Law Reform Commission of Canada
Commission de réforme du droit du Canada

ADMINISTRATIVE LAW

policy implementation, compliance and administrative law

Working Paper 51

Canada

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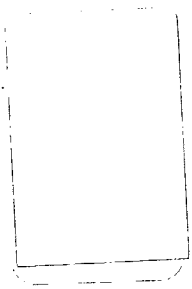
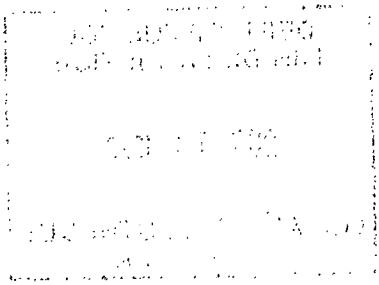
POLICY IMPLEMENTATION, COMPLIANCE AND ADMINISTRATIVE LAW





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Working Paper 51

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1986

Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Abbreviations

ACCA	Accelerated Capital Cost Allowance
AECB	Atomic Energy Control Board
CATA	Canadian Air Transportation Administration
CBC	Canadian Broadcasting Corporation
CFDC	Canadian Film Development Corporation
CFVCO	Canadian Film and Video Certification Office
CHRC	Canadian Human Rights Commission
CRTC	Canadian Radio-television and Telecommunications Commission
LRCC	Law Reform Commission of Canada
EPS	Environmental Protection Service
NEP	National Energy Program
PIP	Petroleum Incentive Program
PPMGP	Pulp and Paper Modernization Grants Program
TDG	Transportation of Dangerous Goods

Foreword

From its very inception, the Law Reform Commission of Canada addressed issues relating to law and policy implementation. In 1981, we began concentrated study in the area, with a Discussion Paper entitled *Sanctions, Compliance Policy and Administrative Law* (Eddy, 1981). The author of this Paper concluded that understanding the role of law in achieving compliance involved considerably more than simply examining the formal, largely negative sanctions provided by statute. A complete understanding required an analysis of day-to-day administrative practices, including informal negotiations and incentives. We needed to know more about the "law in action."[1]

To test the tentative conclusions of the 1981 Paper, we initiated a series of background empirical studies. The two most comprehensive examined content regulation by the CRTC (Clifford, 1983), and the efforts of the federal EPS to control industrial water pollution (Webb, 1983). These studies confirmed that "sanctions" do not emphasize sufficiently the importance of more informal processes. Policy implementation rarely involves the imposition of sanctions and when it does, it is only as a last resort, because "things have gone wrong." The imposition of sanctions also indicates that less formal techniques have failed: by calling upon sanctions, administrators react to non-compliance probably more than they seek to achieve compliance. For these reasons, we shifted attention from sanctions and focused on the more wide-ranging notions of compliance and policy implementation.

Shorter studies supplemented the three major Papers. In these studies, researchers explored the use of "contracts" to control pollution (Barton, Franson and Thompson, 1984), investigated the ways in which Crown corporations could influence private sector behaviour (La Roche and Webb, 1984), compared regulatory and economic methods for controlling pollution (Dunning, 1981), described the costs of compliance (Dunning, 1982), examined aviation safety regulation in Canada (Dagenais, 1983), analysed the activities of the Northern Pipeline Agency (Lucas, 1981), described the efforts of the CHRC to reduce discrimination (Laberge, 1983), and examined the incentive programs offered by the CFDC (Lillico, 1985).

We wish to thank for their co-operation the many officials within the institutions studied, as well as a host of individuals in the private sector, interest groups and academics. In addition, we express our indebtedness to four persons who advised us during our efforts to synthesize our findings: Howard R. Eddy, Kenneth Kernaghan, J.W. Mohr and W.T. Stanbury.

1. Our focus for research has been on empiricism and on the operation of law in society. In that sense we find that our work on implementation has much in common with the legal realists. See, generally: Llewellyn and Hoebel (1941); Hägerström (1953); Ross (1946); and Twining (1973).

Introduction

A citizen living in a small northern Canadian town learns that the local pulp and paper mill is exceeding federal liquid effluent standards. Concerned, he contacts a federal official who informs him that the standards set by regulation have not been proclaimed in force. However, the mill meets the terms of an informal compliance schedule negotiated between federal and provincial officials and the pulp mill operator. Moreover, he learns that the mill is receiving a government grant to modernize its facilities. Shocked at these discoveries, the citizen contacts the local newspaper and radio station and, amidst tremendous local media exposure, launches a private prosecution. After the citizen runs into technical, evidentiary and financial difficulties, a federal representative assumes responsibility for the prosecution. Eventually, the mill owner is convicted and given a small fine. In summing up the decision, the judge notes that the mill is doing everything it can to reduce pollution, that it is an economic mainstay in the community, and that the informal agreement between the government and the mill operator is being met. He also wonders aloud why the prosecution was brought in the first place.

CXYZ is an FM radio station whose licence conditions require it to broadcast "middle of the road" programming. However, CXYZ listeners prefer a rock format, so it begins to play more rock music. Government officials (from the CRTC) repeatedly warn CXYZ that it is not meeting its promise of performance as set out in its licence, but CXYZ continues to play rock music. Consequently, the CRTC does not renew CXYZ's licence. In a petition, CXYZ listeners demand that the CRTC reinstate the CXYZ licence. A month later, the CRTC grants CZYX (a reorganized CXYZ) an FM licence to broadcast in the same market.

These examples, which are composite fictional scenarios based on the case-studies described in Webb (1983) and Clifford (1983), illustrate many aspects of the implementation process which we have come across in our research. They convey an impression that legal processes do not always serve effectively the purposes of public policy. To the average citizen they raise a number of questions about enforcement. Why is government not prosecuting all violators? Why are the licences of transgressors not being suspended? Why is the government entering into agreements that clearly contemplate violation of the law? Why do many violators "get off" so lightly, even when courts convict them? Why does government grant money to those who ostensibly violate the law? Why are some people treated differently than others? Why are private citizens ignored or side-tracked when they attempt to do something about violations that they perceive to be a threat to their own, or a wider public interest? Is the law being flouted by those who are paid to apply it?

Questions such as these illustrate the confusion and frustration that citizens feel about government efforts to implement public policy. Citizens look to the law for redress and comfort, and find it wanting: there is a wide gap between what we expect of law, and the security it can ultimately deliver. Unless we can understand this gap, it will lead to public disrespect for the law, for the policy the government is attempting to implement, and for those whose job it is to implement that policy.

Much of this frustration has its source in misconceptions about how policy is implemented, and about the ways in which law does, can and should assist policy implementation. But law is both specialized and limited. It facilitates, constrains, frames and, in many cases, is the vehicle for policy implementation. In this Working Paper we hope to provide a better understanding of the relationships between policy implementation, compliance and law with a view to improving the design and application of public policy, and the use of legal instruments as vehicles for policy implementation. Appropriate legal vehicles can be designed and applied only if program planners, legal drafters, advisers and administrators understand the needs of one another. Consequently, reform at the design stage should be based on an appreciation of policy implementation at the operational level. This involves an understanding of the activities that are actually carried out to implement public policy, and of the legal framework within which implementation of government policies actually takes place.

After a brief explanation of certain key concepts in Chapter One, we examine the "real nature of policy implementation" from three perspectives: relations, instruments and activities.

In Chapter Two, we describe implementation as an ongoing process, involving lengthy interactions among government, the private sector, and members of the public. This "relational" perspective stands in sharp contrast to the traditional "discrete, isolated incident" approach to law. The examples we provide illustrate that the role of law in policy implementation extends considerably beyond the courtroom doors.

In Chapter Three, we examine the capabilities and limitations of instruments used to influence private sector behaviour, including financial incentives (for example, grants, tax expenditures, low-interest loans, and so on), persuasion (for example, advertising, information campaigns, advice, and so forth), and command-penalty instruments (such as regulatory offences and licences). While lawyers tend to focus on prosecutions and licence suspensions, administrators resort mostly to less Draconian measures. The legal community needs to analyse and better appreciate these versatile, practical, non-coercive instruments.

In Chapter Four, we examine activities in policy implementation from the perspectives of the parties involved. In Chapter Five, we summarize a few major conclusions derived from this Paper, and make some suggestions for reform and further research.

We recognize that the study and practice of policy implementation is multi-disciplinary in nature,[2] and thus we have drawn on commentary from several disciplines in Canada and abroad (see the attached bibliography). In the final analysis, better policy implementation calls for both legal and non-legal reforms. On the legal side, legislators should, among other things, consider whether to recognize formally "transition periods" so that major policy changes can be "phased in" with as little disruption as possible; there also is an urgent need for more legal structure surrounding the administration of non-coercive instruments. Non-legal reforms such as changes in attitudes, management practices, and training can also help to improve implementation.

2. See, generally, Krislov *et al.* (1972). Policy implementation interests several disciplines, including political science, behavioural science, public administration, economics and law. Each is capable of contributing its own insights. For example, the definition of "politics" advanced by Meyerson and Banfield (1955: 304), allows one to understand the diversity of activities and relationships in policy implementation: "Politics is the activity (negotiation, argument, discussion, application of force, persuasion, etc.) by which an issue is agitated or settled."

A central theme of this Working Paper, then, is the importance of recognizing gaps between appearances and reality. What are the implications of these gaps and can they, or indeed should they, be removed? A great deal of implementation activity is informal. Should this informality be recognized in the design of legal frameworks? The values identified in our Report 26 (Canada, LRCC, 1985) which support good administration apply equally here. Thus, if the overall integrity of the system is to be preserved, fairness, accountability, openness and fundamental justice should, as far as possible, be balanced against efficiency and economy in addressing decisions aimed at securing the implementation of public policy.

CHAPTER ONE

Language and Philosophy of Policy Implementation

Before a constructive discussion concerning law, policy implementation and compliance can begin, we must introduce the concepts and language used in this Working Paper. In this chapter, we briefly explain concepts such as policy, implementation and compliance. As well, we outline the kinds of parties, institutions and instruments primarily involved in policy implementation, and describe how these relate to administrative law.

I. Policy, Implementation and Compliance

Public policy is an elusive concept.[3] As used here, it refers to government objectives. In this broad sense, public policy includes everything from enhancing Canadian culture to improving the health of Canadians and the quality of their lives.

Frequently, one policy of government will come into conflict with another. For example, the government may wish to improve the economic well-being of Canadians by encouraging industrial activity. However, industrial activity can have harmful side-effects, such as pollution or unsafe working conditions. In situations such as these, administrators attempt to balance conflicting policies. They do so usually "on their own," since law provides poor guidance about ways and means for balancing. For

3. "Policy" is a word which has many uses: the flexibility of the word may flow from its Greek root "politeia," meaning government. Generally speaking, policy is the sum of those "considerations which a governing body has in mind in legislating, deciding on a course of action or otherwise acting" (Walker, 1980: 965). Usually, the "considerations which a governing body has in mind" are primarily the advancement or protection of public interest and of private rights and liberties. Policy implementation will be considerably facilitated if the Administration and private party achieve a measure of consensus about the underlying values of, and ends to be achieved by, public policy. However, that ideal is not easily achieved in areas of policy which raise a "polycentric" array of problems (Fuller, 1960). "Policy" can mean different things to different people. Smith (1982) argues that government policy is of three types: normative, strategic and operational. Normative policy corresponds to what *ought* to be done (for example, the environment should be protected from industrial pollution). Operational policy is what actually *is* done (for example, informal agreements are negotiated between government and the private sector). Between normative and operational policy is another type — strategic policy — which is essentially what *can* be done. For our purposes we use the word "policy" to refer to normative policy or government objectives; we use the word "implementation" when referring to what government does, operationally and strategically, to achieve policy objectives. Doern and Phidd (1983: 54) suggest that several "dominant ideas" about normative policy are selected and combined to suit the political party in power. In the Canadian context those "dominant ideas" are said to include: efficiency, individual liberty; stability (of income and of other desired conditions); redistribution and equality; equity; national identity, unity and integration; and, regional diversity and sensitivity.

example, EPS officials face the classic "jobs versus fish" dilemma: if federal water pollution legislation were to be read literally, the protection of fish would be a paramount objective of government, no matter what the cost or other circumstances. In practice, administrators, industrial operators and the courts often compromise; because of the *ad hoc* nature of these compromises, the chances for consistent treatment from one case to another are greatly reduced (Webb, 1983).

The "jobs versus fish" dilemma highlights two important aspects of public policy: first, implementation, or government strategy and operations may be different from the stated or *normative* policy; secondly, legislation frequently does not adequately describe a public policy, and this can have detrimental consequences for government, the private sector and the general public.

The relation between public policy and law is a difficult one. On the one hand, enshrining policy in legislation can improve understanding by government and the private sector about the intentions of Parliament. On the other hand, political and economic realities, such as the federal-provincial division of power and budgetary constraints, may force legislators to forego explicit statements of policy objectives, or to state some objectives without ranking priorities. Also, express policy objectives in legislation can reduce the flexibility for administrators who need to develop policies over time, and react to new circumstances. It is never easy to strike the proper balance between the need for statutory policy guidance on the one hand and flexibility on the other.

Law also frames implementation. It provides appropriate powers, instruments and institutions for the carrying out of government objectives. It facilitates orderly and practical delegations of responsibility and generally structures the relationships in which government, the public and the private sector interact.

This Paper focuses on public policies which, for their implementation, require that private sector behaviour be altered or influenced. We leave aside the implementation of *service* policies (for example, unemployment insurance, pension plans, welfare), in order to concentrate on policies which require private sector *compliance* with express government commands and requests. For our purposes, compliance refers to a measure of private action or inaction, insofar as it conforms to a standard of conduct requested or commanded by government (that is, compliance standard). Sometimes the standard of conduct is explicitly prescribed in legislation (for example, speed limits, workplace safety standards); in other cases, it is implied (for example, the "Participaction" campaign promotes improved physical fitness but does not set express standards). Legislation can describe policy objectives in absolute terms, such as the *Fisheries Act* prohibition against the deposit of deleterious substances into water. This frequently results in an impossible compliance standard. Where realistic policy objectives are not set in legislation, government officials charged with the responsibility of administering the policy can be criticized for "not doing their job," while the private sector can be accused of "dragging its heels."

The difference between compliance and implementation is perhaps best explained through an example. Largely in response to the Mississaugua derailment incident, the federal government promulgated extensive TDG legislation. This legislation regulates conduct of transporters, but does not require changes in transport technologies. So, even if full compliance is achieved, underlying technological problems will remain, preventing full implementation of policy (that is, safe transportation of dangerous goods).

In its dictionary meaning according to Oxford, "compliance" refers to action in response to a request or command. This is true of the implementation of many public policies. Government often establishes compliance standards by means of commands

or requests, be it in legislation, in conditions attached to a licence, or at a less prescriptive level, such as government advertising campaigns. Where government "requests" private actors to do things (for example, to exercise, to conserve energy) it is inappropriate to speak of imposing penalties for non-compliance.

The word "compliance" implies that conduct can be objectively measured, usually in relation to legal standards. However, direct measurement of compliance is often difficult; instead, administrators may resort to secondary, measurable indicia, such as numbers of prosecutions, suspensions of licences, and expenditures for enforcement actions. Such numbers may indicate that administrators are using the legal instruments provided to them, but they tell little about the extent to which compliance has occurred.

Even where legal standards are supported by commands and penalties, administrators may not invoke penalties on each detected transgression. Administrators, using their discretion, may feel that, although transgressions are taking place, private action seems to be "improving" or "coming into compliance,"[4] and thus enforcement action is not necessary. The question of what constitutes a proper exercise of enforcement discretion is one of the most difficult issues in policy implementation. To an administrator the individual's compliance or non-compliance with standards is important as it relates to government's ultimate goal — the achievement of policy objectives.

II. Relational Implementation

Policy implementation is frequently an ongoing process, involving lengthy relationships among government, the private sector and members of the public. We refer to this process as relational implementation. All too often, the law and lawyers focus on discrete, isolated incidents and thus miss the ongoing relational character of implementation. For example, while federal water pollution legislation portrays a formal and mechanical process, in practice EPS officials and the private sector engage in informal long-term negotiations, exploring the various technological and financial practicalities of potential solutions. Implementation may sometimes require formal reactions to discrete incidents, or the invocation of coercion or punishment in instances of non-compliance. However, to pretend that such practices are the norm or are ideal distorts administrative action: the discrete, isolated incident approach does not reflect real administrative mandates or actual implementation practices.

Some policy implementation research has produced findings which underline the importance of relationships in implementation literature. For example, some commentators suggest that implementation can be planned and improved by taking account of "predictors of compliance,"[5] "critical variables determining the impact of policy

4. Krislov *et al.* (1972) use the phrase "zone of acceptance."

5. Rodgers and Bullock (1976: 125) have deduced these "predictors of compliance." "(1) [W]hether the regulated acknowledge that a legal standard which requires compliance has been established; (2) whether the regulated agree with the legal standard; (3) whether the regulated feel that they would benefit from the law; (4) whether environmental factors support or mitigate against compliance; (5) whether the law clearly and carefully defines who is responsible for enforcement; (6) whether the law specifies the type and amount of compliance required; (7) whether the regulated perceive that certain and serious sanctions will result from noncompliance; and (8) whether those who are to receive the benefits of the law are cohesive and take strong actions to achieve their rights."

outcomes''[6] and ''conditions for successful implementation.''[7] Many of these ''predictors,'' ''variables'' and ''conditions'' are relational in nature in the sense that they recognize the ongoing process of implementation. We discuss in greater detail these and other related issues in Chapter Two, *infra*.

III. Parties in Policy Implementation: Administrators, *Administrés* and Third Parties

The parties involved in policy implementation have been labelled differently by different commentators. Sometimes these labels can be misleading. For example, the regulator/regulatee categorization used by many may convey the government-private sector relationships accurately in command-penalty contexts, but it appears less appropriate when used to describe the non-coercive processes of implementation (for example, with respect to incentives, persuasion and services). In effect, the terms ''regulator/regulatee'' carry the connotation of coercion.[8] In this Paper, we prefer the administrator/*administrés*/third parties classification; in our opinion, this classification encompasses both coercive and non-coercive aspects of policy implementation.

6. Similarly, Rodgers and Bullock (1976: 6-7) have posed the following critical variables determining the impact of policy outcomes: ''I. The substance of the law (A) How extensive is the change required by the law? (B) Will the law be considered a benefit or a burden by those it attempts to regulate? (C) Are changes required in public behavior or only in officials' behavior? (D) How many officials will be affected by the law? (E) How clear are the standards for determining compliance, and are data available with which to compare performance with standards? (F) Does the law contain specific sanctions for noncompliance? (G) Are specific individuals held responsible for enforcing and complying with the law? II. The social, economic, and political characteristics of the compliance environment. (A) Is the law counter to established local mores? (B) Are there racial, social, or economic characteristics of the environment that will make it more difficult to enforce the law? (C) Will political characteristics make it more difficult to enforce the law? III. Decision maker variables. (A) Do affected decision makers disagree with the law? (B) Do affected decision makers accept the legitimacy of the law? (C) Do affected decision makers fear conflict if they abide by the law? (D) Do affected decision makers feel a need to conform to local pressures against compliance? (E) Do affected decision makers feel a need to defend past noncompliance by continuing to be noncompliant? IV. The quality of enforcement efforts. (A) Is it certain that noncompliance will be punished? (B) Are the sanctions realistic and severe enough to offset the benefits of noncompliance? (C) Is there an agency with viable enforcement powers to enforce the law?''

7. Sabatier and Mazmanian (1979) suggest these conditions for successful implementation: ''1. There is little behavioral diversity among those being regulated; 2. The target group to be regulated is geographically concentrated and not too numerous; 3. Not much change is required; 4. The requirements are specific; 5. There are few points at which demands for change can be vetoed; 6. Built-in biases (for example, creation of a new agency or assignment of high priority to the program favor policy achievement); 7. Environmental conditions favor achievement of program goals; 8. The policy receives extensive favorable media coverage; 9. The public supports the policy objectives; 10. The intended beneficiaries of the program cohesively support the policy; 11. The implementing agency's superiors support its efforts; and 12. Agency personnel are committed to achieving change.''

8. Indeed, some commentators describe governing instruments on a scale of coercion (Tupper and Doern, 1981: 17).

The term "administrators" embraces all government agents who perform implementation activities. These administrators include prosecutors, negotiators, inspectors, information officers, investigators and so on. The "Administration," used as a noun, designates government institutions as a whole.[9]

"*Administré*" refers to one whose behaviour government wishes to influence. The size of *administré* groups varies from one policy context to another. For example, there are less than 200 pulp and paper mills subject to the federal Pulp and Paper Effluent Regulations. In other policy contexts, the group is enormous. For example, all taxpayers are *administrés* in their relationships with the Department of National Revenue. The smaller the group of *administrés*, the greater the chances will be of their getting individualized attention. *Administrés* also possess various other characteristics, which can be considered in policy implementation. These include "opinion leadership," "risk preference," "future orientation," "co-ordination" and "institutional behaviour" (Spigelman, 1977: 44 ff.).

When the focus of attention shifts away from administrators and *administrés* to the "other" actors in policy implementation, simple classifications become difficult. These other actors are not homogenous, recognizable groups; they are a myriad of diverse parties, each with different interests, rights and remedies. They include, for example, those individuals who are *intended* to benefit from the implementation of a policy. In some cases, such as the babies protected by baby car seat standards, they may be easily singled out. In other situations, it is considerably more problematic to do so, as is the case with Parks Canada policy which includes all present and future generations in its class of "beneficiaries."[10] Once problems of identification and definition have been overcome, there remains the difficult task of describing their interests, and attaching "rights" and "remedies" to these interests so they can be recognized in the implementation process.

Beyond the class of persons who are "intended" to benefit from the implementation of a policy lie those persons who are "indirectly" affected, both negatively and positively. For example, home insulation contractors were indirect beneficiaries of the government's energy conservation program (CHIP) while many oil producers in western Canada were indirectly negatively affected by the NEP policy to encourage development of offshore and Arctic oil deposits. What are the rights and remedies, if any, of all these parties, and how can their interests be taken into account in policy implementation?

Still another group of actors "other" than administrators and *administrés* whose activities can play an important support role in policy implementation is private organizations such as insurers and private standards associations. People will alter their own behaviour if it will result in lower insurance premiums. Insurance companies frequently engage in advertising campaigns which can alter behaviour. Insurers will rely on non-governmental standards associations to determine the kind of equipment which will

9. A wide meaning of this term has recently been countenanced by the Supreme Court of Canada: "[T]he words ["Administration" and "administrative"] are fully broad enough to encompass all conduct engaged in by a governmental authority in furtherance of governmental policy — business or otherwise," *per* Dickson J., for the court, in *British Columbia Development Corporation* v. *Ombudsman*, p. 311. In Working Paper 40 (Canada, LRCC, 1985a: 1), we used the term "Administration" to refer to "the administrative apparatus of the Federal Government."

10. In Canada, Department of the Environment (1980: 15), it is stated that the entire world population and its progeny are potential beneficiaries of the policies respecting Canada's National Parks.

validate an insurance coverage (for example, the obligation to use appliances approved by the Canadian Standards Association). The Administration's job can be made considerably easier when its implementation objectives coincide with the objectives of these standards associations and private insurers.

In the rest of this Paper, we will refer to all these individuals and groups — direct and indirect beneficiaries, insurers, and so on — as "third parties." For our purposes, "third parties" refers to all those who, although neither administrators nor *administrés*, can still claim a stake in the outcome of the process. Although impractical and simplistic in many other circumstances (see, for example, Canada, LRCC, 1985: 53-54), this definition is useful in the context of this Paper. Indeed, some current federal regimes have adopted it. It should be noted also that the expression "third parties" is not limited here to the traditional legal sense of those who formally intervene in legal proceedings. Third parties are not simply spectators in the implementation process: they can orient policy and greatly influence an implementation program without directly participating in it. Because of the almost inevitably large size and diffuse nature of the third-party group, accommodation of its interests is an ongoing problem for administrators. We do not here propose a taxonomy of third parties, although we suggest that this should be done.

Third parties can and do act as "eyes and ears" of the Administration, notifying it of deviant behaviour or questionable field practices. As a rule, administrators seem to try genuinely to respond to such comments. Both of our major studies (Webb, 1983; Clifford, 1983) noted that letters, criticisms and other third-party comments seem to receive high priority within the administrators' agendas.

One of the biggest challenges facing government today is the fair and effective integration of the interests of third parties in policy implementation. There are many dimensions to this challenge: diversity of interests, informed participation, funding and standing, to name but a few. Underlying these somewhat technical problems lie fundamental yet vexing issues: Who represents the public interest? Are all third-party interests components of the public interest? How can the public interest be determined and articulated? Informed, active participation by all these parties — administrators, *administrés* and third parties — may result in more fair, responsive, effective and efficient implementation.

Third parties — be they private individuals, interest groups, the media, insurers or non-governmental standards associations — can have significant positive and negative impacts on policy implementation. At their best, they can reinforce government policies and help keep government accountable. On the darker side, they can delay and distort implementation, as well as add to its cost. It is apparent that regardless of their failings or strengths, these parties will continue to play integral roles in this area. The objective is to design regimes which can accommodate the many diverse forms of third parties and their inputs without weakening the parties or the implementation process. If participation is not to be considered merely symbolic, new channels permitting inexpensive, uncomplicated access to information and to the implementation process must be found.

Administrators, *administrés* and third parties participate in the implementation process in different ways, bringing their own perspectives, problems and interests into play. The primary interest of administrators is the implementation of policy, while respecting the public interest as well as private rights and liberties; however, in the course of implementing policies, administrators typically must also contend with such diverse factors as interdepartmental rivalries, federal-provincial sensitivities and inadequate

resources (Webb, 1983). Commentators have identified other factors which can affect an administrator's ability to carry out a policy: the age of the government institution; the clarity of functions; the ease of perceiving results and effectiveness of actions; the interdependence of assigned functions; the simplicity or complexity of functions; the stability of external environment; and, the resources.[11] In the final analysis, administrators may become more concerned with their own survival than anything else:

> [E]nforcement agents may well seek to display their activity (rather than their effectiveness) to their superiors, because regulatory organizations may in fact find it easier to monitor activity rather than effectiveness (Hawkins and Thomas, 1984: 19).

Such tendencies ought to be recognized in the design and operations of public policy.

Administrés are also characteristically interested in the protection of their physical well-being and in the protection and enhancement of their property and other interests.[12] Whether private individuals or firms, they wish to minimize their costs of complying with standards imposed by policy implementation.[13] Frequently, groups of *administrés* may band together to better disseminate their views on how policy implementation should be carried out;[14] for example, nationally, the pulp and paper mills of Canada are organized into the Canadian Pulp and Paper Association, which actively promotes its positions with government and the public. The *administré* manipulates the system as much as the Administration does. Implementation provides the *administré* with opportunities to promote his interests as much as it threatens them.

Because "third parties" are in effect a diverse grouping of persons, their perspectives, problems and interests are particularly difficult to describe. Generally speaking, the amount of third-party participation in a particular policy context depends upon factors such as perception by individual third parties of how greatly the policy affects their

11. Spigelman (1977: 101) summarizes the importance of those factors as follows: "An administration ... will tend to be faithful to its behaviour modification objectives — the younger the agency is, the greater the clarity with which its functions are defined, the greater the ease with which the results of its actions can be perceived and evaluated, the greater the interdependence of the functions assigned to the agency, the more narrow the scope of the functions of the agency, the greater the simplicity of the functions of the agency, the greater the stability of its external environment and the more substantial are its resources."

12. In fact, very little is known about motivations of *administrés*. As well as the interests mentioned here, *administrés* are also interested in matters which are not usually treated directly by policy implementation: confidentiality, accepted engineering practice, duty to customers and pride in workmanship or product, and so on.

13. Costs of non-compliance include: *fixed costs* from being found in violation of the standard (for example, legal fees, community stigma, decrease in sales); and *financial penalties* (fines) for violating the standard and costs necessary to comply with the standard, or those associated with termination of operations. See, generally, Viscusi and Zeckhauser (1979). See also Rodgers and Bullock (1976: 65), especially their finding that where costs of compliance were perceived to be high and rewards low, the most severe coercion was required. Costs to meet requirements external to the interests of private parties ("externalities") may be partially if not completely offset by persuasion, coercion and incentives, whether directly or indirectly (Burrows, 1970; Seidman, 1978; Drayton, 1980; see also Dunning, 1982). *Administré* behaviour can impose costs or other burdens on third parties (Coase, 1960). Private civil remedies can address some cost displacements; beyond that, difficult political choices usually precede any activities of the Administration which are undertaken to address matters affecting the interests of *administrés*.

14. The Canadian Chamber of Commerce has, through its study of Regulatory Cost of Compliance methodologies, served collective *administré* interests beyond the scope of a single policy.

interests,[15] information availability, level of organization and participation costs. For example, if the policy will directly affect the livelihood or property of an individual (such as an expropriation), the amount of his participation will usually be high. With policies lacking an immediate and direct effect, the amount of third-party participation may not be significant, outside of some special interest groups. There are as well a number of other factors which can have an important bearing on participation. These include the extent to which legal processes accommodate third parties,[16] the distribution of costs, risks and benefits, the transaction costs of participation and the relative resources of the parties.

For the law to respond to the varying interests and needs of parties involved in policy implementation, it must provide administrators with the flexibility to adapt to changing circumstances, yet at the same time offer certainty and accessibility to the *administrés* and third parties. The dynamics of administrator, *administré* and third-party participation are explored in greater detail in Chapter Two, *infra*.

IV. Instruments of Policy Implementation

Three basic groups of instruments[17] used for policy implementation are examined in this Paper: command-penalty, financial incentives and persuasion. Command-penalty instruments include criminal offences, regulatory offences and licences; compulsion is a central element of each in the sense that non-compliance could result in a financial penalty, imprisonment or the withholding of permission to engage in an activity.

Financial incentives[18] encompass such instruments as conditional grants, low-interest loans, loan guarantees and tax subsidies. There is no immediate element of government coercion associated with financial incentives: they are designed to encourage compliance. Persuasion instruments or "techniques" include education and public information campaigns, advertising and "advice-giving" activities of government, intended to alter or influence private sector behaviour.

Instruments may be used in combination or in sequence. However, each possesses distinctive legal, political and economic characteristics and capabilities, rendering it more or less appropriate in a given context. For example, financial incentives and

15. Perception is obviously a long way from participation and the kinds of possible participation also vary considerably. For example, on the one hand, it may be achieved with only a telephone call or letter. On the other, the level of concern can give rise to the organization of a group, meetings with administrators and elected officials, entering formal interventions in an Administration's proceedings or initiating private prosecutions or civil proceedings in the courts. For analytic purposes in this Paper we have adopted the term "third party," although it may be far too broad to allow meaningful discussion of the range of third-party types, their interests and means for participation in policy implementation. For a description of identities, interests and motivations of special interest groups, see Pross (1982).

16. Third-party participation varies significantly, depending on the nature of the government institution and the governing instrument.

17. "Power" may be a better term, although it does not readily lend itself to legal analysis. Our discussion of instruments and activities was inspired by the literature about the uses of coercive, compensatory and conditioning power (Russell, 1938; Galbraith, 1983).

18. An incentive is essentially an inducement to behave in a certain way; the incentive is defined by the entity offering the incentive. To be an incentive the money transfer must be conditional on some action by a private actor; an incentive is not, therefore, merely an unrequited transfer.

persuasion are often used to adjust or influence private sector behaviour of a non-life-threatening variety; because they do not involve a coercive component, they are usually subject to less onerous procedural requirements than command-penalty techniques.

V. Institutions and Policy Implementation

While all government institutions play important roles in policy implementation in Canada, the front-line functions are carried out by independent administrative agencies, departments and Crown corporations. Our research thus far has focused mainly on departments and independent administrative agencies, but we have also come to recognize some policy implementation uses of Crown corporations. Legislatures and courts likewise serve important support roles in policy implementation. The political science and public administration perspectives on institutions can help inform policy implementors (Hodgetts, 1973; Kernaghan, 1983; Canada, Royal Commission ..., 1979).

In a given policy context, government may resort to a full range of institutions and instruments. For example, in its efforts to influence the content of radio, television and film, the federal government has called on the services of an independent administrative agency to implement a licensing regime for radio and television (the CRTC), a government-owned broadcasting corporation (the CBC), a Crown corporation to administer grants for Canadian film and television programs (Telefilm Canada), and a department to implement tax incentives for Canadian programs (the Department of National Revenue).

Throughout our work, we have speculated about whether certain kinds of policy implementation functions were best administered by one or other institution type. What kinds of institutions can or should perform adjudication functions? What kinds of institution should administer grants programs? What type of institution should be given authority to prosecute regulatory offences? Should a policy or regulation-making institution be responsible for implementing them? A better understanding of institutions can lead to better implementation.

VI. Summary

Policy implementation, compliance and administrative law form a hybrid topic, drawing on the expertise of academics and practitioners in public administration, political science, economics, law and other disciplines. Developing a language which reflects these diverse backgrounds, while not carrying inappropriate connotations, is difficult but necessary if meaningful discussion is to take place.

Implementation at the operational level may be quite different from the appearances of normative policy. Implementation is what occurs; it is often a matter of judgment whether implementation has achieved policy objectives. In this Paper, we are concerned with implementation which requires compliance with legal standards. We define "compliance" as action in response to government requests or commands. Government

often expresses its desires as requests. Measurements of both implementation effectiveness and of degrees of compliance can be difficult. The Administration can measure outputs and inputs (for example, numbers of prosecutions, money spent, and so on), but these may be poor indicators of implementation and compliance.

Relational implementation is a way of describing the ongoing interactions among government, the private sector and members of the public. We use the term "administrator" to refer to all those government officials engaged in policy implementation; the "Administration" means all those administrators and their institutions, taken collectively. "*Administrés*" are those natural or corporate persons who are the subject of an implementation policy. "Third parties" include all individuals who fall into neither administrator nor *administré* categories.

Three major groups of policy implementation instruments are discussed in this Paper (namely, command-penalty, financial incentives and persuasion), as are the three major classifications of institutions which are used to implement the policy (that is, departments, independent administrative agencies and Crown corporations). In a given policy context, government may bring to bear a host of instruments and institutions. Law provides a framework in which these instruments and institutions operate.

CHAPTER TWO

Relational Implementation

> [T]he problem of government is two-fold. From the point of view of the government, the problem is to secure acquiescence from the governed; from the point of view of the governed, the problem is to make the government take account, not only of its own interests, but also of the interests of those over which it has power (Russell, 1938: 197-8).

To talk of "relational implementation"[19] is a way of describing the kinds of interactions which take place over time among government institutions, private parties and their representatives. It is a way of recognizing that "[r]egulation, like marriage and labour relations, involves a continuing relationship" (Eddy, 1981: 70). It may be true that not everything can be bargained. However, continuing relationships require mutual adaptation.

Our implementation research proceeded on the assumption that administrators and private parties do what they are required to do to implement policy, mainly by way of "accommodation that puts to one side the alternative routes of prosecution and Court injunction" (*Tomko* v. *Labour Relations Board (N.S.)*, p. 122 (S.C.R.)). Research findings confirmed that assumption and have led us to examine the roles of participants and processes in such accommodation.

Implementation relationships are similar to one another in some general respects but the differences remain important. For example, very few areas of policy attract the political support and resources which are committed to criminal law implementation. As well, each of the many federal licensing and other "permission-granting" systems under which private parties are allowed to engage in an activity within a scheme of particular conditions and requirements, also has its relational peculiarities, again depending on political support for the normative policy, resources of administration, and so forth. Within some systems, permission is highly negotiable, while in others there is less flexibility. Many policy implementation arrangements, under which private parties receive incentives, are negotiated. The implementation of other incentives and transfers is more mechanical: the Administration grants approvals or benefits to qualified applicants. Finally, there are many areas where the Administration desires but does not compel, coerce or provide financial incentives; persuasion is often used in contexts where no formal legal processes apply. Negotiation and accommodation may occur at every stage of the implementation process including policy making, rule making, rule application and adjudication.

19. Macneil (1980) classifies contracts as "discrete" and "relational": the former involves simple exchange while the latter extends over a longer period of time during which the parties treat the contract as a framework for an evolving relationship. The "relational" idea has been suggested as an alternative theory to explain what positive law theory cannot. It has been suggested that "on account of the character of relations between the parties, their conduct is far removed from the demands of the formal legal order" (Gottlieb, 1983: 577). Gottlieb borrows Macneil's idea to support a theory of "relational regulation."

As is the case in all relations, obligations and benefits flow between parties. Legal instruments circumscribe only some of those relations; government institutions play various roles in guaranteeing and enforcing some obligations and benefits. In the triangle of relations, third parties may pay *administrés* for goods and services provided by the latter; the *administré* may submit (formally and informally) applications, requests and fees to the Administration; the Administration and the *administré* may exchange information and goods, engage in adversarial contests, and use various kinds of power on one another; third parties enjoy the advancement or protection of the public good by the activities of *administrés* and administrators. The Administration may have engaged the third parties in the process (through rule making, public inquiries or judicial review). In the end, third parties pay the taxes and provide the political support both of which are necessary for the continuing existence of the Administration.

We use the phrase "relational implementation" to indicate the importance of the various interactions among parties in policy implementation.[20] The examples set out below highlight the diverse nature of relationships between private parties and the Administration, as well as the kinds of differences which persist between legal frameworks and actual implementation processes.

I. The CRTC and Broadcast Content

The public and private elements of the Canadian broadcasting system are explicitly referred to in the *Broadcasting Act*. Born out of compromise more than fifty years ago, the system consists of a variety of federal government entities which have various responsibilities and can resort to various instruments "to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada" (*Broadcasting Act*, s. 3(*b*)). Among the federal institutions responsible for influencing the content of broadcasting (see *supra*, Chapter One), the CRTC is the most regulatory in this area. It possesses the authority to make and implement policies respecting some matters of content. Its implementation activities are directed to the licensing and prosecutorial streams, and its jurisdiction extends to the CBC and to private licensees.

Content policy goals are expressed at length in the *Broadcasting Act*, but the CRTC has been given considerable authority to develop this policy further through rules, policy statements and individual decisions. The CRTC has dealt differently with the areas of

20. According to Meyerson and Banfield (1955: 305 ff.): "The activity by which the parties to an issue agitate it or bring it to a settlement may be described broadly as one or more of the following types: A. Cooperation, B. Contention, C. Accommodation, and D. Dictation .... In all of these modes of activity the parties either take each other into account (i.e., they interact) or one party takes the others into account (i.e., acts unilaterally with respect to them). Two other modes of reaching a settlement may be mentioned in which no party to the issue takes the others into account: these are *competition*, a process in which the settlement is the outcome or result of unconcerted activity by parties who are not oriented either as cooperators or adversaries to other parties and who may even be unaware that an issue exists or that they are parties to it (competition in this sense does not imply emulation of course) *and arbitration*, a process in which an actor who is not a party to the issue fixes the terms of the settlement. Since these two types of process do not involve either interaction or the taking account by one party of others, we do not class them as political."

"Interactions among parties" is also the stuff of administrative procedure. The present Paper does not treat questions about procedure in detail because they will be addressed in subsequent Papers of the Commission.

television and FM radio. In the former, it has made "Canadian content" the principal concern of its regulatory attention, while in the latter, the content concerns, identified and promoted by the CRTC, are extremely diffuse.

Content of broadcasting has different implications for different parties. In content analysis of communications, the elements of communication are classified into channels, messages, sources and receivers.[21] Any message carries different implications for different actors: for the CRTC, the message should comply with the legislation governing content, as well as the conditions of the "channel's" licence; for the private licensee, the message must attract a maximum measured audience so that advertising revenue will maximize profits. For the audience, the message has intrinsic significance beyond the commercial interests of licensees and advertisers.

Instruments available to the CRTC include licences and regulatory offence prosecutions. Licences are the main instruments: it is through licensing that the Administration allows private parties to make use of a public property (the air waves). The CRTC has authority to issue, renew and amend licences subject to the approval of technical standards by the Department of Communications. In addition, the CRTC may attach conditions and lesser prescriptions, and may suspend, revoke or refuse to renew licences after violation of licence conditions. Except for the most uncontroversial matters, such as applications to change transmission frequencies where no interventions have been filed and the licensee is in compliance, the CRTC conducts public hearings for each licence application. In theory, the application process accommodates all parties, but the usual participants are the licensees, and occasionally a market competitor.

As regards content regulation, the activities of the CRTC aim primarily at producing data and analysis of licensee behaviour for its licensing and prosecutorial streams. To be effective, these require extensive resources for the preparation of analytical and other information about licensee conduct. Licensees supply information about content, and third parties occasionally express their support or dissatisfaction about content or about competitive aspects which are coincidentally content related. In practice, however, the difficult issues are not typically resolved in public hearings.[22] In the FM radio sector, CRTC analysts understand better than others the diffuse content concerns set out in the regulations and, therefore, CRTC staff meet with licensees before public hearings on licence applications to reduce the possibilities of strident confrontation at public hearings. In this respect, what the licensing process affords is an opportunity to discuss the terms for complying with regulations and conditions of licence.

In the television sector, the licensing system is not designed to address the Canadian content issue directly, because licensees who substantially violate the Canadian programming regulations may be prosecuted. The CRTC therefore compiles (extensive) annual statistics about Canadian and non-Canadian programming to support the (rarely used) prosecutorial stream. Canadian content in television is addressed in the licensing stream only indirectly by reference to technical facilities, local programming, and the like. In contrast, the CRTC addresses FM radio content concerns only in the licensing stream; no prosecutions have been undertaken for violation of FM content regulations. The FM

21. For our purposes the licensees are the channels, and they may also be sources; program sources are licensees and non-licensees; receivers are the audience (Budd *et al.*, 1967: 4).

22. For example, until recently in the television sector, line staff who were seven levels removed from the Commissioners made daily determinations about whether programs qualified as Canadian. Subsection 16(1) of the *Broadcasting Act* gives the CRTC authority to make regulations "respecting standards of programs," and the CRTC's Television Broadcasting Regulation 8(3) states its own authority to "deem ... any program ... to be a Canadian program." The "deeming" has been done by line staff.

radio content policy was established more than ten years ago, before the sector experienced significant growth, to make FM radio different from AM radio and to attempt to ensure diversity in the various listening areas. Moreover, the CRTC uses the FM policy to regulate competition in the Montréal radio market.

Without general public participation and understanding of the FM radio policy, licensing in the FM sector has been largely a matter for deliberation between the CRTC and individual licensees. As well, no clear guidance has been given by Parliament on the matter of content of FM radio.

The CRTC has not revoked or suspended FM radio licences for detected non-compliance with content requirements. Indeed, the CRTC has not denied licence renewals in notorious situations such as the large Montréal FM radio market, where licensees' non-compliance with content requirements has been perhaps the most serious. The CRTC tends to be satisfied with reasonable assurances from licensees that they will improve their performance. In rare situations where assurances have not been forthcoming, the CRTC has refused to renew a few FM radio licences.[23] Typically, however, the CRTC has received the majority of comments concerning licence revocations from third parties who support the former licensees. When the CRTC has refused to renew licences, the same licensees, newly constituted, have always been given new licences for the same markets. Even the CRTC itself has explicitly recognized that such non-compliance threatens its integrity.

Ultimately, the task entrusted to the CRTC may be an impossible one: to serve all the interests set out in the *Broadcasting Act* may be beyond the human and other resources of any governmental entity.[24] However, given the fundamental normative

23. That is, in small to medium markets such as in Coburg, Ontario, Saint John, New Brunswick and Québec City.

24. *Broadcasting Policy for Canada*

3. It is hereby declared that (*a*) broadcasting undertakings in Canada make use of radio frequencies that are public property and such undertakings constitute a single system, herein referred to as the Canadian broadcasting system, comprising public and private elements; (*b*) the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada; (*c*) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned; (*d*) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources; (*e*) all Canadians are entitled to broadcasting service in English and French as public funds become available; (*f*) there should be provided, through a corporation established by Parliament for the purpose, a national broadcasting service that is predominantly Canadian in content and character; (*g*) the national broadcasting service should (i) be a balanced service of information, enlightenment and entertainment for people of different ages, interests and taxes covering the whole range of programming in fair proportion, (ii) be extended to all parts of Canada, as public funds become available, (iii) be in English and French, serving the special needs of geographic regions, and actively contributing to the flow and exchange of cultural and regional information and entertainment, and (iv) contribute to the development of national unity and provide for a continuing expression of Canadian identity; (*h*) where any conflict arises between the objectives of the national broadcasting service and the interests of the private element of the Canadian broadcasting system, it shall be resolved in the public interest but paramount consideration shall be given to the objectives of the national broadcasting service; (*i*) facilities should be provided within the Canadian broadcasting system for educational broadcasting; and (*j*) the regulation and supervision of the Canadian broadcasting system should be flexible and readily adaptable to scientific and technical advances; and that the objectives of the broadcasting policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcating system by a single independent public authority.

policy that the air waves are public property, and given the mixed public and private Canadian broadcasting system, the federal government has made content a priority. The audience for broadcast content could probably not have its interest in content better represented than through the aggregation which can be partially achieved by governmental entities. It remains an open question whether the CRTC's implementation of its content policy achieves more than the symbolism of government doing something. Some commentators have suggested that multiple conflicting objectives in legislation arise from symbolic politics which can in turn lead to symbolic legislation and symbolic implementation (Trebilcock *et al.*, 1981; Hartle, 1979).

The CRTC has involved a range of third parties in its policy-making and rule-making exercises. Third-party involvement in the planning of normative and strategic policies has been more significant, for television and radio sectors at least, than the meagre representation of their interests in implementation. In the formulation of "criteria" for recognition of Canadian television programs, for example, a series of workshops, seminars and public hearings afforded generous opportunity for participation and comment. In its review of radio, the CRTC again convened a number of hearings, consultations and other opportunities for comment about revision of the FM content regulations, among other matters. In implementation, however, third-party complaints and occasional formal intervention in licensing applications were the only substantial manifestation of third-party relations with the CRTC and its licensees. In this repect, depending on the evolving technical configurations and public priorities in matters of broadcasting content, third parties could do more than register *ad hoc* complaints about licensee compliance. As sources (merchants), as competitors and as audience (selectors, viewers and payers) of Canadian programming, their interests in broadcast content are clear.

Taking into account the interests of government and private parties in content of broadcasting, our research of CRTC activities illustrated those interests at representative stages of policy development, legislation and implementation between 1974 and 1983. During that period the FM radio content policy was promulgated, implemented and revised; for television, the normative Canadian content policy remained essentially unchanged, but the focus of implementation changed dramatically.

The new FM policy was phased in, because time was needed by licensees to understand the new regime; the need for phasing in implementation was recognized by the CRTC in the original FM policy. However, when the transition periods had expired, many licensees still had much work to do to comply with the FM content policy. That situation was improved somewhat by the recent removal of content categories for the FM regulations.

Until promulgation in 1984 of the criteria for recognition of Canadian programming, the CRTC's implementation of Canadian content regulations for television was attempted mainly through exhortation in private and in public hearings. When "regulation by raised eyebrow" (Barrett, 1981) had failed in the mid-1970s, the CRTC began to prosecute licensees for failure to comply with non-Canadian programming regulations. That activity shocked some licensees while renewing the focus given by the CRTC to matters of Canadian content in television. The CRTC's strategy has evolved since 1980 through a policy-making process which involved all parties interested in Canadian programming. The new criteria for recognition of Canadian programming are more coherent and credible because of the involvement of third parties and licensees, and because of the similarity of the criteria to those used by cultural agencies (for example, CFVCO of the Department of Communications) which are involved in incentives

programs. In view of the improved co-ordination between public institutions and the greater integration of operational criteria for the exercise of discretion for both regulatory and incentive instruments, it is expected that relations between CRTC licensees and third parties will be substantially different from former relations which were clouded by imminent prosecutions.

In summary, the CRTC has two kinds of instruments around which it structures its relationships with *administrés*: licensing and prosecution. To a certain extent the interests of third parties are taken into account in both streams, broadly in the sense that the CRTC should represent the public interest, and occasionally when a third party complains or formally intervenes in licence applications. Prosecution is infrequently used, although formidable logistic supports are maintained for its potential use, and the threat of prosecution for some kinds of non-compliance is a useful operational device. Licensing, on its face, appears to carry grave consequences for non-compliance; however, licensing actually provides a framework for informal bargaining about content. In fact, CRTC practice has entrenched tenure in licences. Loss of licence for failure to meet content requirements is a remote possibility at best, and so licensing relations are substantially different from what one might expect on reading the legislation. The CRTC's licensing system, as it operates, is a good example of a generally applicable legal framework which accommodates the changing nature of the particular interests of the Administration and of the *administrés*. The relations maintained by the CRTC's licensing system, however, beg for experiments for better accommodation of third-party interests.

II. The EPS and Water Quality

Protection of water quality is a matter fraught with scientific, technical and economic uncertainties. At least partly because of this, the EPS of the Department of Environment has frequently been unable to conduct its administrative activities in a detached, formal manner. Typically, determination of an appropriate level of effluent discharge for a water user requires assessing, among other things, the water ecosystem in the vicinity of the water user, the technical and economic capabilities of the water user's operations, the technical and economic feasibility of available abatement and control systems, and the role the water user's operations play in the community at large. Given the wide range and dynamic nature of such factors, the EPS has frequently resorted to negotiation. The precise form of negotiations varies, depending upon variables such as the parties involved, the legal instrument involved, and the strength of provincial environmental protection efforts. Descriptions of EPS-*administré* and EPS-third-party relations in a pulp and paper pollution control context are provided below.

The *Fisheries Act* and *Pulp and Paper Effluent Regulations* (C.R.C. 1970, c. 830) set out a command-and-control regime for pulp and paper water pollution control. Briefly, a pulp mill's allowable effluent discharge varies depending upon the type of operation and the amount of production. If prescribed standards are exceeded,[25] the mill can be prosecuted and could receive a fine (*Fisheries Act*, s. 33(5)), a court order

25. The pulp and paper water pollution control regime established pursuant to the *Fisheries Act* is complicated by the fact that the standards set in regulations for "existing mills" (that is, those unexpanded on unaltered mills in operation prior to November 2, 1971) have yet to be proclaimed in force. As a result, existing mills are legally subject to the absolute prohibition against the deposit of substances deleterious to fish prescribed by subsection 33(2) of the *Fisheries Act*. The legal and practical implications of this and many other aspects of the *Fisheries Act* pulp and paper water pollution regime are explored in detail in Webb (1983: Chapter V).

restricting his operations, or both (*Fisheries Act*, s. 33(2)). In addition, administrators are provided with a variety of ordering powers to encourage compliance with the standards.[26]

While the *Fisheries Act* and regulations suggest a straightforward, almost mechanical implementation process, actual practice is much more fluid and *ad hoc*. From the outset, the EPS and the pulp and paper industry worked in close co-operation to develop the initial industry-wide standards. Since that time, the close government-industry relationship has continued, as standards for individual mills have been negotiated. This ongoing, negotiatory type of relationship is necessary, given the existence of economic, technical and scientific uncertainty, the need to develop vocabulary and standards as changes arise, the desire to accommodate individual circumstances through individual treatment, and so on. Negotiations usually take place at a very technical level, with no lawyers present.

The EPS attempts to use provincial environmental protection regimes as delivery vehicles for its own desires wherever possible. Thus, where there is a strong provincial presence, EPS-*administré* contact may be minimal. Communications between the EPS (or the provincial equivalent) and *administrés* are ongoing, as new abatement technologies develop, expansions are considered, abatement equipment is installed, and new problems come to light. Actual EPS conduct is considerably more flexible and informal than the legal model would lead one to believe.

While informal EPS-*administré* relations may be necessary to achieve practicable environmental solutions, this close relationship can be perceived as detrimentally affecting the impartiality of the EPS in its enforcement actions. Indeed, the EPS has rarely chosen to prosecute even when violations have been detected. In addition, the informality of EPS-*administrés* relations decreases the likelihood of openly consistent, predictable treatment from one *administré* to another. As well, informal relations are less accessible to the public. To many administrators, however, the courts are to be avoided whenever possible.

In contrast to the informal negotiations between the EPS and *administrés*, EPS-third-party contact tends to take place on a more formal and sporadic basis. Third parties have had no involvement in the setting of existing industry-wide standards, and participation in specific negotiations can only be described as minimal. Recent attempts to improve third-party participation at the rule-making stage suggest that the EPS is trying to redress inadequacies in its handling of third parties; still, no formal attempt has been made to bring third parties into the site-specific negotiations. It is difficult to assure meaningful third-party participation in negotiations, given the disparity of interests, and the time, expense and expertise required for constructive bargaining. Nevertheless, experiences in other Canadian jurisdictions suggest a more participatory third-party role is possible.[27]

Under the *Fisheries Act*, third parties do have recourse to one formal method of participation: private prosecutions. This form of participation can be an important safeguard against lax enforcement practices, and for ensuring that Administration-*administré*

26. For example, the Minister may by Order in Council require modifications, alterations or restrictions to an undertaking (s. 33.1(2)); an inspector may take remedial measures (s. 33.2(6)).

27. See, for example, Gibson (1983).

relations do not become too cosy. The formal and adversarial nature of the private prosecution process stands in sharp contrast to, and can disrupt, ongoing Administration-*administré* relations. However, for all their value private prosecutions do not compensate for the lack of early third-party involvement in the administrative process, be it in negotiations or in the formulation of standards.

The Pulp and Paper Modernization Grants Program (PPMGP) is an example of a federal financial incentive initiative which encourages pulp and paper mills to adopt less polluting processes. The Modernization Grants Program is a jointly administered federal-provincial program offering mills up to twenty-five per cent of the cost of mill modernizations, if those modernizations have received the prior approval of federal and provincial authorities. Briefly stated, the modernization program has two major objectives: first, to make the Canadian pulp and paper industry more commercially viable, and second, to reduce the impact of the industry on the environment. From an environmental protection standpoint, the PPMGP is of particular relevance to those older, less efficient pulp mills which cannot realistically accommodate pollution abatement renovations unless they take place as part of more fundamental mill modernizations.

For government authorities to make constructive comments on mill modernization proposals, a close government-industry relation is normally necessary, with relatively open information exchanges. But while close government-industry relations take place at the technical level, there is little legal framework structuring such relations. As a result, it is unclear what redress is available to a potential applicant whose modernization proposal has been rejected; nor are the enforcement terms clearly set out for federal and provincial administrators and for grantees. According to officials involved, to date these aspects have not been the source of problems.

The legal regime describing the PPMGP does not expressly address the position of third parties. Thus, it is unclear what access or recourse a concerned taxpayer might have to a modernization proposal; moreover, it is not known whether a third party could compel enforcement of grant terms. Third parties' lack of opportunities to participate in this program differs little, in this respect, from their position in relation to the *Fisheries Act*. In contrast, however, third parties concerned with the modernization program do not have any direct "end-run" enforcement potential equivalent to private prosecutions under the *Fisheries Act*.[28]

III. The Canadian Human Rights Commission and Discriminatory Behaviour

Broadly speaking, the CHRC attempts to reduce or eliminate discriminatory behaviour through reactive and proactive approaches. The reactive process is dependent upon an individual or the CHRC itself lodging a complaint of discriminatory behaviour. This, in turn, sets in motion the investigation, conciliation and hearing phases of the process. However, the limitations of the reactive individual complaint approach are well known:

> [I]t is not realistic to expect that the individual complaint mechanism and the non-discriminatory provisions of human rights statutes can effectively alter and remedy historical patterns of disadvantage experienced by whole groups of people.

28. Of course, if a mill receiving a modernization grant was at the same time violating the terms of the *Fisheries Act*, third parties could bring a private prosecution pursuant to the *Fisheries Act* when they are unhappy with PPMGP administration. At best, this would be an extremely roundabout method of participating in the process.

> [E]mployment and education systems function through a multiplicity of procedures and practices, and there is no reason to believe that the individual complaint mechanism can deal with a complex of practices and dismantle the discriminatory effects of a system as a whole (Day, 1980: C/13, C/14).

The proactive approach to eradicating discrimination involves the use of such techniques as affirmative action, education and contract compliance programs. These methods aim at preventing, eliminating or reducing *entrenched patterns of disadvantage* for whole groups of people *before* individual complaints arise.

The process and the relationships associated with it differ considerably depending upon whether a reactive or proactive approach is adopted. Thus, the investigation of complaints of discrimination is, at the best of times, complex and emotionally charged. Clear-cut cases are rare: the more typical situation involves issues such as "systemic discrimination," where "neutral" employment standards may negatively affect a particular group of disadvantaged people; for example, height and weight restrictions have significant effects on women. Outside of the straightforward, intentional discrimination situation, problems of proof become particularly difficult to overcome: one commentator noted the "almost impossible task" of disproving alternative reasons a person may give for her conduct (Tarnopolsky, 1968). Perhaps for these reasons, the individual complaint process seems to be geared toward settlement at the investigation and conciliation stages, and hearings appear to be reserved as a forum of last resort. Thus, although the Commission may, at any time after the complaint is filed, hold a hearing before a CHRC tribunal (*Canadian Human Rights Act*, s. 39), the usual practice apparently is first to exhaust less formal methods, such as investigation and conciliation. Moreover, all settlements must be referred to the Commission for approval (s. 38).

A complaint can be made by someone other than the alleged victim of discrimination, although the Commission may refuse to deal with the complaint unless the alleged victim consents to the action (s. 32(2)). Moreover, the Commission itself may initiate a complaint, where it has reasonable grounds to do so (s. 32(3)). The Commission is under an obligation to "deal with" any complaint, unless the alleged victim could have more properly sought redress through another procedure, or the complaint is trivial or dated (s. 33).

Investigators can be authorized to enter business premises and carry out inquiries necessary for the investigation of the complaint (s. 35(2)). It is an offence to obstruct an investigator in his work (ss. 35(3), 46(1)). In practice, the investigator will interview the complainant, the alleged discriminating parties and any witnesses. This entails close contact between complainant and investigator as evidence is amassed and examined. Confidentiality is of the utmost importance at this initial stage (s. 27(2)) because only an *investigation* is taking place. The investigator then submits a report to the Commission. The complainant is not present at this submission.[29] The Commission has a number of options: it may dismiss the complaint, substantiate the complaint and appoint a conciliator to attempt a settlement, approve any settlement that has been proposed during the investigation, or appoint a tribunal.

Information provided to a conciliator is confidential and can be disclosed only with the consent of the person who gave the information. The parties to a complaint may take the conciliator into their confidence while discussing a possible settlement, since

29. But see *Radulesco* v. *Canadian Human Rights Commission* wherein the Supreme Court of Canada ruled that the Commission ought to afford a complainant reasonable opportunity to make written submissions in response to the investigator's report, before the Commission adjudicates a complaint.

a conciliator cannot be compelled to appear before a tribunal or court (s. 37(3)). A person is not eligible to act as a conciliator in respect of a complaint if that person has already acted as an investigator in relation to that complaint (s. 37(2)).

At any time after a complaint is filed, the Commission may appoint a tribunal (s. 39). Hearings are conducted in a formal manner, with notice requirements and evidence rules similar to those of a Superior Court (s. 40(3)). The tribunal can compel attendance and testimony of witnesses (with the exception of conciliators) (s. 40(3), (5)). Hearings are generally public, unless the tribunal wishes to exclude certain persons in the "public interest" (s. 40(6)). Decisions of tribunals can be appealed to the Federal Court.

Tribunals may order a respondent to cease a discriminatory practice, to rehire an employee unfairly dismissed, or to pay compensation for damages (s. 41(2), (3)). An order of a tribunal may, for the purpose of enforcement, be made an order of the Federal Court of Canada (s. 43).

Relations between complainant, the CHRC and other interested parties become more structured and formal the further one progresses through the complaint process. Most complaints are successfully resolved before the tribunal stage is ever reached. The CHRC summarizes data detailing how the complaint processes operated in 1983:

> [T]he Commission received 29,759 enquiries and 312 complaints. The Commission dismissed 295 of the 481 complaints it examined and 110 complaints were settled — 15 in conciliation, 14 by tribunal and 81 during investigation. In addition, 18 cases submitted to the Commission were discontinued. Thirty-four cases were referred to conciliators and 24 were sent to tribunal (Canadian Human Rights Commission, 1984: 21).

This jurisdiction of the CHRC is limited as regards complaints. On the other hand, it appears that the CHRC may legitimately exercise powers to disseminate information and to persuade in areas where it may not otherwise have jurisdiction (Laberge, 1983). Proactive persuasion activities are significantly different from the Commission's "reactive" functions. During such activities, the CHRC may gather information in order to build its case for extending its jurisdiction. The CHRC sends its commissioners and officers to the premises of companies where they conduct seminars which are designed to "sensitize" company officers and staff about human rights policies. It is significant that the CHRC has statutory authority to "develop and conduct information programs to foster public understanding" (s. 22(1)(*a*)), and to "endeavour by persuasion, publicity or any other means that it considers appropriate to discourage and reduce discriminatory practices" (s. 22(1)(*g*)). Such activities obviously affect the relationships between government and private parties, and are part of an implementation strategy. The implementation relationship can and does begin before things go wrong.

IV. The Criminal Justice System and Criminal Behaviour

Although the reactive component of the criminal process receives the most attention, preventive activities also play an important role in decreasing or minimizing criminal behaviour. The reactive criminal process — involving primarily the *Criminal Code* offences, police, courts, prisons and crimes compensation boards — is structured in a formal way. In contrast, the proactive criminal process — Neighbourhood Watch, drinking and driving advertising campaigns and so on — is considerably more flexible.

Relations between administrators and private parties in the reactive criminal law enforcement process can be described as formal and detached. Once the alleged criminal behaviour takes place and is detected, police apprehend the suspect and investigate the events surrounding the alleged crime. Even when the victim or another party brings the complaint to the attention of authorities, the police usually initiate legal proceedings. In some cases, where the authorities choose not to prosecute, private parties may still launch a private prosecution. Once a complaint is filed, the police will usually interview the suspect, the victim and any third parties who might have witnessed the event. Any of these parties might choose to have legal counsel present during the investigation. The police have broad search and seizure powers to assist them in their investigation function. There are few ongoing relations between citizens and the police, although a certain amount of dialogue does take place in "policemen on the beat" situations (Ericson, 1982: 62-3). An integral aspect of the policeman's role is that of a "presence," a visible sign of the enforcement authority in the community.

The complaint, arrest and investigation phases of the criminal justice system are geared to support the court's guilt determination process. In the usual course of events, lawyers represent and speak on behalf of parties involved in the prosecution (for example, the accused and the Crown). The criminal courts operate in a highly formal manner, with complicated evidence rules, defences, and so on. Nevertheless, some negotiation may still take place: plea bargaining is an example of this. The victim of the alleged crime usually does not play a major role in the court process, although there has been a recent trend for victims of certain crimes to be heard by the court about sentencing.

If the court finds the accused guilty of a criminal offence, the disposition is often a fine or imprisonment. As well, alternative sentencing methods such as supervised community work are increasingly being used. In the case of incarceration, prison terms are adjusted by parole boards. Use of lawyers at parole board hearings is not uncommon. Hearings are conducted in a fairly formal manner (Carrière and Silverstone, 1976). Upon release from prison, governmental and non-governmental organizations attempt to ease the integration of the individual back into society (Chan and Ericson, 1981).

Regardless of a court's disposition in a criminal trial, the victims of crime can turn to crimes compensation boards for some financial relief. Essentially, these boards offer some financial assistance to those victims who, for one reason or another, cannot obtain relief from the perpetrator. In circumstances where the physical condition of the victim is constantly changing, the victim may appear before the board annually for reassessment.

In summary, the criminal justice system has come to involve many government institutions which treat the different needs of parties within the process. Some institutions and procedures associated with detection of criminal activity — apprehension of suspects, investigation, incarceration and post-incarceration — operate in more informal ways, with more opportunities for ongoing relations. Symbolism seems to be important in the criminal justice system: hence the insistance on displays of legitimate force (by policemen) and on the gravity of the process (administering of oaths, rules of evidence, and so forth, in courts). Such manifestations tend to ensure that relations among parties remain formal and detached. Victims of criminal activity usually play only a support role in the investigation, incarceration and trial phases, and while not well accommodated in the criminal trial process, some victims are treated by crimes compensation boards.

The proactive functions of government which help reduce the likelihood of criminal activity occurring include Neighbourhood Watch programs, advertising campaigns (for example, warning of the dangers of drinking and driving), property identification programs and drug abuse clinics, and, in an indirect way, government social programs, such as unemployment insurance, job training programs, education and schooling.[30] In its broadest sense, it could be argued that the proactive aspects of the criminal justice system encompass all those activities of the administration which may help reduce the likelihood of criminal activity occurring.[31]

The formal styles of relationships which characterize the criminal process are not generally appropriate for other areas of policy, because of costs and the positions occupied by accused and incarcerated parties. The criminal process is highly visible for scrutiny by the public. Although the visibility does not necessarily entail a proper airing of the views of all persons who are interested in the process, visibility placates, to a degree, the desire of third parties to be accommodated in policy implementation.

V. Inspectorates and *Administrés*

A. The Canadian Air Transportation Administration and Aviation Safety

CATA is part of the Department of Transport, and is responsible under Part I of the *Aeronautics Act* for managing such technical aspects of aviation as aircraft registration, licensing of personnel, maintenance of airports and facilities for air navigation, air traffic control, accident investigation and safe aircraft operation. The Canadian Transport Commission regulates the economic aspects of commercial air services. In our review of the work of the Department of Transport's Task Force on Aviation Safety and of the Commission of Inquiry into Aviation Safety (Dagenais, 1983), we noticed several aspects of the relations between the Administration and private parties which added to our knowledge about policy implementation. Aviation safety regulation is conducted mainly between administrators and *administrés*, as established by licensing systems and subject to regulatory prohibitions, with little third-party involvement.

Most aviation safety problems occur among small private operators in northern and remote regions of the country. The physical size of Canada and the resource limitations of private parties and of the Administration present formidable implementation problems. CATA uses its own monitoring personnel (that is, its inspectors) as well as the services of the RCMP. With its own inspectorate, CATA has had problems combining enforcement and advisory functions: which hat, "black" or "white," should the inspector wear when performing a particular task? When an inspector detects an airworthiness violation or an overweight aircraft, should he advise the licensee about the

30. This broad, all-encompassing list presumes that criminal activity can be at least partially explained in economic terms.

31. The criminal justice system primarily addresses past wrongs, but it is recognized that the system is substantially rationalized on the basis of deterring future criminal conduct. See, for example, Fattah (1972: 7-20).

problem and suggest solutions, or should he ground the operator? Given the ongoing nature of the relations between inspector and operator, would a "hard line" strain future relations? Will the operator treat safety less seriously if he is advised or warned instead of being coerced through prosecution or licensing action? Grounding an operator may mean the suspension of services to a remote community where no alternative transportation is available. In such instances, third parties served by the "unsafe" operator may oppose the CATA position. Such circumstances create real dilemmas for CATA inspectors.[32]

CATA has developed an enforcement manual which has partially relieved the inspectors' sources of uncertainty about correct responses to detected non-compliance and about the exercise of many kinds of discretionary functions. The approach of CATA is decidedly enforcement-oriented. This orientation has been strengthened by the analysis and recommendations of Mr. Justice Dubin's inquiry into aviation safety (Canada, Commission of Inquiry ..., 1981). In practice, however, significant persuasion activities take place, both systemically and during informal discussions with operators.

Some inspectors may have close, ongoing relationships with the air carriers and may prefer not to wear the "black hat" of enforcement. Those who spent many years as pilots (civil or military) or engineers may more readily form part of the "old network." Their familiarity with aviation standards is an asset to CATA administration in one sense. In another respect, however, they may sometimes be overly sensitive to the uncertainties about airworthiness standards and the difficulties faced by small operators: in that sense one's background training may equip the inspector for service functions other than enforcement. Some inspectors may see themselves as public consultants rather than enforcers, and consider their functions as strictly inspection-related. They may apprehend that, if seen by the carriers as "policemen," their information sources would be jeopardized.

Technical standards governing aircraft also create many operational difficulties for the inspectorate.[33] On-the-spot determinations about overweight aircraft pose real problems for inspectors and *administrés* because repairs and weather may change the airworthiness of the particular aircraft. Notwithstanding such technical problems, the operators and the inspectors seem to have a tacit understanding of what constitutes safe flying. This "understanding" may only be called into question once an accident has occurred.

B. Design Problems: The Case of *Transportation of Dangerous Goods*

Largely in response to the public outcry following the Mississauga train derailment, the federal and many provincial governments have recently passed legislation (*Transportation of Dangerous Goods Act*) attempting to treat comprehensively matters of dangerous substance transportation within their jurisdiction. The statutory schemes, not

32. This is a problem familiar to all inspectors; it defies simplistic formulas and legal solutions: "The effective enforcement officer must recognize in a field situation when to issue a warning and when to lay a charge. No manual can help him there" (Burton, 1984: (iv)). See also: Hawkins (1984); Jowell (1973); Bardach and Kagan (1982).

33. One cause of equivocation and uncertainty is in the incorporation by reference of foreign manufacturers' specifications into legislated airworthiness standards (Dagenais, 1983).

yet fully in place, envisage control measures for all modes of transport and for intermodal transfers. The schemes rely substantially on the placarding of shipments and checking by TDG inspectors.

As with any control system where inspectors are required for operations, strategic decisions were made about background qualifications and subsequent training of inspectors. Given the technical knowledge necessary to determine whether an *administré* is complying with the legislation, technical background would seem to be necessary. Police experience or training can also be helpful when inspectors perform enforcement functions. TDG ultimately decided to select candidates from both technical and police backgrounds. As a result, the training program tries to accommodate both groups, touching on elementary policing and on technical concepts.

In order to help attenuate some of the role conflicts to be experienced by its inspectorate, TDG will expect private parties to pay for solicited advice. The fees for such advice may, in the short run, act to deter private parties from asking for advice. As a result, the relationship between them and the inspectors could be restricted to detecting and reacting to non-compliance.

The draft TDG regulations are voluminous and highly technical. In anticipation of private-party difficulties with the new regulations, TDG has also produced "cookbooks" which attempt to describe the meaning of the regulation, and methods for complying with it. Unfortunately, the regulations and the "cookbook" appear to differ in some significant respects. Private parties have identified the difficulties, and it remains to be seen whether TDG has made implementation more or less difficult in its efforts to be helpful.

VI. Summary

This chapter provides some examples of how the parties in policy implementation interact with one another in practice to "get things done." "Styles of administration" (Kagan, 1984) vary considerably, depending on the parties, costs, normative policy, public support, and so on. Implementation is always multifaceted, never unidimensional, and the parties' relationships are never entirely formal. Nor is it necessarily desirable that they be:

> [I]n many cases the imperative voice of authority is not the most effective method of approach. Something more subtle, more in the nature of mediation and influence, with authority merely in the background, may be needed in the constitution of the modern state. A somewhat ambiguous form of official action — part service and part control, part executive and part judicial, part suasion and part command, part formal and part informal — may perhaps best perform that function (Freund, 1928: 584).

Problems between parties are sometimes resolved through adversarial processing of contraventions, applications and private rights of action. Indeed, legislation sets out formal procedures and other instruments for resolving problems. However, legislation does not usually provide adequate guidance to govern the more common informal relations between the parties. Specifically, legislation usually gives poor (or no) guidance on how accommodating the Administration should be or on when and how to change from accommodation to contention. For example, should an inspector, upon detecting

non-compliance, give a warning, commence prosecution or advise on suitable corrective measures? Institutions ought to articulate standards for guidance of administrators so that they can be fair and effective, yet flexible in their interactions with private parties. Policy statements, guidelines, and enforcement manuals can help structure relations among parties in the implementation process.

The Administration and *administrés* depend on one another; their relationships are built on interests, expectations and other features which weave a fabric of interdependence. The powers of the parties are unequal and there is need for legal clarification of the status of the Administration to reflect contemporary values. The relations between the Administration and *administrés* are complicated by the fact that in any given area, one might have to deal with several institutions of government. Again, we have proposed in Working Paper 40 (p. 86) that the status of the federal Administration ought to reflect a better balance in relations between the Administration and the *administré*.

Implementation is often achieved through quiet, private consensus, co-operation and accommodation. This is reflected in practice, whether or not the governing statute accurately describes the relational process. There are many explanations for the kinds of informal ongoing relations which actually exist between parties. For example, command-penalty provisions are not often invoked, partially because of logistic factors (cost and delay), and partially because administrators sometimes do not want to jeopardize what they perceive as effective relations with *administrés*. In licensing, it might at first glance appear that administrators neglect to use available sanctions where warranted. On closer examination, however, the licence may not be an appropriate instrument where the policy being implemented defies simple determinations about compliance. In the area of human rights, conciliation, negotiation and treatment of systemic (as opposed to discrete) abuses are clear indications that relations between parties in policy implementation are not always tied to isolated incidents.

The illustrations provided here of how policies are actually applied make it clear that much of implementation is achieved through ongoing interactions or relations between parties. In contrast, law traditionally tends to structure relationships around specific incidents, complaints and disputes. Discrete measures for responding to non-compliance have their use. However, federal government institutions should articulate strategic and operational policies which better reflect the more common, accommodating and co-operative relationships within which policies are implemented.

This chapter serves to highlight two fundamental problems with policy implementation. First, administrators and private parties have poor guidance on the limits of accommodation. In other words, they do not readily know when to stop talking and start fighting, or vice versa. Such uncertainty can lead to abuse and can undermine the integrity of implementation. The time may have come to circumscribe in legislation the parties' relationships as regards some policies. Secondly, third parties are not able to influence policy implementation if issues are treated privately. The Administration may be adequately protecting the public interest and the interests of third parties, but *in camera* interactions are invariably suspect. However, given the limits of parties' resources and other factors, not all aspects of relationships in implementation should be constrained by legislation. In that sense we are wary of worse alternatives:

> If the parties are unable to deal with each other without the aid of counsel, the transaction costs become enormous. The alternatives are an ineffective and ponderous regulatory apparatus, and outright takeover by government of the regulated activity. In either case, the regulator has *de facto* abolished the relationship, and substituted his own judgment for that of the regulatory client (Eddy, 1981: 69).

The relational nature of policy implementation creates problems for all parties involved in the process. It is the nature of public affairs that the powerful do better. Attention to "squeaky wheels" may lead to uneven application of the law. Important questions also must be raised about the limits and constraints on bargaining. As well, when trade-offs are executed on a decentralized basis, the original policy intention of Parliament may be lost. Relational implementation is not conducive to easy evaluation of administrator activities. In fact, the parties can become so occupied with recognition, learning and negotiation that they may seem to lose sight of core objectives.

CHAPTER THREE

Instruments in Policy Implementation

Government uses a wide variety of governing instruments to implement its policies, ranging from regulatory offence prosecutions to financial incentives, licences and persuasion.[34] This chapter outlines major categories of instruments, their characteristics, strengths and weaknesses. In order to facilitate comparisons, we put forward a number of evaluative criteria including speed of implementation, expense, degree of formality and intrusiveness. These criteria must be balanced against the general concern for fairness, responsiveness and effectiveness of administrative action.

We wish to stress the limitations of an instrumental approach. No matter how appealing descriptions of instruments may appear, "cataloguing" de-emphasizes the importance of *policy context* and *process*. Thus, for example, while there have been innumerable breaches of broadcasting licence conditions over the years, the CRTC rarely uses its expansive powers to suspend, revoke and cancel licences. This is largely because of the public uproar which has typically ensued (Clifford, 1983). Any description of the broad powers and capabilities associated with licences fails to acknowledge the importance of the policy context. The realities of policy implementation — perceived public support for a policy, government officials worried about their public image, insufficient manpower and resources to carry out programs, and so on — are not considered in an instrumental approach. For these reasons, the following descriptions of instruments are by their very essence incomplete. Consequently, the present chapter must be read in light of other chapters which, taken together, outline the realities of policy implementation at the operational level.

I. Criteria for Evaluation

A large number of factors can bear upon the design and implementation of instruments. Here is an admittedly incomplete list of questions[35] which policy planners should consider in the selection of a particular instrument.

34. The use of the regulatory offence prosecution instrument is pervasive in federal legislation: we encountered examples of practice in several fields. As for licences, our main examples have been taken from research on the CRTC's broadcasting licence administration (Clifford, 1983). Various incentive instruments were exposed in our research of the EPS (Webb, 1983) and the CFDC (Lillico, 1985); our treatment of incentives is also supported by our "contract model" Paper (Barton *et al.*, 1984). The persuasion instrument is used by every institution which we have studied, but our best example to date is derived from a study of the CHRC (Laberge, 1983).

35. See also the "attributes" of various instruments, described in Stanbury and Fulton (1984: 319-22).

(1) *How quickly can the instrument be implemented?* An instrument which can be swiftly put in action brings home the policy message without delay. An instrument which can be implemented by administrators is more expeditious than one which requires the involvement of outside agencies (for example, the courts).

(2) *How expensive is it to use the instrument?* Cost is a major concern of government: almost all institutions operate within a limited budget. Included here are costs of initial invocation, as well as follow-up expenses associated with inspection, monitoring, revision, and so on. A separate issue is the expense to the *administré*. Again, a distinction between initial start-up and maintenance costs can often be drawn. In recent years, the financial burden caused by regulations has become a concern to both government and the private sector.[36]

(3) *How formal are implementation activities?* Closely related to questions about expense and speed are those pertaining to formality. Generally speaking, instruments involving formal processes and third parties (for example, public hearings) are both more expensive and more time-consuming. However, more formal instruments can have greater influence over *administrés* generally, since they are more public and enjoy a higher profile.

(4) *How intrusive is the instrument?* Some instruments require a certain behaviour under threat of penalty or imprisonment; as such, they are clearly very intrusive. Others, while not compulsory or coercive, nevertheless entail divulging detailed information and maintaining close ongoing contact with the administrator. These, too, can be described as intrusive. Some *administrés* can be more concerned with intrusiveness and operational stringency than with threat of penalty (Rosenbaum, 1981). Serious questions remain about the permissible limits of intrusions such as administrative search. The guarantee of security "against unreasonable search and seizure" in section 8 of the Charter has brought such concerns to the forefront. However, intrusiveness is not *per se* undesirable; the intrusiveness of an instrument may be the very essence of its usefulness. Finally, certain activities necessary to effective administrative action are inherently intrusive: it is almost impossible to look for information without intruding.

(5) *Does invocation of the instrument change the nature of the relationship between the* administré *and the administrator?* Does it inject a level of formality and adversariness into an otherwise harmonious relationship? This may, in certain circumstances, explain an administrator's reluctance to invoke an instrument. In other circumstances, the change in the nature of the relationship might help the *administré* to appreciate the seriousness of government policy objectives.

(6) *How certain is the outcome of the instrument invocation?* Certainty in implementation can mean different things to different people. For the private sector, predictability in the use of an instrument is important. For the administrator, certainty entails confidence on his part that using the instrument will help implement the policy. If it is not clear that invocation will achieve policy objectives, there is little point in providing the instrument in the first place. From an implementation standpoint, it is important to distinguish between those instruments which generate heat and those which produce light: invocation of some mechanisms attracts much attention, but may not accomplish a great deal.

36. See for example: Canada, House of Commons ... (1980); Canada, Economic Council (1981a); Canada, LRCC (1980 and 1985); Canada, Royal Commission ... (1979); Canadian Chamber of Commerce (1981).

These are a few of the questions which policy planners might consider when selecting instruments for a particular regime. The answer to each question depends in large part on law-related issues. Thus, for example, a legal process can either speed up or slow down implementation of an instrument, increase or reduce costs, and so forth. This comes out clearly from reading this set of questions. However, in the final analysis, what may matter more is not what the legislator and policy planner think of a mechanism, but rather what the administrator thinks of it. If the administrator is intimidated by the complexity of implementation, or is reluctant to allow decision-making authority to shift to another agency (as certain mechanisms require), this may defeat the legislator's and policy planner's objectives.

Although we have addressed political and public administration issues in earlier Papers,[37] such issues come into sharper focus in the context of discussions about policy implementation. Specifically, to implement its policies, government enacts legislation by which it delegates authority to its institutions to use legal instruments. A range of legal issues arise from delegation — matters of jurisdiction, procedure and controls. However, assuming that Parliament passes legislation within its constitutional authority, and assuming that private parties will benefit from appropriate procedural protections, then the government's principal concerns ought to be with achieving policy goals. With that in mind, we ask what kinds of institutions (departments, agencies, Crown corporations) can perform the kinds of activities necessary for implementation? What kinds of institutions and legal instruments ought to be combined to implement a given policy?

II. Instruments

A. Command-Penalty Mechanisms: Regulatory Offence Prosecutions

Use of the regulatory offence instrument raises several fundamental legal issues. The Commission has taken positions on some of these issues. For example, in *Our Criminal Law* we suggested that regulatory offences should be required to meet a fourfold test: (1) "[I]s the act a potential source of harm to the community?" (2) "[A]re we satisfied that prohibition will not contravene our basic values regarding what the individual should be free to do?" (3) "[A]re we convinced that enforcing the regulatory prohibition will not do more harm than good?" and (4) "[A]re we sure that the regulatory prohibition will make a significant contribution in dealing with the problem?" We stated that those tests are lighter than the tests of criminality because "little stigma is involved in conviction for a regulatory offence; and prison should not be in general a permissible penalty for such offences" (Canada, LRCC, 1976a: 34).[38]

37. In Reports 14 (Canada, LRCC, 1980a); 17 (Canada, LRCC, 1982); 18 (Canada, LRCC, 1982a); 26 (Canada, LRCC, 1985); in Working Paper 25 (Canada, LRCC, 1980); also in the following Study Papers by Hunter and Kelly (1976); Doern (1976); Carrière and Silverstone (1976); Issalys and Watkins (1977); Lucas and Bell (1977); Janisch (1978); Issalys (1979); Slayton (1979); Johnston (1980); Kelleher (1980); Slayton and Quinn (1981).

38. As to the relation of this issue to *mens rea* and regulatory offences, see *R.* v. *City of Sault Ste. Marie*, and *Ref. re Section 94(2) of the Motor Vehicle Act (B.C.)*. The Department of Justice has followed up our recommendation on imprisonment. See Canada, Department of Justice (1982). See also the work of the Federal Statutes Compliance Project of the Department of Justice. Initially a part of the *Criminal Code* Review, this project moved into other areas of public law.

Within the general category, "regulatory offences," a number of further distinctions can be made: regulatory offences can be administratively or judicially imposed; they can pertain to social or economic activities; the offence can attach directly to the achieving of a policy or can supplement it (primary and secondary offences). While each of these subcategories carries with it significant consequences for implementation, by far the most important distinction is between administratively and judicially imposed offences. The vast majority of federal regulatory offences are judicially imposed; that is, an administrator or private citizen might *initiate* a prosecution, but the courts decide whether an offence has been committed and determine the sentence. And because courts are integrally involved, the adjudication process tends to be quite formal.

The Supreme Court of Canada has classified offences into three types: criminal, strict liability and absolute liability. A reading of the provisions creating regulatory offences may leave the impression that most are of the absolute liability type, requiring no proof of intention. In practice, the courts find many offences to be of the strict liability type, thus allowing the defence of due diligence. In other cases, evidence of due diligence may mitigate the sentence. How deeply should courts look into the intentions of those accused of regulatory offences? Given that government policy is seldom expressly stated in moral terms, and that private parties are usually law abiding, an emphasis on the moral elements of a regulatory offence violation may be out of place (Eddy, 1981: 55).

Furthermore, there is no clear connection between culpability and policy implementation. Consequently, to the extent that punishment requires culpability, regulatory offences should not be the premier instrument for policy implementation. Yet, this appears to be the case, at least according to the statute book. By anyone's counting, federal statutes create an ominous number of regulatory offences: the Department of Justice counted more than 97,000 in 1983. The number of regulation-created offences is even more foreboding. And yet, comparatively few offences against those thousands of provisions have resulted in prosecutions. Moreover, little attempt has been made to accumulate and collect statistics on prosecutions commenced and on dispositional information about convictions, acquittals, imprisonment terms and fines. Such information could aid in an assessment of the usefulness of specific regulatory offence prohibitions for policy implementation.

The federal traffic offence regimes include "basket" clauses which illustrate some of the difficulties with regulatory offences. A basket clause provides that contravention of any provision of the particular Act or regulations made thereunder constitutes an offence. Such provisions reach a height of absurdity where the Minister responsible for the administration of a statute may be liable to prosecution under the statute's "basket" clause if he violates a reporting duty. In the administration of the several federal traffic offence regimes,[39] there is clearly need for a thorough consolidation and rationalization of offences and their administration.

Our main empirical research about policy implementation described experiences with the regulatory offence instrument in the areas of industrial water pollution control (Webb, 1983) and supervision of broadcast content (Clifford, 1983). In the former, the

39. *Airport Traffic Regulations*; *Government Property Traffic Act and Regulations*; *National Parks Highway Traffic Regulations*; *Indian Reserve Traffic Regulations*; *Band Council Reserve Traffic By-Laws; National Capital Act Traffic and Property Regulations; National Harbours Board Act and Regulations; Government Harbours and Piers Act and Regulations*; The *Harbour Commissions Act and Regulations*; *The Hamilton Harbour Commissioners' Act and By-Laws*; *The Toronto Harbour Commissioners' Act, 1911, and By-Laws*; *An Act respecting the National Battlefields at Quebec and By-Laws; St. Lawrence Seaway Authority Act and Regulations.*

Administration did not prosecute mainly because it was expensive, slow and uncertain, and because financial incentives encouraging modernization may have been more appropriate. Third parties have, however, initiated some private prosecutions. These can disrupt implementation strategies but remain an important method for third-party participation. For their part, CRTC prosecutions for violation of the non-Canadian television programming regulations clearly bring out many of the difficulties in using regulatory offences: long trials, acquittals, cumbersome data collection processes and difficulties with definitions.

The creation of regulatory offences is sometimes a way for Parliament to establish or consolidate its jurisdiction to legislate in a given area. The problem with this approach is that probably "the criminal law power will not sustain a regulatory scheme which relies upon more sophisticated tools than a simple prohibition and penalty" (Hogg, 1977: 289). Consequently, it could be that Parliament can provide for better articulated implementation strategies only in those areas where it can claim jurisdiction under a heading other than criminal law.[40]

The presence of regulatory offences in a statutory scheme can greatly influence the Administration's activities and style. Even where few prosecutions are initiated, systems must be maintained to collect and analyse information about *administré* conduct. Administrators gather information so that they are able to identify "problem" *administrés* for closer monitoring. Ideally, this information is gathered in a manner that will make it admissible as evidence. On the other hand, even though reading the statutes may leave the impression that regulatory offences are in the foreground of policy implementation, much administrative activity is less confrontational. Much of it is conducted with the persistent possibility that prosecutions could be undertaken; none the less, given the many shortcomings of prosecutions (for example, delay, expense, effects on relations between the parties), regulatory offence prosecutions seem to be treated as a scarce resource[41] in practice, although the implicit threat of prosecutions may be omnipresent.

40. The test for valid federal criminal legislation was set out by Rand J. in *Ref. re Validity of Section 5(a) of the Dairy Industry Act*, p. 50: "Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law, ..." Canadian jurisprudence has also developed tests for assessing the validity of a regulatory provision. In *MacDonald* v. *Vapour Canada Ltd.*, for example, Laskin C.J. at p. 25 held that paragraph 7(*e*) of the *Trade Marks Act*, was "not a regulation, nor is it concerned with trade as a whole nor with general trade and commerce. [...] One looks in vain for any regulatory scheme .... Its enforcement is left to the chance of private redress without public monitoring by the continuing oversight of a regulatory agency ...." In the matter of fisheries jurisdiction, the courts continue to make fine distinctions about the *vires* of regulatory provisions in the *Fisheries Act*; see, for example *Attorney-General of Canada* v. *Aluminum Co. of Canada Ltd.*, where Berger J. upheld the Minister's order to discharge more water to ease salmon migration, because the court will recognize the Minister's authority to make such orders in the public interest, under subsection 20(10) of the *Fisheries Act* if he acts on evidence, not arbitrarily and not upon extraneous considerations unrelated to fisheries protection. See, however, *R.* v. *MacMillan Bloedel Limited*, where the court held that a subspecies of cutthroat trout was outside federal jurisdiction. See also *City National Leasing Ltd.* v. *General Motors of Canada Ltd.*, wherein the Ontario High Court held section 31.1 of the *Combines Investigation Act* invalid. That section purported to create a civil cause of action; Rosenberg J. at p. 662 held that "[i]t is clear that s. 31.1 is not part of the complex scheme set up by the Act. [...] It cannot be justified as a *necessary* part of an administrative scheme set up by the Act. The only possible justification for s. 31.1 is as legislation 'necessarily incidental' or 'truly ancillary' to other provisions in the Act or the regulation of trade and commerce."

41 "Precisely because the legitimate occasions for social intervention will continue to multiply as society becomes more complex, congested, and technologically sophisticated, the collective-coercion component of intervention should be treated as a scarce resource. Since some coercion is implicit in all social intervention, intervention should be reserved for times when it promises large benefits. And when we

In the reform of federal regulatory offences, one might question the current institutional arrangements whereby provincial courts exercise jurisdiction over federal offences; whether this is done or not, reform, to be credible, must take into account the important differences that exist between crimes and other offences. Any reform should also begin by examining the purposes which regulatory offences are to serve. Among such purposes which may be relevant, in varying combinations, within a particular policy context, are punishment (with or without resort to imprisonment), disgorgement of income resulting from illegal activities, compensation, retribution, deterrence and revenue. Reassessing institutions would raise its own set of questions. Who should manage the system, prosecute charges, hear them at the trial level and on appeal? Would the division between the federal (criminal law) and provincial (administration of justice) jurisdictions require that "conjoint-provincial and federal action" (*McEvoy* v. *Attorney (N.B.)*, p. 722) be taken to create a discrete system of courts for federal (or federal and provincial) regulatory offences? Should agencies be allowed to create tribunals to adjudicate minor offences?[42] What procedures should govern? Can new systems serve the Administration's purposes better than the existing system? Should a new vocabulary be developed to distinguish non-criminal from criminal offences?

Some measures could also be taken to improve offence administration within existing institutional arrangements. The prosecutorial decision-making process could be more structured (see *infra*, pp. 62-3). The Administration could establish controls allowing it to assess costs and perhaps better rationalize offence administration: this can begin by accumulating statistical information about prosecutions and their dispositions. Agencies could adjudicate or process minor offences on an experimental basis. Consolidation of similar kinds of offences, as in federal traffic offences, can visibly rationalize inconsistent practices. Attention can be directed to the issues associated with publicity, its timing and its effects on various kinds of parties in various circumstances. Finally, without the making of fundamental changes to the system, there still remains a need for addressing harm to third parties: in that sense, reform initiatives ought to include consideration of improved rights of private civil action[43] and clarification of rights in private prosecutions.[44] Consequently, it seems obvious that whether the approach taken is fundamental or within existing institutional arrangements, much can be done.

B. Command-Penalty Mechanisms: Licences

In public law, licences (including permits and permissions) convey authorization, and are issued for persons, things and activities for specified terms. Strictly speaking,

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do intervene we ought to maximize the use of techniques that modify the structure of private incentives rather than those that rely on the command-and-control approach of centralized bureaucracies. ... [O]ur political system almost always chooses the command-and-control response and seldom tries the other alternatives, regardless of whether that mode of response fits the problem" (Schultze, 1977: 7, 13).

42. There is a plan to do so in the Department of Transport's regulation of aviation safety. Recent revisions to the *Aeronautics Act* enable a new Civil Aviation Tribunal to adjudicate on such matters.

43. Note, however, that the validity of a civil cause of action created by federal statute will probably depend on whether it is "necessarily incidental" or "truly ancillary" to other provisions in the same statute or to regulation under a head of federal constitutional authority. See, for example, *City National Leasing Ltd.* v. *General Motors of Canada Ltd.* See also *MacDonald* v. *Vapour Canada Ltd.*

44. Legal and social histories of private prosecutions are clearly beyond the scope of this Paper, but it is suggested that an analysis of actual private prosecutions can reveal the extent to which they aid policy implementation. A preliminary analysis of this kind was made by Webb (1983: 284-322).

a licence represents the authorization of the Administration (or the "licensing authority") to a person ("the licensee") for a specified term. The licensee is governed both by generally applicable legislated standards and by specific conditions included in his licence. Provided the licensee complies with legal requirements, he is free to pursue the relevant activity. Legally, the licensee has no right to licence renewal or to tenure in the licence, unless it is expressly so stated. At first glance, licensing appears to be an ideal instrument for accommodating the public's general concerns while at the same time addressing the peculiarities of individual *administrés*.

Licences are used to regulate occupations, trades and activities where the principal public concern is in the matter of eligibility standards. Licences also allocate use of public property, such as natural resources and the air waves. Administrative action associated with allocative licences commonly involves formal and elaborate procedural protections. The licensing authority has a number of available licensing sanctions, such as revocation, suspension, refusal to renew or short-term renewal. A variety of factors can influence the imposition of sanctions. Where private parties are significantly interested in the policy being implemented or in the performance of *administrés* (as in content regulation of broadcasting), public hearing of licence applications is the norm. Where the policy attracts little attention beyond the immediately affected licensee (for example, *Radio Act* licences, except for the use of vertical amplifiers which can threaten aviation safety), licensing sanctions may be imposed without a public hearing. In some cases, delayed suspension of licence could have grave public consequences: in such circumstances, administrators often have been given extraordinary powers to suspend permission without convening public hearings (for example, the aviation safety inspector's authority to suspend documents of entitlement).

Licensing has been recommended as an optimal instrument in policy areas "where the relevant pattern of activity can be defined with sufficient specificity" (Spigelman, 1977: 91). There ought to be "clearly identifiable activities capable of performance and review in accordance with particular standards" (Rice, 1968: 586). The success of licensing as a policy implementation instrument might therefore turn on the clarity of conduct prescriptions and the ease with which a binary determination can be made about "correct" or "incorrect" behaviour. The certainty derived from such standards can greatly facilitate the task of the Administration. On the other hand, binary "yes-no" determinations about conduct may have little direct effect on policy implementation. In making public administration easier to perform and assess, the very basis for its existence, the implementation of policy, may be lost.

Individualized treatment of licensees is achieved mainly by the imposition of conditions and lesser prescriptions which address the particular circumstances of the individual licensee and the market in which he operates. These are supplemented by generally applicable licence conditions, statutes and regulations. Breach of a licence condition theoretically results in licence suspension or revocation. In some licensing schemes, compliance with regulations is made a condition of licensing, so that their breach can give rise to licensing action, prosecution for regulatory offence, or both.

A licensee acquires a kind of *de facto* tenure for the term of the licence even though its continuation is conditional on compliance. Where revocation or suspension for non-compliance with conditions is rare, tenure seems to extend beyond the term of the licence. In some licensing systems formidable procedural protections, with respect to the consideration of applications and the imposition of sanctions, safeguard the proprietary nature of the licence. The governing statutory instrument may specify that

no tenure exists in the licence (for example, *General Radio Regulations*, Part II, C.R.C. 1978, c. 1372, s. 20). However, in a regime where there is no competition for licences on renewal applications, the licensee appears to have interests or rights beyond the term. The CRTC, for example, does not accept competing applications when considering broadcasting licence renewal applications.[45]

Our main example of licensing is taken from study of the CRTC's regulation of broadcasting content. The procedure the CRTC follows in considering licence applications is very open and judicialized, with some important exceptions, such as time-limits for oral presentations and the absence of cross-examination. During public hearings, the CRTC and its counsel may examine the licensee's representatives about its application, its past performance and its new undertakings and plans. In an evolving matter such as content regulation, the public hearing of applications affords the licensing authority an opportunity to urge the licensee to do more and to do better. In other words, where the subject-matter of regulation lends itself to various interpretations, a public process may be an optimal forum for developing an understanding about performance objectives and for bilateral persuasion.

Since so many of the requirements governing the licensee's activities are particular to the licensee, the importance of bargaining is clear. Licensing allows such bargaining to occur, in connection with the formal processing of applications, in rule making and policy making, and commonly in consultations between the licensing authority and a licensee. Licensing often provides a formalized context for bargaining, although the respective powers of those involved in the bargaining process are not equal.

From the administrator's standpoint, the licence is a flexible instrument for policy implementation, capable of addressing a range of initiatives. The formal exercises of rule making and consideration of applications can serve to build consensus. In its decisions on applications, the licensing authority can praise or admonish the licensee for past performance and can set binding prescriptions and other requirements for future conduct. Licensing decisions can establish reporting requirements thereby allowing a double-check of the authority's analysis, while constantly reminding the licensee of the conditions with which it must comply. The licensing decision can also be used to increase the frequency of formal review, by shortening the licence term where allowed. Indeed, requiring frequent licensing applications (that is, for renewal) can become of itself a sanction: the licensee must commit significant resources to the preparation of applications, especially where support of experts and collateral approvals of other regulators may be required. A shorter licence term also requires more frequent contact with the Administration in preparation for public hearings, and at the hearing the licensee must justify its past performance and the degree to which it has or has not improved.

In a competitive market, the short-term renewal is a way of distinguishing degrees of compliance among competitors. However, if many licensees in a particular market are found to be non-compliant, it becomes difficult to make meaningful distinctions. Market competition is not a primary reason for regulation of broadcasting content, but in the case of FM radio regulation, the CRTC has prescribed station formats; competitors

45. This approach has been explored in the following materials: Babe (1979); Babe (1980); Babe and Slayton (1980); and Slayton (1981). Slayton suggests that institutionalizing competitive applications presumably would help correct failures and deficiencies: licence holders do not provide quality programming or observe their promises of performance; profits of licence holders are excessive, unjustifiable and objectionable; CRTC procedures do not take into account the differing information and transaction costs of relevant interests; and the consequences of non-competitive renewal and transfer applications are regulatory failure and unfortunate preferment of narrow and selfish interests.

in large markets are extremely concerned about "format interlopers." Implementation of content standards therefore gets mixed with licensee concerns about competition. The CRTC's express concerns relate more specifically to the question of choice for audiences than to the regulation of competition. Short-term licence renewals allow the Commission to address variations in compliance within a market, but if each licensee is given a different length of licence term, the licensing authority may be faced with the expense of arranging several public hearings: it is better management practice to convene one public hearing of applications for licences in the same market. Therefore, while the short-term renewal may often be the best response to non-compliance (given that the licensing authority will not revoke or suspend licences), such action may complicate significantly the logistics of the authority's operations in a given market and reduce the efficiency of its operations.

Licensing can allow the Administration to control its treatment of the *administré* in a relatively non-adversarial, more flexible manner. In that sense, licensing action is preferable to regulatory offence prosecution.[46] Licensing allows for an attention to detail that is not possible in prosecutions. Prosecutions can be necessary to control entry by unlicensed parties. However, a prosecution regime requires precision as to the nature of the prohibited conduct and a higher "quality" of evidence relating to private-party behaviour. Also, prosecutions may not often effectively influence future behaviour. Licensing can also address past behaviour, but licensing-related activities typically address future conduct, and can allow for bargaining about matters which have not been made precise by legislation. Much of what government wants to achieve is not easily reduced to precise prescriptions that lend themselves to effective prosecutorial action. The Administration is often left alone to resolve some inherent ambiguity or conflict in the goals expressed in legislation, either generally through rule making or in relation to particular subjects, through the very flexible instrument of the licence.

Some problems with licensing were identified (Eddy, 1981: 84 ff.) in connection with the limited measures which the Administration may invoke on detection of non-compliance. Short of licence suspension or revocation, imposing reporting requirements and requiring more frequent renewal applications, there are few legal options available to administrators, notwithstanding the wide scope of informal activities which are possible in licensing administration. The Administration should have some more appropriate intermediate means for reacting to non-compliance, such as "civil" penalties imposed by the licensing authority. These measures have been virtually ignored in areas other than customs, excise and income taxation.

Failure to invoke sanctions, where circumstances seem to demand some significant response to non-compliance, may undermine the integrity of a licensing system. The CRTC has noted this in some of its decisions. The licence must therefore be more than a context for relations: there must be a real possibility that the licence will be lost for non-compliance. Failing that, the regulatory program may atrophy: non-compliance addressed only by raised eyebrows, persuasion, nudges and minor administrative burdens may lead to more non-compliance and the ultimate deflation and withdrawal of policy goals.

Licensing is sometimes thought of as the only way in which the Administration can regulate certain activities. In other countries, however, imaginative solutions have been found to deal with areas which we, in Canada, regulate through licensing. Indeed,

46. It is arguable that some "economic offences" merit economic responses. Conviction for a regulatory offence is not often accompanied by a fine which measures up to the economic costs caused by the offending behaviour.

some operational models that apparently leave the Administration with less powers over the *administré* have in fact turned out to allow for better control. Thus, for example, the British system for implementing content policy in private broadcasting is substantially different: the Independent Broadcasting Authority (IBA) owns the transmission hardware, and "contracts" with private broadcasters who provide the programming. This contract clearly carries no right of renewal. Indeed, the IBA calls for competitive bids and has refused contract renewal on several occasions. Yet, the courts have refused to impose on the IBA the procedural trappings that constrain the CRTC, precisely because they have seen the relationship between the IBA and a broadcaster as being more akin to a contract than to a licence. The CRTC clearly does not exercise anything close to the degree of day-to-day control over content that the IBA does: the CRTC examines records of programming after broadcasting whereas the IBA screens and approves programming content before the material is broadcast. The systems are perhaps too fundamentally different from one another to allow fair comparisons: the United Kingdom first adopted an exclusively public broadcasting policy, and private interests have had to make gradual erosions; in Canada, the governance of broadcasting was originally conceived as a compromise between public and private interests, and in spite of many changes, the mix of private and public elements persist. It may also be that ownership of the hardware makes a significant difference in our legal culture. Consequently, as a model for policy implementation, the IBA may not be useful *per se* within the Canadian context. It may, however, help us reflect on new ways of dealing with old issues (see, for example, Sendall, 1982).

Ability and willingness to respond to licensee non-compliance by revoking or suspending licences depend substantially on the political support for the policy goals. None the less, we recognize the great variations, capacity for subtle treatment and flexibility of the licence for adjusting relations through licence conditions, and in those respects, we hold out licensing as a very important instrument for policy implementation.

C. Financial Incentives

In recent years, the federal government has increased its use of financial incentives to achieve policy objectives. The federal Department of Regional Industrial Expansion distributes over $1 billion in contributions annually, and has the authority to guarantee loans up to $1.3 billion (von Finkenstein, 1984). Federal corporate tax expenditures for 1980 were estimated at $6.2 billion (Howard and Stanbury, 1984: 150). Government financial incentives can take a variety of forms and names, including "contributions," "grants," "subsidies," "low-interest" and "forgivable" loans, "loan guarantees" and "tax expenditures." Each type has distinctive implementation characteristics; indeed, within each incentive type there are many distinct examples.

Government financial incentives typically promote such policy objectives as creating or maintaining jobs, stimulating Canadian research and development, creating opportunities for Canadian suppliers, modernizing Canadian industrial machinery, and encouraging environmental protection. The fact that government financial incentives are used to encourage these broad types of goals at the same time as providing economic stimulus for specific private sector projects makes financial incentives, at one and the same time, multi-faceted and unwieldy instruments.

Although the federal government can regulate only those matters falling specifically within its legislative jurisdiction, commentators have suggested that it can nevertheless spend or lend its funds to any government, institution or individual it chooses for any purpose it chooses; moreover, it may attach to any grant or loan any conditions it chooses, including conditions it could not directly legislate (Hogg, 1977: 71). In short, the federal government may be able to influence the behaviour of the private sector through financial incentives (grants or loans) where it could not use command-penalty methods.

Regrettably, the state of legal research concerning incentives is still in its infancy in Canada. LRCC study in this area has, to date, been limited to preliminary findings regarding incentives operating in the environment and broadcasting policy contexts (Webb, 1983; Lillico, 1985). In this part, legal, financial and administrative characteristics of the PPMGP and the ACCA tax subsidy for pollution abatement equipment are described as an introduction to the types of incentives currently used by the federal government.

(1) Definitions

For the purposes of discussion here, a grant is defined as "a conditional transfer payment made by government to a recipient ... for which the government will not receive any goods or services" (Fry, 1984:1). With loans, government focuses on recovering the money transferred at some later point, whereas with grants, government concentrates on levering a desired action from the recipient. With loan guarantees, government aims at recovering its money but pays out funds only if the recipient defaults on the loan. As well, government bears the costs of alternatives or other opportunities foregone in selecting another course of action (that is, opportunity cost) (see generally, Fry, 1984).

There are other, more subtle legal differences as well. For example, loan guarantees are payable directly out of the Consolidated Revenue Fund, and thus there is no need for annual appropriations; moreover, the authority for loan guarantees can be "buried" in a vote in an *Appropriation Act* where it is subject to minimal parliamentary scrutiny (von Finkenstein, 1984: 1-4).

Tax subsidies function as deductions from income or revenue; hence, they are most attractive to those who have income from which to offset the deduction. A "tax expenditure" is government revenue foregone rather than a positive act of appropriation of government funds (Webb, 1984: 7-9).

The above-outlined classification of financial incentives has some appeal. However, not everyone uses the same vocabulary,[47] and even federal personnel admit the distinctions sometimes blur in practice (Fry, 1984: 1).

47. See, for example, the Ontario description in Cass (1984).

(2) The Pulp and Paper Modernization Grants Program: An Example of a Grant Program

The PPMGP is a federal-provincial initiative in which government offers to subsidize up to twenty-five per cent of the "approved capital cost" of mill modernizations if recipients adopt government-approved mill redesigns. In consideration for providing financial assistance to industry, government is able to dictate some of the terms on which modernizations will take place. Briefly stated, the program has two major objectives: to make the Canadian pulp and paper industry more commercially viable and to reduce the impact of the industry on the environment. The Department of Regional Industrial Expansion plays the lead federal role in implementating the Program, while the federal Department of the Environment is responsible for ensuring that its environmental objectives are properly carried out.

The only federal statutory authority for the PPMGP is found in one long ambiguous sentence buried in Vote 11a of the schedule to the *Appropriation Act No. 5, 1973*. Appropriation Acts are presented to Parliament at regular intervals, they are under an automatic debating time-limit, and are usually so detailed and lengthy that they escape the normal close scrutiny given to other legislation (von Finkenstein, 1984: 4). The terms of the program vote refer to providing "measures for economic expansion and social adjustment ... for productive employment ... and access to ... opportunities." The actual description of the program is contained in a federal-provincial "subsidiary agreement." In short, the statutorily proclaimed objective is extremely vague and it thus provides a wide mandate for the program, but little direction as to what is and is not eligible under the program.

The PPMGP is a "shared-cost" program: the federal and provincial governments share the cost of the program within a particular province.[48] The ratio of funding differs from province to province. For example, in Ontario the federal contribution is thirty-three per cent of total government disbursements; in Newfoundland, it is ninety per cent. A federally proposed program may be difficult for provinces to refuse, even though it may be well down on a province's list of priorities. In effect, the federal government can induce provincial co-operation in the implementation of federal objectives through the shared-cost mechanism; moreover, the less wealthy provinces may have the greatest difficulty resisting shared-cost programs while being the ones most greatly affected by them (Webb, 1983).

The PPMGP is jointly administered by federal-provincial "Management Committees," comprised of representatives from the key federal and provincial departments concerned; for example, the federal members include one Department of Regional Industrial Expansion official (co-chairman) and one Department of Environment representative. Because eligibility criteria are described in vague terms, the Committee has wide discretion to interpret the provisions. While this promotes flexibility in bargaining, it also means that potential applicants and third parties have little advance indication of what types of projects will be approved. Although the amounts of government assistance to individual pulp mill applicants can be quite large, there are actually very few potential recipients of Modernization Program Grants (in all of Canada, there are roughly 150 pulp mills, and many of these do not need modernization). This stands in contrast to other more widely available grant programs of the federal government such as the Petroleum Incentives Program which is open to thousands of potential recipients, has

48. Information describing total federal and provincial funding is set out by Webb (1983: 548 ff.).

most criteria carefully outlined in advance, and operates in a comparatively mechanical fashion (see *Petroleum Incentives Program Act*, Part I; Lacasse, 1983; Webb, 1985: 1).

The applicant whose proposal for modernization is rejected has no clear legal recourse. Legislation does not put administrators under an obligation to provide reasons for their decision. Indeed, given the vague eligibility criteria, they may appear to accept and reject project proposals in an arbitrary fashion. There is no provision for third-party participation at the negotiation or enforcement stages. If, for example, administrators chose to ignore the fact that a grant recipient had not fulfilled its environmental protection obligations under a modernization contract, there is no method provided for third-party enforcement. Both *administré* and third-party recourse against the Administration are further hampered by problems of lack of information. Administrators tend to treat applications as confidential, and treat successful grant agreements as "contracts," to which normal rules about "privity of contract" apply.

The PPMGP has complemented the federal government's command-and-control pollution regime in the sense that the program is primarily directed at reducing pollution by a segment of the pulp and paper industry (the "existing" or older pulp mills) which has not responded to command-and-control techniques. It has operated in a non-confrontational, positive manner, and has encouraged government and industry to look at pollution abatement in a holistic fashion, where environmental protection is not an "add on," but is considered in light of, and in conjunction with, the other processes of the mill.

On the other hand, one might ask whether government should be financing the pulp and paper industry to meet its command-penalty standards. From an operational standpoint, does the existence of a PPMGP between the federal government and industry affect command-penalty prosecutorial decision making? The apparent incongruity in twinning command-penalty and financial incentives highlights the distinction between the ideal world and the real world of implementation: for many of the older pulp mills operating in Canada, compliance with the command-penalty effluent standards was not possible without major mill reconstructions. The PPMGP provided impetus for these mills to modernize their facilities; by doing so, they come into compliance with the command-penalty effluent standards. In effect, the program eased the transition from the old, less onerous rules to the new.

(3) The Accelerated Capital Cost Allowance (ACCA) for Pollution Abatement Equipment: An Example of a Tax Subsidy

Under the federal *Income Tax Act*, taxpayers can deduct from their income the capital cost of certain properties. The ACCA for pollution abatement equipment provides the taxpayer with a faster "write-off" for pollution equipment than for certain other properties. To be eligible for this form of subsidy, a property must be "primarily for the purpose of preventing, reducing, or eliminating" pollution. Versions of this tax subsidy have been provided since 1965.

Tax deductions such as the ACCA are expenditures by government in the sense that, if the deductions were not in place, government would normally collect money from the taxpayer: put simply, government is giving by not taking. This is a considerably less obvious method of providing assistance than is the direct act of disbursing funds:

once a tax deduction has become law, the amount of government expenditure (revenue foregone) is not revealed in the regular tax budgeting process. It is not necessary for Parliament to approve the appropriation of government monies for tax deductions; moreover, there is no "ceiling" on the amount to be expended by government pursuant to a tax subsidy.[49] Thus, from an accountability or visibility[50] standpoint, tax deductions are neither accounted for in the budget nor accorded the periodic parliamentary scrutiny which direct expenditures receive.

Usually, for a tax subsidy to be an incentive for changed behaviour by an *administré*, that *administré* must be in a position to offset the amount of the tax subsidy against his income or profit for a year (this may not be the case where "tax credits" are used: tax credits would allow the *administré* to "save" the amount owing from government for a future year, when he has income to offset the subsidy). Consequently, the ACCA for pollution abatement is attractive only to those pulp mills which are in a profit-making position. Ironically, it is those pulp mills in poor financial shape (that is, the old, non-modernized mills) which need abatement equipment the most and on which the ACCA for pollution abatement equipment has least effect.

The tax system is considered to operate in a "self-assessing" manner. Deductions are claimed by the taxpayer, but may be subject to verification on audit. In the case of "low-volume" programs such as the ACCA pollution abatement initiative, the Department of Environment will approve abatement projects in principle prior to their actual installation. With high-volume programs, such as the oil and gas tax deduction regime (which is intended to stimulate exploration and development of oil and gas properties), the self-assessment method is cost-effective for federal administrators. As a general observation, high-volume tax subsidy programs tend to operate in an automatic or mechanical function, with discretion structured through regulations, interpretation bulletins and advance rulings.

Generally speaking, tax subsidies do not require administrators to assess the *quality* of a taxpayer's actions; a pulp and paper mill operator could install abatement equipment which, although eligible for a subsidy, was not the most effective method of reducing the pollution discharged by the mill. Moreover, the ACCA tax subsidy provides no continuing incentive to *use* the abatement equipment, once installed. The tax system is geared to *expenditure* of the taxpayer, not his day-to-day actions. The ACCA tax subsidy is not a major factor in an *administré*'s decision whether or not to abate pollution; rather, it offers assistance once the decision to reduce pollution has been made. In this sense, the ACCA tax subsidy for abatement equipment may be of more symbolic value — as an indication that government will help industry meet its pollution standards — than a practical catalyst for changing behaviour. Tax matters are typically treated in strict confidence, so that information disclosure beyond the immediate parties concerned is unusual.

The ACCA tax subsidy for abatement equipment and the Modernization Grants Program are similar in that both amount to government financial assistance to achieve anti-pollution (and other) policy objectives. The general principle that one should not

49. See, for example, Margaret Munro, "Mercedes, Penthouse, Promises All Part of Scam," *The Citizen*, 13 June 1985, pp. A1 and A20; "Fines Reaped by Windfall from R&D Tax Credit Plan," *The Citizen*, 31 May 1985. The United States federal tax credit for research spending is another example of an incentive which produced unintended inappropriate consequences (see Brown, 1984).

50. Data about expenditures has been compiled by central agencies but this information has not, to date, been readily available to the public on a year-by-year basis.

benefit twice from the same act (that is, a double subsidy) appears to apply with respect to tax treatment of grants: a provision in the federal *Income Tax Act* requires that the amount of "assistance" received by a taxpayer is not to be included in the computation of deductible expenses for that taxpayer. With respect to interaction with the command-penalty regime, the ACCA tax subsidy is a two-edged sword: on the one hand, administrators may be able to bring the existence of the tax subsidy to the attention of an *administré* in the course of command-penalty negotiations, and in this sense the tax subsidy would be a small bargaining lever for the administrator. On the other hand, as with the PPMGP, the question can legitimately be asked, Should government be financing industry to meet its command-penalty standards?

While a tax subsidy for abatement equipment appears to be minimally effective in the environmental protection context, it may have greater utility in other policy contexts.[51]

(4) Summary Observations

Government financial incentives, as a method of influencing *administrés*' behaviour, are negotiated in a non-confrontational manner. Generally speaking, because they do not threaten private individuals with the loss of their life, liberty or property, they do not attract the heavy legal procedural protections generally associated with licensing and command-penalty mechanisms. This, in turn, means that they are normally easier and less expensive to administer. On the other hand, because they operate in a more informal legal atmosphere, many important facets of their operation are clouded in uncertainty: What are the rights of rejected applicants? Of concerned third parties? How much information can applicants and third parties receive concerning a financial incentive regime?

On a socio-economic level, because financial incentives involve very large expenditures of government money, some persons may find them more objectionable than command-penalty methods. This may be the case particularly where the incentives are intended to encourage behaviour which government is at the same time addressing through command-penalty instruments.

Effectiveness evaluations of financial incentives are often difficult: Would someone have installed pollution equipment, or explored for oil and gas in the North, or produced a Canadian television program even if the incentive scheme had not been in place? Perhaps what should be asked is not *would* the *administrés* have changed their behaviour without the existence of the incentive, but *when* would they have changed it?

D. Persuasion

Persuasion can be a principal instrument of policy implementation or an activity collateral to the operation of other instruments. For example, advertising may be conducted to "make perceived benefits greater than real benefits," and "to obscure the erosion of real benefits" (Trebilcock *et al.*, 1981: 33). Persuasion can be used as an instrument

51. "Study Shows Firms Favour Tax Breaks," *The Globe and Mail*, 17 March 1983, p. 88.

in its own right, as has been the case in activities of the CHRC. It quite properly calls such activities "education" or "information sessions." For our purposes, all such activities are subsumed within the meaning of "persuasion."

To what extent can persuasion replace other policy-implementation instruments? Persuasion has great potential to influence private behaviour at less social and economic cost than other instruments (Adler and Pittle, 1984; Stanbury and Fulton, 1984). In policy implementation, persuasion is usually followed by more persuasion. That may be accounted for in part by the characteristic absence of intermediate measures in Canadian public administration. There are as well several "attributes" of persuasion which commend themselves to administrators in the implementation of policy. Stanbury and Fulton (1984: 297) set out the nature of attributes such as informality and the somewhat "nebulous nature of [per]suasion [which] makes it more difficult for the 'targets' ... to challenge the constitutionality of the government's actions." Persuasion is highly reversible, flexible, targetable, potentially intense, useful to effect symbolic policies (that is, to show concern), immediately available, and may be popular when the marginal political cost of using other instruments is high (*ibid.*). However, the technical substitutability of persuasion may be rather limited (*ibid.*).

The Administration is commonly given authority to "supervise" (*Broadcasting Act*, s. 15) *administrés* which come under its authority: implicit in that power is the exercise of persuasion. In some instances, Administration is expressly given authority for persuasion.

> [The Commission] ... shall ... endeavour by persuasion, publicity or any other means that it considers appropriate to discourage and reduce discriminatory practices ... (*Canadian Human Rights Act*, s. 22(1)(*g*)).

The persuasion instrument poses considerable challenges to the Administration: to be effective, persuasion, like propaganda, ought to encircle the whole person (Ellul, 1965) without reaching beyond the mandate of an administrative unit. Propaganda has been described in a way which conveys an indication of its scope:

> In the midst of increasing mechanization and technological organization, propaganda is simply the means used to prevent these things from being felt as too oppressive and to persuade man to submit with good grace (*id.*: xviii).

That view is consistent with Max Weber's opinion about why people comply with rules in the absence of force:

> [Weber] identified three types of legitimacy which lead people to submit to authority without constantly being forced to comply. These were traditional authority, charismatic authority and the legal-rational type based on the acceptance of generalized rules (Gerth and Mills, 1958: 78 ff.).

There are many historical examples about the ways in which traditional authority and charismatic authority have, through persuasion, led people to comply with policy (Thomson, 1977). As for the legal-rational acceptance of generalized rules, it is clear that education and other forms of persuasion are important for informing parties about the rules. While it is important to distinguish pure information from persuasion, the distinction is not always clear. Vocabulary can obscure their effects.

Persuasion is pervasive throughout most policy implementation; its substantive limits extend to the limits of the Administration's mandates. The limits and public acceptability of the persuasion instrument are more difficult to circumscribe. According to surveys,

Canadians tend to frown upon partisan government advertising and to approve of persuasion campaigns directed at protecting society (for example, from drunk driving) or at improving the economy (for example, via tourism) (Goldfarb Consultants, 1982; Stanbury, Gorn and Weinberg, 1983). Deciding about acceptable limits for the use of the persuasion instrument poses major challenges for the reform of policy implementation.

In summary, the persuasion power of government has many manifestations. Education and persuasion may be side-effects or main thrusts of administrative activities. Publicity about non-compliance may have benign or intrusive effects on the *administré*. Persuasion can greatly improve the efficiency of implementation, and may in many instances be necessary for the effective invocation of command-penalty and incentive instruments. Persuasion, to be effective, requires a degree of organization and resource co-ordination which should arguably allow for due consideration of the probable effects of publicity on constituencies. So, notwithstanding the darker potential uses which can be made of persuasion, its importance for policy implementation is clear.

III. Combining Institutions and Instruments: Some Examples

A. Content of Broadcasting

The federal government has a variety of concerns about the content of broadcasting. Those concerns can be generally grouped as matters of nationalism, diversity, scheduling, morality and social values, pornography and obscenity, intellectual property, language, freedom of expression, commercial content, and quality of transmission (Clifford, 1983: 28-31). The breadth of those concerns defies simplified analysis, not only because of their range, but also because of the many interests of the various constituencies. For example, as in any communication, the messages in broadcasting have different significances for sources, channels and audiences (see *supra*, p. 21). Canadian government institutions attempt to influence messages, sources, channels and audiences of broadcast content. The front-line institutions conducting such efforts include departments (Communications, Revenue, Justice), agencies (CRTC, National Film Board (NFB)) and Crown corporations (CBC, CFDC — now Telefilm Canada, Canada Council). Other institutions, such as Parliament, courts and police, are occasionally used for implementation of policy respecting content of broadcasting. For the purposes of the present discussion, only the departments, agencies and Crown corporations are mentioned.

The Minister of Communications is responsible for most, but not all, government institutions involved in broadcast content policy implementation (for example, Department of Communications; CBC; CRTC; NFB; Canada Council; Telefilm Canada; but not the Departments of Justice and National Revenue or the courts). The Minister must achieve some consensus with his cabinet colleagues about aspects of cultural regulation. The Department of Communications, on the other hand, is in an advantageous position for evolving co-ordinated, coherent policy among institutions within the department's sphere of influence. The department has, for example, advanced policy proposals about Canadian broadcasting strategy, which envisage modified complementary functions for

institutions within its sphere of influence (see Canada, Department of Communications, 1983 and 1983a).[52] Those proposals, as well as more recent ones of the new government, recognize that changing one institution requires changes in others. The interrelated nature of the Canadian broadcasting system is expressly set out in the *Broadcasting Act*, and in the distribution of functions and instruments among the several institutions.

Each public institution concerned with broadcast content has a distinct mandate and combination of instruments. In the matter of Canadian content of television programming, the functions performed by each institution contribute to the implementation of the Canadian-content policy, which focuses essentially on nationalism and diversity. The CRTC, the instruments and functions of which have been more fully set out elsewhere in this Paper, is responsible for supervising the system mainly through policy development, licences and prosecution of offenders. In Canadian content, the CRTC has evolved an operational definition which was borrowed essentially from criteria established by the Department of National Revenue for capital cost allowance purposes and from the Department of Communications' CFVCO. This office performs a clearance function for Telefilm Canada's financial incentives.

In its implementation of government policy on Canadian content, the Administration uses many instruments, including financial incentives (Telefilm Canada, Canada Council), tax incentives (Department of Finance), public enterprise (CBC, Canada Council, Telefilm Canada), regulatory offence prosecutions (Departments of Communications and Justice, CRTC), licences (CRTC), primary production of Canadian film and video (CBC, NFB) and persuasion.

Broadcasting and film making are interrelated. The links developed between the programs of many of the institutions reflect this. Thus, some functions with apparently little relevance to broadcasting can have an effect on the contributions which institutions can make to the implementation of Canadian content in broadcasting policy. For example, Telefilm Canada, through its predecessor, the CFDC, used its incentives instruments to promote Canadian film and video production.

In the important matter of Canadian content in broadcasting, touching as it does on so many social and economic interests, the need is clear for coherence and co-ordination of administrative functions. A good example of an attempt to achieve such co-ordination and coherence is found in the CRTC's adoption of guidelines for Canadian programming to govern its regulatory instruments; the CRTC guidelines are substantially the same as the definitions utilized by the Departments of Communications and National Revenue for their respective roles in administering grants and tax incentive instruments. The advantages of such coherence to all parties are obvious.

B. Industrial Water Pollution Control

The EPS of the federal Department of Environment has been charged with the major responsibility for administering federal water pollution control initiatives. The EPS is not, however, the only government actor involved in environmental protection.

52. With the change in government in 1984 it was expected that the policy would be thoroughly reviewed again; indeed in April 1985, the Minister of Communications announced the creation of a "task force" to review broadcasting policy.

The federal Departments of Fisheries and Oceans, National Revenue, Regional Industrial Expansion, as well as provincial government institutions, all play important roles in environmental protection. Together, these actors administer a host of command-penalty instruments and financial incentives. In addition, a variety of other institutions (such as Parliament, the courts, Crown corporations) serve important "support" functions to the "front-line" actors described above.

The following description summarizes the actors and their functions in the area of federal water pollution control initiatives, and is followed by a brief description of the "institutional galaxy."

— *Federal EPS*: (1) administers *Fisheries Act* command-penalty effluent regulations, in conjunction with the federal Department of Fisheries and Oceans and provincial environment departments; (2) administers Accelerated Capital Cost Allowance (ACCA) for pollution abatement equipment, in conjunction with the federal Department of National Revenue; (3) administers Modernization Grants Program, in conjunction with the federal Department of Regional Industrial Expansion and provincial departments through "Management Committees."

— *Federal Department of Fisheries and Oceans*: administers *Fisheries Act* habitat protection provisions.

— *Federal Department of National Revenue*: administers ACCA tax subsidy for pollution abatement, in conjunction with the EPS.

— *Federal Department of Regional Industrial Expansion*: administers financial incentive programs (including PPMGP), in conjunction with the EPS and other provincial and federal actors through "Management Committees."

— *Federal Department of Justice*: conducts prosecutions for other federal departments.

— *Provincial Environmental Protection Departments*: administer their own command-and-control abatement regimes and co-administer federal effluent regulations.

Although in practice EPS is the lead federal actor involved in industrial pollution control, in law the programs the EPS administers are the responsibility of other institutions. Thus, EPS may administer the pollution control provisions of the *Fisheries Act*, but the *Fisheries Act* is nominally the responsibility of the Department of Fisheries and Oceans. An informal administrative arrangement between EPS and the Department of Fisheries and Oceans allows the EPS to carry out its command-penalty functions. EPS also has informal arrangements with many of the provinces which permit the provincial departments to take the lead roles in environmental protection. Similarly, EPS administers the environmental component of the PPMGP through its membership on the "Management Committees," even though nominally the program is an initiative of the Department of Regional Industrial Expansion. EPS certifies the equipment which qualifies for an ACCA tax subsidy for pollution abatement, although the Department of National Revenue has responsibility for administering the federal income tax legislation.

While these informal arrangements perform a basic structuring and allocation function among governmental actors, their informality presents at least two drawbacks. First, they carry no official status, and thus their terms can be violated without any real likelihood of reprimand. Second, *administrés* and third parties may find it considerably more difficult to become aware of informal *ad hoc* and often unpublished arrangements. These two characteristics can lead to confusion, misunderstanding and conflict among all parties concerned.

Each institution involved in implementing the federal environmental protection policy brings with it its own experience, perspective and bias. Informal arrangements link institutions to carry out a common policy objective, but frequently do not address the more subtle differences underlying an institution's involvement.

IV. Summary

Parliament delegates to various institutions the authority to implement policy by means of activities associated with legal instruments. Important legal issues about institutions and instruments of government are critical to the implementation of policy.

Our focus for research to support this Paper was on administrative activities associated with particular legal instruments. This chapter has addressed mainly issues associated with such instruments. Thus, we have found that prosecutions for regulatory offences are commonly given too much prominence in policy design, legislation and implementation. Each particular instrument has some specific technical and operational strengths and weaknesses; the built-in weaknesses of legal instruments are too often ignored. For example, in licensing, administrators are able to develop standards specific to the individual *administré*; however, in some scenarios, the licensee acquires *de facto* tenure in the licence, because the licence is not revoked or suspended when non-compliance is detected. Furthermore, licensing often attracts procedural trappings which may unduly encumber policy implementation. In the administration of financial incentives such as grants, procedures are less formal; the rights of prospective applicants and third parties are unclear, as well as the legal characterization of grants. As for persuasion, legislation sometimes countenances such activities, but there are difficult questions about acceptable limits.

There are a number of other federal penalty-type instruments which are ripe for study and reform. Administrative imposition of fines for tax evasion deserves separate treatment. The revenue penalties are the most outstanding example of administratively imposed financial penalties. Another type, the "civil penalty," is more commonly used in the United States than in Canada (Diver, 1979). In Canada, some administrators would very much like to have available intermediate measures, such as civil penalties, to address minor instances of non-compliance. CATA may soon have such measures available, through amendment of the *Aeronautics Act*.

Ticketing is another instrument which shows promise. Already, the Department of Justice has explored ways of standardizing the numerous provisions in the area (see note 39). Questions remain, however, about the processing of ticketed offences: Should they continue to be treated as summary conviction offences? Should such matters be treated outside the criminal courts? What language, procedures and dispositions ought to be used? The expected implementation of a new ticketing plan by the Department of Transport, for *Transportation of Dangerous Goods Act* offences may eventually furnish needed empirical information in this regard.

In some of our Briefing Papers (Dunning, 1981; Dunning, 1982) we explored a range of "alternative" administrative, regulatory and economic techniques which are

used in Canada and the United States to implement policy.[53] Those techniques have important policy implementation implications[54] and should be further explored. Our research about instruments has, to date, only scratched the surface of a huge body of examples in each instrument type. It is our hope that exposition of issues about legal instruments of implementation will lead to increased attention by the legal community.

It would be out of place in this Paper to try to draw definitive conclusions about the relative value of different instruments in given contexts. Indeed, some may disagree even with the very broad statements we have made here. Our intention in this Working Paper is not to close the door on the area, but rather to raise issues in a way that will promote an optimal level of discussions.

We are interested in the extent to which one instrument may be substituted for another. Issues about instrument choice should be addressed in view of information about a body of real-life examples; our empirical work (Clifford, 1983; Webb, 1983) contains the kinds of examples needed. As well, attention ought to be given to the instruments for use by private parties.

The descriptions we have made of instruments may seem to imply a high potential for substitutability. Where presented in the context of their potential for substitutability, the features of particular instrument examples take on a greater significance for policy makers and draftsmen, and indeed for all parties. A catalogue could be created and maintained by government for the use of civil servants and the public in which governing instruments could be listed with comments on strengths and weaknesses with reference to specific examples (Stanbury and Fulton, 1984).

The relationships between instruments and institutions bring out difficult legal questions. Should the same institution administering command-penalty sanctions also be negotiating grants with *administrés*? The idea of co-ordination also highlights the interrelationship between institutions and their instruments. Co-ordination is important for several reasons. For example, institutions could agree about policy goals and use of instruments where legislation is silent or confusing. Numerous questions about co-ordination need discussion and analysis. To what degree should institutions share information about *administrés*? To what extent can or should institutions co-ordinate their use of instruments among a shared group of *administrés*? Given the variations of legal

53. Strictly speaking, many of the so-called "alternative" techniques are not alternatives to regulatory offence prosecutions. Rather, they are non-offence methods of implementing policy. The American categories of such "alternative techniques" include compliance reform, economic incentives, enhanced competition, information disclosure, marketable rights, performance standards, tiering and voluntary standards (see the review in Dunning (1982)). The Federal Statutes Compliance Project of the Department of Justice has conducted a preliminary investigation of the use of some of these techniques, by some departments and agencies, as alternatives to regulatory offence prosecutions.

54. It is important for implementation that administrators become familiar with generally accepted practices. When a body of examples is known by administrators the techniques can be used in other appropriate circumstances. "Tiering" is an obvious example: it is to be expected that *administrés* who have histories of non-compliance will have their operations inspected more closely and more frequently than *administrés* who have better histories of compliance. Some Administrations, such as the Departments of Agriculture and Consumer and Corporate Affairs, have developed systems such as FOIL (Frequency of Inspection Levels) which "tiers" inspection on the basis of compliance records. The FOIL system is established administratively; a more formal model is found in the *Metal Mining Effluent Regulations*, C.R.C. 1978, c. 819, which established a similar system for "tiered" inspections. Dissemination of information about such measures can help improve efficiency of an Administration's implementation activities. As well, knowledge about similar practices can improve the confidence which administrators bring to their activities.

supervision of institutions, are they able to co-ordinate implementation effectively? Research of such legal issues about institutions would be useful for improving implementation.

Choice of institution can be as important to the effectiveness of implementation as is choice of instrument. The two decisions should be made together: the institution used to convey a particular policy should not be hastily considered as an afterthought to instrument choice. The two go hand in hand.

Generalizations about institutions and instruments are dangerous outside of specific policy contexts. That being said, however, one general observation does hold true: the practices of policy implementation are often quite different from the appearances of legal order. For example, bargaining between administrators and *administrés* pervades every part of the implementation process. Despite the many offence-creating provisions, few prosecutions are undertaken; departments which appear to be administering command-and-control instruments may give more attention to financial incentives. That conclusion underscores our fundamental observation that government policy cannot always be discerned from statutory descriptions of institutions and instruments; public policy is in the implementation activities of government administrators.

CHAPTER FOUR

Activities of Parties in Policy Implementation

In this chapter, we review policy implementation activities associated with some familiar legal instruments. We have divided our descriptions of activities into four broad categories: those associated with licensing, persuasion, regulatory offence prosecutions and financial incentives administration. Sample policy implementation activities of parties are set out to allow description of what individuals do: In meeting the needs of legal instruments, what is being done by people in the system? Who participates? Who provides or obtains information? How is information analysed, acted upon and disseminated? The approach taken in this chapter stands in contrast to some of the "relational contexts" described in Chapter Two, and the instrumental discussions of Chapter Three.

The relationship between discretion and rules is a theme which pervades analysis of policy implementation activities.[55] How do administrators decide which grant application they will approve? When should a licence be revoked? How are decisions to prosecute made? On the one hand, administrators need some flexibility in applying a policy to individual circumstances. On the other, administrators, *administrés* and third parties all need the guidance and certainty which flow from pre-established rules and procedures. As we shall see, non-legislated rules (that is, administrative guidelines, procedure manuals, and so on) can perform a major role in structuring the "bare bones" discretion which typifies much federal legislation.

It is difficult to generalize about implementation activities because there is such variety even within a specific implementation technique; for example, licensing regimes are implemented through a distinctive range of parties' activities depending on the regime in question. In any implementation there is usually a great deal of overlap and conflict among activities, instruments, actors and institutions. The discussion which follows is only meant to give the reader an indication of the range of activities associated with implementation techniques and is not intended to be comprehensive.

I. Administrative Activities: Issues

There is a wide range of private parties' activities in policy implementation. People apply, negotiate, defend, report, produce and consume goods and services, suffer the

55. For examples of discretionary powers included in federal legislation, see Anisman (1975). For discussions of problems associated with discretion, see: Davis (1969); Hart and Sacks (1958); Jowell (1973); Wexler (1975).

effects of non-compliance, acquiesce,[56] contravene, observe and complain. This range of activities can be understood best in connection with policy implementation examples as are set out in the following sections of this chapter. Administrative activities, for their part, deserve a few more general comments from the outset.

The Administration's activities are as diffuse as those of private parties. The Administration may be doing no more than reacting (that is, detecting violations, warning, prosecuting). It may have a mandate and appropriations to provide incentives, or it may undertake massive persuasion campaigns to achieve compliance. It may have an army of inspectors or access to the resources of other agencies. It may act in concert with fellow actors and thereby co-ordinate a range of activities geared to implementing a common policy. Its staff may conduct enforcement activities as well as other duties which are more conciliatory in nature.

The main difference between private-party and administrative activities is that the latter are more completely circumscribed by a framework of law. The common law has long supported activities necessary for the exercise of statute-conferred power. The *Interpretation Act* also is instructive about the matters of defining public officers and the powers of persons, officers and functionaries:

> **2.** (1) "public officer" includes any person in the public service of Canada
>
> (*a*) who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or
>
> (*b*) upon whom a duty is imposed by or under an enactment.
>
> ...
>
> **26.** (2) Where power is given to a person, officer or functionary, to do or enforce the doing of any act or thing, *all such powers shall be deemed to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing.*[57] [Emphasis added]

When one seeks definitions of "inspector," "investigator," "analyst," "negotiator or other official," it may be more appropriate to examine their powers.[58] If an inspector is given authority to enter premises, what activities are necessarily incidental

56. Seidman (1978a: 48), argues that "an actor will obey a rule if, but only if (1) a specific rule exists, (2) of which he learns, and which he has both (3) opportunity and (4) capacity to obey, (5) which serves his interest to obey, (6) which he perceives as to favour his interest, and (7) which he will be more likely to obey if he decides in a public, participatory process." See also Kadish and Kadish (1973).

57. Subsection 26(2) is consistent with the longstanding position of the common law, since *Franklin's Case*, when Sir Edward Coke expressed the court's deference to the operational width of discretion granted by law: "When the law gives anything to anyone, it also gives those things without which the thing itself would be unavailable." [Original in Latin] See also *British Columbia Development Corporation* v. *Ombudsman* (p. 311).

58. The Administration has ongoing difficulties with its attempts to arrive at satisfactory definitions for purposes of its job classification scheme. For example, the precise nature of the powers of customs officers was the subject of detailed investigation by the Treasury Board in the early 1970s. Customs officers were not satisfied with having been included in the Clerk Regulatory (CR) group. They then lobbied to have a special category created for them. Later, Treasury Board investigations included interviews and ratings about duties performed. Especially revealing were the descriptions given by interviewees about their responsibilities and exercises of discretion in situations where considerable judgment must be brought to bear. One wonders whether the officers would have been as candid about their exercises of discretion if the interviews had not been conducted pursuant to their self-interested ends: for Law Reform Commission purposes, for example. The classification problem was ultimately

to effect the particular entry? To what extent should the activities be made explicit? Does the conferment of regulatory powers on administrators tacitly include a set of support activities? Support may consist in providing information, suggesting solutions, conducting diagnosis, providing recommendations, assisting an *administré* with implementation, and making suggestions about improving organizational effectiveness. If those associated activities were to be specified in legislation, this would mark a departure from the current minimalist drafting style of federal legislators. How precisely should legislation describe administrative activities for the implementation of policy? Does fuller elaboration provide greater protection for private rights?

Administrative activities in policy implementation also raise important issues concerning the delegation of powers: What kinds of decision-making authority should government delegate to its various creatures? What controls or fetters ought to be placed on what kinds of exercises of discretion? To what persons or bodies should the government bodies be permitted to subdelegate what kinds of discretionary authority? By what means should government bodies be required to demonstrate the accountability of their programs? Given the defects of adjudication and other participatory procedures and their limited capacity to deal with polycentric problems, what is the role for law in ensuring effectiveness, fairness and efficiency of implementation activities?

The study of activities throws light on the practical features of available instruments. It also illustrates the human details of skill and style which in part account for the disparity between an agency's prescribed mandate and the policy which is actually implemented. Our empirical work gave us a sampling of information about what administrators really do, and why they do it. This has allowed us to see some of the most crucial issues in policy implementation. What are administrators doing? How are their priorities set? How do their duties relate to the achievement of program goals? How do the instruments available to them shape, enhance, hinder or contribute to the effectiveness, fairness and efficiency of their activities? How do staff activities relate to the activities of other public actors in the sector? How do staff select from *administrés* those who shall receive detailed attention through monitoring, and so forth? What background, training and continuing education are necessary for the performance of what kinds of functions? What standards of professional conduct ought to prevail in dealings with *administrés*? What feedback should staff be delivering to management about performance? What kinds of roles should staff play in what kinds of relationships? Given the scarcity of resources, how can roles and responsibilities be assigned so that effective, ongoing relationships can be maintained? What authority to make discretionary decisions about matters affecting private interests ought to be delegated down the line to staff? What style should the administrator adopt for dealing with its constituency?

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resolved in 1974 when the Treasury Board amended its classification standard and structure for the Program Administration Group to include CR5, CR6 and CR7 Customs and Immigration officers from the Clerk Regulatory group. The general minimum qualifications are described in terms of academic prerequisites. No mention is made of the nature of job training, notwithstanding the rather formidable description of duties, including: the collection of taxes and other money from the public; the examination or assessment of persons or goods entering or leaving Canada and the taking of actions required to ensure compliance with the law or regulations respecting such movement (see Canada, Treasury Board, 1974). Customs officers are responsible for ensuring compliance with portions of a vast number of statutes as well as those which are entirely related to Customs and Excise. Although the public interest is high in matters controlled by the department, one might understandably shudder to think of the *ad hoc* measures taken to ensure compliance.

These are but a few of the issues raised by administrative activities in policy implementation. Some others will be touched upon in the following sections. The ones that we underline here, however, permeate all areas of policy implementation and consequently, must be kept in mind throughout.

II. Activities in Relation to Regulatory Offence Prosecutions

A "regulatory offence prosecution," as used here, refers to administrative attempts to prohibit or control a certain behaviour through the use of legislated, non-criminal command-penalty provisions. A monetary or other type of penalty (for example, imprisonment) is attached to the offence. For the penalty to be invoked, an administrator or other party (for example, a private prosecutor) must initiate an action (that is, lay an information); the appropriate adjudicating body must then decide whether the conduct in question constitutes an offence, and if so, the extent to which the offending behaviour should be penalized.

Prosecutions are often used in conjunction with other instruments; for example, it is an offence to operate a broadcasting facility without a licence (*Broadcasting Act*, s. 29(3)). To take another example, at the same time as the federal government restricts the amount of effluent discharged by the pulp and paper industry through command-and-control regulations, it offers grants to certain pulp mills which will include environmental protection measures in mill modernizations. There may be overlap and conflict of activities when prosecutions take place coincidentally with persuasion, licensing or financial incentive implementation. For the purposes of discussion here, prosecution activities will be examined in isolation from other implementation functions, even though prosecutions often act essentially as a backdrop to other administrative activities.

The three basic types of activities associated with offences are those related to information gathering, enforcement and informal negotiations. Each group of activities is examined below from the perspective of the administrator, *administrés* and third parties.

A. Information Gathering

To operate effectively the offence prosecution process requires a constant inflow of information concerning the status of individual *administrés* in relation to the standards established by the regime. Government makes use of its own and third-party information-gathering resources to help carry out its implementation activities. As well, the *administrés* themselves are often the most important sources of information about their own conduct.

Special corps of administrators are responsible for the gathering of information pertaining to private parties' behaviour: these are frequently referred to as "inspectors," "investigators," "monitoring and surveillance units," and so on. To carry out these information-gathering activities, administrators are often given "search and seizure"

powers, allowing them to enter premises to inspect or remove records (for example, *Fisheries Act*, s. 33.2. See Webb, 1983: Chapter V). It is an offence to obstruct an administrator in the course of his investigation work (for example, *Fisheries Act*, s. 33.4). In addition, administrators from one department or agency may obtain information concerning *administrés* from another department or agency, from another level of government or from private party complainants (Webb, 1983: Chapter V).

An administrator will find it more or less difficult to obtain information depending on factors such as information availability, degree of intrusiveness required to obtain information, the degree to which administrator and *administré* share goals, the benefits that the *administré* may hope to derive from allowing access to the information he controls, and so on. Information gathering is almost always intrusive, and this raises a certain number of issues. What are the limits of intrusiveness, for what kinds of places and for what kinds of activity? Who should do the intruding? What background and training should potential administrative searchers have in matters of enforcement techniques and technical knowledge? Should staff who conduct administrative searches be charged with other functions such as advising and consulting? What collateral or remedial powers should administrative searchers have (for example, a power to suspend operating certificates)?

The need to process information must be taken into account. In some cases, information analysis is not difficult and leads to immediate determination of non-compliance. For example, airworthiness inspectors can quickly recognize many instances of non-compliance. In other situations, determinations are more problematic. Thus, when violations of section 33 of the *Fisheries Act* are suspected, the responsible officer collects effluent from the suspected source and has a test conducted where rainbow trout are introduced into a sample of diluted effluent and observed over a period of time: immediate determination of non-compliance in these circumstances is difficult. Analysis may require attention to detail about conduct which involves more than a single discrete event: in the licensing of broadcasting content, for example, television Canadian-content quotas are measured for the whole year and FM radio content analysis requires the painstaking designation to content categories of each second of broadcast time.

The Administration's chief concerns about information on private-party conduct are its adequacy and veracity.[59] The Administration needs to know not only when a violation is or might be occurring, but also when it is likely to occur in the future, so that it can be anticipated and perhaps prevented. To this end, administrators are occasionally given powers to demand plans and studies, regarding possible future actions of *administrés* (for example, *Fisheries Act*, s. 33.1).

There are many aspects of the information-gathering process which are of direct concern to *administrés*. Three such characteristics are the following.

Confidentiality: *Administrés* are frequently concerned that commercially viable aspects of their operations might be disclosed to the public and to their competitors. Moreover, in the course of negotiations, *administrés* may take positions which, if made public, could be damaging to their reputation. The introduction of access-to-information legislation can heighten the fears of *administrés* in this regard.

59. This is true even of information obtained from the *administré* himself. In *R.* v. *Suncor*, p. 285, an *administré* argued that the information he had supplied pursuant to a reporting requirement was not accurate, and therefore that charges should be dismissed.

Expense/Disruptiveness: The quality and amount of information required of *administrés* can be both time-consuming and expensive (Dunning, 1982). The problem is particularly acute for those who are subject to several different regimes (for example, health and safety, labour, environmental protection, product safety).

Reasonable Search and Seizure: Section 8 of the *Canadian Charter of Rights and Freedoms* provides that search and seizure is only authorized where there are "reasonable grounds." While the exact meaning of the term "reasonable" is yet to be enunciated, it seems that many longstanding search and seizure practices will now be re-examined and modified in light of the Charter (see Reid and Young, 1985).

These and other issues illustrate the ways in which the Administration's needs for complete information about conduct are frequently in conflict with the *administré*'s desires for a commercially viable operation.

From the perspective of third parties, the central issue in this area is *accessibility*. How do they find out about individual *administrés*' operations? As was described earlier, administrators and *administrés* alike commonly raise the shield of confidentiality. The new *Access to Information Act* can help third parties learn of both Administration and *administré* activities, but even if this formal route should prove successful, there are problems of expense and interpretation of the information. Often, raw evidence must undergo sophisticated, expensive analysis before it can be interpreted. Because of a lack of resources to pay for this analysis, third parties can in effect be excluded from meaningful participation in the regulatory offence process.

B. Enforcement

To the layman, the enforcement process associated with offences may seem quite straightforward: first, determine whether an *administré* has committed an offence. If a violation is detected, prosecution should follow. The actual process is considerably more involved. Many detected violations are not prosecuted; instead, administrators often prefer less formal methods of inducing compliance, such as negotiation, warnings and persuasion. Reasons for decisions not to prosecute run the gamut, from perceived inadequacies in the evidence needed to support convictions, to lack of faith in the value of prosecutions, to apprehensions about the formal and public nature of legal proceedings.

Concerns with the enforcement process vary, depending upon the perspective of the parties involved. From the standpoint of administrators, the major issues relate to prosecutorial discretion: *When* is the decision made to switch from non-confrontational approaches to prosecutions, and *on what basis*? These issues are also of major interest to *administrés*, but perhaps their overriding concern is with *consistency and certainty* in prosecutorial decision making from one day to the next, and *equality of treatment* from one *administré* to another. While all these issues are important to third parties, they are often left with the much more basic, preliminary question of *participation*; they can become involved in the enforcement process as complainants and private prosecutors, but their participation in the administrator's prosecutorial decision making is often minimal. These aspects are explored below.

In Canada, unless legislation specifically compels enforcement through imperative language, there is no legal necessity for Administration to resort to prosecutions at each detected transgression (Williams, 1956; Burns, 1975: 293). Instead, administrators exercise discretion as to when and how to apply legislation. Administrators may choose to adopt a *selective* enforcement strategy, in which only certain types of fact situations will result in prosecutions (see generally, Evans *et al.*, 1980: 792-826).

There is a wide range of reasons why administrators might decide not to prosecute. Administrators may feel that courts lack technical knowledge in a particular area and that this reduces the likelihood of a conviction or significant penalty. Administrators may find prosecution to be a slow and expensive process. Those administrators who are in day-to-day contact with an *administré* may resist the transfer of control over an *administré's* situation to prosecutors and courts. They may feel that initiating a prosecution jeopardizes otherwise harmonious and constructive relations. Prosecutions entail formalism and publicity, neither of which administrators might desire. Administrators may not have faith in the knowledge, commitment and capabilities of Crown counsel. Even if a conviction is entered, administrators may be sceptical about the effect of the prosecution on either the convicted party or the broader constituency. Administrators may be wary of injuring provincial sensibilities; where jurisdiction is shared, there may be informal agreements between departments not to prosecute. Administrators may perceive their role as primarily conciliatory, with prosecution only an option of last resort.

The decision whether to prosecute rests on many factors, including the behaviour and attitude of the alleged violator, his current efforts to correct the problem, the receptiveness of the court toward convictions for offences of this or a similar kind, the strength of the evidence, and the probability or preference for another enforcement authority carrying out a prosecution (that is, the province, or another agency of the federal government).[60] To take an example, in the case of *Fisheries Act* pulp and paper prosecutions, federal administrators may consider the following factors: (1) courts are often reluctant either to convict industrial polluters or to levy substantial penalties; (2) it is difficult to prove sublethal deleterious effects of effluent; (3) the provinces have water pollution legislation of their own in place and by administrative arrangement are usually considered the lead enforcement authorities; (4) rivalries exist among federal institutions as to who should bring the prosecution; (5) many pulp mills are currently receiving federal and provincial funding for mill modernizations which should remedy major water pollution problems; and (6) many pulp mills have entered informal "compliance agreements" with the federal government, allowing short-term violations of the effluent standards in return for commitments to long-term compliance (Webb, 1983: Chapter V; see *infra*, Informal Negotiations).

Legislation often provides minimal guidance as to how to make decisions about the enforcement of offence provisions. The *Fisheries Act*, for example, contains no indication of how to resolve the "job versus fish" dilemma. Read literally, all violations would appear to be worthy of prosecution, regardless of competing resource uses. A few Canadian statutes have adapted to a more sophisticated approach; they explicitly require administrators to consider other resource uses (*Ministry of Forests Act* (B.C.), s. 4(c)), or authorize and structure federal-provincial administrative arrangements (*Transportation of Dangerous Goods Act*, s. 25). These statutes serve to refute any

60. In his empirical study of the exercises of prosecutorial discretion, Rabin (1972) found that United States attorneys wish to improve or maintain their high conviction rates, given the importance attached to those rates as a measure of their performance. In the process of making concrete decisions regarding whether or not to prosecute a particular violator, he also found that the following considerations arise singly, and more often in combination: (1) case-load considerations; (2) magnitude of the violation; (3) court-perceived criminality of the offence; (4) special characteristics of the defendant; (5) existence of alternative sanctions; (6) adequacy of the case; (7) equality of treatment of regulated parties; and (8) special interest influence. While Rabin's analysis is illuminating, he does not place it in the broader context of policy implementation. Indeed, within his limited focus on command-penalty mechanisms, Rabin admits that he has ignored alternative administrative action such as the revocation of a licence, because he did not encounter it in his study.

claims that detailed language in legislation necessarily goes against Canadian legal drafting traditions. Where the statute provides a relatively detailed statement of policy and structure for policy implementation, the administrators get a much clearer idea of how offence provisions are to be enforced, and can therefore carry out their activities confident that their actions are supported by law. Similarly, more explicit, structured legislation and guidelines allow *administrés* and third parties to anticipate the consequences of policy implementation on their activities.[61]

As was stated at the outset of this section, a key consideration for *administrés* is that there be consistent and certain enforcement, from one day to the next, and concomitant with that, equality of treatment from one *administré* to another. Typically, *administrés* must budget and plan their activities months and even years in advance: inconsistent or uneven enforcement frustrates the best laid plans. The principle of equality before the law has been embodied in paragraph 1(*b*) of the *Canadian Bill of Rights*, and subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, but it is not clear at this time whether these provisions could be used to defeat selective or random enforcement strategies. In theory, at least, these provisions appear to be open to this interpretation, although to date Canadian courts have not construed them in this manner. Recently, the federal government has been making some effort to standardize and centralize its prosecutorial decision making, in anticipation of the effect of subsection 15(1) of the Charter.[62]

The American experience suggests that if the Crown can demonstrate a rational basis for its prosecution policy, it may be upheld.[63] In the United States, courts have held that it is not a defence to a criminal charge that others were unpunished for the same offence.[64] However, the terms of the American law do not exactly parallel the Canadian provisions and thus comparisons are both problematic and difficult.

For third parties, meaningful participation in the enforcement process is a major concern. If *administrés* are violating the law and not being prosecuted, third parties often want to know why. If no satisfactory explanation is forthcoming, third parties are increasingly taking enforcement action on their own. Third-party participation in the enforcement process has been treated differently from one regime to another. In

61. The issues raised do not touch on matters of entitlements of private parties whether *administrés* or third parties. As well, it is outside the scope of the present Paper to discuss either the setting of public policy agendas or the available options.

62. Thus, in a move apparently sparked by public criticism that the Crown applied the law arbitrarily, as well as in anticipation of the impact of section 15 of the Charter, the federal government standardized the exercise of discretion with respect to all persons charged with illegal drug importation. See M. Strauss, "Move to Standardize Drug Importing Prosecutions," *The Globe and Mail*, 10 January 1985, p. B9.

63. A constitutional violation may exist only where selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement. Test cases and selective prosecutions with a view to general deterrence are allowed (see *People* v. *Utica Daw's Drug Co.*).

64. *Oyler* v. *Boles*; *People* v. *Gray*.

some jurisdictions, prosecution policies have been promulgated which obligate administrators to provide information regarding individual *administrés* in cases where administrators have decided not to prosecute (Gibson, 1983: 47). Some offence regimes require the prior consent of the Attorney General before third-party prosecutions take place (for example, *Canadian Human Rights Act*, s. 46); in contrast, others freely permit prosecutions by third parties (for example, *Fisheries Act*, s. 33). In fact, in some cases financial incentives are offered for third-party complaints which lead to prosecutions, and for private prosecutions themselves.[65] The effects of third-party involvement at the enforcement stage are varied, and subject to a number of interpretations. On the one hand, third-party or private prosecutions can be a useful "check and balance" to ensure that government enforcement authorities do not lose their prosecutorial enthusiasm. Private prosecutions can be an excellent method for bringing incidents to the attention of administrators, *administrés* and the public generally. On the other hand, private prosecutions can disrupt a selective prosecution strategy (see, generally, Webb, 1983; Chapter V). As a last resort government can "stay" private prosecutions; however, because of the political repercussions of such actions, "stays" of prosecutions are rare. In effect, third-party prosecutions are often a poor substitute for earlier public participation in the policy implementation process; where third parties can get involved in rule making and negotiations, they are more likely to support the Administration's enforcement strategy.

C. Informal Negotiations

While the terms of regulatory offence legislation usually do not admit to it, there is often a substantial amount of informal negotiations taking place in conjunction with enforcement and information-gathering activities. An illustration of this is the elaborate "compliance schedule" and federal-provincial administrative arrangements associated with implementation of the *Fisheries Act* and *Pulp and Paper Effluent Regulations* (see Webb, 1983: especially Chapter V). Such negotiations, and the informal arrangements they typically produce, are at least partially the result of a simplistic or inadequate legislative framework for implementation; in effect, administrator and *administré* are left to work out the "real rules of the game" by themselves. These informal types of arrangements appear to be unenforceable in court, leading to a protective, "hush hush" implementation environment, since administrators cannot explicitly justify their actions in law. Even more problematic in these situations is the role of third parties with respect to these informal arrangements. In effect, the informality acts as a barrier to third-party access. Private prosecutions can cut through this informality as a last resort. However, what private prosecutions produce in terms of public exposure, they may destroy in terms of constructive relationships.

Legal counsel for the Administration often experience difficulties in even acknowledging the existence of negotiations in relation to offences. The bias of lawyers is in some cases so strong that counsel for the Administration may be unaware of the existence of negotiations. In fact, during one of our meetings with Department of the Environment officials, one senior counsel asserted that no negotiation was conducted between his department and *administrés*: that was immediately refuted by other department officials at the same meeting, who stated that virtually all phases of their relationship with *administrés* — rule making, policy development, compliance levels, compliance schedules, and so on — are negotiated. It is important for administrators to have clear

65. For example, the *Penalties and Forfeitures Proceeds Regulations* promulgated pursuant to the *Fisheries Act*; similarly, the *Migratory Birds Convention Act* (see, generally, Webb, 1983: Chapter V).

guidance for negotiation and other activities in policy implementation. Sources of guidance are found in legislation and in internal instructions developed by government. Examples of the latter are found in manuals, circulars, directives, and so on. Such materials are important for good administration: they are evidence of attempts to fill gaps and eliminate uncertainties. While encouraging the production and use of appropriate instructions, the Commission notes that several serious legal issues arising from the use of such materials remain unanswered. In particular, what is the legal nature and status of such materials? Are such materials binding on *administrés*, administrators and the Administration? Should such materials be publicly disseminated? These issues ought to be addressed to help improve activities in policy implementation, but they are outside the scope of the present Paper.

III. Activities in Relation to Financial Incentives

By "financial incentive," we mean the encouragement of a behaviour through some form of financial remuneration: tax subsidy, grant, low-interest loan, and so on. The exact nature of implementation activities differs from one incentive form to another, but discussion here will be kept as general as possible. Incentive programs are used by government in conjunction with other techniques; for example, Telefilm Canada offers grants to producers of Canadian films at the same time as the CRTC limits non-Canadian content on television through a licensing regime (Clifford, 1983). There may be overlaps and even conflict in activities when incentives are implemented coincidentally with other instruments.

The three basic classes of activities associated with incentive implementation are negotiations, agreement enforcement, and information gathering.

A. Negotiations

Only tax-based incentives tend to operate in a highly mechanical way. For others, there is often a negotiation phase which leads to the signing of an incentive agreement between administrator and *administré*. In the case of the PPMGP, for example, federal and provincial administrators and the *administré* in question negotiate the nature of the modernizations to take place and then, if the project is approved, the *administré* receives government subsidization (Webb, 1983: Chapter VII). EPS negotiations are often far-reaching and varied, where a number of options are considered by a variety of government departments and company officials. The central concern of administrators is to ensure that the modernizations are the most practical and effective methods of improving an operation, bearing in mind their concern with environmental protection, low energy consumption, and use of Canadian labour and material. *Administrés* are primarily concerned with the least costly and most productive modernization design. Negotiations are highly technical and can span several months before a formal agreement was reached. For the administrators to make an informed choice of the most effective grant proposal, they need to know almost as much about plant operations as the *administrés* know themselves.

Third parties are usually not involved in these negotiations: the high level of expertise and resources necessary makes constructive negotiation difficult. While *administrés* are primarily occupied with getting the most "bang for their buck," they are

typically concerned also that each incentive proposal they put forward be carefully considered, and that each *administré* receive an equitable share of funds. Thus, *administrés* would strive for advance description of the criteria upon which incentive proposals would be judged, an opportunity to adjust and defend their proposals, and an indication of how other incentive applications are being treated. Unless requirements are explicitly set out in legislation establishing the incentive, there appear to be no legal requirements that administrators provide such information. Administrators typically operate in an environment characterized by a great deal of discretion. Neither *administrés* nor third parties have much legal opportunity to demand fairness in such circumstances.

B. Agreement Enforcement

If an *administré* agrees to perform certain activities in exchange for government funding, and then does not perform, administrators have a number of options. They can renegotiate the incentive agreement, should this be reasonable in the circumstances. They may seek to enforce the terms of the agreement[66] by demanding "specific performance" or claiming damages as compensation for violation of agreement terms (Webb, 1983: Chapter VII). They may simply ignore the violation. In contrast to command-penalty situations, where the possibility of private prosecution usually exists, there does not appear to be a clear legal avenue for competitor or third-party enforcement, should the administrators falter. In point of fact, competitor and third-party involvement in the incentive enforcement process is normally not addressed in the legislation or regulations which establish the incentive program.

C. Information Gathering

Generally, information disclosed by the *administré* during negotiations or in fulfilment of a term of the agreement (for example, a reporting obligation) will differ depending upon the nature of the incentive program. In practice, administrators and *administrés* treat information disclosed between them as confidential (that is, as if it were a matter of private contract). In certain cases, express provisions require information disclosure. Third parties would appear to have little access to pertinent information; the agreement usually does not provide for this. It is not likely that the courts would interpret incentive agreements in a way that would provide for meaningful information disclosure to third parties. As with enforcement and negotiation activities, it would appear that third parties are left "out in the cold" as regards information disclosure concerning incentive agreements.

IV. Licensing Activities

A licence grants a permission to do what is otherwise illegal. Given that the term of a licence is fixed, the licensing authority possesses, in theory, considerable leverage for influencing private conduct (Williams, 1967; Street, 1975). In such contexts, both

66. It is not certain in Canadian legal circles whether modernization incentives would be characterized as "contracts," and thus whether contractual remedies would apply.

the Administration and private parties have the opportunity to engage in a variety of activities. None of the parties' activities *vis-à-vis* licensing can be correctly understood in isolation from other activities, instruments and institutions operating in the same area. However, licensing is conducted through a variety of activities, more predominant in some regimes than in others.

Once a licence is issued, a cycle of legal relations begins. During the cycle, which usually leads to a licence renewal application, the licensing authority needs information about licensee conduct *vis-à-vis* the applicable legislation and conditions of licence. As well, the authority needs to analyse information about licensee conduct to determine whether such conduct is in compliance with legislation and licence conditions. The Administration may then decide what to do, within the legal limits of licensing, on the basis of information and analysis of licensee conduct. Strictly speaking, detection of non-compliance with licence conditions can lead to suspension or revocation of licence. For some kinds of licence, no renewal is allowed on detection of non-compliance, and some licences are actually suspended or revoked for non-compliance. For some kinds of licences, however, withdrawal of government permission is unusual, even if non-compliance is detected. It is the latter kind of regime with which we were concerned in our CRTC research (Clifford, 1983), and to which we now turn in a discussion of parties' activities.

Administration and *administré* negotiate many aspects of their relationship, from ground rules (conditions of licence and regulations) to the degrees of permissible non-compliance and timetables for changing private behaviour. Third parties have little to do with such negotiations, except in the contexts of formal policy- and rule-making exercises.

Formal negotiations are conducted in the context of applications. In some regimes, the licensing authority adjudicates licensing matters in public hearings. This is appropriate for matters which attract third-party attention and are the subject of ongoing policy change. The public hearing component of licensing thus affords all private parties opportunities to be heard through formal interventions. Such opportunities are important for matters which affect third-party interests in diffuse ways which do not normally lead to civil claims.

In some regimes licensing operations are conducted without adjudication, and suspension may be ordered without a public hearing. Where the delay created by a hearing process may exacerbate any potential harm to third parties or where the policy being implemented does not attract much public attention, officials may exercise significant discretion to suspend. Thus, the Department of Transport's CATA inspectors are empowered to suspend documents of entitlement to prevent flying where they detect non-compliance with safety standards (Dagenais, 1983). Similarly, in the Department of Communication's administration of *Radio Act* licences, where licence tenure has been eliminated by regulation (C.R.C., c. 1372, s. 20), perhaps because of the non-controversial nature of the policy being implemented, the Administration is free to take licensing action without convening public hearings.

Negotiation between a licensee and an authority also occurs on the micro level: the licensee and the authority will reach agreement as to what will be the authority's attitude as regards a given situation that may arise (for example, a special event which may pre-empt scheduled programming). In the case of Canadian television programming designation, for example, CRTC staff commonly reach agreement with licensees about whether a planned program would qualify as Canadian (Clifford, 1983). Obviously, third parties do not participate in such private negotiations.

Licensing authorities obtain information about licensee conduct on their own (inspection, investigation, monitoring), from other government entities acting as their agents (police, other government departments), from the licensee (self-reporting requirements) and from third parties (competitors, audience, and so on). Depending on the source of information, an authority's response may vary. It may wait until consideration of the licensee's renewal application if it possesses only information it gathered on its own. Where competitors or other third parties complain, the authority may become more inclined to take action.[67] Conversely, when an authority threatens discontinuance of a licence, third parties may rally in support of a non-complying licensee. All of these can have demonstrable effects on the authority's responses. In FM radio licensing, for example, complaints about non-compliance from market competitors have had profound effects on the development of regulations and on implementation generally. As well, when the CRTC has refused to renew some FM licences, third-party community support has been instrumental in issuing new licences to the non-complying parties.

In particular policy areas, there are accepted or standard practices known as "accepted engineering practice, good maintenance, standard laboratory procedure, good sanitation," and so forth. If an inspector thinks the *administré* is not observing the standard, the inspector will try to reform him unless the *administré* is not sincere; if the *administré* is insincere or will not reform, the inspector will try to invoke available sanctions, such as licensing action or prosecution.

A licensing authority receives regular reports from the licensee about its conduct. The authority verifies licensee information by obtaining its own information. Failure to provide reports is characteristically made an offence punishable on summary conviction. Reliability of licensee information may be tested by the authority using its own sources, but obtaining such independent information may pose considerable logistic burdens. In the case of broadcasting, such information is easily obtained over the air, but other licensing systems require intrusions into private affairs to gain access to information. Such intrusions raise difficult legal issues because of protections afforded by section 8 of the Charter.

Analysis of information about licensee conduct is an activity which consumes considerable resources. In the CRTC's licensing practice, licensees provide analysis of their own conduct regarding their broadcast content requirements. After exchanging such analysis, the CRTC and the licensee are able to attempt to reach consensus about licensee conduct with legal requirements. Again, this kind of private negotiation about licensee conduct lessens the likelihood of acrimony and protracted public hearings, although such negotiations do not afford third parties opportunities to participate.

Finally, in licensing there are information-disseminating activities. As activities of the Administration, they are of primary importance. However, information may be disseminated in a selective fashion whereby licensees are given information while others get much less. For private parties, knowledge about legal requirements and about licensee conduct underpins the successfulness of licensing.

V. Persuasion Activities

By "persuasion" we mean those various attempts by the Administration to educate, disseminate information, and otherwise convince *administrés* to act or refrain from acting, as the case may be. The word "suasion" is sometimes used to convey a sense

67. During an inquiry into aviation safety, for example, it was learned that without public complaints local administrators experienced difficulty in their attempts to ground an unsafe operator.

of government attempts to influence private behaviour. However, "suasion" may not embrace the full range of persuasion activities which government undertakes in its attempts to produce compliance.[68]

Administrative activities aimed at influencing private behaviour through persuasion are important and wide-ranging.[69] They also raise serious moral and legal issues.[70] The examples we use in this Paper are drawn mainly from our study of the CHRC (Laberge, 1983). Although many of its persuasion activities might not have direct parallels in other regimes, they are nevertheless significant.

The CHRC uses persuasion in order to make its role known, to "sensitize" Canadians to human rights and to elicit participation in the elaboration of its policies. Since its beginnings the CHRC has continuously received a large volume of submissions, requests (for assistance, for information) and complaints. Its response has been characterized by its own staff as helping, listening and giving example. Its active presence builds a twofold advantage because in receiving information about specific potential complaints, the Commission adds to its body of knowledge about problems in human rights.

The CHRC conducts information sessions on its own initiative or on request. Those sessions provide an opportunity for the Commission to gather information for two main purposes: to respond to particular complaints and problems, and develop and evolve policy. The latter purpose falls short of rule making. The information session may be devoted to problems and issues which affect the particular group. The commissioners have also made a practice of attending conferences and meetings on topical issues related to groups such as the handicapped and Indian bands. The Commission's role in disseminating information at meetings necessarily strays to advocacy in instances where it perceives that an enterprise, or another government agency or department, could be making greater efforts to improve human rights in its own practices.

In an area such as discrimination, keeping on top of events represents a formidable task for all parties involved. There are many enterprises which appear to be ignorant of anti-discrimination laws. The task of making persons aware of the law is formidable. For its part, the CHRC attempts continuously to renew its own staff commitment by conducting information and continuing-education sessions.

In 1981, the CHRC began to conduct seminars for the promotion of equality. Initially the seminars were conducted for enterprises which were the objects of complaints. Gradually, however, the purpose of conducting such seminars has become more preventive; in placing less stress on the curative role of this form of persuasion, the Commission can thereby employ its resources to try to influence future attitudes and behaviour.

In spite of the efforts to date by the CHRC in its persuasion activities, it appears that more could be done. The Commission does not have sufficient time and personnel available to effect its work of persuading its constituency to change behaviour through

68. But see Stanbury and Fulton (1984) where they classify six categories of "suasion."

69. As for private parties' activities, virtually all efforts to influence the Administration's decision-making processes can be understood as forms of persuasion.

70. For example, see Stanbury and Fulton (1984: 297 ff.): "Suasion may also be perceived to be immoral if it is believed to be conducted in a *discriminatory* fashion (i.e., persons or organizations in similar circumstances are not being subjected to the same treatment); if it is being conducted in *secret* — where the government's actions would meet with widespread disapproval if conducted in public; or if it is not clear that the government has the legal right (or would violate the rules of natural justice) to impose the sanctions that they threaten to use to induce compliance with its wishes."

a program of education. Commission staff has estimated that to be effective an education program would require fifteen two-day information sessions for each large enterprise. Given the great number of large enterprises and government institutions within CHRC jurisdiction, the education task is daunting. Nevertheless, the importance of such persuasion exercises, in the effort to implement human rights policy, has been demonstrated in the work of the CHRC.

Persuasion activities are commonly undertaken in conjunction with other implementation activities. The public hearing process provides many opportunities for persuasion. For example, on many CRTC licensing applications, it is within the Commission's discretion to decide whether the application will be granted without a public hearing, or whether the applicant will be called to a public hearing. In cases of applications for licence renewal and for licence amendments, the applicant licensees appearing at public hearings are quizzed by commissioners and counsel about past performance, the application itself, future plans and other undertakings. At the public hearing, non-compliance with content regulations and licence conditions must be explained. As well, good intentions must be supported by financial, technical and other persuasive analyses; the licensee is asked, in public, to do more and to do better. So, in a sense, the public hearing and the supporting licensee undertakings (promise of performance, licence applications, compliance certificates, and so forth) ought to be viewed as persuasion exercises. Persuasion, albeit in the context of a formal process, therefore occurs through chastisement at public hearings, in the praise and warnings noted in published decisions and notices, and of course at the operational level (when analyses of performance are exchanged). Some such activities may be more effective at getting compliance than others, but one initiative cannot be easily scrutinized in isolation as to its effectiveness in producing compliance. In a rather metaphysical matter such as content of broadcasting, arguments about compliance cannot be made without quantifying the unquantifiable. Therefore, the parties to the licensing process must argue about unsettled matters of content; in that context the real issue (namely, private profit motivations versus "public" broadcasting) is addressed indirectly. Where there is no real opportunity to build consensus (about the private-public issues), let alone influence new behaviour, strong words about non-compliance and "raised eyebrows" of commissioners at public hearings may substitute. In a sense one wonders whether through such manifestations the Commission attempts to persuade its audience into believing that policy goals are being achieved (Trebilcock *et al.*, 1981).

In the early implementation of its FM radio policy, the CRTC found that licensees were not complying and the Commission then attempted to coax them into coming close to the conditions of licence and the regulations. Even though many licensees failed to comply, Commission decisions expounded praise and encouragement for quantitative improvements. Significant parts of the FM radio policy were later dismantled. In such a climate of new or unsettled policy, persuasion can play an important role, simply because the imposition of available sanctions may be inappropriate.

The EPS has also elaborated official policy in which it expressly places emphasis on the use of persuasion:

> Emphasis will ... be placed on the advice, advocacy and information transfers as means to influence the actions of others (Canada, Department of the Environment, 1982).[71]

71. Our EPS study did not focus on the activities described in the Strategic Plan, largely because the Plan's implementation had just begun when our research was substantially complete.

The Administration sometimes publicizes information about prosecutions. Such publicity has persuasive effects on the party concerned, if not on the whole constituency (Fisse and Braithwaite, 1983). We are wary about the uncontrollable effects of publicity and stigmatization. In the matter of prosecutions for violations of the *Atomic Energy Control Act*, for example, Board officials take the view that the real penalty is in the effect of publicity about the fact of prosecution.[72] In the Department of Communications, publicity about prosecutions is used as one measure among many other persuasive elements, such as seminars with equipment suppliers and handbooks for operators. In respect of earth stations (''television satellite dishes''), departmental staff were of the view that publicity could not work because users did not believe that the prohibitions against installation would be enforced. The act of publicizing prosecutions or other information about alleged non-compliance is an exercise of power which, given its potential for harm, ought to be exercised with due care.

The Department of the Environment uses education and publicity of convictions in its attempts to get compliance with the *Migratory Birds Convention Act*. Talks are given to schools and other groups, to disseminate the regulations, to cultivate informants, and thereby to complement the small staff and resources that are available for the administration of the statute. In the matter of publicity of offences, stigma varies with the area. In a small community, stigma could be significant: personal pride can be greatly affected where a convicted person is precluded from getting a hunting permit for a period of one year. The persuasion effort in this Act's administration extends to matters of courtesy, so that, for example, inspectors do not interrupt bird landings, useful advice is given where appropriate, and an overall consistent enforcement approach is taken in respect of all detected non-compliance. All such measures can be viewed as part and parcel of the department's persuasion activities.

In summary, the persuasion power of government has many manifestations. Education and persuasion may be principal activities or they may flow from other activities. Publicity about non-compliance may have benign or intrusive effects on private parties. Persuasion can greatly improve the efficiency of implementation, and may in many instances be necessary to the effective invocation of command-penalty and incentive instruments. Persuasion, to be effective, requires a degree of organization and resource co-ordination, which should arguably allow for due consideration of the probable effects of publicity on constituencies. Notwithstanding the darker potential uses which can be made of persuasion, its importance for implementation is clear.

VI. Summary

Policy implementation is about activities: Who does what to whom? Why? When? Where and how? Activities of the parties, especially activities of the Administration raise fundamental legal issues about legitimacy, participation, delegation, discretion, supervision and control. Three major types of administrator activities can be associated with financial incentives, regulatory offence prosecutions and licences: information gathering, negotiation and enforcement.

72. Derived from an interview with AECB officials.

Information is the stock-in-trade which fuels implementation. Information needs differ depending upon the stage of the implementation process (for example, negotiation or enforcement) and the type of instrument (for example, when administrators need to enter private premises to obtain information about *administré* behaviour, to what extent should their practices change on the basis of the Charter?). Issues relating to information gathering have long been of concern in criminal law, but little attention has been given to the search issues which arise in administrative situations. Because of the voluntary nature of financial incentives, the information needed to support their use may be more easily obtained than regulatory offence information.

Negotiation activities are pervasive through all phases of implementation. Some negotiation is formal, in the context of matters such as policy making, rule making or processing of licence applications. Other negotiations are informal and can occur at any point. Formal negotiations are usually conducted within a legal framework which provides minimal rules for participation; informal negotiations, by their nature, may exclude third parties. While we do not deny the legitimacy and importance of exclusive administrator-*administré* negotiations, we note the difficulties which they pose for excluded parties. For example, the EPS and industrial operators may privately negotiate a compliance schedule without hearing the views of interested third parties. The fundamental difficulty with private negotiations is in finding means for making third parties aware of negotiations and arranging suitable avenues for participation, without undue formality, expense and delay. If third parties do not participate in negotiations, implementation decisions may not be well thought out, and as a result subsequent implementation activities may be called into question. Independent third-party initiatives against non-compliant *administrés* (for example, private prosecutions) probably result from the frustration with the closed nature of many implementation programs and may be inversely proportionate to the degree to which third parties are included in the implementation process.

Enforcement usually has a higher visibility than other implementation activities, and has traditionally been a focus of legal attention. Different enforcement issues are raised depending upon which instrument is under scrutiny. For example, with respect to regulatory offences, major problems include developing an appropriate structure for prosecutorial discretion, ensuring that like cases be treated alike, and maintaining effective but not unduly disruptive third-party participation.

In licensing, administrators might not be able to make determinations about compliance if standards are not clear: in such circumstances, revocation and suspension are not common (Clifford, 1983). Intermediate licensing measures, such as short-term renewal, special conditions and reporting requirements may impose logistic burdens on administrators and *administrés* alike.

Implementation activities associated with financial incentives other than tax subsidies are generally conducted in a less formal manner than either regulatory offence prosecutions or licensing: at present, it is uncertain whether administrators can be compelled to enforce the terms of grants, whether like cases must be treated alike, and whether third parties have a legally recognized avenue of participation in enforcement decisions.

The Administration has difficulties in speaking through its many administrators with a consistent, fair voice. The difficulties are highlighted by our studies which show, for example, the problems arising out of the use of two legal instruments in one policy context. Instruments are often used in tandem; at the very least, the Administration needs to be prepared to use all of its available instruments. Administrators within a

single institution often behave in an inconsistent or conflicting manner towards the same *administrés*. The introduction of compliance specialists who could act as "internal ombudsmen," to inform administrators about related activities, receive suggestions, organize training courses and generally communicate between the various administrators would help to obviate this. Even though many institutions employ persons who engage in some "compliance-specialist" activities, adoption of the designation and a full description of duties could be useful in many instances.

Administrators attempt to influence behaviour and decision making. However, not all their activities can be precisely defined. Parliamentarians sometimes would not want to bear the brunt of attacks about interference with affairs which may appear outside the ambit of programs. However, activities outside the scope of powers granted by statute may nevertheless be legitimate in the sense that they help staff in doing the things for which they are empowered.

The administrator's plight is not an easy one: he must convince his superiors that he is "doing his job," he must be responsive to the needs of *administrés*, he should provide real access for third-party participation, and he must generally implement policy in a fair, efficient and open manner. Administrator activities are conducted against a tumultuous backdrop of changing socio-economic conditions, shifting public opinions, budget restrictions and rivalries among government institutions. Commentators have described implementation activities as:

> a series of games involving the efforts of numerous semiautonomous actors to protect their interests and gain access to program elements not under their control — all within the face of considerable uncertainty and the context of general expectations that something will be attempted consistent with the legal mandate (Mazmanian and Sabatier, 1981: 4).

It seems clear that examination of legal instruments without a concomitant analysis of implementation activities would fail to capture the true nature of how government gets things done.

CHAPTER FIVE

Summary, General Observations and Recommendations

In this Paper, we have focused on problems relating to the implementation of policies that require private sector *compliance*. In order to understand how government goes about doing this, it is not enough to examine the *legal instruments* available to government officials. These often provide only a backdrop for what really occurs. Administrators do not apply law mechanically: an analysis of day-to-day implementation activity reveals its more typical, informal nature. Implementation is a human process, involving ongoing interactions among government and private parties: policy implementation is mainly a *relational* process. In such a context, administrative law is called upon to address more than defects in decision making, to become that branch of law which, among other things, provides structure and guidance for policy implementation.

Law relies heavily on coercive instruments. This reliance emphasizes unduly the contentious or adversarial components of the implementation process, and can give rise to many implementation problems. First, it can cause relationships to start off on the wrong foot, by framing interactions in an adversarial mode when compliance may more likely be achieved through co-operation. Secondly, it does not always provide administrators (namely, those who implement the policy), *administrés* (that is, those members of the private sector who are the subject of administrative action), or third parties (that is, all those other than administrators and *administrés*) with practical guidance as to how the policy is actually to be implemented.

The administration of *regulatory offences* characteristically involves many government officials and institutions, including "front-line" enforcers, inspectors, Department of Justice prosecutors, and the courts. Each official and institution may have its own priorities and concerns about prosecution. Administrators face difficulties related to their "wearing different hats": one day an administrator may be acting as an adviser to *administrés*, on another as inspector, and on the next as enforcer. The government institution may sometimes provide its administrators with some strategic guidance; more often than not, however, such decisions are left to personal judgment. The administrator's operational and prosecutorial discretion poses difficult problems for policy implementation: how administrators apply the law may be different from what legislators intended.

Some of the parties to a prosecution come into action later in the process than others. Thus, for example, once proceedings have begun, the front-line administrator relinquishes control over the prosecution to the Department of Justice prosecutor. However, prosecutors may not be as familiar as administrators with the policy underlying regulatory offences. As a result, prosecutions may be poorly handled, or inappropriately plea bargained. On the court docket, a regulatory offence prosecution may not receive high priority, because of competing demands such as criminal prosecutions,

heavy case-loads, and so on. Its outcome may be difficult to predict. Furthermore, depending upon factors such as court, media and community reactions to the prosecution, publicity arising from prosecutions can either further or detract from policy goals, and bolster or harm the reputation of *administrés* (regardless of conviction), all of which is beyond the control of the administrator. As a result, in many contexts reliance on offence provisions in legislation can prove to be an inappropriate emphasis for policy implementation.

Licensing is also a coercive instrument: it permits an activity which would otherwise be subject to prosecution and can restrict the nature of permitted activity. Licences can be administered with or without public hearings, depending on the regime. Administrators face considerable logistical and practical burdens in order to satisfy the formal evidentiary demands of the public hearing process. Moreover, licence standards are frequently complicated and subject to interpretation and change; thus it is difficult to make determinations about levels of compliance. Where licences are not revoked or suspended following detection of non-compliance, licensees may acquire *de facto* tenure in the licence. On the positive side, licences are flexible instruments: through licence conditions and other requirements, the Administration can develop standards specific to the individual licensee.

While the formal legal structure is heavily weighted to framing and constraining the use of coercion, in practice government resorts more and more to incentives and persuasion. Here the role of law is less defined. The administration of grants, for example, is usually informal: details are negotiated without the participation of third parties. This may give rise to suspicion on their part, as they are not allowed to participate in the process. While in appropriate circumstances the use of incentives can be highly effective, the broader implementation picture may suffer. Issues such as the legal characterization of grants, the rights and obligations of parties, methods of participation and the enforcement obligations of administrators cry out for further study.

The Administration resorts extensively to *persuasion* in policy implementation, whether or not enabling legislation addresses or authorizes such practices. Persuasion can help change attitudes and improve efficiency: persuasion activities can lead to decreased reliance on more costly activities associated with other instruments. As well, persuasion can be used to "test the waters" and otherwise influence behaviour in areas where the Administration lacks substantive jurisdiction. However, the lack of safeguards is for many a cause for concern. If only for this reason the various forms of persuasion used by government merit separate study.

The preceding summary underlines only a few of the difficulties in the area of policy implementation. Many others need to be examined with a view to reform. The role of *inspectorates* calls for much more research; we hope to offer an overview of the issues in the near future. Our examination of licences and incentives confirms that much of policy implementation relates to *bargaining*, *agreements* and *arrangements*. Indeed, the Administration sometimes relies on *compliance contracts* to implement policies (Barton *et al.*, 1984; Daintith, 1979). This attempt to call on the language and practice of private law also merits further exploration, since the threats it may pose could be as great as the potential it offers.

A final area in need of immediate attention concerns the use of publicity to stigmatize non-compliant behaviour. The effects of this are poorly understood. Should such measures be taken, say, where non-compliance adversely affects third parties? What

identifiable effects does publicity have in the minds of the audience and on the *administré*'s bottom line? Does the *administré* suffer a boycott as soon as the constituency knows that a charge has been laid? What information about *administré* conduct should administrators publicize? Policy makers need to better understand and to recognize explicitly the effects of stigmatization from publicity about non-compliance in their implementation policies.

I. The Role of Law

We have sought to underscore, in this Working Paper, what, for us, provides a warning signal that law reform may be due: *what the law seems to suggest administrators should be doing, and what actually is done, are often significantly different.* The legislators may specify commands and penalties for non-compliance, whereas in practice few or none of the non-complying parties are ever penalized. In some cases *administrés* may comply with statutory standards and yet, the policy may not be implemented. There may be a need for an essential technological change, as in transportation of dangerous goods. Or, the statutory "policy" may not correspond to the actual objective pursued by the administrators: for example, the statute may prohibit the deposit of substances deleterious to fish, but the Administration may treat the policy as if it were there for the protection of human life.

The administrator is frequently provided with inappropriate legal instruments to implement policy; he may therefore feel more comfortable using less structured instruments. And when legislation provides no practical measures for responding to non-compliance, administrators commonly resort to *ad hoc* measures such as publicity, education or threats. To some, this is illegitimate and dangerous; others find such practices necessary, even laudable. On the one hand, administrators are sometimes left to innovate so as to adjust their regime to reduce patent unreasonableness or practical impossibilities. Such adjustments may result in greater administrative fairness, efficiency and responsiveness than if the letter of the law were strictly applied. Some crucial activities (such as negotiation) even depend on a certain level of ambiguity and non-visibility for their very effectiveness. On the other hand, the administrator who departs from activities that are prescribed by law has no reliable sense of limits for *ad hoc* or informal activities. This can lead to confusion for the parties, bureaucratic obfuscation and misappropriation of resources. Apparent arbitrariness also can reduce the Administration's public credibility. If only for these reasons, it is important to *explore ways of closing the gaps between law and implementation.*

"Policy is in the implementation" (Schumacher, 1974: 169): policy is what is done, not what is written. How then can law more appropriately be used as an instrument of policy implementation? Law influences what is done. *The way in which normative policies* (that is, goals or what *ought* to be done) *are stated can have important consequences for implementation.* For example, if the mandate of an institution is complex, with overlapping and inconsistent objectives, administrators may informally develop priorities different from those legislators or the public might expect (Clifford, 1983). If the mandate is unstated or does not represent the policy that is actually being implemented, none of the parties has the benefit of guidance for their respective activities (Webb, 1983; Dagenais, 1983).

While the degree to which normative policy is well stated is often a reflection of political expediency, we have expressed in Report 26 (Canada, LRCC, 1985) a number of suggestions that would help to improve the development of more clearly stated normative policies. For example, legislative drafters can help implementation if they express administrative objectives as clearly as possible when preparing draft legislation.

Law is a dominant influence on the design of strategic policy (that is, what *can* be done). Law frames and facilitates activities of the Administration and private parties. Strategic policy formulation involves choosing the instruments and institutions, as well as determining the course that administrative activities should take in response to particular events. The first institution to articulate strategic policy is Parliament. It not only establishes goals, but also delegates tasks to government institutions, grants the authority to use legal instruments and creates private rights of action. Strategic policy is also established by government institutions, through delegated legislation, policy statements, manuals and so on: all of these guide administrators in their activities and responses among private parties. *In the selection of legal instruments, strategic policy designers are constrained by constitutional and practical limits, as well as by the limits of procedural and substantive fairness. Government lawyers should know the operational strengths and weaknesses of different instruments, and should use that knowledge when advising about the details of instruments to be described in legislation.*

Law also has important effects on operational policy (that is, what administrators *do* to implement policy). If normative policies are clearly stated in legislation, administrators can take confidence in their operational activities. Of course, the effectiveness of government operations also depends on factors such as the administrators' backgrounds and training. Again, lawyers play important roles. They need to be aware of the kinds of relations which exist between private parties and the Administration so that they can recommend appropriate measures for triggering compliance or responding to instances of non-compliance. For example, on being informed about an instance of non-compliance, should counsel recommend the immediate imposition of sanctions, such as regulatory offence prosecution or licensing action, or another response? Here *the lawyer's training to respond to discrete events contrasts with the relational nature of much policy implementation.* To act as government counsel, therefore, requires a perspective which allows one to take into account the limits of legal instruments, as well as the policy goals which those instruments support. *The lawyer must integrate his activities into the larger implementation network.*

In developing normative, strategic and operational policies, *law need not only be perceived and used for coercive purposes.* Not every legal process needs to be structured to produce binary responses to non-compliance (that is, guilty/not guilty), as it is to enforce criminal justice policy. Non-compliance is sometimes tolerated by government and, indeed, "budgeted" into its policies. There are many reasons for this, depending on the circumstances. The EPS, for example, may decline to prosecute a mill for violating the *Fisheries Act*, if that mill is installing pollution abatement equipment pursuant to a modernization grant, resulting in an improvement in the mill's performance *vis-à-vis* pollution. *Perfect compliance is not necessary to implementation in many areas of public policy.*

In some public policy areas, no sanctions are available in cases of non-compliance. Indeed, they may not be necessary. In matters such as fitness and amateur sport, for example, government encourages changes in behaviour only through persuasion and incentives. Clearly, *the roles of law and legal process are not the same for all areas*

of policy implementation, and it is important for the legal community to recognize the limited usefulness of coercion where the implementation of a policy does not require strict compliance.

Strict application of the law does not always take into account the ongoing nature of relations between government and private parties. Over the long term, the *administrés* may, without coercion, gradually adjust their behaviour; they may not comply with law in the strict sense, although their performance may be "coming into compliance." One of government's main reasons for being is policy implementation, not the rigid application of statutes. It is through constructive long-term relationships that much policy is implemented. In this respect, it becomes clear that *the Administration cannot always use sanctions to respond to non-compliance. The Administration and the* administré, *often legitimately, claim the need to go beyond the strict language of legislation, in order to develop understandings about acceptable* administré *conduct and about timetables for improving it.*

The fact that third parties usually have no access to relations between the Administration and administré, *aside from participation in public hearings and other formal processes, can, in the broader sphere, hinder implementation.* It may give rise to third-party indignation about perceived incidents of non-compliance. Legislation does not usually specify the conditions under which non-compliance will be "accommodated." This has at least two possible results. Third parties cannot easily understand the Administration's failure to impose sanctions. The silence of the law also leaves the door open to abuse, obfuscation and atrophy. Whether relations among parties can be structured more openly is, we suggest, an issue which must be addressed in all policy implementation planning.

II. A Path to Reform

What we have said about the role of law in policy implementation may appear pessimistic. There are gaps between law and reality, and between capabilities and expectations. These gaps may or may not be capable of being closed. There are aspects clearly in need of attention. Regulatory offences are ripe for reform as instruments of policy implementation. The legal framework (or lack of it) within which incentives and persuasion operate is inadequate. Some *administrés* do not know what to expect; they disparage regulation when what they may really be looking for is more certainty. Others, who have managed to make sense of the implementation jungle, end up flouting the policies by deftly playing both ends against the middle: to those, the current hodgepodge is not a nuisance, but a benefit. Third parties may feel left out, if not betrayed. To them, it looks as though "the big guy is getting away with it." In all this, administrators are caught in the middle. Either they despair that their actions will ever get results, or are left wondering whether it is all worth it. Dithering, shelving and obfuscation become the order of the day.

Any significant reform of the role of law in policy implementation requires that the following hypotheses be closely examined:

(1) *The letter of the law must be brought closer to the realities of policy and of compliance.* If not, law risks becoming irrelevant to implementation, as well as an object of ridicule for *administrés* and, for third parties, of contempt.

(2) *The relational nature of policy implementation and the dynamic nature of compliance must be brought out more clearly and recognized in government action as well as in legislation.* Only in this way can public confidence and program legitimacy be restored or preserved.

(3) *A better understanding of the relation between policy implementation, compliance and administrative law is, in the short term, imperative.* This Working Paper has barely scratched the surface of the issues involved. More needs to be done, and quickly.

Much of what we suggest stresses attitudinal changes, education and planning, as much as the revision of legal mechanisms or legislative rules. Legislative intervention may be necessary, but to be effective it might involve specific attention to the normative, strategic or operational policy of particular compliance programs, rather than wholesale, across-the-board change.

The planning of policy implementation involves important choices about institutions and instruments for influencing private behaviour. Each has its inherent capabilities and drawbacks in any given political and socio-economic context. There are a number of basic considerations that should be taken into account in the making of these choices:

(*a*) *Degree of change required*: How radical a change of constituency behaviour is government suggesting? Is it merely tightening up a standard (for example, changing a tax rate), or introducing new standards (such as a switch from the imperial system of measurement to metric).

(*b*) *Type of change required*: Does the change speak to questions of safety to health (for example, pollution emissions or crib safety standards) or to "quality of life" standards (for example, content of broadcasting)?

(*c*) *Speed of phasing in of change*: How quickly does the change have to occur? Over what time period? Is an immediate change of behaviour required (such as new speed limits), or can the new behaviour be gradually phased in (such as with graded Canadian Ownership Rate standards under PIP grants)?

(*d*) *Public support and media attention*: Is there widespread support for the program, or is it the subject of some controversy? For example, it was not difficult to introduce new sealed-bottle safeguards after the "Tylenol" incident in the United States, but the introduction of the metric system has met with considerable public resistance.

(*e*) *Characteristics of private activity*: Is it easy to detect violations? Are intrusions necessary to observe conduct? For example, to determine whether a pulp mill is exceeding liquid effluent standards may require administrators to enter the mill's premises to take samples. Can reliable information be lawfully obtained from *administrés* or third parties? A recent court decision has thrown into question the accuracy of self-reported effluent information (*R.* v. *Suncor*).

(*f*) *Adequate resources*: Has government provided adequate funding to administrators so that the program of policy implementation can be carried out? For example, the Department of Transport has promulgated a comprehensive Transportation of Dangerous Goods regime, but its effectiveness substantially depends on whether there are sufficient field level personnel available to administer the program.

(*g*) *Can the activity be readily and accurately defined, quantified, qualified, and so on*? For example, the process of proving effluent to be deleterious to fish (as is required by the federal *Fisheries Act*) is fraught with technical, legal and scientific uncertainty.

(*h*) *Characteristics of* administré: Number, diversity, natural and artificial persons. Are there specific groups of *administrés* with peculiar problems? For example, the PPMGP is available only to eastern Canadian pulp mills with inefficient, polluting processes, while the PIP is open to all persons engaged in petroleum exploration and development.

(*i*) What are the characteristics of the available governing standards? Are the *available legal mechanisms* cumbersome, slow to invoke and unpredictable in outcome? For example, pollution prosecutions are typically time-consuming, expensive and of uncertain outcome.

This is not an exhaustive enumeration. The questions may not be relevant to the choice of every instrument under every circumstance. Some questions are more important than others. The answer to a given question may weigh differently in different contexts. However, these considerations make it clear that *legal instruments cannot be understood outside the normative policy context in which they operate.*

Not every kind of instrument and institution will prove appropriate in every context. Nor can reforms be expected to change or influence behaviour instantaneously, whatever instrument or institution is chosen. It is important, therefore, that strategic and operational policy planning acknowledge the inherent resistance that will accompany practically every normative policy change. Just as relationships go through phases, so does policy implementation. "Transition" is a way of thinking about the continuous accommodation that occurs in implementation, because of changes in technology, public priorities, political agenda, federal-provincial relations, activities of other government entities, market conditions, and so on.

Frequently, this can be seen today. First, "new rules" are introduced. Administrators may be relatively tolerant of non-compliance, and may rely heavily on persuasion techniques such as advertising, advising and educating. Once this initial phase is complete, administrators concern themselves with "tightening" the implementation process, without causing undue trauma. In essence, the initial period is devoted to overcoming inertia of the *administrés*, while the second focuses on maintaining momentum.

While our research confirmed that many administrators were in fact utilizing this two-phase compliance approach, frequently this was not so much the result of forethought as it was accidental. Moreover, legislation rarely provides for it.[73]

The traditional approach may not be appropriate or necessary in many circumstances. However, it can be a way of ensuring that the law does not formulate unreasonable demands where progressive behaviour adaptation is required. Legislators, policy makers and administrators should keep in mind this two-phase compliance model in the design of implementation regimes. For example, the use of non-coercive techniques (such as grants and education) can help to overcome initial resistance during the preliminary phase of policy implementation, in order that a more coercive model may later operate more effectively. It could also be advisable to reflect in the legislation, as well as in the policies and guidelines under which a program is carried out, any transitional approach to implementation.

73. Thus, for example, in the case of water pollution in the pulp and paper industry, the EPS eventually became involved in the administration of a grant program which went a long way toward overcoming initial resistance to the change in behaviour demanded by government. The introduction of the grant program was not planned by the EPS when the pulp and paper effluent regulations were originally promulgated, some eight years earlier.

Some may find it difficult to accept a concept of "phasing in." For those who are most familiar with the command-penalty orientation of the criminal law, there may be no greater heresy than the official tolerance of non-compliance. We do not condone non-compliance *per se*. What we do recognize, however, is that *administrés* need some time to adjust their behaviour or technology so as to comply with new policy. Administrators also need time to deploy scarce resources effectively to try to get compliance, and to police non-compliance.

The highly complex nature of policy implementation, involving as it does many specialized government officials, and many different institutions, places a high premium on communication and co-ordination. Prosecutors must understand what the front-line administrators want. Field personnel must appreciate the pressures facing upper management. Inspectors must be cognizant of the rules of evidence used in courts. The public must be made aware of the reasons behind the administrator's action or reaction. *Effective planning and use of governing instruments would benefit significantly if "enforcement" could be viewed from a wider implementation perspective, and if these considerations could be integrated into the planning of overall administrative activities. One way to promote this would be to recognize policy implementation as a vocational specialty.* "Compliance specialists" could facilitate communication between lawyers and non-legal staff, between front line and management, between headquarters and the region, and so on. They might also play an "internal ombudsman" role, and could provide training and refresher courses. The recognition of compliance specialists by the Administration could, we think, eliminate many legal problems associated with policy implementation. In the same vein, more attention should be paid to the establishment and dissemination of standards for administrative conduct and to management practices. The creation of an association of regulatory officers could also help set professional standards and provide training. These and other measures would help improve public confidence in the Administration, as well as administrative performance.

Another related point concerns the various parties' needs for information in the implementation process. To be effective, administration, *administrés* and third parties alike must obtain, evaluate, act on and disseminate information. Information is, as we said earlier, the stock-in-trade which fuels implementation.

And yet, administrators often do not have very accurate means for assessing the effectiveness of their programs. When asked about this, many can only advance guesses. The gaps between ideal standards set in black letter law and operational objectives can only partly explain this. The function of assessing the degree of compliance appears to be poorly developed and in need of further study. More information as to what goes on in other areas could help in this respect. Consequently, *the Administration should create and maintain a catalogue listing the different types of government instruments, commenting on their characteristics and giving specific examples of their use. This catalogue should be made available to the public as well as to public servants.*

Administrators, as well as others, could do with more information concerning patterns of conduct in relation to law. There may be no definitive predictors about activity and actors which produce compliance, but frameworks for analysis and behavioural models are needed by all parties to lend sufficient certainty for policy implementation, business and other private affairs. Human and circumstantial diversity need not prevent the development of such analyses and models. For all parties, articulation of frameworks and models may produce a higher degree of certainty than unarticulated assumptions and guesswork.

The recognition of the specialized nature of implementation activity should lead to the development of a more appropriate legal framework for that activity, whether it be formal or informal in nature. The development and publication of compliance policies, guidelines and procedures would serve to structure much of the informal, *ad hoc* decision making that is so prevalent today in many programs. Implementation activities should not be placed within a procedural strait-jacket; however, our research has documented many examples of ineffectiveness and unfairness owing to a lack of guidance and structure in legislation. Policy implementation involves much administrative decision making that should fall within the framework we described in Report 26. The credibility, competence and confidence of those involved in policy implementation can only be heightened through the respect shown for the fundamental values we identified there. *The more the interested public can understand the implementation process, have access to administrators and participate in basic decision making, the less anomalous and anachronistic outcomes will appear and the more likely they will be to gain wide public support. As we stated in Report 26, our goal is to reduce the exorbitant costs that are typically associated with public policy implementation,* while respecting the value of fairness in government decision making.

Conclusion

In a letter to us in 1984, Professor J.W. Mohr succinctly stated a rationale for law reform work in the matter of compliance:

> '[C]ompliance' is one of those notions which is central to the relationship between law and human behaviour and yet is not locked into any specific legal form. And to the extent a law reform commission wants to re-form law, rather than adjusting and adapting it where this is necessary and possible, it must make use of notions which cut across the incredible constraints of given legal forms.

This comment expresses in a nutshell our reason for looking at policy implementation and compliance in the context of our work on administrative law. In their day-to-day work, lawyers are involved in many informal activities similar to what goes on in policy implementation. And yet, the substantive goal of policy implementation is sometimes overshadowed by formal legal processes and undue insistence on compliance with the letter of the law. Our legal culture characteristically prevents explicit recognition of less formal interactions among parties. Canadian lawyers forge and wield instruments. They are trained mainly for the resolution of private disputes and for representing people accused of violating the law. This leads to an over-emphasis of formal responses to deviant conduct, to overjudicialization, to overreliance on adversarial processes and to over-use of sanctions in much of policy implementation. Undue focus on the instruments might not allow the freedom necessary to a full understanding of human behaviour and motivators. Better appreciation for the place of law in policy implementation is essential to reform in this area.

Law and legal instruments are useful for framing, facilitating and constraining activities of administrators and private parties. However, law has been too event-specific, centering on commands, strict compliance and penalties. To date, law has been unable to reflect the complexity of long-term relationships prevalent in policy implementation activities; as well, law does little to frame, constrain and facilitate government's use of persuasion and incentives. There is no need for this unsatisfactory state of affairs to continue any longer.

By making explicit some of the ways in which government policies are implemented, we hope that a synthesis may be forged between what lawyers and parties do in the implementation of policy. By linking law and implementation we have to bring together administrators, outside experts and the legal community to help resolve complex problems of governing in the 1980s and beyond.

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