principles. If good bankruptcy law was indeed a public good, then varying cases could be made for financing by all employers, all employees, and governments or combinations thereof--much like unemployment insurance.

A second issue in dispute was commercial reorganizations. The reorganization and rehabilitation of an insolvent business require that its essential assets and organization be kept intact. This cannot be done if creditors are at liberty to enforce their rights. It follows that this period to allow a possible reorganization restricts the rights of secured creditors. In the various bills this provision for possible reorganization was confined to unsecured creditors.

In the early 1980s, especially in the wake of press coverage of American bankruptcy cases, concern arose about both abuses and extensions of this provision in Canada. The Chapter 11 provisions of the U.S. code are more extensive than Canada's in that a petition by a creditor stays proceedings by all creditors and the courts themselves can confirm a reorganization plan. Unions were critical in the U.S. because firms, including those adversely effected by deregulation, were allegedly using the provision to break collective bargaining agreements.

A strong case can be made socially and economically for provisions to enable commercial reorganizations to occur but it is also clear that this is a further threat to the most powerful of secured creditors, especially the banks. There are also difficult practical procedural steps involved in implementing such a provision.

The final issue to be highlighted is consumer bankruptcies. The 1949 legislation and even the 1966 amendments predate the heyday of the modern credit

card consumer economy. In the mid 1980s there were over 22,000 consumer bankruptcies totalling about $1.2 billion in liabilities.The key problem of the present law, which was drafted primarily to deal with commercial bankruptcies, is that it does not provide for an expeditious and inexpensive procedure for an individual with relatively few debts to avoid bankruptcy by making a proposal to creditors to settle the debts in some agreed way. The debtor is also deterred by the current legislation from filing proposals because there is an automatic bankruptcy when a proposal is rejected by creditors. Administrators of the current law have made some administrative procedural adjustments to accommodate the consumer influx, but these are only stopgap measures.

Since consumer interests are by definition diffuse they present the classic political problem for the process of modernization introduced in Chapter 1. Significant numbers of consumers (and their families) are effected and an even larger latent constituency could potentially be effected. But the consumer interest is not easily mobilized to push for change on such an issue. Moreover, the players interested in even individual bankrupt citizens include governments themselves. Thus on matters such as unemployment insurance premiums owed or related "social bills" federal and provincial finance ministers increasingly insisted on their right to a "deemed trust." The government, in other words, is not just a disinterested or neutral referee but a party at interest. Finance ministers, moreover, are better able to lobby consumer ministers than consumer groups are.

Many of the key interests are revealed by the brief account of the three issues highlighted above, but some are not. The banks through the Canadian Banking Association, through individual Senators in the Senate of Canada, and through individual bank pressure have, over the period as a whole, been most supportive of the status quo. They oppose super priority for wage earners and several other proposals that have the effect of reducing their capacity to act as

secured creditors. Labour unions, primarily through the Canadian Labour Congress (CLC) have not persistently pressed for change. They favour super priority and the wage fund but do not want workers to have to pay for the fund. Consumer debtors are represented episodically by the Consumers Association of Canada but the more relevant pressure on ministers comes from particular debtors and firms in specific situations via letters, telephone calls and urgent meetings.

Less evident are the interests which, in whole or in part, make a living out of the bankruptcy process and help it function properly. First there is the legal profession which can be involved on behalf of all parties to a dispute. A second interest consists of the trustees. These are essentially the Chartered Accountants and Certified General Accountants who are individually liscensed as trustees by CCA and who lobby and maintain professional standards through the Canadian Solvency Association. Finally, there are the regulators and the courts, including specialized bankruptcy courts. It is essential to stress that it was primarily through the interplay of these day-to-day interests that an improved professionization of bankruptcy matters had occured despite the absense of statutory change. The bankruptcy business had not had a good public image in the 1950s and 1960s. In the 1960s and 1970s, the provinces also became regulators. Initial provincial legislation on the orderly payment of debts was declared ultra vires by the courts but was later incorporated in federal law with administration delegated to the provinces. Six provinces were involved via this mechanism.

In broad chronological terms, the efforts to modernize bankruptcy law can usefully be broken down into three periods: the mid 1970s, the late 1970s and early 1980s, and the mid 1980s. In each period the issues were much the same but the political climate and dynamics varied.

Bill C-60 in 1975 did not actually reach the House of Commons. Instead, Senator Salter A. Hayden, Chairman of the Senate Committee on Banking, Trade

and Commerce, and a staunch defender of banking interests, succeeded in having the subject of bankruptcy reviewed by his committee. The committee was critical of the bill especially, as noted above, of the concept of super priority for wage earners. This situation prevailed throughout the mid 1970s. Doubts were also raised about just how much the alternative wage fund would cost. Moreover, the rest of the business-government relations climate during this period was not conducive to reform. The Competition Act was being severely criticized and wage and price controls were being imposed under the 1975 Anti-Inflation Board program.

In the late 1970s to early 1980s period, the attempts at legislative reform were frustrated by an explicit lack of ministerial interest in the subject relative to other issues. André Ouellette was the longest serving minister at CCA and made no secret of his lack of interest in this legislation. This situation began to change in 1983 when Judy Erola became minister. In part because of her own experience in running a small business, and even more because of the escalation in bankruptcies among small firms in the wake of the 1982 recession, she wanted to give new bankruptcy law her top priority ranking. But her agenda too was deflected. The latest competition policy round was in full swing and required scarce time. Special mortgage interest rate concerns in the wake of skyrocketing interest rates, metric issues, and the UFFE health and safety issue exacted more "unplanned" political attention. When she sought to obtain approval for a new bankruptcy bill in the Priorities and Planning Committee of Cabinet, there was strong opposition from colleagues on the grounds of both substance and timing.

The first Conservative Minister of Consumer and Corporate Affairs, Michel Coté, and his successor, Harvey André, have to date been similarly preoccupied. Unlike earlier ministers, however, Coté did have some personal professional experience in the bankruptcy field arising out of his previous employment with a

major accounting and consulting firm in Quebec. He therefore appointed a special advisory committee composed of trustees and lawyers from across Canada to examine the bankruptcy system. It tabled its report in January 1986. In view of the past failure to secure wholesale reform, the Cabinet subsequently decided to reform the Bankruptcy Act in phases.

COPYRIGHT LEGISLATION

Compared to the fields of competition policy and bankruptcy, the history of efforts to change copyright law is not that of a series of bills that failed to secure Parliamentary passage. For the better part of the past decade policy has been at the draft proposal, study or white paper stage. Only in May 1987 was legislation tabled. Unlike these areas, copyright has also involved CCA in defacto shared jurisdiction over the field with proposals emanating since 1982 under the joint auspices of CCA and the Department of Communications.

Along with the Patent Act, the Trade Marks Act, and the Industrial Design Act, the Copyright Act constitutes a family of intellectual property laws of growing importance to the modern Canadian economy.[5] About 350,000 Canadians are employed in industries which are dependent on the law of copyright to protect works that are the core of their commercial existence. They are part of an $8 billion industry encompassing broadcasting, journalism, film and television, music and book publishing, sound recording and advertising. The even larger set of intellectual property relationships extend to a series of international treaties and obligations throughout the world. Of no small practical importance is the fact that about 75 percent of the rents earned in Canada by cultural producers on the basis of such protections accrue to Americans.

As a concept of legal rights, copyright is intended to give proprietary rights to creators and authors to reward them for their intellectual labour. Moral

rights are also inherent since the law is intended to restrain others from distorting or destroying their work. Copyright has been tremendously effected by new communications technologies which only complicates the related purpose of copyright regimes which is also to ensure that creativity can flourish for the general public good and new technologies can benefit Canadians as a whole.

Canada's legislation was passed in 1924 and modelled on a 1911 British statute. It is grotesquely out of date. The need to modernize it has long been recognized. Both the 1956 Isley Royal Commission and a 1971 Economic Council of Canada Report stressed the growing commercial significance of intellectual property but neither of these studies lead to significant policy or legislative response.

In the last decade there have been essentially three main phases in the effort to modernize the legislation. These are: 1) the period from 1977 to 1982 when CCA developed a working paper, a series of studies and a consultation process; 2) the period from 1982 to 1984 when CCA and DOC attempted joint initiatives, including the preparation of a White Paper; and 3) the 1984 to 1987 period under the Conservative Government which has tactically adopted a phased approach to legislation with priority put on three "fast track" items. Legislation on these items was tabled in June 1987. Before examining these phases, however, it is essential to have a background profile of the structure of interests and the particular issues that most concern them.

Compared to the previous two cases the structure of private interest groups and interests in the realm of copyright is even more diffuse, and arguably even more devoid of any umbrella organization within which conflict can be resolved and managed. CCA's own list of the main players contains some 45 groups.[6] There are, however, five groups that CCA considers to be umbrella organizations: the Canadian Conference of the Arts, the Conferences des

Associations de Createurs et Creatrices du Quebec, the Canadian Copyright Institute, the Patent and Trademark Institute of Canada, and the Book and Periodical Development Council. These range from groups of creative producers, to technical and legal expert groups, and to users of copyrighted products. But even these bodies do not adequately encompass such groups as the Canadian Association of Broadcasters or groups in the growing semi-conductor chips industry.

In part cutting through these interests and in part separate from them are interests divided along linguistic/cultural lines. Quebec based cultural interests, especially cultural creators, have several avenues of pressure and, for historic reasons relating to Quebec's overall place in Canadian federalism, are a more concerted lobby than English Canadian interests. The Quebec Government, for example, operates its own small copyright office. The Quebec Government itself is extremely vigilant and assertive about cultural matters. Within the federal caucus, in both the Liberal and Conservative parties, there are assertive concerns about French language and culture. Quebec cultural interests tend to be asserted with a strong emphasis on protecting cultural producers.

Compared to the first two cases it is also much more necessary in the copyright case to visualize CCA and DOC as two distinct departmental interests. As a department whose inherent mandate is to play a refereeing role in the market place, CCA has tended on the whole to support the users and consumers of copyrighted material. It has strong concerns about a balanced approach between producers and consumers but has increasingly adopted a pro-market tilt precisely because of the need to act as a counterweight to DOC's pro-producer emphasis. CCA is also more of the conduit for international pressure, especially from American interests desiring changes in Canadian law that would lessen any discrimination against American producers and users.

The Department of Communication's overall mandate need not inherently be pro-producer since it deals with both halves of the communications duality--the medium and the message--but it has gradually devolved into a department that is pro-cultural producer and pro-nationalist.[7] It has fostered alliances and helped nurture some of the creator umbrella groups. Another feature of DOC's policy environment, is that, as the availability of spending and budgetary resources has declined in an era of fiscal restraint, the value of regulatory instruments as substitute policy instruments increases. The Copyright Act thus becomes an even more vital policy battleground. Moreover, like many regulatory instruments, the announcement and achievement of tough sounding pro producer regulatory change, produces good short term rhetorical politics while all the long term and potentially some adverse consequences are left to be played out in a distant future that is, "out of sight-out of mind" politically speaking.

In the light of these configurations of interest one can begin to understand the chronological efforts to develop new copyright legislation in the three periods set out above. In the period from 1977 to 1982, CCA was the primary initiating body but itself went through its own version of the pro-producer versus pro-market juggling act. Its 1977 Working Paper, Proposals for Revision of Copyright Law, emerged essentially from a small core group within CCA who, as advocates of change, tilted their recommendations strongly towards a Canadian producer protectionist posture. This is not to suggest that there was no recognition of other key features of the copyright reform agenda, but the tilt in the proposed legislation was quite clear. Not surprisingly it aroused strong criticism from outside interests, from other parts of the government, and from other parts of CCA itself.

The result was the launching of a new study and consultation process. Twenty papers were prepared and a large network of groups were consulted. Increasingly during this period from 1978 to 1982, the cultural producer interest

groups sensed that the exercise was CCA's way of delaying the process and of ensuring that eventually a pro-market tilt was secured for the new legislation. These groups increasingly saw the Department of Communications as their natural ally. These same groups, moreover, had been actively wooed by successive ministers of communications, but especially by David McDonald, the minister in the Clark Conservative Government.

In 1982 the DOC Minister, Francis Fox, succeeded in persuading the Prime Minister that there should be joint responsibility for the development of copyright legislation between DOC and CCA. DOC then prepared its own task force report that reasserted its pro-Canadian producer position. It is essential to stress that at least one key official then involved in devising DOC's strategy had been involved in the original CCA working paper of 1977 which had taken the initial CCA pro-producer tilt.

In 1983 and 1984, the two departments cooperated to the extent of presenting a joint memorandum to Cabinet on the subject which helped pave the way for the preparation of the 1984 White Paper From Gutenberg to Telidon. These joint endeavours, however, must be seen in the context of the preoccupations of CCA ministers. André Ouellette accorded only a moderate priority ranking to Copyright changes. But as a minister with major regional political responsibilities regarding Quebec and the Quebec caucus, he had to be very mindful of the pressures borne by his fellow Quebec minister, Francis Fox. Later, when Judy Erola became minister, the configuration of priorities and pressures changed. For Erola, there was a personal preference to resolve the bankruptcy backlog but even these areas, as we noted above, were overwhelmed by other events and aspects of the mandate. Erola developed a personal interest in copyright but it was not her central preoccupation.

In general, however, the 1984 White Paper did strike a more demonstrable balance between the pro-producer and pro-market postures. The government also announced its intended changes and thus one can argue that the change process was being advanced, albeit tortuously. But at the same time, the proposals were very complex with a broad mixture of real, potential, or simply "feared" impacts on the many interests involved.

In the most recent phase under Conservative Government ministers, another version of these balancing acts has been attempted. However, a somewhat different division of labour, tactical and substantive, occurred. Marcel Massé became Minister of Communications and secured agreement from the Prime Minister that he would play the lead role in copyright legislation as an instrument of cultural policy. The CCA minister, Michel Coté, would have the lead role on the "high tech" computer related issues and on the administrative system. DOC's search for strong regulatory policy instruments became even more pronounced at this stage in part beause very severe expenditure restraint cut backs were denying the department any new spending leverage. Massé was also a very strong personality in the context of the Quebec political situation where the government was particularly anxious to consolidate its new found political base.

The pro-Canadian producer tilt reappeared during this stage, however, and was aided and abetted by the report of a Parliamentary Sub-Committee which recommended a "charter of rights for creators." The government's subsequent generally favourable reply to the idea of such a charter created even higher expectations in the Canadian cultural community.[8]

On the CCA side of the new division of labour, there remained opposition to this renewed tilt but, in addition, there were agenda pressures of a separate kind. These came from international and domestic user groups where the need to modernize copyright law was most pressing. These included issues such as

computer programs, piracy, and relationships between copyright and industrial design. In July 1986, CCA persuaded Cabinet to agree to early legislation on these three "fast track" items of supposedly non-controversial policy. A bill was tabled in May 1987 and, as a result, the government has in fact adopted a two-phase approach to modernizing copyright law.

OTHER CCA LEGISLATIVE AREAS

Our focus in the chapter and in the study as a whole is on the three legislative areas examined above. It is factually important to note, however, that CCA secured legislative change in some areas during the last decade. The most recent, and of no small importance are changes in the Patent Act and the transformation to the metric system. In addition, relatively speedy legislation was secured in areas such as the Tax Rebate Discounting Act. Space does not allow any examination of these cases, but the reader should keep these in mind when assembling any total report card on the department.

CONCLUSION AND SUMMARY

This chapter has presented a perilously brief account of CCA's experience with three areas of framework legislation. The main chronological phases of attempted reform in each case have been presented. Our concern here is simply to understand broadly what has happened. We have also set out a basic profile of the interests involved and of the substantive issues that most concerned them. Where possible the cases indicate the rough preferences and strategies of various ministers as the reform efforts unfolded.

Thus far the account has proceeded as if the three were in no way connected with each other. In fact the three are linked not only by virtue of their all being framework laws but, more importantly, by the simple fact that they were

each attempting to muscle in on their minister's agenda. As three separate stories, the cases do not yield a picture of legislative success. Only one area reached a plateau of actual change. Competition policy was ultimately changed in part through a fear of further failure and through more sensible and practical consultation. The key question inherent in the study is, "Can one learn and act more quickly, and more regularly to change such framework law in an era of continuous technological and economic change?" And if so, how? Before we can address these questions we need to revisit the cases as well as other CCA and federal public policy making experience in a more analytical way.

Notes to Chapter 2

1. See W.T. Stanbury, Business Interests and the Reform of Canadian Competition Policy 1971-1975 (Toronto: Carswell Methuen, 1977). The account of the early 1970s draws extensively on Stanbury's analysis.

2. See W.T. Stanbury and Susan Burns, "Consumer and Corporate Affairs: Portrait of a Regulatory Department" in G. Bruce Doern How Ottawa Spends 1982 (Toronto: Lorimer, 1982), pp. 190-191 and D.J. LeCraw, "Proposals for Amending the Combines Investigation Act--A Business Economist's Views," Canadian Business Law Journal, Vol. 5, No. 4, September, 1981, pp. 438-469.

3. See Consumer and Corporate Affairs Canada, Backgrounder to Competition, March 1984.

4. Report of the Advisory Committee on Bankruptcy and Insolvency. Proposed Bankruptcy Act Amendments. (Ottawa: Minister of Supply and Services, 1986), p. 20.

5. Canada, From Gutenburg to Telidon: A White Paper on copyright (Ottawa: Minister of Supply and Services, 1984).

6. Consumer and Corporate Affairs, "Main Players in Copyright." Ottawa, July 1986.

7. See Luc Fortin and Conrad Winn, "Communications and Culture: Evaluating an Impossible Portfolio." in G. Bruce Doern, ed. How Ottawa Spends 1983 (Toronto, Lorimer, 1983), Chapter 8. See also Paul Audley, Canada's Cultural Industries (Canadian Institute for Economic Policy, 1983).

8. A Charter of Rights for Creators. Report of the Sub-Committee on Communications and Culture. (Ottawa: Minister of Supply and Services, 1985) and Canada, Government Response to the Report of the Sub-Committee on the Revision of Copyright (February 1986).

CHAPTER 3

FACTORS INFLUENCING LEGISLATIVE AND POLICY DECISIONS: THE THREE CASES AND RELATED FEDERAL EXPERIENCE

Static and separate descriptions of three case studies is one thing. Explaining the varied decisions, decision processes and outcomes over an entire decade, is quite another. The larger task involves an appreciation of the dynamics involved as both process and substance constantly intermingle. In this chapter we analyze this more difficult terrain by re-examining the three cases as a whole as well as examples of federal experience in other federal policy fields. CCA's performance, as revealed through the cases, is explained as being the product of an interplay among five factors: the nature and complexity of interests and the consultative strategies employed; the nature of governmental, departmental and legislative priorities; the nature of the policy itself; ministers, personalities and unique timing factors; and the nature of the department and internal strategic capacities.

THE NATURE AND COMPLEXITY OF INTERESTS AND THE CONSULTATIVE STRATEGIES EMPLOYED

In the discussion of this first factor it is important to keep in mind three definitional issues: interests versus interest groups, peak associations, and the several purposes and kinds of consultations. Distinctions between interest groups and interests are vital. The former are aggregations of individual members and companies whose capacities are usually limited to lobbying and supplying (or witholding) information. Interests, on the other hand could be individual companies (especially large ones), individual provinces (or groups of provinces); other federal

departments; and other foreign governments. Such interests are more likely to have actual capacities to act, that is, to invest or disinvest, regulate, tax or confer and withdraw favours. In the case of the provinces,important constitutional and jurisdictional issues and powers can be at stake.

In dealing with interest groups and interests that, by definition, stretch across sectors (the essence of framework law) the notion of "peak associations" is also important. The search is for an entity that can traverse the interests and groups, speak for them, help resolve conflicts among them, and perhaps act and negotiate for them. Since the values of freedom of association are democratically ingrained and since the agenda and issues across the framework law areas vary widely, such peak associations are hard to find or create and are likely to be unstable. If our largest peak associations - political parties - have some of these qualities, then they apply even more to peak associations of interest groups and interests.

The fact that there are various purposes and kinds of consultation follows logically from the above points about interests, interest groups and peak associations. Consultative strategies can be logically and plausibly launched to: a) exchange views and information; b) arrive at trade-offs regarding priorities; c) negotiate actual decisions (including the detailed content of legislation) or d) all of the above. In each case the act of strategizing about these activities can be carried out by the government or by the other players. It is not a unilateral activity. In the full panoply of consultation, individual decision makers (leaders) for the interests and interest groups also face realities and judgements about "principal-agent" problems. Can the agent one is dealing with bring along the principal? Does CCA's minister have cabinet or prime ministerial backing? Can the interest group or peak association leader carry the day among its members? Will the consensus unravel when the agents or principals return to their home turf?

As the consultative strategies - in short, the politics - are employed the government may also engage in a form of reverse lobbying. An outside interest or group may succeed in having its core proposal adopted but the government as its price for agreement will add on other items important to its agenda or to its perception of current inadequacies in policy.

In terms of consultative strategies, the three cases reveal experimentation with the full gamut of policy formulation and consultative devices and arenas.[1] These include: internally generated and therefore somewhat more unilateral CCA proposals and working papers; commission, task force or advisory committee reports followed by meetings and consultations; white papers; Parliamentary committee reviews of the subject matter or of actual legislation; and (in the Competition Case only) a process of defacto negotiation with key interests of legislative content on a clause by clause basis.

Since we are dealing with a decade or more of history in each case in which many of the key players were different at each stage, it is misleading to regard the use of these mechanisms as a whole as "strategies." Strategies imply a concerted view of how to coax, cajole and manoeuver interests into some agreed upon end result. It implies continuity of thought and action. Policy strategy at this level implies being political not in a partisan sense, but in the sense of having to deal with power.[2] All policy with serious intent involves changing people's behaviour in some intended preferred direction.

When viewed with hindsight over a whole decade, one senses not strategy per se but rather a series of experiments. Only the mid 1980s phase involving the virtual negotiation of new competition legislation with key interests seems to contain some strategic sense of direction. But even here, it took equal willingness on the part of key business groups to actually achieve change with the "gang of three" forming a temporary peak association.

The three cases all involve a very diverse set of interests on both the producer and consumer sides of the market. Interest groups on both sides are very numerous and difficult to mobilize but the difficulties are undoubtedly greatest on the consumer side. The consumer side includes ultimate end consumers which suffer from the greatest "free rider" problems in political organization, but it also includes intermediate users who are simultaneously producers of other products.

The producer interest groups are somewhat more cohesive than consumers' interests but are still not organized into any single "peak organization" with which CCA could consult and/or negotiate.[3] The Competition Case saw a hybrid peak mechanism emerge, especially through the "gang of three" but this happened only after a decade of previous efforts. There are severe limits to CCA's inherent capacity to arrange for these peak mechanisms since the relationships of power must, to a considerable extent, be arranged within and among the diverse groups involved. The Competition Case also involved virtual defacto negotiation rather than the other kinds of consultation referred to above.

Neither of the other two cases produced a peak mechanism sufficiently strong and stable to "do a deal." What did emerge were smaller groups or blocks of power which were sufficiently strong to help prevent change. Banking interests performed this role in the Bankruptcy Case and, in the Copyright Case, Canadian cultural producers, coalescing around the Department of Communications, were able to checkmate the process.

To examine the structure of interests inevitably suggests a focus on private sector interest groups. But the chronological account of the cases undoubtedly underplays not only the other ways in which private interests channel their influence but also the role of governments and government departments as distinct interests. The former can involve private interest groups utilizing ministers such as the Minister of Finance or important regional ministers to convey support or

displeasure for policy or for fears about rumoured policy. Foreign firms and interest groups also exercise influence through the direct pressure of the U.S. government on either the Minister of External Affairs or on other federal line departments. Provincial governments as a whole or individually, such as occurred in the Bankruptcy field or in Copyright, must also be viewed as distinct interests who do not necessarily function in the same channels of influence as regular interest groups do.

A brief reference to other federal policy development experience may be useful at this point so as to give the CCA experience a larger set of reference points. In each case one can argue broadly that a form of framework legislation is involved and a similar diverse array of interests exist as in the three CCA case studies. Three other fields will be noted illustratively in this regard, namely: transportation freight rates concerning the historic Crows Nest agreement; tax reform; and Bank Act revisions.

The Crows Nest Agreement was a statutory provision that subsidized western grain freight rates for most of this century. The Ministry of Transport (MOT) had sought on several occasions in the 1970s to change the Crow, but each time ran into opposition from key prairie interests, including some provincial governments. In 1982 a new initiative was attempted.[4] Several seemingly unique factors created a new "window of opportunity" for a renewed effort. Space does not allow a full account to be given here of these factors, but they certainly included the fact that booming energy revenues in 1980-81 helped make possible a $2 billion fund designated to be spent on Western Canada. MOT seized the initiative and the subsequent changes that were achieved became the product of three distinct stages two of which were well "strategized" and the last of which was not.

The first stage involved a process of actively encouraging several heretofore latent groups who stood to benefit from the Crow changes to press for change. A later stage involved the minister appointing a special "federal representative." At this point broad policy principles were set and so was an outer financial limit. The representative then called in the main groups to Winnipeg, and in a brief period of time, coaxed, cajoled and muscled the groups into agreement. Later legal experts from the same groups sat down over several days with the MOT deputy minister present at most of the sessions and hammered out the legislative detail. However, just as the bill reached the house, one major change occurred which significantly altered its content. This was due to a sudden last minute lobby by the Quebec caucus in alliance with some traditional prairie groups. This last lobby took the MOT planners by complete surprise. Major changes were made to the old Crow agreement but the last minute partial defeat was regretted deeply by MOT's team. The 1983 Crow reform package followed decades of frustration and failed attempts and was secured only after a heavy (and risky) dose of ministerial policy entrepreneurialism, some supportive interest groups, special negotiation mechanisms, and hands on interest group legislative drafting.

As a second comparative reference point, consider taxation statutes. Tax legislation is framework law par excellence. But among all framework law for the economy it involves processes which are only partially illustrative of CCA's typical situation.[5] First, in the tax field there is a regular annual opportunity to change tax law centred on the Budget Speech and tax legislation process. Second, it is characterized by the norm of budget secrecy and also by an elaborate, and some say ritualistic, pre-budget speech consultation process. The concept of tax reform paradoxically refers not to this process of annual changes (regular incremental reforms) but rather to a few periodic efforts to redesign the entire system according to some larger normative plan. This presupposes that annual

"reformism" has gradually yielded a monster no one planned and no one really likes.

The two most frequently cited instances of major tax reform (other than the current Wilson initiative) were the Carter Commission exercise of the late 1960s and early 1970s and the 1981 effort in the MacEachen Budget. They were starkly opposite efforts. The first involved elaborate consultation from Royal Commission, to White Paper, to legislative committees. The conclusions reached by most assessors of the Carter exercise was that the resulting change was modest because only powerful interest groups could afford to play the consultative game through its full four year cycle and that they had the greatest stake in the status quo.

In contrast the MacEachen exercise in 1981 involved little or no consultation and was lightning quick. The proposed gains to the average taxpayer were infinitesimely small but the losses to entrenched business interests were large. No effort was made to mobilize a constituency favourable to the basic thrust of reform. The entrenched interests again prevailed.

The tax process and the tax reform dynamics are cited here briefly for two reasons. First, it is the area of framework law that most closely approximates at least one allegedly ideal feature of the change process, namely--it has a clearly identified annual policy occasion and legislative slot reserved for it. If modernization implies continuous annual change, then here we have it in spades. Alas, we also see the downside of rampant incrementalism, namely the need to find still other major occasions to redesign the monster. As we approach the discussion of reforms in Chapter 4 this possibility needs to be kept in mind since it goes to the heart of the question of when change is occurring fast enough and with enough regularity but producing an entire array of unintended consequences. Imagine for example what CCA's life might be like if there was an equivalent for CCA to the Budget speech. We could call it "the Competition Speech" preceded by fixed

annual occasions for groups to line up to propose regulatory - statutory ways to enhance or constrain competition, the analogue to taxing and spending choices in the Budget Speech'

Finally, and with equal brevity, consider the Bank Act revision process.[6] Federal experience with this process supplies another model of how varied interests can be accommodated. In this case one has the closest equivalent to the concept of sunset provisions followed by a deliberate consultative process. Reviews and changes every ten years as prescribed by statute were begun in the 1950s and have been continued since. The process did provide for regular change and accommodation but one which had to be acceptable to the dominant interest involved, the banks. More recent revisions in the late 1970s, however, lead to postponement and delay as the complexities of revision increased, and indeed as the very definition of banking became more problematical in the age of both computers and mass telecommunications.

The Bank Act process is a useful model but it also has its limits. It does have one dominant industry and hence a hybrid peak association one can deal with. The Bank of Canada and the Department of Finance also supply a powerful focus within the government. It must also be stressed that the Bank Act sunset provisions operated at a time when one had almost no other sunset processes operating concurrently. The sunset model as a general reform proposal applicable concurrently to dozens of statutes is a very different political phenomenon than one tried out virtually on its own as the Bank Act was. We return to this point in Chapter 4.

Whether one looks at the three CCA cases or at the illustrative glimpses into the Crow, tax reform, and the Bank Act revisions, it is plain that the inherent structure and complexity of interests is a vital variable and that there are various strategies for dealing with them. The differences between broad consultation and

defacto negotiation, including hands on legislative drafting are also important. The complexity of interests also varies so that it is always important to appreciate the differences in the degree to which the "framework" or public goods attribute is present. For example, the area of tax legislation and competition policy seem to be purer versions of framework law since they stretch horizontally across sectors to the limit. The other cases examined are extensive to be sure, but some, such as bankruptcy and copyright, seem to be somewhat more confined.

THE NATURE OF CABINET, DEPARTMENTAL, AND LEGISLATIVE PRIORITIES

The progress or fate of any single decision or piece of legislation can never be understood in isolation. It must always be explained in relation to the nature of overall Cabinet, departmental and legislative priorities at any given time. The Cabinet decision process, the departmental process and the Parliamentary process are clearly intertwined cycles of behaviour but they are not wholly synonomous.[7] Policy initiatives can either succeed or fail, move through the maze or be shunted to a sidetrack leading nowhere depending on how the three priority setting dynamics occur and interact. At any given time (annual or over a four year mandate) there are 40 departments pressing and jockeying for their place in the priority que, for scarce finances, and equally for scarce political energy and limited attention spans.

The purpose of the Cabinet policy process, it must be remembered, is partly to make policy and partly to prevent policy from being changed. The preventative part can be metaphorically labelled the "pluto theory of policy making." That is, the Cabinet as a whole needs ways in which it can put lower ranking items into distant orbit, perhaps never to be retrieved. So do departments. The Cabinet is partly a coherent collectivity lead by the Prime Minister and three or four other key ministers and partly a loose coalition of unequally endowed

ministers each seeking variously to do good things, enhance personal influence and where possible, stay out of trouble. The central agencies, including the senior officials and their ministers strive to maintain overall coherence even while knowing that they straddle a bundle of policy and program contradictions.

At the departmental level, priority setting is partly a function of particular ministerial preferences but it is also driven by external pressures from interest groups and from other parts of the Cabinet. Regional concerns and regional Cabinet responsibilities can also be vital both in triggering priorities and in deflecting a minister's attention away from previously agreed to priorities. It is almost always necessary for ministers to have two lists of priorities, their real one governed by a practical sense of reality, and their symbolic, public or quasi-public one, which is driven at least partly by the political need to express visible concern about all matters in their mandate area especially when confronted by media or interest group pressure. There is overlap between the two lists but there are indeed two sets of realities to deal with.

At the parliamentary and legislative level, yet another rhythm of priorities can operate. The legislative timetable is only partly controllable by the government. A subtle interplay between government, opposition tactics and public mood occurs. Even getting a department's legislation or policy initiatives mentioned in the Throne Speech, a key initial symbolic step, is not easy. Key calendar periods are used and abused such as ramming home several bills as Christmas and summer recesses loom. All of the above was true before the recent Parliamentary committee reforms. Although it is difficult to guage the impact of the greater committee freedoms, if anything they suggest a legislative process even less controllable. The new rules adopted in 1985 confer more powers of initiation on committees. Studies and reports can be carried out without ministerial permission and ministers are obliged to respond to such reports. As time goes on

these rules are bound to put more subtle and not so subtle pressure on ministers and their agendas. These legislative dynamics are all the more vital for CCA precisely because its legislation is framework oriented and technical and it has more of it than most other departments. As a former deputy minister of CCA put it, CCA always seemed to have to find the "tag-ends of Parliamentary time."

The three case studies reveal the interplay of the three rhythms of priority setting. Over the entire decade covered, one is entitled to conclude that for the most part the Cabinet, or at least the key Cabinet ministers simply did not regard these items as a consistently high priority. Their sluggish progress reflects their low marginal ranking. If one reviews priorities of the federal government in each of the five year periods from 1970 to 1985, as revealed in throne speeches, budget speeches, and key Prime Ministerial statements, it is evident that the CCA mandate area as a whole stays quite consistently on the lower end of the list.[8] One must also link these rankings to the government's overall desired posture vis-a-vis "the business community" as a whole. These relations and moods as a whole were usually crystalized around non-CCA policy areas such as inflation, unemployment and deficits but, if they lead to the need for a period of tranquility and fence-mending with business, they could easily be a vital factor in ministerial views that one should not proceed with a particular CCA item "now" . . . perhaps later.

At the ministerial level, the cases also show the variable rankings given by successive CCA ministers not only to the three cases but to other matters that bubbled up from time to time. Over the whole period Competition Policy stayed at or near the top and certainly was viewed by the business press as CCA's biggest priority. But bankruptcy and copyright oscillated with different ministers. One can obviously not separate these shifts in rankings, coupled with the normal firefighting that any minister must do, from the very high turnover of CCA ministers. We refer to this in more detail below. Suffice it to say that if new

ministers are appointed to CCA every 18 months it clearly does not make for continuity or persistence in priority setting.

In the Parliamentary and legislative arena, the cases indicate the episodic nature of finding one's niche in the schedule and also the independent influence of legislative drafting and language per se. The Competition bills displayed the full array of potential traps. If bills are too complex they are opposed in part because they are politically indigestible. Only massive exercises of political power, such as occurred over the NEP energy legislation in 1980-81 can overcome these problems. By definition such power can only be exercised infrequently. On the other hand, if bills are divided into more chewable chunks, those whose chunks are not included immediately clamour to have them added since they rightly calculate that this may be the only moment of opportunity for some time. The Bankruptcy Case also shows how strategically placed individuals, including Senators, can act as conduits for interests and can exercise enough influence to delay the process.

THE NATURE OF THE POLICY

This factor encompasses several elements which authors on public policy theory refer to broadly as public policy content.[9] In the introduction to the study we have already mentioned two of these features. The first is the broadly regulatory character of CCA's policy terrain. The second is the technical nature of the field and the consequent difficulty of selling it politically in the modern mass media age of politics.

By the regulatory character we mean initially not the distinction between parent legislation and delegated legislation (the latter referred to as regulation) but rather the even broader distinctions between spending and regulation. CCA's mandate is obviously not without concerns over spending--witness the debate over the wage fund in bankruptcy matters--but its overall mandate is profoundly

regulatory. CCA is in the business of establishing broad rules of behaviour for the marketplace backed up by the sanctions of the state. This feature is important in that, unlike spending (and major spending departments) the values at stake are not as readily converted into the somewhat more common denominator of governmental budgetary money. This is why as the Competition Act came down to clause by clause haggling with key interests, the drafting of definitions and words in the statute became, in effect, the surrogate for dollars, especially private dollars.

This also has crucial links to the inherent capacity to set priorities at the government wide level. For the Cabinet as a whole, there is a well defined expenditure budgetary cycle. The regulatory cycle and the process for determining regulatory priorities is less well defined.[10] There has always been some rudimentary central regulatory decision process in that statutory instruments were checked to see if they were in conformity with the parent statute and later with the 1960 Bill of Rights and now the 1982 Charter. But neither the substantive nature of regulatory choices nor their aggregate annual private sector impacts were assessed or even totalled. In the late 1970s a further, somewhat more substantive process was inserted at the centre called the Socio-Economic Impact Assessment (SEIA) process. It provided for a modest form of a priori assessment of proposed social regulation in areas such as health, safety and fairness. In 1985, following the study by the Neilson Task Force, a regulatory affairs secretariat was established and in 1986 its functions were combined under a Minister of State for Privatization and Regulatory Affairs. These developments may suggest the eventual emergence of a "regulatory" central agency analagous to a "spending" central agency but this is doubtful. What is quite clear, is that during the past decade, no such central capability existed - certainly not in the realm of economic regulation or economic framework law. In Chapter 4 we return to this point particularly to inquire into

whether it is in CCA's interest to foster such a central presence.

The second notion of regulation--that is, limiting its definition to that of delegated legislation, is also of some importance when considering this factor. This arises because it can certainly be argued that if more of the "rules of the game" for the marketplace were not contained in the parent statute but rather in delegated legislation then, ceteris paribus, it would be somewhat easier to change and modernize more regularly. However, a key element of the politics of changing framework legislation (precisely because of its public goods nature and the interest group dynamics referred to above) is that, when in doubt, interest groups often prefer to have their interests in the short run protected within the law rather than merely within the delegated legislation.

Both of these notions of regulation, when combined with the breadth of framework coverage, easily yield the technical characteristics of this kind of law referred to in Chapter 1. A technical community of "rentiers" builds up around these statutory havens which the general public, the typical voter, the typical MP or the typical minister has only a limited capacity and amount of time to make sense of. Even the typical deputy minister of CCA, more permanently ensconced than the others, faces severe constraints. This in turn sets off a chain of plausible and sensible defence mechanisms among the key political players.

Ministers on entering the CCA portfolio (most of whom having not ardently sought the portfolio) quickly discover how technical it is and how much time they would have to invest to be knowledgeable about it. When confronted with the task of shepherding legislation through Cabinet and then Parliament, they are naturally concerned with "how to sell this stuff" politically. Faced with the modern realities of media politics they are, not surprisingly, looking for ways to economically package proposals. What "angle" can they use to sum it up and to garner enough political support and credit that it is worth the level of learning

effort involved? Moreover, in CCA, there is not just one or two such areas but a dozen or more major statutes, and 60 other minor ones.

The contrast between the immense technical grey zone in framework law and the problems of political marketing are starkly present in the three cases. In each case one can envisage scenarios where perhaps a quasi-populist twist could be given to the proposed legislative package but, in each case, the more simplistic and glib the appeal becomes the more worried and fearful the more concerted interests become, often advisedly so. In copyright the Canadian pro-producer orientation would seem to make excellent short term politics, but other interests and ministers resist over fear of long term impacts. In bankruptcy, changes to help workers and the average consumer bankruptee against the banks would seem to be a political menu made in heaven. But actual bankruptcies, except perhaps in recessions or in the collapse of one industry towns, are scattered events and most voters do not see themselves as future bankruptees. Their interest is at best latent. Interestingly, however, when farm bankruptcies escalated in the early 1980s, it was not hard to get some action because it was seen as a farm issue and not as bankruptcy per se. The bailout of Dome Petroleum also showed this phenomenon at work since it could be seen as both energy policy and as having concerted adverse effects in western Canada in particular. The banks, moreover, had more than a passing interest!

When the Competition Act was finally changed in 1985-86, the minister had insisted on a more saleable message linked to promoting competition in the context of the international competitiveness of Canadian business. Even this would, on its own, have undoubtedly yielded another round of failure. The changes resulted from several factors which is precisely why it is necessary to construct the kind of analysis being attempted in this chapter as a whole. If further evidence of the delicate nature of political marketing is needed one need look no further than the recent passage of CCA's new patent legislation. It ultimately had to be sold as a

"high tech" job promoting policy but linked to a price review mechanism to handle the political attack against increased generic drug prices. It required the energy of a minister prepared to invest political time and energy in the details in what was at best a high risk initiative. Arguably, nine out of ten ministers would have walked away from such odds.

MINISTERS, PERSONALITIES AND UNIQUE TIMING FACTORS

We have already alluded to the importance of ministerial preferences in priority setting. All decisions are ultimately made by individuals, but it is evident from most accounts of the world of Cabinet ministers that theirs is not that of serene executives sitting confidently astride their department and steering boldly into the future. More often they are likely to feel themselves to be "in the middle," possessors of some preferences about their agenda, but also buffeted by the pressure of others, by constituency concerns, and by the exigencies of the political clock.[11] The political clock, alas, produces both deadlines and deadends. The ministerial and personality variable therefore deserves separate attention but always in the context of unique timing situations.

The first point to stress about CCA ministers in the aggregate is the high turnover of ministers. There have been thirteen ministers since the establishment of the department with ministers changing on average every 18 months. Only one minister, André Ouellette, served for a total of five years but on three separate occasions. Generally, ministers have been appointed either at very early stages of their ministerial career and hence are learning the ropes of political influence or, in one or two instances, they were appointed as seeming demotions following political difficulties in other previously held portfolios. This rate of turnover is not in itself unique since some other departments have similar experience and are also training grounds for ministers. But, given the character of framework law and the

extent of such law in the CCA mandate, it is a particularly deadly combination and has undoubtedly contributed to the sluggish performance.

Partly because of this, few ministers bring to the portfolio a concerted view or base of expertise on the department's substantive concerns. They will hold or communicate general views about whether they want to be generally interventionist or non-interventionist or about being low profile or high profile but few, if any, have had the proverbial "fire in their belly" about substantive CCA issues. They basically inherit an agenda and then juggle it within these limits. Clearly some influence is exercised this way as the cases demonstrate. Ouelette downplayed bankruptcy but was interested in the Competition Act and gradually learned from his own previous experience in the 1970s about the need for real negotiation. Erola gave bankruptcy a higher priority both because of her own experience in running a small business and because of the impact of the recession. On the other hand, she felt far less comfortable with the politics of changing the Patent Act and, accordingly, in the run-up to the 1984 election, preferred to send the issue to a commission study.

The relative inexperience of most CCA ministers and their short tenure also contributes to some weakness in the level and efficacy of their capacity to build alliances with other ministers, with caucus and Parliament and with central agency officials. Selling framework law changes, even if one can concentrate only on one, requires a considerable investment of time and effort. Seeing themselves as junior ministers undoubtedly leads to some self-fulfilling prophesies since ministers must decide whether to, as it were, put all their policy eggs in one priority basket. It is not surprising under these circumstances that successive CCA ministers have hedged their bets. In addition, several CCA ministers were given other concurrent responsibilities by the Prime Minister. On three occasions this included the Post Office and all its accompanying controversy.

CCA ministers also quickly discover that being the statutory referee of the marketplace and being spreadeagled across several statutes does not yield any obvious popular political constituency that one can be continuously seen defending. An early minister such as Ron Basford attempted an avowedly pro-consumer posture but got nowhere. It is simply too diffuse an interest.

None of the above is intended to imply that successive CCA ministers have not enjoyed some partial successes. They have usually handled particular controversies such as product safety cases adroitly. Moreover, often decisions not to proceed with legislation too quickly were themselves good decisions. In addition, some of the work of particular ministers helped pave the way for later ministers. The ministerial variable must be treated separately however, because only ministers as working politicians actually experience the above pressures and dynamics. They must be seen from their perspective as real and pressing and not as irrational "political" intrusions in an otherwise rational world.

THE DEPARTMENT AND STRATEGIC POLICY CAPABILITIES

The final variable to be considered is the Department of Consumer and Corporate Affairs itself, including its strategic capabilities. We include in this variable, the role of deputy ministers, the inherent structure of the branches and the efforts to improve strategic policy capability. Evidence for this variable arises less from the description of the cases per se and more from interviews conducted by the author on the general evolution of the department.

The high turnover of ministers in CCA has been counterbalanced somewhat by a lower turnover among its deputy ministers. The DM turnover was high in the early years of the department and thus reinforced the lack of continuity in leadership. From 1978 to 1985, however, there was continuity in the person of George Post. Nonetheless, throughout most of CCA's history the deputy still had

to adapt to a steady stream of ministers. This situation could not help but effect behaviour down through the structure of CCA.

The branches of any department to some extent constitute quasi-independent fiefdoms. The overall policy coherence displayed by a department is therefore partly a function of just how much leeway is given and of how policy ideas and initiatives that emanate from the branches are handled and coordinated. The deputy ministers interviewed all stressed on coming to CCA how struck they were by the high degree of independence. Each believed that they took some steps to enhance coordination. To appreciate the basis of the independence however one needs a sense of the evolution of the department.

The three main line branches--competition policy, consumer affairs, and corporate affairs--all have a somewhat different lineage and modus operandi. When CCA was formed, the corporate affairs area was in reality a series of business law provisions and entities previously located in other departments.[12] These areas were highly technical and legal, and CCA officials in this area were largely able to function with little notice taken by the rest of the department or the rest of the government. The competition policy area was ultimately centred in the Restrictive Trade Practices Commission which had to practice in a virtual court like manner and hence also developed a base of independence.[13] Its independence was not absolute. The minister could require the Director of the branch to act but, once launched, he could not stop such investigations. In the mid and late 1970s, in part out of the sheer frustration at making the old competition law work, CCA, through this branch, became known as a more aggressive agency. This notoriety undoubtedly peaked in 1981 with the aggressive release of the competition study on the oil industry in the middle of the heated debate on the National Energy Program. This area became CCA's defacto public personna but, in some key central agency and ministerial quarters, it was not viewed with applause.

Finally, there is the consumer affairs branch. At CCA's inception, this was the main political impetus for establishing a new department. It was the dawn of the consumer era. Gradually, however, this branch settled into its normal rhythm of operations in areas such as product safety. This field always had the potential to embroil the minister in periodic brief controversies over particular hazardous products, perhaps seven or eight per year, and hence always had to be alertly and skillfully managed.

For much of the 1970s, CCA's legislative initiatives, especially in the three case study areas, essentially emerged from the line branches. As professionals in their areas officals in these branches were quite naturally interested in obtaining comprehensive rational packages of change. As new ministers came and went they saw opportunities to push their area to the top of the ladder. For much of this period, the policy analysis function was also located within each branch.

In 1979 policy coordination was lodged in a separate bureau headed by its own assistant deputy minister. This reflected a judgement that the separate fiefdoms, in a policy sense, were too independent. Undoubtedly the main evidence for this was continuing sluggishness in CCA's legislative output. Some improvement seemed to follow this step although it was still very slow in nature.

All of the above could not help but adversely effect CCA's corporate capacity to build the necessary alliances with the central agencies to shepherd policies through the system. This is precisely where good policy analysis per se ceases to be the main need and good persistent political (small p) lobbying, intelligence and savvy is important. It is also full time work and it depends on having some concerted view of where priorities lie at both the ministerial and deputy ministerial level. CCA was cummulatively building up better analysis and data as reforms were attempted and this too is vital to success. But policy analysis

involves, as Wildavsky has pointed out so clearly, not just "cerebral cogitation" but also "social interaction" and power.[14]

CONCLUSIONS

In this chapter, we have attempted to explain CCA's overall performance, as revealed especially in the three case studies, in the context of five variables. We have also related CCA's experience to other federal policy areas where framework law has been involved. We have not explicitly weighed the five variables but rather have tended to portray them as a fairly even-handed interplay or set of dynamics. This makes sense when one considers that we are essentially trying to explain decisions and nondecisions over a ten to fifteen year period.

At the same time, the order of presentation of the five variables suggests some implicit weighting on our part. Broadly speaking, the inherent structure of interests, the nature of overall priorities, and the nature of the policy field are more pervasive causes than ministerial and departmental variables. As the concluding chapter shows, this suggests both lessons and constraints regarding future strategies for improving the modernization of framework law.

Notes to Chapter 3

1. On consultation and interests, see G. Bruce Doern and R.W. Phidd, Canadian Public Policy: Ideas, Structure Process (Methuen, 1983). Chapters 3 and 18.

2. See Aaron Wildausky, Speaking Truth to Power: The Art and Craft of Policy Analysis (Little Brown, 1979).

3. For the best general discussion of these issues, see William D. Coleman "Canadian Business and the State" in K. Banting ed. The State and Economic Interests (University of Toronto Press, 1986), pp. 243-290.

4. See Kenneth H. Norrie, "Not Much to Crow About: A Primer on the Statutory Grain Freight Rate Issue," Canadian Public Policy, Vol. 14, No. 4 (December, 1983) pp. 434-445.

5. On the tax decision and reform processes, see G. Bruce Doern, Allan Maslove and Michael Prince, Budgeting in Canada: Politics, Economics and Management (Methuen 1987) and Stanley L. Winer and Walter Hettich, "The Structure of the Sieve: Political Economy in the Explanation of Tax Systems and Tax Reform." Osgoode Hall Law School, York University, March 1987.

6. See Economic Council of Canada, Efficiency and Regulation: A Study of Deposit Institutions (Ottawa, 1976).

7. See G. Bruce Doern and R.W. Phidd, op. cit., Chapters 10, 11 and 12, and Robert J. Jackson and Michael M. Atkinson, The Canadian Legislative System, Second Edition, (Macmillan of Canada, 1980).

8. See Doern and Phidd, Canadian Public Policy, Chapter 11.

9. See M.J. Trebilcock et. al., The Choice of Governing Instruments (Ottawa: Supply and Services, 1982).

10. See Doern and Phidd, Canadian Public Policy, Chapter 11, and Robert D. Anderson, "The Federal Regulation-Making Process and Regulatory Reform," in W.T. Stanbury ed. Government Regulations: Scope, Growth, Process (Institute for Research and Public Policy, 1980).

11. Conrad Winn, "Ministerial Roles in Policy Making," in André Blais ed. Industrial Policy (University of Toronto Press, 1986) Chapter 6.

12. See Phidd and Doern, The Politics and Management of Canadian Economic Policy (Macmillan, 1978) Chapter 11.

13. W.T. Stanbury, Business Interests and the Reform of Canadian Competition Policy 1971-1975 (Carswell-Methuen, 1977).

14. See Wildavsky, op.cit., Chapter 1.

CHAPTER 4

MODERNIZING FRAMEWORK LEGISLATION: LESSONS, LIMITS AND PROSPECTS

With the three CCA case studies as background and with the five factors an an analytical underpinning we can now address three questions in a concluding fashion. What strategic lessons does the analysis suggest about modernizing framework law? What limits does it impose on any approach to future reform? What prospects for reform does it suggest to facilitate a more continuous modernization of framework legislation?

One way of deriving some strategic lessons and insights is to identify a central proposition about each of the five variables examined in Chapter 3. These propositions will be stated initially in a point-blank manner. The subsequent discussion of limits and prospects will then temper them but hopefully in a way that contributes to the identification of a sensible set of strategic questions.

The five propositional lessons are:

1) The continuous modernization of framework legislation is maximized the more that CCA can itself encourage and induce the formation of "peak associations" among the interests and interest groups involved and can engage them in negotiations tied directly to actual legislative drafting.

2) The modernization of framework law is maximized if CCA, over any one or two year period, focusses its priorities on one area of framework law which in turn requires it to devise a concerted lobbying effort on the Cabinet, central agencies, caucus and legislative planners.

3) The modernization of framework law requires medium-sized packages of change that can be rhetorically and practically sold to MPs and the

caucus in keeping with the modern realities of media politics. Neither comprehensive packages nor continuous ad hoc bits of change meet this test.

4) Modernization is enhanced if there is less ministerial turnover and greater ministerial stability (and, as in 3 above, if ministers focus on one priority area).

5) Modernization is enhanced the more that CCA policy strategy focusses on a more limited menu and consciously and persistently recognizes that good policy analysis includes not only good data and prior study but also a heavy dose of small p political lobbying of a continuous kind, particularly among the central players and vis-a-vis caucus.

The analysis in this study counsels the need to regard these five propositions as possible or plausible elements of an improved strategy but hardly as law-like prescriptions leading to guaranteed policy success. They are best posed as questions since the cases themselves suggest the limits inherent in the advice they suggest. The reasons are obvious.

First, there is an overall assumption in the five points that the best route to improved performance is a steady presentation of one medium sized bill every year or two, with the focus on a carefully selected focussed priority behind which CCA's resources for political persuasion are mobilized. It presumes therefore that, under this approach, any single area of CCA's major fields of legislation might be reformed in medium sized doses, at best every five or six years. Second, the five point package is also one which is not wholly within the discretion of CCA as a department to implement on its own. Each of the areas requires action by others, and each of the areas is inherently debatable by other players whose interests differ from CCA and whose strategy is not preoccupied by the desire to secure an orderly modernization of framework law. Permanent coalitions must therefore be

nurtured with other centres of influence.

Proposition 1, for example, involves concerted action and cooperation by the constituent interest groups themselves. Forming or forging so-called peak associations can be viewed as manipulative for the simple reason that it is. Mobilizing power always is. Involving peak associations in actual legislative negotiation as opposed to other kinds of consultation, can also bring valid criticism that this practice offends the right of Parliament since negotiated packages must more or less be presented as a fait accompli to elected representatives.

The cases suggest, however, that one cannot simply establish such associations or mechanisms willy nilly. The particular nature of the principal-agent problem must be carefully determined. One cannot negotiate and "do a deal" if one or more of the key principals in the peak mechanisms essentially sees the purpose of consultation in a different light, that is, as being purely for information exchange or issue identification and the narrowing of trade-off possibilities. In addition there must be some essential sense of trust among the actual negotiators about the purpose and about the pressures that the peak association player faces on returning to his or her home turf. Such levels of trust may take several years to build up but can be quickly dissipated either by a simple changeover in key personnel "at the table" or by any number of other factors, including of course the other four propositional issues being discussed here.

Proposition 2 implies eventually cooperative coalition-building both within CCA, in Cabinet, and among the central agencies. It implies much more of a strategic and continuous willingness to adopt a "put your eggs in one (or two) baskets" approach than has been apparent in CCA to date. It is the context of this proposition that our reference in Chapter 3 to the relative absence and "regulatory" central agency deserves further elaboration. Departments are naturally suspicious of any existing central agency (defined here to include both the

central agency's minister and deputy minister) let alone new or hybrid ones such as the previously mentioned Ministry of State for Privatization and Regulatory Affairs. The latter now constitutes the main staff agency to the former Cabinet Committee on Operations whose title also now includes privatization and regulatory affairs. This recent central agency is approaching its role as a regulatory "rationalizer" very carefully so as not to ruffle too many departmental feathers.

The essential question it raises in the context of CCA's experience is whether or not CCA should seek to build alliances with it precisely because CCA has lacked real or potential "regulatory" friends at the centre. The new agency was partly premised on the current government's desire to deregulate in some areas (oil and gas, and transportation) but also to regulate "smarter and better" in other areas. The framework law area, in which CCA is enmeshed, is arguably a vast area where smarter regulation could be usefully achieved.

Proposition 3 steers a course between ad hoc incrementalism (e.g. each area of legislation changed a little bit each year) and rational comprehensive change where entire bills are remodelled. CCA has certainly learned that phased approaches work better than comprehensive ones, but the proposition advanced here implies selective incrementalism on one medium sized package of change every year or two. This is still difficult to do since it implies leadership and cohesion, the cooperation of other players and the relative absence of other surprises or crises.

Proposition 4 ultimately involves choices by the Prime Minister. His Cabinet appointments are made for many reasons, the majority of which have little to do with an ongoing concern about the steady modernization of CCA's framework law. At the same time, there is little doubt that high ministerial turnover is an important factor in the sluggish CCA performance. It would certainly therefore be

worthwhile for CCA to lobby the Prime Minister or the Clerk of the Privy Council to see if greater continuity could be secured specifically because of CCA's framework dilemmas.

Proposition 5 is partly an issue of attitudes toward, and knowledge of, what policy analysis ultimately is. We have stressed that good policy analysis is both a cerebral and social activity. But the cases suggest that CCA must develop a much more ingrained understanding of what doggedly socio-political work it involves. But there are also dilemmas involved in enhancing this skill and employing this set of tactics and attitudes, especially regarding the respective roles of senior officials versus ministers. Senior CCA officials can certainly help lobby other central agency and line department officials, but ultimately only ministers can lobby other ministers and the caucus about CCA's preferred strategy and priorities.

There can be little doubt that either individually or as a group, the above propositions can and will be contested. But they do also serve as a basis of thinking about the strategies available for improving the modernization of legislation. They only partially address, however, other issues about the limits of change and about what constitutes success or failure.

LIMITS AND RELEVANT CRITERIA

In Chapter 1 and at various points throughout the paper we have posed questions about how CCA planners can meaningfully know whether modernization is occurring fast enough or successfully enough, given the new technological, economic and international dynamics that are clearly impacting on Canada and hence on framework law. These points, which do not all lead in the same direction, can be summarized as follows:

1) The status quo is unsatisfactory. The overall pace of change and the success rate in obtaining legislative approval (despite some recent successes) is inadequate for the Canadian economy and frustrating for CCA

management, despite some recent successes.

2) CCA has a higher proportion of framework law than the great majority of federal departments, and since this type of "public goods" legislation is logically harder in principal to change, then CCA's success or failure ratio requires the inclusion of a "degree of difficulty factor" before making head to head comparisons with other departments.

3) Despite this sluggishness, the political economy has adapted--often despite the law--through new private, contractual or administrative arrangements.

4) There has been a general and quite considerable decline in the overall ratio of bills passed to bills introduced in Parliament for the government as a whole. These ratios drop even more during the last years of a Parliament's life.

5) The mere passage of laws and amendments (let us say, hypothetically, three or four legislative enactments each year) cannot alone be considered to be successful modernization, because presumably one is also interested in the qualitative nature of such changes including the level of consensus about them among interests.

6) From the point of view of the government as a whole, postponing and delaying at least some of CCA's proposals (or those of any other department) can be considered in many instances to be good decisions and can be evidence of a policy process working well. The policy process for the government as a whole exists both to make policy and to prevent it as well. Therefore, it is logically possible for a low batting average for CCA to be, in any given period, a good batting average for the government as a whole.

7) The tax and budget speech process supplies an example in which framework law has an almost ideal set of opportunities for regular "modernization." Changes are made every year. This process shows that potentially too much incremental change can occur, which then yields demands for comprehensive reform (in this instance, major tax reform).

8) Successive failures to produce a legislative output may ultimately not be failures when judged over a longer period of time and when seen as a process involving real "learning" and accommodation between government and industry and among interests. For example they may allow better data to be assembled, relationships of trust to be developed, or they may simply be consultations of a simpler kind and not intended to produce negotiated decisions.

These points as a whole suggest the need for caution in thinking about what constitutes the new future criterion of success. CCA is right to feel frustrated at the sluggishness of the past decade. But this does not mean that criteria for the new millenium emerge with self-evident clarity. Improved ratios of bills passed to bills introduced may make CCA feel better but still not produce better policy. Two good bills enacted out of ten attempted, encompassing moderate change and acceptable to key interests, may be a better batting average than nine out ot ten bills enacted but each consisting of relatively inconsequential change.

PROSPECTS AND OTHER INSTITUTIONAL REFORMS

The five propositions when set against a realistic appreciation of the various criteria for "improved modernization" ultimately suggest that a multiple reform strategy must be applied and thought through. It is at this point, moreover, that one must be realistic about the usual way that recommendations for reform are framed.

For example, the study shows that CCA has utilized the entire array of consultative mechanisms, from advisory panels, to task forces, to white papers. It will undoubtedly have to continue to use this array of devices. This is because even if the logic of the above five propositions governed CCA's future modernization strategy, the department would still require devices to study, examine, and even placate issues and interests that CCA ranks low on its priority list. It would have to pursue different kinds of consultation at different stages for each of the main areas of legislation.

One variant of this array of devices that increasingly creeps on the agenda to "solve" the sins of never ending laws and programs is the statutory "sunset provision". This is a provision built in to the statute which requires an automatic statutory review every five or ten years such as occurs in the field of Banking legislation. The assumption of such provisions is that the statute ceases to exist unless it is positively reenacted and that, therefore, a review of first principles is possible "from scratch" so to speak. As a generic reform suggestion it is analagous to proposals in the budgetary process for the adoption of zero-based budgeting.

Our brief reference to the Bank Act review process in Chapter 3 suggested some advantages to this approach but also focussed on a very severe set of limitations of this device as a "catch-all" reform measure. The first was the increasing experience with delays in the process as the dynamics of banking became more and more complex. Moreover, it must be remembered that these delays of several years occurred despite having a fairly coherent "peak association" or, more accurately, dominant interest (the banks) with which one could negotiate. The second and even more significant limitation is that sunset laws function very differently if there are only one or two in operation at a time as opposed to when it is theoretically applied to all major statutes or framework laws simultaneously--that is, several bills coming due for review across the government in the same

year. In such a situation, it would ultimately be an illusion to believe that such bills would be even-handedly reviewed as if one was starting with a clean slate. Some legislation would get quick extensions or superficial review for the simple reason that the political agenda is always crowded, time is always scarce, and intense political energy is a precious commodity.

The reforms inherent in the five propositions tend to be more tactical and even attitudinal. There are, however, other avenues of reform that are more inherently medium term and institutional. Three of these are worth considering especially as a way of garnering a more sustained appreciation of the continuing need to reform framework law. These reforms constitute, in effect, efforts to educate key elites involved in framework laws. The elite or professional nature of this focussed effort must be stressed because we have shown how unresponsive this type of law is to any popular appeal or populist voter pressures. Each of the three reforms may, over the next few years, help create a better climate for reform in an elite educational and institutional sense. The three institutional reforms are: a standing Parliamentary committee on economic framework law; an Institute on Framework Law; and annual or biannual conferences on framework law.

The idea of a standing Parliamentary Committee on Economic Framework Law with jurisdiction over an agreed (reasonably) short list of framework statutes would enable a greater focus to be given to this type of law. It would help build up, potentially at least, a group of Members of Parliament with some expertise in this area and some appreciation of the continuous work needed. Political careers would clearly not gravitate to this technical area but some modest incentives might be created. This could be especially the case if the current House of Commons committee reforms are taken advantage of. In the realm of framework law one is not looking, over the long haul, for political eagles but rather for political beavers.

The concept of an Institute for Economic Framework Law would merely parallel other institutes, usually university based, established by departments in other policy fields. Even with a modest budget, such bodies through published research, links to teaching, and a network of interest group contacts could help elevate an analytical and professional interest in the on-going reform agenda. If there were concerns that such a body would live too isolated or too long a life then this could be minimized by in fact (quite usefully) applying a five year sun-set clause to its existence. The Institute would also be expected to develop continuous interactions with the MPs on the Standing Committee, and the three political parties.

The idea of annual or biannual conferences on generic themes of framework law is suggested simply to ensure that, in addition to the first two reforms, CCA itself brings elements of this professional network together on particular current or future priority areas.

One must be fully conscious of the usual criticisims that are easily marshalled against "another" committee, institute, or conference. But I am persuaded that CCA needs more than most other departments to do some of the minimum things needed to build up an attentive professional community interested in its overall policy problems and not just its single statutes.

Despite the limitations suggested by past experience and despite the weaknesses of pro-offered "single reform" solutions such as sunset triggering mechanisms, there are reasonable prospects for enhancing the modernization process. The thrust of future reform, however depends primarily on CCA building a series of permanent coalition relationships as implied in the five propositions and in the three institutional reform suggestions. The building of these relationships suggests a concerted focus on the policy process at the key points of leverage--Cabinet, caucus, Parliament--and in the interest group arena.

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