

**Speaking Notes;
Frontiers of Regulation
Panel 18**

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If this summer taught me anything, it is that I will never be David Levi Faur. He would have managed to finish a book manuscript, and also the paper for this conference, with no trouble at all, and probably sent off a couple of thousand emails in his spare time. I didn't come close to writing a formal version of this paper. I did create speaking notes, however, and I do think the topic relevant and important. Here are the speaking notes.

1. The original proposal for this paper took up an issue that has long bothered me about regulation, and one about which I believe very little has been written.

I wanted to explore how particular words and phrases, particularly the phrase “the public interest”, was being used in mandating regulation and to what effect. Lawyers routinely pay attention to the court’s determination of the meaning of particular words and phrases, but my interest was not in doctrinal analysis. I was interested in how presumptions about the proper content and scope of regulation and about the role of regulation were established in codifying the mandates for regulators, including self-regulators. I was interested in how politics and interests were factored in to the seemingly even-handed, almost neutral mandates for regulators.

My method bears traces of discourse analysis, picking up on Black’s notion of the regulatory conversation, but the task I was undertaking was not a study of discourse per se. I reasoned that if we want to know why regulation has unanticipated or contrary results, or if we are interested in how regulation (including self and co regulation) might be reformed, we need to pay attention to what regulators are being told to do.

I wasn't interested in the obvious ways that words and phrase might be included in regulatory mandates – say, words that set boundaries of jurisdiction or lay out the powers of a regulator. Rather, I was interested in the addition (or subtraction) of a word or phrase, here or there, whose plain sense meaning seemed to imply one thing, but whose legal meaning was quite different, and whose inclusion took the regulator off in directions that outsiders might not have predicted.

Such words can be called *code words* and *pivot words*. Code words are words that have one meaning in everyday language and another meaning in the context of regulation, such that an outsider might well misunderstand their significance. Pivot words are words that have two quite contradictory meanings within in regulatory discourse, such that they permit very different approaches to be taken, both seemingly consistent with the mandate of the regulator.

There were originally three reasons for my interest in this problem:

The first was simply my observation, after many years observing many regulators, that the “outsiders” (the public for lack of a better word and the media pundits) so often got it wrong about what the regulator was empowered to do. Why were public expectations so often mismatched to regulators' actions? Couldn't such people read the legislation or by-laws correctly? One possibility was, of course that regulators went off and did their own thing regardless of their mandates, say, because they were “captured”. Another, more convincing reason might be that outsiders simply didn't see in the implicit instructions in the legal wording. If the second reason were the correct one, we would need to tease out the implicit meanings of the words on the page.

My second reason has to do with changes in regulatory behavior over time. Regulators acting with the same legislative mandate take unexpected turns, and they do things very differently over time. The usual explanation for changes in regulation (in the absence of a mandate change) is that regulatory bodies have a life cycle, and that they behave differently at different stages of their “life”. This explanation has always bothered me, although I could see how long-standing relationships with the regulated industry might, over time, have an effect, like waves pounding on rock, so to speak. But life-cycle explanations gave a regulatory body a human personality, when in fact the

personnel involved in regulation change regularly over time. My question became: Were there, in fact, several contradictory sets of instructions embedded in the legal text, law or by-laws, such that there could be something akin to a regime change even without any change of mandate?

The third reason I wanted to look closely at the legislation mandating agencies is specific to broadcasting regulation, and the agency in Canada that deals with broadcasting, the CRTC. There is no question in anyone's mind that its legislation is political: anyone familiar with Canadian politics can spot the key phrases, such as regional representation that represent political inputs into how the regulator should conduct its business. There are literally dozens of these "political inserts". Yet the CRTC is less of a political body than these inserts suggest. Indeed, these inserts seem not to be very influential at all, or perhaps it is that they have been influential in ways that one might not predict.

2. My original paper was intended to capture the phenomenon of interest by looking at several regulators operating in one field of communication, broadcasting. The reality of my summer constricted these remarks instead to my study of broadcasting regulation in Canada.

In Canada, despite the existence of a single over-arching regulatory agency, the CRTC, there are several regulators in play in this policy domain. Regulation is at once cohesive and at the same time fragmented. The mandates of the regulators – say, the Competition Bureau and the CRTC – seem, on the face of it, to overlap, but the words on the page (mainly in the form of legislation) do not fully account for the differences and the relationships among the agencies.

This led me to a fourth reason that I wanted to explore the issue of how regulatory mandates are constructed and codified: If the goal of regulatory reform is to rationalize regulation, creating a more straightforward and efficient approach, why wasn't a plain language approach enough to sort things out, to say which agency or committee was responsible for what? Why do efforts at rationalization so often fail or have unintended consequences? What is it about the mandates of regulators that undermine efforts at rationalization?

3. The focus of my book is broadcasting regulation in Canada. I have been teaching Communication Law and following the CRTC for all too many of its forty-year history. Each year I normally read a significant portion of its decisions in preparation for my classes. For the book's research, I undertook to go back and re-read as many of these decisions as possible, this time looking much more closely at how the CRTC decisions mapped onto the elements in its legislation, and at what I called "turning points" in the CRTC history.

I haven't done the final count, but my sample was about 2000 decisions of about 28,000 that the CRTC has issued. This would seem like a small sample, but it was not, because the great majority of the CRTC decisions are "boiler plate" such that its 28,000 decisions probably boil down to less than 5,000 decisions that are substantive in nature. To choose the decisions, I used three methods: (a) the CRTC's own annual reports describing the decisions that it considered important each year, (b) the decisions referenced as "the history" in each new CRTC policy statement, and (c) a selection made by my research assistants about decisions that seemed to them, according to pre-established criteria, to be significant, as they skimmed virtually all of the decisions in the last ten years. I wasn't looking for a random sample, and I had to take account of the fact that CRTC decisions do not set precedents, but this method allowed me to include my own impressions of "turning point" decisions, and to consult other insiders, including the many Chairs of the agency over the years. For the interviews, I used a technique called "snowball interviews, where each interviewee suggest others.

I won't take the time here to go into the legislative mandate of the CRTC. Sufficed to say, this is an agency unlike any other I have ever found in the world, not just in the policy field of broadcasting.

Let me just speak about four elements:

One: The CRTC's span is exceptionally broad: the scope (and number) of its objectives, written in flowery language, and the scope of its jurisdiction. Each element of the industry is included or not under the jurisdiction of the CRTC if it "materially affects the implementation of the objectives – a long list of vague objectives - of the Act. Cable and DTH are included; Pay-per-

view and video-on-demand are included, as is the portion of Internet activities that falls within the legal definition of broadcasting.

Two: The CRTC both regulates and supervises; indeed most of what the CRTC does falls outside the ambit of regulation or rule making (it sets policies, but its policies are guidelines only). In supervising, the CRTC deals with each licensee on a case-by-case basis within a framework of guidelines that set out the CRTC's expectations.

Three: The CRTC has a virtually unlimited array of regulatory instruments to work with, not only in promoting new kinds of broadcasting, but also in monitoring and achieving compliance, a whole set of pulleys and levers going well beyond incentives (of which there are many), standards, rules, short term renewals and even court orders and fines.

Fourth and most significantly, the Act gives the CRTC a positive obligation. Its job, clearly stated in the legislation, is to work at its own initiative, and with the public and industry, to identify reasonable ways to implement the prescriptive objectives of the Act. The CRTC is not reactive in the way that many regulators are reactive to initiatives from industry and complaints from the public and stakeholders. It must itself initiate ways to render the Canadian broadcasting system a vehicle for achieving a set of broadly described social policy goals.

4. For the purposes of this conference, I want to point out just five words/phrases that serve as code and pivot words, and show why they matter. None would normally attract attention, and all might easily, and inadvertently, be eliminated from any future Broadcasting Act, notwithstanding the probable consequences of doing so.

The first word (two words actually) acts as a code word: that is, it has different meanings for insiders and outsiders. The Canadian broadcasting system is regulated as a SINGLE system, and each kind of broadcasting service is regulated in an APPROPRIATE way. To an outsider, these words might look like the Act simply gives the CRTC a lot of leeway, but there are much more serious implications. To insiders, these words mandate a system/sector management approach to regulation. And, in turn, the system/sector management approach is what has accommodated a turn of

mind in the last decade towards deregulation. System/sector management allows the CRTC to actively engage in deregulation of some aspects of the industry's activities, even while zeroing in on others, because each decision can be gauged in terms of its impact on the whole. Where there is no impact, or where there is an impact that seems undesirable, the CRTC is free to deregulate, streamline, or exempt from regulation. These few words – “single system” and “appropriate” - seem to outsiders suggest the heavy-hand of regulation (The CRTC is involved in everything, a meddler!) but are, in fact, the instruments of deregulation.

The second is also a coded phrase. It is HIGH STANDARD. The Act says that broadcast programs must be of a high standard. To an outsider, this phrase seems like Pabulum, rhetoric of the most innocuous and ineffectual sort. Interestingly, this phrase (a leftover from a previous era) is essential. It gives the CRTC the right to promote high-end program production in particular genres, as well as to deal with public complaints without drifting into the realm of censorship. It distinguishes the Canadian approach to regulating program content from the American one.

The third phrase is also a pivotal one. It is REGIONAL REPRESENTATION. On the surface this phrase looks to be about the politics of the Broadcasting Act. A number of such phrases, corresponding to the political priorities of the government of the day, were inserted in the Act. But reality is not always as it seems. This phrase allows the CRTC to have a double standard, and to act upon whichever of these standards suits its needs at the time. So regional representation turns out not to be about the vast majority of broadcasting services in the Canadian broadcasting system. Instead, it turns out to concern only the public broadcaster (whose mandate is also buried in the same Broadcasting Act, but which is regulated by the CRTC). Applied in this context, the phrase casts the CRTC at odds with the priorities of the management of the CBC, so much so that regulation of the CBC has been, in most people's view, an abysmal failure.

The fourth pivotal phrase is FACILITATE TECHNOLOGICAL INNOVATION. Interestingly, this phrase is buried at the bottom of the second list of objectives in the Act but, in some senses, it has been the best predictor of what the CRTC has done since about 1985 (and well before the Act was revised to add a second iteration of it). The CRTC has taken on a mission of anticipating and promoting new communications technologies, not because there is public demand for them, and certainly not because the

industry has been eagerly pushing innovation (technological upgrades cost a lot of money, but because the CRTC believes it is required to do so. I can think of no other phrase that has so influenced what the CRTC has done, especially in recent years.

The fifth phrase, again a pivotal one, is ESSENTIAL PUBLIC SERVICE. The Act says that Canadian broadcasting is an essential public service. Interestingly, this phrase allowed the CRTC to sidestep the debate about whether the radio spectrum limitations still matter, and indeed to regulate broadcasting by any means of transmission (new old, wire, wireless) as long as the service falls under the definition of broadcasting. But “essential public service” also harkens back to a notion of public utility regulation, although absolutely nothing in the Act suggests that broadcasting is a public utility or that the tools of public utility regulation should be applied. In my view, the CRTC has begun to think of itself as akin to a public utility regulator, as evidenced in its rationales for deregulation and in its overall approach to economic regulation. Indeed, the CRTC increasingly has assumed the role of a conventional economic regulator despite the vast number of provisions in the Act that would seem to take it in another direction.

6. So why do such code and pivot words matter, especially because I am certainly not engaged in the kind of discourse analysis that suggests that talk tells the whole story.

They matter in this case because the CRTC is under review, as indeed is the Broadcasting Act. The Canadian government – a new conservative government – has come to believe that Canada is out of step with the rest of the world (it is) in having an agency like the CRTC, notwithstanding the CRTC’s many deregulatory initiatives and its vast array of co-regulation bodies, as well as the CRTC’s own active promotion of new technology.

Had this government its way, it would probably either turn the Broadcasting Act into an add-on to the Telecommunications Act, and/or eliminate most of the Canadian ownership restrictions, and/or replace “essential public service” with the more commonly accepted term of economic regulation (a code word itself) “the public interest”, and/or treat cable and other distribution undertakings as telecommunications carriers (and thus not subject to the

Broadcasting Act). It would dismantle the carefully negotiated and calibrated balance of privileges and obligations that currently sustains the Canadian broadcasting system. Most likely, all flowery language about high standards, single systems and appropriate regulation would disappear from the Act, and this might well mean that the CRTC would be cast into a reactive mold, just as the standard economic regulation agency is reactive, not proactive.

Removing or adding a word or phrase here or there from the Broadcasting Act, might seem inconsequential. The public and cultural advocacy groups might either not notice or, being outsiders, or they might well miss seeing what is going on. Even the regulators and government officials (and certainly parliamentarians) might well believe that the government had changed nothing of significance in new draft legislation. But the collateral damage might well be great. A few seemingly inconsequential words, here or there, might well change everything.

7. The paper I intended to write would not have taken a position about the value of different sorts of regulation, or even about how to foster a flourishing Canadian broadcasting system. My concern in this case lies elsewhere. My concern is that changes should be made as on the basis of informed debate about the consequences of changes being proposed. My goal is to shine a light on what might generate such consequences, the phraseology of the Act that might otherwise be overlooked.

If I have a larger concern, it is to draw attention to the importance of the wording or legislation or by-laws that set regulation in motion. Much of consequence is being said, and the future is being made more path-dependent, in ways that are easily overlooked.