

THE NEW REGULATORY STATE

Economic and Business Regulation Tomorrow

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The government is the warden of the economic order. The economic order is a complex of activities and regulations designed to achieve individual and public-interest goals. Some individual goals coincide with the public interest. Some conflict to an extent sometimes great and sometimes minor. The role of regulation and government is to resolve the conflict in the general public interest.

Among the broader economic goals are a high standard of living equitably distributed, full employment, optimal allocation of resources, a stable economy with a satisfactory rate of growth, currency stability, and equilibrium in the balance of international payments. General fiscal, monetary and expenditure policies are designed to keep factors relating to these goals in balance. The general fiscal and monetary policies apply to all persons, whether directly engaged in business or not, but their impact may vary depending on the circumstances.

Taxes and interest-rate policies are conventional instruments of general fiscal and monetary policy. A major question currently debated intensely is whether such general policy instruments are adequate to achieve the economic goals mentioned above, or whether more direct instruments of intervention are required, for example, price and personal income controls. Experience with the problems of grappling with broad economic issues indicates that government activity in fulfilment of its role as the warden of the economic order will increase. This increase will be characterized by the application of more specific rules directed to particular persons or activities in addition to the more general techniques of adjustment of levels of taxation and the cost of borrowing.

Policy in Canada will continue to be responsive to the international economic scene, of which Canada is a dependent part. Current discussion of policy toward foreign direct investment cannot overlook the facts of international economic relations largely

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outside of our control. At the same time, policies need to be developed and refined that will give us the best return from our participation in the international economy. These will also require direct intervention by government in business activity. The Foreign Investment Review Act¹ will probably be followed by more controls involving specific and discretionary regulation.

This article is concerned with economic and business regulation. Economic regulation includes the general policies we have already mentioned. The policies and measures to implement them apply not only to business but also to persons and activities we would not define as being encompassed within the term "business". Thus, economic regulation encompasses limitations on tourist imports and restrictions on payments for non-business travel abroad, as well as constraints on prices and incomes which relate directly to business activity. The characteristic of economic regulation is that it encompasses all government activity designed to achieve economic objectives.

In addition to determining economic goals, the government's duty is to define and implement social goals. Social goals may be neutral so far as economic goals are concerned, or they may conflict to some extent. The attainment of social goals may have economic costs that must be borne if the social goals are to be achieved. Debate will continue about the relation, and particularly about the long and short-run costs of social goals. It is sufficient to say for the purposes of this review that the relation is complex and the long-run benefit-cost analysis applied to goals such as reduction of water and air pollution is not simple.

Business regulation encompasses both economic and social goals, and includes social goals that are not directly related to economic goals. Among the social goals are safe working conditions and safe food products. The attainment of these goals involves economic costs, and the realization of them avoids other costs. However, they are primarily directed to avoiding pain and suffering and are therefore primarily social goals.

We shall see in the years to come a better analysis of the balance of the several economic and social goals. Economists are developing better techniques to measure the effects of policies and more attention is now being paid to the interaction of all the factors within the range of government action. We shall also see better analysis of the economic goals and policy instruments designed to achieve them. It is notable that we have enjoyed a period of more than twenty-five years since the end of world war two without economic recession of the major proportions of the 1930's. It seems

¹ Canada, House of Commons, 29th Parliament, First Session, Bill C-132 (First Reading, January 24th, 1973).

to me inevitable that as government tries to attain the economic and social goals which are now being better defined than ever before by the continuing study of them, and by the emergence of stronger co-ordinated forces to advance the interests of various groups, we shall see an increase in the role of government in specifically directing certain activities. Since private enterprise is the heart of the economy, the increase in government direction will be most directly felt by the managers of private enterprise. Hence, increased potential for tension at the business-government interface will characterize economic and other business regulation in the future.

Business is, of course, regulated also by market factors. These have long been evident in the conventional analysis of business behaviour—how managers react to suppliers of capital, goods and services, and to consumers of their products. As with the labour force, the consumers may be organized or not. The development of trade unions is evident, and is a well-recognized part of the framework of interests within which business operates. The organization of consumer interests is not historically so evident, but is becoming more so and will very likely increase.

Recent years have been marked by significant increases in organized consumer protection groups. These have long existed in trade associations. For example, the Industrial Traffic League is an organization one of whose functions is the protection of the interests of the consumers of transportation services in their relations with the suppliers, the carriers. The significant development is the rise of organizations designed to represent the interests of users of "consumer" products and extends to tenant-landlord relations. In short, wherever there is a substantial concentration of power, as in the hands of large scale apartment operators, there is likely to develop a countervailing force representing an aggregation of individual interests. "Consumer" groups will have their effect both in direct relations with suppliers and in influencing new government policy to regulate the corporations or other business organizations with respect to which the consumer groups may have conflicting interests.

A fundamental question is, "How well do each of these institutions serve the public interest?". Indeed, what is the public interest? Whose interests are we talking about? What is the balance of interest among the individuals that make up the collectivity, the public? The inadequacies of the government process and the influences of the vicissitudes of politics are all too evident. The inadequacies of unfettered free enterprise are also evident. We have, then, a situation in which many-faceted polycentric problems make up the interface between government and business and between

both of them and the many interest groups that exist within the nation.

All individuals have some influence on business and government. Some individuals can muster more strength than others. Associations of individuals can be very effective against both business and government. Many interests of individuals are aggregated in government action—a grant to encourage some activity or a restraint by regulation. All these interests are constantly in a condition of dynamic tension. This condition of dynamic tension is the sum of the creative interfaces between the many interests of individuals and groups. This condition is more likely than any other to be productive of the greatest good to the greatest number of people.

In its search for new policies and new techniques to implement them, government will draw on the organized groups for information and ideas. The various interest groups can be constructive elements in the condition of dynamic tension. Government will have to develop techniques for balancing the several interests and for systematic evaluation of interest-group positions against criteria embodying the general public interest. The role of privately organized non-business interest groups will grow, but the development of the interface between government and business will be the most complex and significant of the aspects of the picture.

Although important and effective, private action to enforce legal rights or to protect interests not specifically recognized by law has not been adequate. Its effect tends to be uneven. One business may be severely constrained, while another may be free due merely to the accident of cases chosen by the interest group. This distorts the competitive framework within which several businesses are offering goods and services. It is also clear that traditional civil remedies are not adequate. Intervention by some public machinery is necessary. Obviously such intervention should be kept to the minimum necessary to do the job adequately.

Government regulation will continue to grow in volume, scope and complexity. The private enterprise system will be subject to more regulation in the public interest. This can and should be a creative interface. Businessmen will chafe at intervention by the bureaucrats and the government people will complain about the intransigence of businessmen, but there will undoubtedly be a developing awareness of the business-government partnership within which the businessman exploits the opportunities of the free enterprise system, the nation benefits from the system, and government shapes and re-shapes the framework constituted by statutes and regulations and implemented by officials, some with wide, delegated, discretionary authority, within which business operates.

Reference to any issue of the metropolitan daily newspapers will indicate the scope and importance of economic regulation. Hardly a day goes by without some reference to price and income regulation, telecommunication rates, transportation rates, product quality, and so on. The most significant factor of our time in the western countries is the complex relation between government and business. This is the heart of the system. In the other system, government is business. Of course, government is also business in the western system in some measure,² but the overridingly evident characteristic of the system is the representation of the "public interest" by "big government" and its regulation of all activities within the scope of its jurisdiction. Inherent in the system is the concept of the maximization of personal freedom consistent with the public interest. Arguments will rage forever about whether the mix of regulation and freedom of enterprise at any moment is the optimum mix.

We shall see also an ever changing mix of regulation—some decreasing and some increasing. Regulation justified by the conditions of yesterday will be subject to closer scrutiny and areas of business performance not apparently satisfying current needs will be the subject of new regulation. At the same time that we see an increase in regulation generally, we shall likely see a decrease in the close regulation of the rates and services in such fields as transportation. Who can now demonstrate that the minutiae of regulation of air service is necessary or even useful compared with the state of affairs that would exist without so much regulation? Who can demonstrate that licensing of the right to offer inter-city truck service serves the public interest, compared with greater freedom of entry?

The complexity of the interface between big government and big business is already evident. Viewing this scene, an individual may feel frustrated—how can his interests be made effective? It is to meet this need for effective representation that consumer groups, tenant associations and associations of home owners have been developed. They follow in the well-developed patterns of trade unions, trade (business) associations, and farmers' organizations.

It should be noted that "business" includes not only the large corporations, but also many small business units. These latter may well be powerfully organized in associations that represent their various common interests. There will continue to be scope for the individual to look after his own interests, but the bulk of complex problems in the field of economic and business regulation

² See A. Lerner and B. Sahni, *The Public Sector in Canada*, Canadian International Centre for Research and Information on Public and Co-operative Economy, Montreal, 1970.

require much information and professional analysis. Effective analysis of the information will often require resources that can be provided only by groups organized to pursue common interests.

The growing complexity of business-government relations is probably the cause of the present state of tension between the managers and government. Business-government relations often appear unconstructive, and businessmen are often heard to cry that government does not understand their problems. The challenge for the next decade is to convert the tensions of business-government relations to a more creative interface than now appears evident.

One of the problems to be resolved is the propensity for extreme statements. Any law which is thought to favour business is characterized in public debate as a sell-out. Any law which does not reflect the views of a segment of the business community is characterized as anti-business. Examples of the latter are readily found in the reaction of businessmen to the proposed Competition Act.³ Examples of the former are evident in the "corporate welfare bum" allegation.

One of the obvious characteristics of the condition of dynamic tension is that not all interests can be fully satisfied. So it is in the business-government interface. In some cases, government's evaluation of a position stated by businessmen will indicate a decision less favourable than the businessman would like. No doubt in his own mind he is satisfied if he wins a few as well as loses a few. But fair evaluation of legislative proposals and other measures is often not assisted by the salvos fired in heat. The problem is exacerbated by the fact that the communications media, even the specialist press, tend to give broader display to the forcefulness or colourfulness of comment than to the substance of the comment itself.

Development of economic and business regulation will be assisted by growth in size and sophistication of business associations designed to represent common interests. Of course, one cannot expect a business organization to present a comprehensive balanced view on a proposed measure if it is to be faced with extreme positions taken in other quarters. There is a natural tendency to adopt an adversary stance. Yet, in the field of economic regulation, business is equipped to organize and present a reasoned position. My discussions with government officials over a period of several years leads me to the conclusion that business briefs would be more effective if they were to take a more balanced approach to issues. I expect that the weight of complexity of the issues involved in the

³ Canada, House of Commons, 28th Parliament, Third Session, Bill C-256 (First Reading, June 29th, 1971).

business-government interface will lead to a more systematic and rational dialogue than we often see today. The challenge is to develop the creative aspects of business-government relations and minimize unproductive comment.

Closely related to the question of how much regulation is required in the public interest is the question of how much disclosure of business affairs is required for effective regulation. Greater disclosure of information relevant to economic and business regulation will characterize future laws. In recent years, more and more disclosure has been required of corporations to protect investors. This has been accompanied by increasingly stringent rules for the accountability of corporate officers and directors. However, information required for regulatory purposes has often been aggregated and published as general statistics. The type of information necessary for public evaluation of factors relating to economic performance has not yet been adequately determined. It is the subject of active study and one can fairly predict that more disclosure will be required to permit public evaluation of business performance in relation to public interest criteria.

Another major question involves allocation of power among the government, the courts and specialized tribunals to make decisions in individual cases. This question is bound up with the question of how much discretionary authority should be provided in derogation from the time-honoured principle of the rule of law. We have been taught to think that a citizen is entitled to know his rights and duties and for this purpose the law must be as certain as expert draftsmanship can make it. Moreover, it is widely held, a citizen is entitled to have his position adjudicated by a court staffed by an independent judiciary. The purity of these principles has been gradually eroded by the growth of specialized tribunals with the power to legislate general rules within a statutory framework as well as the power to decide individual cases within general principles established by statute and even by the tribunal itself.

We shall see, I believe, a swing away from delegation of power to administrative and quasi-judicial tribunals and a concomitant reservation of discretion in the hands of the government and the ministries. The Foreign Investment Review Act⁴ is a step in this direction and it is notable that the Ontario Government's brief on the proposed Competition Act argues that much of the power to make policy which the proposed Act would delegate to the Competitive Practices Tribunal should be reserved to the government.⁵

Ontario seriously questions the desirability of a tribunal, as conceived in

⁴ *Supra*, footnote 1.

⁵ Government of Ontario, Position Paper on National Competition Policy (Bill C-256), February, 1973, pp. 8, 18-19.

the legislation, providing discretionary rulings on a broad range of economic factors affecting the future structure and performance of the Canadian economy. Policy development by a regulatory agency is not a proper substitute for the careful development of relevant policies by the governments which are responsible to the public for them.⁶

This declaration will very likely prove to be prophetic in relation to many areas of economic regulation.

In summary, this brief article on the future of economic and business regulation in Canada predicts the following characteristics for the system.

1. **Specific regulatory intervention in private transactions will increase.**
2. **Regulatory intervention will be based to an increasing extent on discretionary authority within broad principles and guidelines.**
3. **Reflecting this development, more of the power to set policies and make decisions in individual cases will be reserved to the government and the ministries.**
4. **The condition of constructive dynamic tension between interest groups and government and among themselves will become more evident and will be developed as part of the process of determining the general public interest.**
5. **The business-government interface will grow in complexity and will develop as a more creative relation.**

⁶ *Ibid.*, p. 18.