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Evaluating Regulatory Instrument Choice

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The task looked disarmingly simple. I was to review the recent literature on regulatory instrument choice. I would apply insights from this literature to the example of broadcasting regulation in Canada, not because broadcasting was the object of interest, but because, over the past forty years, just about every regulatory instrument imaginable had been used within this sector. Once the most appropriate conceptual framework had been chosen from the literature and this example, I would be in a position to attend to the real task to be done. It was to develop a protocol for the evaluation of regulatory instrument choice for three Canadian sectors that are newly coming under scrutiny and will require new policies as a result of Kyoto.

A single independent tribunal regulates broadcasting, which is somewhat unusual in the Canadian context. The question of having a single overarching regulatory tribunal in the three targeted sectors was not on the table. Despite this obvious difference between broadcasting and these three targeted sectors, I thought it should be clear, once the first task was completed, which regulatory instruments held the most promise. The real task would follow in time: testing the results in the sectors of cement, oil sands and public and paper.

This task was made more complicated by the goals of the study, not my goals but the goals of those who conceived of the research initially, that is, those who proposed that a team of engineers, lawyers and students of regulation apply for research funding. In their view, regulation was understood in a much larger, even different framework than as rule-making, industry-controlling regimes. The claim had been made, with some justification, that regulation could also promote innovation and even competitiveness. (Porter, 1991) The study was intended to promote innovation and competitiveness

through regulation, which was quite a different proposition than studying how regulation could protect the environment or health. Needless to say, protection and control needed to be factored in, but not as the only, or even primary goals of the study.

Although the example of broadcasting was not likely to have been consulted, I already knew that broadcasting regulation proved that regulation could indeed be used for such purposes. The introduction of pay television, satellite television and most recently the digitalization of broadcasting signals (and possible now, satellite radio) had occurred at the instigation or prodding of a government (and regulatory tribunal) eager to push a complacent industry into adopting expensive but important new technological innovations in order to increase the competitiveness of Canadian industry. As well, the most famous initiative of the broadcasting tribunal had created a market for Canadian music and musicians, and a healthy industry had followed. I had no question whether regulation can (and does) impose a dead hand on innovation, but there was more to say about regulation and innovation. Surely, governments could select regulatory instruments that not only promoted the kinds of controls over industry that seemed to be required in light of the Kyoto Agreement, but also contributed to economic development.

Thus far, I have mainly been talking about regulation, a concept that eludes definition. This paper deals with regulatory instrument choice, not regulation in general. Regulatory instrument choice refers to the "how" of regulation, to the bodies that regulate, the mandates they have to work with, their methods, and the tasks they hive off for other bodies to deal with. However one chooses to set boundary conditions for regulation, my focus on regulatory instruments will allow me to say that professional industry associations and courts might establish, or themselves be, regulatory instruments. The emphasis in this paper is on behavior, because regulatory instrument choice is all about behavior, the behavior of those making the choices in the first place, and the behavior of those carrying them out.

The behavior of interest needed to include than the rule making often associated with regulation, because even independent tribunals, the quintessential regulatory bodies, do more than make rules. The behavior of interest in this paper reflects any and all attempts to steer firms [1] and control activities in light of designated public interest goals. [2]

[1] As has recently been discussed, government departments, agencies and even regulators are subject to regulation. See Scott 2002 and Morgan 2003, for discussion.
[2] The term "steer" has come into use recently (See, Braithwaite 2000, Parker 2000, and

This will serve as my working definition of regulation.

My working definition will hardly solve the conceptual problems of defining regulation, but it will serve as a handy way to separate regulation from the market ("designated public interest goals") and it has the advantage of placing emphasis on intention and control ("steer… and control"). It suggests that any body can be a regulator, but only if and when it is engaged in the function of regulation.

The usual route for identifying a conceptual framework would have been to review the literature first, comment upon its strengths and weaknesses, and then propose an alternative that drew upon, but extended, what others had so cogently argued. Once this was done, the job would normally have been to apply the revised framework to a case study, revising the framework again as necessary. This was the strategy I originally intended to follow. I was not starting fresh with broadcasting however. I'd been following broadcasting closely for all of the forty years of its regulation. There wasn't a single regulatory decision that I hadn't at least skimmed, a single regulatory initiative that I wasn't aware of. I knew that I wasn't alone in knowing a lot about a case study before I applied a conceptual framework to it but, in this case, I did not need to go all the way through the case study exercise to know where the conceptual problems were likely to be. This left me free to concentrate on recent writings on regulatory instrument choice as opposed to researching the case study.

It quickly became evident to me that there was a gap between much of the literature that I was reviewing on regulatory instruments and its application in the example of regulation I intended to use, broadcasting. The problem was not a lack of worthwhile analysis: of this, there was plenty. It wasn't a matter of some aspect of regulation being wrongly conceived; this would have been fair game for a contribution from me. It wasn't actually a matter of fault lines in the literature, so much as it was a problem about the poor fit between what almost everyone was arguing and the particular regulatory regime in front of me. Put boldly, the literature did not map onto the regulatory

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for an early use, see Osborne and Gaebler 199). Colin's Scott's conception of regulation is close to the definition I have just offered. His is: "(a)ny process or set of processes by which norms are established, the behavior of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behavior of regulated actors within the acceptable limits of the regime" (Scott 2001, p 331) See also, Parker's "The objective will be to steer corporate conduct towards public policy objectives.." (Parker 2200, p 533)

regime that I was studying. There were some glaring examples of why this was so, and a lot more examples of subtle differences that were causing the bigger problem.

This realization put me on course for the somewhat unusual strategy I will follow in this paper. I will not describe the regulatory regime for broadcasting in Canada as a case study in the application of a conceptual framework. Rather, I will talk about seven problems with "fit" that broadcasting creates for analysts of regulatory instrument choice. I will turn my attention very briefly to the three targeted sectors, cement, oil sands and pulp and paper, to see if these same problems are likely to occur. My goal will not to critique what has been written about regulatory instrument choice, but to see whether I can develop a protocol for a new study of regulatory instrument choice. I suspect that conclusions will be premature, and thus I will simply suggest some cautionary notes for everyone engaged in the study of regulatory instrument choice, however it is carried out.

Let me preview now these cautionary notes.

First, I will stress how important it is to focus on the national context, even where the goal is eventually to understand regulatory instrument choice in general. The national context conditions the likely outcome of regulatory instrument choice in every case.

Second, I will suggest that, for the purposes of assessing the impact of regulatory instrument choice, the sector is the proper unit of analysis. I will argue for a "bottom up" approach. In my view, studies of regulatory design properly focus on describing regulation, and on creating an overall framework and a typology or classification system. By contrast, my study is focusing on impact, that is, on the sector putatively being regulated to see what is actually going on and what the impact of regulation (however understood) is likely to be.

Third, most studies of regulation, and the great majority of studies of regulatory instrument choice, are intended to support evaluation and policy-making. All too often, it seems to me, the evaluation standards are those of the analyst. In a study of regulatory instrument choice, "choice" is the key word. I need to understand why choices are made, and this requires my taking account of the actual goals and reasons of those making the choices. Many decades ago Robert Merton distinguished between manifest and latent functions (Merton, 1957). It will be useful to apply his distinction between manifest and latent to the goals of regulatory instrument choice.

Fourth, the paper will mention, but not discuss in detail, a propensity in the literature to caricature regulation, and to assume an historical trajectory that is, at best debatable. It will suggest a caution about how regulation and regulatory instrument choice should be described.

Fifth, the paper will suggest a note of caution about the many definitions of regulation (and thus of regulatory instruments) in play in the literature. The boundaries drawn around regulation appear to address something other than a conceptual problem.

The final observation (and cautionary note) follows directly on the last. There are multiple epistemic communities involved in regulation, some overlapping and other not. This paper will barely touch upon the questions raised by the discourses of regulation. Its caution in this regard is to emphasize how important these discourses are in shaping the limits of the politically permissible, and thus in eliminating for consideration some choices about regulatory instruments.

Seven observations about regulatory instruments:

I suggested in the introduction that the literature on regulatory instrument choice did not map neatly onto the example of broadcasting. I have located seven possible reasons why there might be a mismatch in the case of broadcasting. My goal in listing these reasons is to identify the conditioning variables of regulatory instrument choice.

1. The interweaving of many policy and regulatory bodies:

Almost all studies of regulatory instrument choice start with the presumption that it is relatively easy to identify the regulator, and thus the regulatory instrument choices made by this regulator. Classifications of instrument choice seem to treat regulation as if it were a unitary phenomenon. They do so by suggesting that attention be directed to regulatory compliance, as if compliance were the only issue to be dealt with, not regulation [3]

Broadcasting in Canada *is* regulated under a single, federal tribunal that has an exceptionally broad mandate and many powers. The existence of such a tribunal implies

[3] Scott is an exception in this regard (See Scott, 2003)

that only one regulator needs be taken into account. Its regulatory instrument choices are choices that matter. In Canada, even the self-regulation and voluntary compliance programs connected to broadcasting have been undertaken under the auspices of this single tribunal or, put more accurately, with its direction or guidance. [4] But, in the broadcasting example, it is not enough to focus attention exclusively this tribunal and its regulatory instrument choices. This is so for several reasons, all indisputable.

First, there is another, overlapping regulatory regime, underwritten by a different tribunal. This other tribunal deals with competition issues, as does the broadcasting tribunal. Although there is a memorandum of understanding between the two tribunals, there has been much outright conflict between the two.

Second, the broadcasting tribunal reports to a line department of government, Industry Canada. Industry Canada officials have been explicit about their intentions (and have a legal mandate) to influence the broadcasting tribunal, even its specific decisions. In fact, there is also a history of conflict between Industry Canada and the broadcasting tribunal.

Third, if this were not enough to confuse the picture, several other line departments of government have responsibility for issues that directly affect broadcasting. The too have had their conflicts with the broadcasting tribunal from time to time, and also their conflicts with each other.

Fourth, Industry Canada actually regulates some aspects of broadcasting, and several communication services that one might expect should be dealt with by broadcasting tribunal. For example, Industry Canada issues the technical certificates needed by licensed broadcasters, and it alone deals with issuing cellular radio licences. In an environment where convergence (that is, ownership linkages) is commonplace, it is not easy to conceptualize who should regulate what, either the broadcasting tribunal or the line department. Furthermore, many of the seemingly technical issues regulated by the line department also fall under the mandate of the broadcasting tribunal, such as local

[4] For the purposes of clarity in a single paper, and the rest of this paper, I too will speak mainly about this one broadcasting tribunal only, leaving aside the argument that I am just about to make that there are in fact many other regulatory bodies operating in the broadcasting sphere.

versus regional coverage of the signal.

Fifth, a legislated goal of the broadcasting tribunal is to promote Canadian talent and media production. There are several other agencies and many independent funds that exist to promote the same talent and media production. The federal government set some of these up, but others were established at the instigation of the broadcasting tribunal and others yet are industry based from their inception. Putting aside the fact that each agency or fund sets its own rules for those it deals with, the links amongst these agencies and funds, and between these agencies and funds and the broadcasting tribunal are exceptionally strong. If there is such a thing as a broadcasting regulatory regime, they are all certainly part of it.

And, last but certainly not least, Canada has both educational authorities (provincial) that regulate educational stations, and a public broadcaster with its own legal mandate and lines of accountability. The federal broadcasting tribunal regulates all of these too, but it is acutely aware that is not the only regulator on this block. Furthermore, the existence of these media outlets is itself a regulatory instrument choice. That is, public and educational broadcasting were established to fulfill the same goals as are found in the legislation that sets the broadcasting tribunal into place.

I have mentioned already the conflicts that can and do emerge between and amongst all these bodies, and I haven't even considered what Morgan calls "meta-regulation" which now exists in the Canadian case as well as elsewhere (Morgan 1999) I have also stressed that some of the not-quite regulators themselves reflect regulatory instrument choices. That is, they are means of implementing the law that calls for regulation of broadcasting even when they do not operate under that law. All the conflicts notwithstanding, these bodies all operate as part of a single system of regulatory governance. The actions of one not only affect the actions of others, but also are always taken into account whenever regulation is being considered.

Of course it is possible to focus on the actions of the broadcast tribunal exclusively, as many analysts have done with excellent results, but it should also be made clear that this tribunal never acts alone or entirely independently of other bodies in carrying out its regulatory mandate. [5]

[5] It is now fairly common in the literature to refer to regulation as including some combination of state, self and hybrid regulation (See, for example, OECD 1997.

If there is a mismatch between the literature on regulatory instrument choice and the example of broadcasting, it is partly because this literature does not seem to take account the fact that all these regulators operate in the same regulatory space as the broadcasting tribunal. Minogue is right to speak of the multi-layered nature of institutional regulation (Minogue 2002 p. 651) [6]

However, the crux of the matter is not the number or layers of regulators, but the relationships amongst them. These relationships are complicated ones, and they cannot be described adequately as a mix or combination. The various regulators (even in the narrow sense of rule-makers authorized by law) interact with each other to such an extent that together they create a complex system.[7] Hood suggests that the mapping of existing networks of regulatory institutions could "promote oversight, cooperation and accountability." (Hood et al. 1999 in Minogue, 2002 p. 662) His is an idealized picture of what I have just begun to describe. Haines and Gurney are right to talk about the "struggle between government regulators." Only by conceiving as all these "regulators" as part of a system can one take struggle, conflict, overlap and co-ordination into account. (Haines and Gurney, 2003, p. 372)

The phrase "regulatory governance arrangements" (Scott, 2003) implies a smoothly operating system, but I have suggested that the system of interlocking

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Braithwaite 2000, Grabowsky, 1995) It is certainly commonplace now to think of "the enlighten delegation of regulatory functions" (Ayers and Braithwaite 1992) The point being made here is not whether regulation can take many forms (with different participants and regulators) but that there are often multiple regulators (state, hybrid or whatever) regulating a single activity and/or sector.

[6] For discussions of "regulatory space, see Parker 2000, Lange 2003.

[7] Grabowky says that "the regulatory space is more diverse and complex than the simplistic either-or model would have us believe." (Grabowski, 1997, p 195,) but the pyramid he draws of regulatory instrument choice remains a very simple one, with the choices broken down into four categories only (persuasion, warning, civil penalty or criminal penalty.

broadcasting regulators is operating smoothly only sometimes.[8] And I haven't even begun to speak about the "'informal and formal resources' and 'regulatory capacities' are dispersed and fragmented elsewhere. (Scott, p. 2001 330)

2. **The Interweaving of regulatory goals:**

Any evaluation requires standards against which the phenomenon can be judged. Often times, writers refer to compliance with "regulatory goals" or "regulatory objectives" as if it were immediately obvious what those goals and objectives were or should be, or as if regulation were always an alternative to the criminal justice system, or as if it were a way of dealing with dealing with potentially criminal behavior (Pearce and Tomas, 1990, p 423; Parker, 2000) For the most part, studies of regulatory instrument choice seem to have used three standards: Regulatory instrument choice is judged as being just (Lange 2003), efficient (see Parker, 1999) and accountable (Picciotto, 2002). Or not.

The broadcasting tribunal in Canada has a legal mandate that sends it in many directions. Its legislation actually contains two separate lists of public interest goals, and they are not quite coincident with each other. For example, the broadcast tribunal must promote a Canadian presence in broadcasting, not only on the airwaves (cable etc. too) but also in the media production industry. It must also promote competition (within the sector, one presumes) and technological innovation. It must promote national aspirations, but also local ones. The list goes on.

The two parent government departments, the official one, Industry Canada, and the unofficial one, Heritage Canada, are themselves often in conflict about what this broadcasting tribunal should be doing, and often they jump into the fray to rectify any apparent gaps, making regulatory instrument choices of their own.

This conflict amongst public interest goals gets played out in specific decisions

[8] I had originally thought of using the term "regime" to describe the system linkages between all the various regulators in a sector. I have been scared away from the term regime not only by the debates in international relations theory about its meaning, but also because "regime" also implies a coordinated and smoothly functioning system and not an unpredictable mix of cooperation, conflict and outright struggle for control.

made by the broadcasting tribunal. The current one is about satellite radio. On one side of the conflict (presumably with Industry Canada lurking in the background) are those who argue that satellite radio must be promoted, not only because it is the latest technological opportunity, but also because the auto industry in Ontario (a Canadian province) depends on it. On the other side of this controversy are the traditional promoters of cultural sovereignty, not only within the broadcasting tribunal and Heritage Canada, but including at least one of the other provincial governments. The federal Cabinet is now considering what to do about satellite radio, and by all reports, it too is split into two camps, fighting about the most important public interest goals to be pursued.

The broadcasting tribunal attempts to manage the conflicts among its own legislated public interest goals, but various other bodies with regulatory responsibility also weigh in. They too make regulatory instrument choices in the attempt to achieve the public interest goals that are specified in their own legislation, which they often argue relevant to goals they think that the broadcasting tribunal has neglected.

Of course it is possible to select some particular goals, say, efficiency and accountability or cultural sovereignty, and argue that these goals should trump all others. There have been many excellent books and articles about broadcasting regulation that have done just so. If, however, one is trying to describe a regulatory space (or even a tribunal) in sufficient detail to understand *why* the regulator(s) does the many things that it does, that is, why it chooses one regulatory instrument versus another, (differently at different times) it is essential to capture the many often conflicting public interest goals that might legitimately be called upon in its choice of regulatory instruments.

I am not the first commentator to notice that regulatory goals on any one list can work can be in conflict or incompatible. Haines and Gurney speak about "the very different ideological underpinnings of different regular regimes "(Haines and Gurney, 2003, p 371) and they note, "regulatory conflict – between competing ideals – is a common feature of the regulatory landscape" (Haines and Gurney, 2003, p. 373). The example of broadcasting regulation suggests that far too little emphasis has been given to the problems of regulators having many different public interest goals, often conflicting goals. Far too often, it is simply presumed that regulation is successful if it is efficient and accountable.

3. The array and mix of regulatory instruments:

Grabowsky's classification system of regulatory instruments has much to recommend it, not the least of which is that it is easy to map onto the decisions that policy makers must make. (Grabowsky) At the same time, even his classification hardly captures the meaning of the phrase once used in conjunction with regulatory instrument choice "by whatever means is appropriate and feasible", or Tombs' observation that one is always dealing with the "sheer range of activities, functions and processes that have come to be subsumed by the label regulation" (Tombs 2002). Over the last few years, in my opinion, the debate about regulatory instrument choice become increasingly sophisticated, with most authors recognizing that there is a mix of instruments and that these instruments occasionally work against each other, as well as in combination.

Still, I am not convinced yet that the full array of options has been identified. The problem may be an overemphasis on compliance. The example of broadcasting suggests that the problems facing regulation include much more (and often different problems from) compliance. If so, then, other kinds of regulatory instruments could conceivably be considered. In broadcasting, the choice of regulatory instruments is not simply a matter of finding the magic formula to make firms to do what they otherwise would avoid doing, or obey orders they would prefer to defy.

For example, the assumption in popular discourse is that the broadcasting industry would not provide Canadian content were it not for regulation, and that the regulatory instruments are intended or securing compliance with Canadian content requirements. After all, it is everywhere said, Canadian content is a loss leader in the market, expensive to produce and cannot compete effectively with American programs bought by the Canadian broadcasters for much less money. All this is true, but let me assume for a moment that the requirements for Canadian content were to disappear. What, if anything, would then distinguish Canadian stations from the American networks the stations that almost everyone in Canada can receive with ease? Why would anyone choose the Canadian alternative? Canadians must be choosing identifiably Canadian stations (at least some of the time) or there would be no Canadian industry at all.

Regulatory instruments that promote compliance are necessary, but they do not

tell the whole story of why the broadcasting industry in Canada might choose to air Canadian materials, at least once in a while. Regulation gives Canadian broadcasters their competitive advantage, and it is essential to their very survival. This does not mean that Canadian broadcasters wholeheartedly embrace regulation all the time, or love every regulatory instrument that the broadcasting tribunal devises. Of course broadcasters complain about government intervention in their markets and about the 'onerous' burdens they bear because of regulation. Canadian broadcasters have the freedom to complain about the details of regulation, and regulatory instrument choice, because they are fully confident that the framework of regulation that protects their interests will remain in place, even if they are successful in getting rid of the bits of regulation they don't seem to like.

One of the legislated goals of the broadcasting tribunal has been to promote Canadian drama production, that is, programs in the same vein as *Law and Order*. Quite an impressive array of regulatory instruments have been marshaled so that Canadian media producers have an opportunity to play in the big leagues with seriously funded major television production, and to ensure that Canadian talent (writing, acting etc.) and all of the industries related to media production, are nurtured, and that Canadians have something to contribute to their own country, as Canadians, through the medium of television drama, and that Canada can produce a product worthy of export, and, finally, that Canadians are able to receive Canadian dramatic products (programs) along with their extensive menu of American (and sometimes British) ones. No matter how often the priorities of this broadcasting tribunal seem to change, the promotion of Canadian dramatic television has always been among them.

The array of regulatory instruments chosen to promote Canadian television drama is truly impressive: For a long time, broadcasters had to specify their drama production commitments when they were trying to get a licence or a licence renewed. They even had to state the expenditures they planned to make on these dramas. For a long time, there was also an actual quota, or regulatory standard, for how much drama each should produce. However, even this standard was intended to be flexible, to be adjusted to accommodate the special circumstances of the different broadcasters; there were, in fact, different standards for different classes of broadcasters. These formal standards were replaced several years ago by an incentive program that gave broadcasters credit towards

their Canadian content quotas (different from their drama quotas) for particular kinds of programming that would have been in short supply without regulation. Then recently, this incentive system was revised, removing drama as priority programming in favour of regional and other types of programming. The result was a flurry of special reports and committees, all engaged in the design of new regulatory instruments, including new incentive systems, to promote Canadian drama. Meanwhile, Canadian broadcasters can still were allowed to substitute their Canadian-commercial packed versions of American drama series for the American shows (the same shows) coming in over cable networks. This particular regulatory instrument was intended to ensure that Canadian broadcasters had enough money to produce Canadian products, drama included.

For a long time, the broadcasting tribunal has also required contributions to special funds (all independent of the tribunal, but with different kinds of links to industry) designed to support production, including dramatic production. Contributions to these funds are expected by the broadcasting tribunal whenever applications are brought forward for changes in ownership, even from sectors of the broadcasting industry that do not, themselves, produce any Canadian programs These funds join other funds that are sponsored by the federal and provincial governments, funds that have no direct connection to the broadcasting tribunal. It is hard to imagine any significant Canadian television production (including drama) being done without the support (often total support) of these funds.

But neither drama nor any other long form television production is simply a matter of getting money from the funds. Those promoting new programs are also now required to show how their programs will be distributed, that is, they are required to have a "licensing" arrangements with broadcasters who will distribute or air their programs. The broadcasting tribunal always asks about these "licensing" arrangements, and it certainly takes the answers into account in its decisions.

I have barely begun to scratch the surface of what the broadcasting tribunal and other agencies, funds and government departments have done to promote Canadian drama on television using regulatory instruments of one kind or another.

Interestingly, there is currently very little Canadian drama on television or in the works, despite all these efforts. Few are prepared to argue that all regulatory instruments necessarily fail. Rather, it has been that these policy/regulatory instruments only work in

combination with each other, as part of a single system of incentives, support, rules and constraints. Remove any one of these regulatory instruments from the package, and the effect might be only minimal. Or not. Remove two or more from the package of regulatory instruments, and the edifice of regulation might well crumble as far as promoting Canadian television drama was concerned. In the case of drama, the broadcasting tribunal did not intend to undervalue Canadian drama production when it changed its incentive scheme (removing one regulatory instrument); It claimed it was surprised by the result, because, as its Chairman said, there were so many other "instruments" in place to support Canadian drama. Such is the way with systems; the effects of any intervention reverberate in ways that are only sometimes predictable.

This brief snapshot of a relatively small aspect of Canadian broadcasting regulation should be sufficient to suggest that that there is quite an array of regulatory instruments. As well, it should indicate that they operate not as add-ons, but in combination with each other, in a systemic manner.

4. Substance versus Procedure:

One of the more cogent contributions to the debate about regulatory instrument choice has been the suggestion that there is a persistent confusion between procedural and substantive goals. (See, for example, Hopkins 1994) However, in the case of broadcasting regulation, these are not easily separated. It is true that the broadcasting tribunal has been explicit about the need for greater participation and procedural innovation, and that, in Canada, there are relatively few legislative and procedural hurdles to be overcome: The broadcasting tribunal is more or less master of its own house and most aspects of how it conducts its business, and it has added all kinds of informal opportunities to canvas possible public opinion, in addition to its hearings, invited members of the public to become direct participants in hearings and bent the rules of procedure on more than one occasion to accommodate their contributions. The other bodies that exercise some regulatory functions have been much less public about their business, but they too espouse consultation.

Canada is a small country, sand o just about everyone in the various stakeholder groups knows everyone else as a result of their frequent interaction in one policy or

regulatory forum of another. But the venues for the exchange of views provided by the many bodies that exercise regulatory control (or something akin to it) are quite different from each other. Some venues promote open dialogue; some venues privilege experts or members of the industry, some venues operate by invitation only, some venues constrict the scope of discussion while others encourage freewheeling dialogue. None of this would be more than a quaint Canadian phenomenon were it not for the fact that the broadcasting tribunal uses (and is allowed to use) all sorts of occasions as a sounding board. It need not confine its assessment of evidence to matters raised in its hearings. Its staff and Commissioners go to conferences, appear before Committees, and establish working groups and mingle to establish the parameters of the problems that the tribunal will address and the priorities that it will follow. Wherever the broadcasting tribunal goes, to hear whomever, speaking about whichever issue, and addressing it in whatever depth they want; all these things have a good deal to do with the actual substantive decisions that are made.

I cannot say how typical the Canadian case is, but the Canadian case suggests that the line between procedural issues (where discussion is conducted according to which rules or understandings) may be less easily distinguished from substantive issues than first appears to be the case. In any case, no matter how strict the procedural rules, it is always true that informal relationships are brought to bear on decisions.

5. The Nature of the Regulated Industry:

Classification systems usually focus exclusively on regulatory instrument choice without reference to the nature of the industry being regulated. This is all very well for many purposes, but it is problematic if the intent of the analysis is to gauge impact. Impact will be different depending on which industry is involved and the conditions within that industry. It will be different from one moment to the next, again depending on industry developments that have nothing to do with regulatory instrument choice.

Moreover, it is highly likely that each regulatory instrument benefits some segments of industry more than others, because each is attuned to resolving some problems and not others.

I can think of no jurisdiction where broadcasting is reflected by a single or

homogenous industry. In Canada, there are many grouping within the broadcasting industry. Power and influence are not evenly distributed among them. The segmentation and unequal distribution of power within the broadcasting sector play out in a dynamic way when choices about regulatory instruments are being made in the first place, and it certainly plays out in the impact that such choices have on the industry itself. What is good for one segment is rarely good for all. The fact that some segment is always dissatisfied with what others find wonderful fosters conflict in the sector, and gives the participants in each sector a ready supply of complaints about regulation.

Each one of the large array of regulatory instruments – incentive programs, quotas, industry association councils, rules, price caps and other standards-setting exercises etc. – responds to the concerns of some segments of industry at one moment in time, and not to others. Industry spokespeople know it. For example, not too long ago, the cable industry promoted itself as a natural monopoly (and advocated regulatory instruments to match), and scarcely a year later, it was promoting itself as the proponent of vigorous competition (and advocating different regulatory instruments). The cable industry (which is internally segmented also) has aligned itself with Canadian media producers at one moment, only to turn around a few minutes later to argue (now speaking in concert with the telephone companies) that cable is simply a common carrier and should be treated as such. Non-governmental organizations like the Consumer Association of Canada or the Friends of Public Broadcasting find themselves patted on the back for saying something "truly valuable" at a public hearing, only to find industry spokespeople turn their backs at the cocktail party thrown by an industry association the same evening.

There is nothing pernicious about the fact that the broadcast industry (including cable) does not speak with one voice or have one set of interests, even from moment to moment. It is simply a fact of life all too often ignored by analysts.

6. The Politics of Regulation:

Canada has had the same broadcasting tribunal for forty years, and its mandating legislation, though often considered ripe for revision, has been changed only once in all that time, and in ways that left most of the regulator's mandate and powers intact. Yet the

broadcasting tribunal that existed forty years ago is a very different than the one that exists today. Five years, one year, six months have all made a significant difference.

In part the changing attitudes of the broadcasting tribunal reflect the fact that, in Canadian law, precedent does not apply to this tribunal's decisions. As well, its policies are only guidelines, and they too are changed from time to time. The broadcasting tribunal is also empowered to be flexible in its approach to regulation and responsive to the circumstances of individual broadcasters. And even if the broadcasting tribunal were of a mind to be consistent over time, its Commissioners and staff change frequently, and each new person brings his or her priorities to the table. The political drivers for regulatory instrument choice change frequently.

The broadcasting tribunal is usually described as being independent, but the law actually says otherwise. Its decisions can be appealed not only to the Courts but also to Cabinet. Cabinet can also issue policy directions. This tribunal is acutely conscious of the political environment within which it operates. Its calculus of the political will for any decision shapes everything that it does at all.

It seems hardly worth saying that regulation operates in a minefield of politics where negotiation is always expected) but it needs be said anyway. (See, Freeman 2000, p. 543 and Tombs 2002 for recent discussions of the politics of regulation)

7. The Technological Constraints:

If ever there was a sector affected by technological development, broadcasting is it. Each new development casts doubt on the efficacy of regulation, and changes the calculus about the usefulness of different regulatory instruments. The new developments come along with breathtaking frequency. Not all new technologies succeed in the marketplace, of course, but all are touted as having the potential to be the 'next big thing" that will replace everything already in place, and a few of them actually are and do. All are seen to affect regulation well before it is clear whether anyone will use them.

In Canada, law requires that the broadcasting promote innovation, including technological innovation. The broadcasting tribunal has tried to deal with all technological changes by creating space for new kinds of services, by exempting new technologies and/or services from regulation until they become established, by regulating

by analogy, that is, by comparing the new with the old technologies to find ways of being fair to both, and finally by being actively pro-competitive, but also managing the introduction of new competitor services or technologies. These are regulatory instrument choices too.

Even if much of the talk about new technologies and their impact on regulatory instrument choices is hype, it is worth putting technological change on the list of conditioning variables for another reason as well. Each new technology comes with salesmen who actively promote changes to regulation because of it. Their terminology is not neutral as far as regulation is concerned. The way that the new technology is described seems to pre-determine the choices of regulatory instruments.

For example, cable was described, in 1968, as offering the potential for people to "talk back to their television" and it was subsequently integrated into the Canadian broadcasting system as "broadcasting" with the result that cablecasters were required to produce community programming. About the same time, satellite transmission of broadcasting (roughly comparable to cable) was being described in terminology taken from telecommunications, not broadcasting. Satellites were regulated as telecommunications not broadcasting, at least until very recently.

The Internet is often described as "fundamentally incompatible" with regulation, yet there are no fewer "gateways" connected to the delivery of Internet services than there were with cable. Still, for now, Internet broadcasting is exempt from regulation in Canada because it is "fundamentally unregulatable." The broadcast tribunal spent two years making decisions on the basis that "convergence" (of technologies and services) was just around the corner, only to abandon "convergence" when it became clear that mergers and acquisitions were the only kind of "convergence" going on.

The point here is not to argue that any one conception of each new technology was better than the others, but to draw attention to the importance of terminology in regulatory instrument choice. To be sure, the technological environment influences regulatory instrument choice, but so too does the discourse about each technology when it is first being promoted and sold.

Discourses exclude and well as privilege ideas and participants. This too must be factored in when considering the choices made about regulatory instruments. (Tombs 2002)

Broadcasting is not Cement:

There are those that argue that Canadian broadcasting cements the country, that is, the role of Canadian broadcasting is and should be to forge and reinforce a sense of national identity. Cement, the real thing, is a very different sector from broadcasting. Before moving on in this paper to the problem of how to assess the impact of regulatory instrument choice, it is worth pausing to see which of the conditioning variables I have just described applies to the three target sectors, cement, oil sands and pulp and paper.

With respect to the mix of bodies with regulatory responsibilities (either narrowly or broadly considered), the situation in each of the targeted sectors appears to be very different from broadcasting. In each of the targeted sectors, there is no central independent tribunal, not even an environmental one. If anything, the lack of an independent Tribunal makes it more, not less, important for analysts to pay attention to the array and interaction of bodies with regulatory responsibility. In broadcasting, the independent tribunal always anchored the debate even when it was not the most important participant; every other body with regulatory responsibility responded to what it did or said. In cement, oil sands and pulp and paper, there is no tribunal to anchor the discussion of regulation.

In the case of cement, oil sands and pulp and paper, there are several different kinds of regulation. These related to the life cycle of the products and services (environmental assessment, land use planning etc). As well, these industries fall mainly under provincial jurisdiction. And although broadcasting is largely exempt from constraints imposed by trade agreements with other countries, the three targeted industries are not. In sum, while regulation is less apparent in the three targeted sectors, there are even more bodies with regulatory responsibilities making regulatory instrument choices. Moreover, federal-provincial relations in Canada are notoriously difficult at times, and so one should not expect to find a smoothly functioning federal-provincial system connecting all these regulators and potential regulators with each other.

Thus far in this paper, I have assiduously avoided taking a position about what properly constitutes regulation. My example of broadcasting predisposed me to cast a wide net in evaluating regulatory instrument choice, and to include instruments that are

also closely connected to policy-making, especially because the broadcasting tribunal also makes policy. In the case of the three targeted sectors, I will have to decide on a definition of regulation. Depending on how regulation is defined (as state agencies issuing rules, or as including standards organizations, industry and voluntary compliance programs etc.) these sectors are either heavily or lightly regulated. There is either a wide array of regulatory instrument choices or there are very few choices to be made.

I suspect that there are many goals associated with regulator instrument choice in the three targeted sectors. To be sure, in the case of the three targeted industries, there is no over-riding goal equivalent to cultural sovereignty, and no one would claim that the future of the country rests upon these sectors, as they do in broadcasting. However, each sector (and many of the firms active in it) has been considered an important contributor Canada's (and provincial) economy. The manifest goals driving regulatory instrument choices are not the only goals in play.

The distinction between procedural and substantive issues does not seem to be very important to any of the three targeted sectors. What is true is that the many different regulators display different approaches to the problems of procedural fairness and participation. In environmental assessment and water board hearings, for example, there are likely to be extensive safeguards for public participation. But there are plenty of instances of regulation conducted through inspectorates in the three targeted sectors.

The three target sectors are very different from each other in terms of the structure of the sector, the size and nature of the firms involved, their degree of ownership concentration and/or vertical integration, and of course also the involvement of multinational companies. Clearly attention should be paid to these sector differences in evaluating the impact of regulatory instrument choice.

Similarly, the political debates concerning each sector are different also. The pulp and paper industry has been at the centre of many public controversies of national and international magnitude, while the oil sands development has been relatively free of controversy despite its major environmental impact. The controversies, such as they are, that plague the cement industry are mainly local in nature. That said, none of these sectors operates in the backwater of politics. They are too important to the economy.

Finally, the three targeted sectors have very different technological profiles, and it isn't clear to me yet whether technological change has much impact on regulatory

instrument choice. Broadcasting may prove anomalous in this regard.

Cautionary Notes in Aid of Future Research:

The purpose of using broadcasting as my example in this paper was not to provide an evaluation of regulatory instrument choices in this sector, but to identify the conditioning variables that might affect regulatory instrument choices and their impact. The seven conditioning variables just described need always to be taken into account in any study of the impact of regulatory instrument choice, even if, in the end, some of them prove to be not very important.

It is time to move on to the task I identified at the beginning of this chapter, designing a protocol for evaluating the impact of regulatory instrument choice, including the goals of innovation and competitiveness. But clearly I am not quite ready to do so yet, and this paper represents only a small step towards that goal. That said, it does point to some cautionary notes, some concerns that must be taken into account if such a protocol is ever to be designed. It suggests not only how the research might best be carried out, but also some of the more important variables to pay attention to, and it suggests an order for the research tasks ahead.

First, it should be clear by now that the focus should be on the national context, even where the goal is eventually to understand regulatory instrument choice in general. Broadcasting regulation in Canada is nothing like broadcasting regulation elsewhere, and the array of its regulatory instruments is also quite country-specific. For example, I cannot imagine other countries adopting a priority system for assessing the national content of what private industry broadcasts. Even if I am wrong, the idea of substituting a version of *Law and Order* with Canadian commercials for the original network version of the same program is an idea that only Canadians would ever think of. I am not alone is stressing the importance of national context. (See, Moran, 2002; Scott 2002, p 491)

There are at least two further reasons why the national context conditions the likely outcome of regulatory instrument choice in every case. They are, (1) The interplay of international and regional law, on one hand, and national law, on the other, plays out in a national context, in laws, regulations and policies that are adopted (if not always fashioned initially) in a national context. (2) Some firms have the option of seeking out

the national context most conducive to their goals. The choice they are making is among countries.

Second, I will suggest that, for the purposes of assessing the impact of regulatory instrument choice, the sector is the proper unit of analysis. Regulation may well be conditioned by sectoral characteristics, as Jordana and Levi-Faur say, but regulatory instrument choice is more than conditioned. It is symbiotically linked with developments within the sector. (Jordana and Levi-Faur, 2003, p. 9) . Furthermore, if the focus is on impact, there is a compelling need for a "bottom up" approach for several reasons: (1) The array of regulatory instruments is so great, and the differences among the choices is often so subtle, that a "top down" categorization is like to miss some of the most salient features of the choices to be made. (2) The various regulatory instruments do not act independently of each other or of the context in which they are used. Regulatory instruments work not so much as a mix as they do in concert with each other and the regulated sector (they operate within a system with sub-systems. (3) I have come to believe that it is important to distinguish studies of regulatory design and regulatory impact. In my view, studies of regulatory design properly focus on describing regulation, and on creating an overall framework and a typology or classification system. By contrast, my study is focusing on impact, that is, on the sector putatively being regulated to see what is actually going on and what the impact is likely to be. In studies of impact, it always pays not to confuse the dependent and independent variables.

Third, most studies of regulation, and the great majority of studies of regulatory instrument choice, are intended to support evaluation and policy-making. All too often, it seems to me, the evaluation standards are those of the analyst. Regulation is measured in terms of its justice, efficiency and accountability, for example, because these are goals that lawyers, Economists and Political Scientists (and the policy makers they influence) are likely to find most attractive. These three standards do not line up neatly with the goals enunciated in the legislated mandates of many regulators, or with what these regulators think they are doing, or with the political pressures that regulators are inevitably stuck with.

In any study of regulatory instrument choice, "choice" is the key word. I need to understand why choices are made, and this requires taking account of the goals and reasons of all those making choices. Many decades ago Robert Merton distinguished

between manifest and latent functions. I suspect it would be useful to apply his distinction between manifest and latent to regulatory instrument choice, because political choices, such as promoting one sector of industry versus another, are often factored in through the latent functions of regulation.

Fourth, in my review of the literature, I have identified something close to a propensity in the literature to caricature of regulation, and its historical trajectory. Anyone who knows a lot about regulation some decades ago (even in the case of independent regulatory tribunals) also knows that rule making was the tip of the proverbial iceberg. There were oodles of co-operation, trust building, informal contact, guidelines and voluntary standards and compliance mechanisms. These have always accompanying rule making activities. I have yet to see (except on TV prison dramas) a pure example of "command and control" regulation. I myself once called regulation "co-management" and argued at length that the regulated industry gave as much as it got, and participated in more than formal adversarial hearings. Even if I overstated my case (I still believe I did not), the phrase "command and control" is a deeply ideological one, and it captures, at best, a small part of regulation then or now.

Of course regulation has changed. Informal arrangements and discussions have become formally recognized voluntary compliance mechanisms and trust relationships. Meta regulation is actually a relatively new phenomenon (Morgan, 1999). Some tribunals have been disbanded or have symbolically burned a portion of their regulations. Many governments today natter on incessantly about public private partnerships, and in doing so, they undermine those regulatory authorities that they have still left in place. Record keeping has been cut back, except perhaps in the case of audits. Perhaps the new regulatory state is different from the old, or Scott is right that we have entered the age of the post regulatory state. My concern is not with the description of the present, but with the idealized notions of what existed before any changes took place. My comments only serve as a caution about assuming the newness of much of what is now being proposed.

Fifth, the paper suggests a note of caution about the many definitions in play in the literature on regulation (and thus on regulatory instruments). If the problem of definition seems intransigent after all these years of study, perhaps it is because the problem *is* intransigent, a matter of something other than achieving conceptual clarity. The boundaries drawn around regulation appear to address something other than a

conceptual problem. For example, if one excludes contract/procurement (for a discussion, see Vincent-Jones 2002) or what the courts do to "back up" regulation from the definition of regulation, the choice becomes regulation *versus* law, or regulation *versus* contract. Exclude non-state initiatives from the definition of regulation, and the choice becomes regulation *versus* voluntary or industry-based initiatives to promote compliance. Focus on the competitive features of markets to the exclusion of other aspects of regulation or regulatory impact, and the choice becomes regulation *versus* deregulation.

Those promoting deregulation prefer the *versus* approach, because it sharpens the choice to be made. Those who are generally in favour of regulation will, by contrast, want to include regulation in all its many forms in order to suggest that regulation is a highly flexible instrument, capable of achieving many goals (including promoting innovation and competitiveness.

As I have already stated, I would probably argue for a broad definition of regulatory behavior (if not regulation itself). My cards are on the table. This is my political as well as analytical choice, however much I might be tempted to argue otherwise. I suspect that there is no correct definition of regulation waiting to be adopted by everyone, neither mine nor anyone else's. There are instead a serious of political choices about the public interest best served (or not served) by regulation one way or another, political choices that feed immediately back into definitions of regulation.

The final observation (and cautionary note) follows directly on the last. There are multiple epistemic communities involved in regulation, some overlapping and other not. For example, there are the discourses among the 'regulated', and within the sector, and yet another discourse that includes both regulators and the regulated. There are epistemic communities among those who write about regulation (not one but several), and incidentally sometimes advise policy makers. Economists, lawyers and Political Scientists rarely read each others' literatures. And there are undoubtedly discourses about regulation entrenched in national and international political ethos's discourses made manifest in such international talking clubs as the OECD and the G8. This paper barely touches upon the questions raised by the discourses of regulation. Its sole cautionary note in this regard is to emphasize how important these discourses are in shaping the limits of the politically permissible, and thus in eliminating for consideration some choices about regulatory

instruments. (See Black 2002 for a discussion of the importance of regulatory conversations.)

Concluding Remarks:

Does any of the discussion thus far in the paper contribute to the debate about regulatory instrument choice in the literature, except to suggest a few of its limitations? I am not sure that the answer is yes. Mainly, the literature reflects different projects than I am proposing to undertake. The preoccupations in the literature have been many and different, but most writers come together around a single intellectual challenge, that of defining and analyzing regulation in such a way that the concept will be useful to analysts and the implications of academic debate will be useful and used by policy makers. Classifications and other discussions of regulatory instrument choices are meant to capture the general phenomenon of how regulation operates.

I am not addressing the problem of regulatory design, nor trying to create a manageable guide for policy makers, at least in the first instance. My concern is about impact, about what happens in the sector being regulated and beyond. Needless to say, it would be shortsighted for policy makers and analysts alike not to pay attention to impact, but I am not even suggesting that they have failed to do so. The protocol that I am reaching for in this paper operates from a different vantage point. It starts by looking at the sector, and only then attempts to identify what the regulatory instrument choice has been, and more importantly, how and where regulation (and regulatory instrument choice) has made itself felt in within the sector.

In the end, the two approaches, "top down" and "bottom up", may prove complementary, except for one proviso. A "bottom up" approach is necessarily centered on what happens in particular countries and it is sector specific by definition. Any attempt to translate the findings from particular cases studies into a more general analysis will require considerable comparative study.

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